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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”.

Contents

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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. ABORTION LAW REFORM (SEX SELECTION PROHIBITION) AMENDMENT BILL 2021*

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

Scope of prohibition – medical grounds

The Bill prohibits registered health practitioners from performing or assisting with the performance of terminations, and ART (assisted reproductive technology) providers from providing ART treatment, for the purposes of sex selection. No exceptions are provided to these prohibitions, including on medical grounds.

The Committee notes that existing applicable guidelines currently prohibit the performance of terminations and provision of ART treatment for the purpose of sex selection, except on limited medical grounds. Specifically, guidelines issued under section 14 of the *Abortion Law Reform Act 2019* provide that if termination is requested for the sole purpose of sex selection, the practitioner must not perform the termination unless not doing so would create a significant risk to the woman's health or safety. Registered health practitioners must comply with these guidelines when performing or assisting in the performance of terminations. That guideline also provides that its provisions do not apply termination due to the possibility of a sex-linked medical condition in the foetus. Additionally, guidelines issued by the National Health and Medical Research Council of Australia provide that sex selection techniques may not be used in ART treatment unless it is to reduce the risk of transmission of a genetic condition, disease or abnormality that would severely limit the quality of life of the person who would be born.

The Bill does not provide any exceptions to the prohibitions. Further, the phrase 'for the purposes of sex selection', which is the criteria for limiting conduct, is not defined in the Bill or either Act amended by the Bill, although the *Abortion Law Reform Act 2019* includes, but does not define, the phrase 'for the purpose of sex selection'. It is therefore unclear whether terminations can be performed or ART treatment provided for the purpose of sex selection on medical grounds, including those mentioned above. Additionally, it is unclear whether persons can access termination or ART treatment in these circumstances.

The Committee considers that clarifying the scope of the prohibitions is particularly important given that an individual may incur significant penalties for contravention (see below) and may limit access to certain medical procedures. The Committee refers this issue to the Parliament for its consideration.

Strict liability and significant penalties

The Bill prohibits registered health practitioners from performing or assisting with the performance of terminations, and ART providers from providing ART treatment, for the purposes of sex selection.

These offences are strict liability offences. 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. It also acknowledges that strict liability offences are not uncommon in regulatory settings and encourage compliance. However, the Committee

considers that the significance of the penalties may warrant the Parliament's further consideration.

Specifically, the Bill amends the *Health Practitioner Regulation (Adoption of National Law) Act 2009* so that a registered health practitioner that performs or assists with the performance of a termination for the purposes of sex selection is strictly liable for professional misconduct. Professional misconduct is grounds for making a complaint about the practitioner, the imposition of a fine and suspension or cancellation of the practitioner's registration. The Bill also amends the *Health Care Liability Act* to void approved professional indemnity insurance to the extent it provides cover for a registered health practitioner who performs or assists in the performance of an abortion for the purpose of sex selection. This may result in the practitioner being exposed to a significant monetary burden or risk. Given the significance of the penalty and statutory exclusion of professional indemnity insurance as a protection for the practitioner, the Committee refers this matter to Parliament for its consideration.

An ART provider that is an individual who provides ART treatment for the purpose of producing a child of a particular sex is strictly liable for a maximum penalty of 200 penalty units ($22 000) or imprisonment for 5 years, or both. Given the potential custodial sentence and/or large monetary penalty that may be imposed on a person for this offence, the Committee refers this matter to the Parliament for its consideration.

2. CLIMATE CHANGE (EMISSIONS TARGETS) BILL 2021 (DIB) AND CLIMATE CHANGE (EMISSIONS TARGETS) BILL 2021 (SHARPE)*

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. ELECTORAL AMENDMENT (COVID-19) BILL 2021

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

Wide regulation-making power

The Bill amends the *Electoral Act 2017* to provide that regulations may be made which modify the application of the Act's provisions to by-elections held prior to 30 June 2022, for the purpose of responding to the COVID-19 pandemic. It further provides that the regulations made under this power are not limited by general regulation-making powers under the Act, and may override the other provisions in the Act. In doing so, the Bill may grant the Minister a broad power to modify the conduct of parliamentary elections ordinarily regulated by the statute.

The Committee notes that voters for specified by-elections may be subject to different electoral rules as modified by regulations, which may result in individuals being uncertain as to their electoral rights and responsibilities. While the Bill provides explicit limits on this regulation-making power, it also notes the provisions allow for regulations which may abrogate existing electoral protections under the Act.

The Bill may thereby include a broad regulation-making power that may impact an individual's right to political franchise and democratic participation contained in Article 25 of the ICCPR. The right to political franchise and democratic participation protects the right of individuals to vote by universal and equal suffrage.

However, the Committee notes that these provisions are an emergency measure, allowing authorities the necessary flexibility to safely conduct parliamentary by-elections held during the COVID-19 pandemic. It also acknowledges that the exercise of this power is limited for the purpose of protecting public health and safety during the COVID-19 public health emergency. Accordingly, the provisions and any regulations made under them are time limited to expire at the end of 30 June 2022. In the circumstances, the Committee makes no further comment.

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

Henry VIII clause

The Bill inserts section 274 into the *Electoral Act 2017* which enables the making of regulations that modify the application of the Act to State parliamentary by-elections held prior to 30 June 2022. The regulations may also override the provisions of the Act and are not limited by the regulation-making power in the Act.

In its Digest No 35/57, the Committee commented on the Local Government Amendment (COVID-19 Elections Special Provisions) Bill 2021 which provided for mirror regulation-making powers in relation to the ordinary local government elections held during the COVID-19 pandemic.

Consistent with those comments, the Committee notes that these provisions amount to a Henry VIII clause, allowing the Executive to legislate and amend any Act by way of regulation without reference to the Parliament. In ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers.

However, the Committee acknowledges that in the extraordinary circumstances created by the COVID-19 pandemic, the Bill's provisions may provide flexibility to facilitate the safe conduct of parliamentary by-elections in a timely and responsive manner during the public health emergency. It also recognises that the regulation-making power is somewhat limited to allow only those regulations reasonable and for the purpose of protecting public health and safety from risks resulting from the pandemic. In the circumstances, the Committee makes no further comment.

4. FISCAL RESPONSIBILITY AMENDMENT (PRIVATISATION RESTRICTIONS) BILL 2021*

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

5. GOVERNMENT GRANTS ADMINISTRATION BILL 2021*

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

Guidelines not subject to disallowance

The Bill sets out a new framework for establishing a government grants scheme to allocate government money to a non-government entity (a government grant), and for the purposes of the non-government entity conducting or delivering a State policy objective. A government sector finance (GSF) agency administering a government grant scheme must ensure that it is administered in accordance with the government grant scheme guidelines. These guidelines are issued by the Minister and must provide for the information, if any, prescribed by the regulations and be published on the NSW grants register. The Committee notes that under the Bill there is no requirement for these guidelines 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 legislative requirements to be included in primary legislation rather than separate materials.

However the Committee recognises that the guidelines issued by the Minister must provide for the information, if any, prescribed by the regulations and be published on the NSW grants register. Therefore, the guidelines contain information from the regulations that would be subject to disallowance. The Committee also recognises that publishing the guidelines and related information online provides flexibility for the guidelines to adapt to changing circumstances quickly. The guidelines must also have regards to any relevant recommendations made by the Auditor General and the Committee on the Independent Commission Against Corruption constituted under the *Independent Commission Against Corruption Act 1988*. In these circumstances the Committee makes no further comment.

Delegation to the regulations

The Bill defers certain matters to the regulations. Section 5 provides that a government grant scheme does not include any other scheme, payment or thing prescribed by the regulations. Additionally, the regulations may prescribe a scheme, or class of schemes, to be a government grant scheme for the purposes of this Act. Section 18 also sets out the general regulation-making power of the Governor with respect to any matter required or permitted by the Act.

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. Additionally, the Committee recognises that under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance which facilitates a level of Parliamentary oversight. In these circumstances, the Committee makes no further comment.

6. GREAT KOALA PROTECTED AREA BILL 2021*

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

Cultural rights – impact on Aboriginal areas

The Bill establishes the Greater Protected Koala Area (the Protected Area) to reverse the current trend of koala population decline by promoting conservation and growth of the koala population and habitat in those lands. Provisions under the Bill authorise the Department to reserve State forests and state conservation lands in order to be included in the Protected Area.

The Committee acknowledges the bill's purpose to protect and conserve the native koala population, particularly given the devastating effects of the 2020 bushfires on koala habitat and population.

However, the Committee also notes it is not clear from the Bill's provisions whether the designation of a Protected Area may impact on the purpose of designated Aboriginal areas which is to preserve, protect and prevent damage to Aboriginal objects or Aboriginal places therein. Schedule 1 of the Bill includes the Nambucca Aboriginal area and the Nunguu Mirral Aboriginal Area under the Protected Area. It is unclear from the second reading speech whether inclusion of those areas into the Protected Area is in consultation with Indigenous representatives. This may impact on the cultural rights of those persons tied to the Aboriginal area.

Concerns surrounding the reservation of Aboriginal areas may be safeguarded by consultation with the Department, Aboriginal Land Councils, the Aboriginal Cultural Heritage Advisory Committee or the Aboriginal Negotiating Panel under the *National Parks and Wildlife Act 1974*. Such consultations may foreshadow any concerns over the use of Aboriginal areas as well as claims for native title, particularly as the Bill is silent on compensatory rights as a result of reserving land. In the 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

Review of licence cancellations

The Bill cancels licences held under the *National Parks and Wildlife Act 1974* and the *Forestry Act 2012* which give licence holders certain rights and uses of specific land and land materials. The Bill allows the Department to reserve land for the Great Koala Protected Area (the Protected Area) which in consequence, will cancel licences or permits held under those Acts.

The Committee acknowledges the bill's purpose to prioritise the population and habitat of koalas, particularly following the 2020 bushfires, in order to reverse the trend of koala population decline.

However, the Committee notes the cancellation of licences under the *National Parks and Wildlife Act 1974* and the *Forestry Act 2012* may result in a loss of rights to use or profit from land which licence holders enjoy. Further, the Committee notes the Bill does not create an avenue of review for licence holders who have lost their licence as a result of land being reserved for the Protected Area.

Nevertheless, existing requirements relating to notice of reservations of land may offer safeguards to licence holders. When land is reserved, the Governor must publish notice of that reservation in the Gazette. In addition, licence holders may engage in the public consultations required under the plan of management under section 8 of the Bill. Traditional avenues of review through the NSW Civil and Administrative Tribunal may also be available. In the circumstances, the Committee makes no further comment.

7. LICENSING AND REGISTRATION (UNIFORM PROCEDURES) AMENDMENT BILL 2021

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

Commencement by proclamation

The Bill's provisions amending the uniform licensing and registration procedures in the *Licensing and Registration (Uniform Procedures) Act 2002* commence on proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected persons. However, the Committee notes the Minister's comment that the flexible start date will ensure regulators currently using the Act's licensing provisions can adapt their systems and processes to the new requirements. In the circumstances, the Committee makes no further comment.

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

Deferral to the regulations – exempting decision from requirement for internal review

Section 23(3) of the Bill provides that, where relevant regulatory legislation provides a right of appeal or review of certain decisions, that right can only be exercised if an internal review is finalised or taken to be finalised, or the decision is exempted from the requirement for an internal review.

The Committee notes that this requirement for internal review generally appears to broaden the right of review. However, the Bill provides that the regulations may provide for the particulars regarding internal reviews. Specifically, the regulations may provide for the circumstances in which an internal review is finalised or taken to be finalised, or exempting decisions from the requirement for internal reviews. These matters inform a person's exercise of their right to review or appeal under section 23(3).

The Committee generally prefers matters informing the exercise of rights to be included in the primary legislation, to provide affected persons with clarity and to facilitate an appropriate level of parliamentary oversight. In this case, the Committee notes that section 23(3) may not operate effectively until the regulations include the relevant matters, in particular the circumstances in which an internal review is finalised or taken to be finalised. However, we acknowledge that including matters in the regulations builds flexibility into the regulatory framework, which is particularly important in relation to the 'opt-in' uniform licensing provisions. The Committee refers this matter to the Parliament for its consideration.

8. NATIONAL PARKS AND WILDLIFE AMENDMENT BILL 2021

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

Strict liability offences/reversal of onus of proof

The Bill amends the *National Parks and Wildlife Act 1974* to introduce an offence for causing harm to an environmental or cultural value of land declared to be an asset of intergenerational significance. This offence carries a maximum penalty for individuals of either or both $550,000 or 2 years' imprisonment. 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 Bill also provides that a person can rely on various defences to this offence. This includes a defence that they did not know their conduct would cause harm to land that was declared to be an asset of intergenerational significance, or to the environmental or cultural value of declared land, because the Minister exercised a power to exempt disclosure of that relevant information under the Act. While this operates as a defence to the strict liability offence, it may amount to a reverse onus by requiring accused persons to prove that they did not have a required mental element otherwise presumed.

In regards to criminal actions, a reverse onus may undermine a person's right to the presumption of innocence as contained in Article 14 of the ICCPR. The right to the presumption of innocence protects an accused person's privilege to be presumed innocent until proved guilty according to law.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. It also recognises that the declaration of lands under the Act is intended to strengthen the protection of the environmental or cultural values it presents to the public.

However, it notes that individuals who are convicted of the strict liability offence may be sentenced to a maximum custodial penalty of 2 years' imprisonment. It further notes that, unless the offending conduct was otherwise authorised by a relevant law or statutory instrument, the only defence available to an accused person imposes a reverse onus on them to prove they did not have knowledge which is implicitly presumed under the Act. For these reasons, the Committee refers the matter to Parliament for consideration.

Procedural fairness – prima facie evidence in respect to strict liability offence

The Bill amends the *National Parks and Wildlife Act 1974* to allow the use of information obtained from digital cameras approved for use in national parks as admissible prima facie evidence in criminal proceedings for a vehicle entry offence. It also permits the sharing of that information to relevant government enforcement agencies and oversight bodies.

As a vehicle entry offence is a strict liability offence, this may impact an accused person's right to procedural fairness as it enables the admission of evidence as prima facie proof of matters which may establish the commission of the offence. It may also impact a person's right to privacy as it permits the sharing of personal information to other government law enforcement agencies and oversight bodies.

However, the Committee notes that the sharing of information is between government agencies and required to be in accordance with existing privacy principles. It also recognises that the Bill does not prevent an accused person from rebutting the matters which is established prima facie under the Act. In the circumstances, the Committee makes no further comment.

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

Henry VIII clauses

The Bill amends the *National Parks and Wildlife Act 1974* to provide regulation-making powers in respect to national parks land. Specifically, section 82S provides the Minister the power to make regulations which modify the operation of a provision in the *Biodiversity Conservation Act 2016* relating to a biodiversity credit. Section 153G also enables regulations to authorise actions which would otherwise be prohibited under other provisions of the *National Parks and Wildlife Act 1974*.

These provisions amount to a Henry VIII clause, allowing the Executive to legislate and amend the operation of statutes by way of regulation without reference to the Parliament. In ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers.

However, the Committee acknowledges that these regulations are intended to facilitate the management of public national parks lands in a manner consistent with the Bill's biodiversity conservation objectives. It also recognises that the provisions are a reasonable measure to allow the Minister to authorise actions to manage national park land in a flexible and timely manner. In the circumstances, the Committee makes no further comment.

Commences by proclamation

Parts of the Bill commence 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 of these provisions and the Minister's proposed consultation period with Aboriginal park owners prior to commencement may assist

with the effective implementation of the new credit schemes in accordance with principles of self-determination for Indigenous park owners. In the circumstances, the Committee makes no further comment.

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 – termination by website publications

The Bill amends the *National Parks and Wildlife Act 1974* to provide for the commitment of national park lands to specified biodiversity management actions by publication of a statement of commitment on the government website. It also provides that the Minister may vary or terminate a statement by publication on the Department's website, to allow the carrying out of otherwise prohibited development on committed land.

As a statement of commitment by the Minister attracts certain rights and responsibilities including for other public authorities, the Committee would prefer for these publications to be set out in the regulation or otherwise published in the Gazette to ensure an appropriate level of parliamentary oversight. Given that no such notification requirement applies to publications on government or departmental websites, the Committee refers this matter to Parliament for consideration.

9. ROAD TRANSPORT AMENDMENT (MEDICINAL CANNABIS-EXEMPTIONS FROM OFFENCES) BILL 2021*

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

Clarity – reversal of onus of proof

The Bill amends section 111 of the *Road Transport Act 2013* to create an exception to an offence of driving with the presence of a prescribed illicit drug in a person's oral fluid, blood or urine. It changes section 111 by enabling a person who uses medicinal cannabis, or delta-9-tetrahydrocannabinol (THC), to drive with THC in their body in certain circumstances.

The Committee notes the Bill is not clear on the issue of who bears the onus of proof in proving the THC was used for medicinal purposes and was obtained and administered in accordance with the *Therapeutic Goods Act 1989*. If the amendment requires the defendant to prove these facts in issue then this may result in a shift of the onus of proof from the prosecution to the defendant. In criminal proceedings, the onus of proof rests on the prosecution and elements of offences must be proven beyond reasonable doubt. If the onus of proof were to be reversed it may also result in a shift in the standard of proof on a defendant as the standard of proof for a defence is on the balance of probabilities. This is particularly relevant considering a finding of guilt may result in a fine of up to $2200 for a first offence and $3300 for a second or subsequent offence as well as a licence disqualification of up to 6 months.

In regards to criminal actions, a reversed onus may undermine the presumption of innocence. The legal issues surrounding the mental element of a crime are complex, which may be exacerbated if the accused is unable to obtain legal representation and compromise their right to a fair court proceeding.

It appears the intention behind the amendment according to the Second Reading Speech is for the exception to act as a defence. If so, then the onus of proving the THC was used in accordance with law rests on the defendant on the balance of probabilities. The Crown will bear the onus of

proving that the THC was not used in accordance with law by proving it was not used for medicinal purposes or was not obtained or administered in accordance with the *Therapeutic Goods Act 1989*. Given a person may experience high financial penalties and lengthy licence disqualifications, it is important the legislation is drafted with sufficient clarity so that all parties are aware of their rights and obligations in subsequent proceedings. In the circumstances, the Committee refers this issue of clarity to Parliament for its consideration.

10. STRONGER COMMUNITIES LEGISLATION AMENDMENT (CHILDREN) BILL 2021

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

Right to presumption of innocence

The Bill amends the *Child Protection (Working with Children) Act 2012* to authorise an animal welfare body to disclose information to the Children's Guardian that proceedings have been commenced, or a finding of guilt(even if not recorded), has been made against a person in relation to an animal cruelty offence. It further provides that the commencement of such proceedings is a matter which will trigger provisions under the Act requiring the Children's Guardian to assess the suitability of a person to hold or continue to hold a working with children check clearance. This may mean that a person who has not yet been found guilty of an animal cruelty offence by an animal welfare body may still have their charges considered by the Children's Guardian in considering their application for a check clearance or otherwise in their suitability to continue holding such a clearance.

The provisions may thereby impact a person's right to the presumption of innocence as contained in Article 14 of the ICCPR. The right to the presumption of innocence protects an accused person's privilege to be presumed innocent until proved guilty according to law.

However, the Committee acknowledges that the statutory triggers under the Act do not require the Children's Guardian to assess the accused person's application for or validity of a working with children check clearance against the person's favour. It also recognises that similar statutory triggers currently apply under the Act in relation to aggravated animal cruelty offences. In the circumstances, the Committee makes no further comment.

Right to liberty and freedom from arbitrary detention – revocation of parole

The Bill amends section 67 of the *Children (Detention Centres) Act 1987* in relation to a reconsideration hearing required under the Act after making an order in the absence of a hearing which revokes a parole order for a juvenile offender. Specifically, it allows magistrates of the Children's Court to take into account the juvenile offender's behaviour while released on parole or after the revocation of their parole order in determining whether to rescind, vary or confirm the order for revocation. This may mean that behaviour of a juvenile offender which does not constitute a breach or non-compliance with their parole could be taken into account in varying or confirming the revocation of their parole order.

As the revocation of a parole order may result in a juvenile offender being returned to custody, the Bill 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. This is of particular concern as the Bill concerns the liberty of juvenile offenders to be released from custody on parole.

However, the Committee acknowledges that the ability to consider the behaviour of juvenile offenders while released on parole or after the revocation of their parole orders is a matter of

judicial discretion. It further recognises that the imposition of conditions for release on parole is a common measure intended to balance the rights of offenders who can demonstrate reformed behaviour and the need to protect public safety. In the circumstances, the Committee makes no further comment.

Compensation rights – indemnity of authorised carers

The Bill amends the *Children and Young Persons (Care and Protection) Act 1998* to exclude the specified class of authorised residential care workers from an entitlement to indemnity from the Minister for loss and damage suffered in the course of providing authorised care to a child or young person. This may impact the right of individuals to be compensated for loss or damage caused as a result of performing the duties of their employment.

However, the Committee notes that these amendments apply to those care workers who provide authorised care only in the course of their professional work or paid employment, and thus may be separately entitled to compensation from their employer. It acknowledges the statements from the Minister that the indemnity provision under the Act is intended to benefit authorised carers like foster carers and that it would not be appropriate for the Minister to additionally indemnify residential care workers. In the 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

Excludes administrative review

The Bill amends the *Child Protection (Working with Children) Act 2012* to disqualify a person who has been convicted of a criminal offence of bestiality or serious animal cruelty from ever holding a working with children check clearance. It further excludes a person who has been so convicted from making an application to the NSW Civil and Administrative Tribunal for an administrative review of such clearance decisions. By excluding this entitlement for administrative review under the Act, this may impact on the rights of affected persons to have those administrative decisions independently reviewed.

However, the Committee acknowledges that the Act is intended to protect children by limiting who is suitable to engage in child-related work. It also recognises that individuals who have committed animal cruelty offences engage in violent behaviour and that other violent offences are also similarly treated in the Act. In the circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

The Bill amends the *Children's Guardian Act 2019* to extend the operation of transitional regulations and the power to make transitional regulations under clause 1 of Schedule 4 of the Act for a further six months. Clause 1 provides that these transitional regulations may make provisions in respect to a wide range of matters and which may have retrospective application not predating the commencement date of the Act.

The Committee generally prefers substantive matters to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the matters may have retrospective application which may run counter to the rule of law principle that people are entitled to know the law to which they are subject at any given time.

However, the Committee acknowledges that the extended operation of the transitional regulation-making power is intended to ensure internal consistency with other regulation-making powers under the Act. It also recognises that the operation of these transitional regulations as well as the power to make these regulations are time limited to expire on 1 September 2022. In the circumstances, the Committee makes no further comment.

Commencement by proclamation

Parts of the Bill commence 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 a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments to the State legislative regimes in respect working with children check clearances and authorised residential care workers. In the circumstances, the Committee makes no further comment.

11. TEACHER ACCREDITATION AMENDMENT BILL 2021

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

Right to privacy of information

The Bill gives the NSW Education Standards Authority the power to share and disclose relevant information to external bodies in their accreditation applications and investigations. This includes the power to obtain information from, and disclose that information to relevant entities for an authorised purpose, check criminal and disciplinary histories, and to refer a matter relevant to an assessment of suitability to an appropriate entity for further investigation (sections 7, 36 and 38). Where the Authority relies on information in an investigation and deems a person unsuitable for teaching, the Authority then has the power to refuse an application or suspend, revoke or impose conditions on an accreditation. Additionally, the Authority is required to establish a publically available register of accredited teachers (section 17).

The Committee notes the sharing of information relevant to a teacher seeking accreditation, or a teacher who holds an accreditation, may infringe on that person's right to privacy of information, and may breach confidence between the person and the Authority. Sharing of information may also result in the subsequent denial of an accreditation application or the suspension, revocation or imposition of conditions on an accreditation. This has the potential to affect a person's ability to continue teaching as a result of information being shared between appropriate entities.

Further, the establishment of a public register of accredited teachers may interfere with a right to privacy, particularly for persons with existing accreditations, as they may not have consented to the provision of their information on the register.

However, the Committee acknowledges the above information sharing and disclosure powers are for the purpose of determining the suitability of a person's accreditation status as a teacher to work with children and young people. The Committee also notes the importance of the Authority having access to all information that may affect the accreditation suitability of an applicant or accreditation holder.

Further, a person who has been affected by a decision under sections 7, 36 and 38 of the Bill has available avenues for review under the *Administrative Decisions Review Act 1997*. The Committee also notes that the Bill places limits on what constitutes 'relevant information' and an 'authorised purpose', which in turn provides some additional protection. By keeping a public register of accredited teachers, the Authority may provide greater transparency to future employers in a manner similar to that of the Register of practitioners kept by the Australian Health Practitioner Regulation Agency or other regulatory agencies such as the Law Society of New South Wales. As such, the Committee makes no further comment.

Strict liability

Section 42B requires employers to notify the Authority of relevant decisions and provide all relevant information regarding those decisions. Employers must also provide the Authority with information relevant to a decision to suspend or revoke a person's accreditation. Employers that fail to do so may incur a maximum penalty of $5500 (50 penalty units). These provisions amount to strict liability provisions as they do not require proof of the mental element of an offence.

The Committee generally comments on strict 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 offences are not uncommon in regulatory settings to encourage compliance. However, it does not appear that safeguards are available to protect persons from being penalised incorrectly. For example, where an employer is unaware of any relevant information to disclose that the Authority later becomes aware of and relies on to make an accreditation decision. As such, the Committee refers the matter back to Parliament for consideration.

Right to fair and just compensation on dismissal of employment

Schedule 3 of the Bill abolishes the Quality Teaching Committee which exists under Part 2, Division 4 of the Act. In abolishing the QTC, the Bill expressly provides that each member of the QTC will cease to hold their positions as committee members and members will not be entitled to remuneration or compensation because of loss of office.

A member who lost office as a result of the Bill would also lose any corresponding remuneration to which he or she would otherwise have been entitled to cover the remainder of his or her term. By providing that the member would receive no compensation for the loss of this remuneration, the Bill thereby impacts on panel members' compensation rights.

The Committee notes existing members of the QTC will not be eligible to fair remuneration on abolishment of the QTC upon repeal of the Act. The repealing provision may infringe on other award rights afforded under the national employment standards, a contract of employment or entitlements in other legislation. The Committee refers the matter to Parliament to consider whether it is an undue trespass on the right of Panel members to compensation for loss of remuneration.

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

Wide and ill-defined power – power of Authority to suspend or revoke accreditation where person's accreditation is on hold or while on leave of absence

Proposed section 24D(3A) of the Act allows the NSW Education Standards Authority to suspend or revoke a person's accreditation while their accreditation is on hold due to being on a leave of absence. Many teachers are required to be accredited in order to remain employed in

accordance with the Authority. The effect of a revocation is that a person is disentitled to teach in a school or in a childhood education centre, while a suspension voids the accreditation for a certain period of time.

The Committee notes section 24D(3A) creates a wide and ill-defined power for the Authority to suspend a person even where that person has taken a leave of absence. This may result in greater difficulty for a person re-entering the workforce upon taking that leave of absence from teaching. The Committee also prefers clearer provisions relating to the specific circumstances in which revocations or suspensions may be issued particularly where it affects the employment rights of individuals.

However, the Committee understands that this provision is aimed at clarifying that a person may be suspended or have their accreditation revoked for misconduct even though their accreditation has been placed on hold while they are on leave. The provision does not prevent a person, while on leave or while their accreditation is on hold, from engaging in training or development to satisfy professional teaching standards. The Committee also notes the existence of statutory safeguards requiring the Authority to notify, in writing, a person affected by an accreditation decision. Also available to a person affected by a decision is the avenue of review under section 27 of the Act. In these circumstances, the Committee makes no further comment.

12. WORKERS COMPENSATION AMENDMENT BILL 2021

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

Compensation rights – workers compensation

The Bill amends the *Workers Compensation Act 1987* to remove existing presumptions under the Act which would entitle a worker in a prescribed employment who contracts COVID-19 to workers compensation. These amendments may restrict an individual's access to workers compensation for COVID-19 related injuries by requiring applicants prove their eligibility where previously they may have been automatically entitled under the presumptions. This is of particular concern as the prescribed employments are generally unable to be performed from home which may result in prescribed workers who contract COVID-19 not accessing compensation, in circumstances where they are required by authorities to self-isolate and cannot work.

However, the Committee acknowledges that these changes would not prevent an individual from applying for workers compensation due to contracting COVID-19 in the course of, and as a result of, their employment. It also recognises the Minister's statements that the statutory presumptions may have a disproportionate financial burden on small businesses in New South Wales, which the amendments are intended to alleviate as NSW moves beyond the COVID-19 public health emergency. In the circumstances, the Committee makes no further comment.

Part One – Bills

1. Abortion Law Reform (Sex Selection Prohibition) Amendment Bill 2021*

Date introduced	17 November 2021
House introduced	Legislative Council
Member responsible	Revd the Hon. Fred Nile MLC
	*Private Member's Bill

Purpose and description

1. The object of the Abortion Law Reform (Sex Selection Prohibition) Amendment Bill 2021 (the **Bill**) is to amend the following Acts—

   i) the *Abortion Law Reform Act 2019* to prohibit the performance of terminations on persons for the purposes of sex selection,

   ii) the *Assisted Reproductive Technology Act 2007* to prohibit the provision of assisted reproductive technology treatment for the purposes of sex selection,

   iii) the *Health Practitioner Regulation (Adoption of National Law) Act 2009* to provide that the performance of terminations on persons for the purposes of sex selection amounts to professional misconduct of a registered health practitioner,

   iv) the *Health Care Liability Act 2001* to void approved professional indemnity insurance for a registered health practitioner to the extent the insurance provides cover for the performance of a termination on a person for the purposes of sex selection.

Background

2. In the Second Reading Speech, Revd the Hon. Fred Nile MLC stated that the intent of the Bill was to prevent sex-selective abortion:

> …I stress that the bill does not eliminate abortion as a whole. It seeks to eliminate the practice of aborting unborn children on the grounds of their sex. Further, the bill penalises medical practitioners who conduct a sex-selective abortion. Those penalties are clearly defined in schedule 2 and schedule 4, with severe criminal penalties and the voidance of any approved professional indemnity insurance.

3. The issue of sex selection in termination of pregnancy was discussed during the passage of the *Reproductive Health Care Reform Bill 2019*. In relation to the 2019 Bill, proposed amendments to prohibit termination for the sole purpose of sex selection were considered by the Parliament, including amendments in the Legislative Council regarding termination for this purpose, excluding where the foetus is confirmed or suspected to

have a sex-linked genetic disorder.[1] The Parliament also amended section 16 of that Bill to include its position on termination for the purpose of sex selection.

4. Section 16(1) of the *Abortion Law Reform Act 2019* states that Parliament opposes the performance of terminations for the purpose of sex selection. Section 16 also required the Secretary of the Ministry of Health to conduct a review and give the Minister a report, to be tabled in the Parliament, on whether terminations are being performed for this purpose within 12 months after the commencement of the section. This report found:

> A total of 15,973 terminations of pregnancy that occurred between 1 October 2019 and 30 September 2020 were notified to the NSW Ministry of Health (Annexure 1). Of these, 13 notifications of termination of pregnancy indicated that they were for the sole purpose of sex selection, representing 0.08 per cent of all notifications.
>
> However, of these 13 notifications, 10 are likely to be reporting errors as they were for pregnancies less than nine weeks gestation and there is no readily available and reliable way of determining gender prior to 10 weeks gestation. If these notifications are excluded, less than 0.02 per cent of notifications indicated that they were performed for the sole purpose of sex selection.[2]

5. Revd the Hon. Fred Nile also raised in the Second Reading Speech that similar legislation already exists in South Australia under the *Termination of Pregnancy Act 2021*. This Act, which is not yet in operation, provides:

> (1) Subject to subsection (2), a registered health practitioner must not perform a termination of a pregnancy for the purposes of sex-selection.
>
> (2) Subsection (1) does not apply to the performance of a termination if the registered health practitioner is satisfied that there is a substantial risk that the person born after the pregnancy (but for the termination) would suffer a sex-linked medical condition that would result in serious disability to that person.

Issues considered by committee

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

Scope of prohibition – medical grounds

6. The Bill inserts section 11A into the *Abortion Law Reform Act 2019*, which provides that, despite any provision of Part 2 of that Act, a registered health practitioner must not perform or assist in the performance of a termination on a person for the purposes of sex selection. The phrase 'purposes of sex selection' is not defined in the Bill or the *Abortion Law Reform Act 2019*.

7. Section 14 of the *Abortion Law Reform Act 2019* provides that registered health practitioners performing or assisting in the performance of a termination of pregnancy must perform the termination in accordance with guidelines issued by the Secretary of the Ministry of Health under that section. Section 16(6) clarifies that the guidelines issued

[1] See proposed amendments c2019-057H and c2019-156B.

[2] NSW Ministry of Health, *Review of termination of pregnancy for the purpose of sex selection in NSW*, December 2020, page 3.

under section 14 may include guidelines about the performance of terminations, that prevent terminations being performed for the purpose of sex selection.

8. A current guideline issued under section 14 provides guidance for practitioners who perform termination of pregnancy in NSW when a termination is sought for the sole purpose of sex selection.[3] It states:

> This Guideline relates to when a termination of pregnancy is sought for the sole purpose of sex selection. This Guideline does not apply to a termination due to the possibility of a sex-linked medical condition in the fetus.
>
> Before performing a termination of pregnancy, it may be disclosed to the medical practitioner that the reason for the request is for the sole purpose of sex selection. If this is the reason for the request, the practitioner must not perform the termination, unless not performing the termination will cause significant risk to the woman's health or safety.
>
> These will often be complex clinical and/or ethical scenarios. In all cases, the woman's physical and psychological wellbeing must be the medical practitioner's priority. When a medical practitioner is uncertain about the degree of risk to the woman's health and safety arising from the refusal, further advice and support may be sought from either another medical practitioner, a multidisciplinary team, a hospital advisory committee or the local clinical ethics committee.

9. A NSW Health Policy Directive setting out the framework for termination of pregnancy in NSW also includes that registered health practitioners must not perform a termination if the reason for the request is for the sole purpose of sex selection, unless not performing the termination will cause significant risk to the woman's health or safety.[4]

10. The Bill also inserts section 29A to the *Assisted Reproductive Technology Act 2007*, which prohibits an ART provider from providing ART treatment to a woman using a gamete or an embryo, or performing the treatment in a particular way, with the purpose of producing a child of a particular sex.

11. 'ART treatment' means assisted reproductive technology treatment, being any medical treatment or procedure that procures or attempts to procure pregnancy in a woman by means other than sexual intercourse, and includes artificial insemination, in-vitro fertilisation, gamete intrafallopian transfer and any related treatment or procedure that is prescribed by the regulations.

12. Section 29A states that the object of that section is to prohibit the provision of ART treatment for the purposes of sex selection. The phrase 'purposes of sex selection' is not defined in the Bill or the *Assisted Reproductive Technology Act 2007*.

13. Guidelines published by the National Health and Medical Research Council of Australia[5] state:

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[3] NSW Ministry of Health, Health and Social Policy Branch, *Prevention of Termination of Pregnancy for the Sole Purpose of Sex Selection*, GL2021_008, 23 June 2021.

[4] NSW Ministry of Health, *Framework for Termination of Pregnancy in New South Wales*, 23 June 2021.

[5] Commonwealth of Australia, National Health and Medical Research Council of Australia, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, 2017.

Sex selection techniques may not be used unless it is to reduce the risk of transmission of a genetic condition, disease or abnormality that would severely limit the quality of life of the person who would be born (see paragraph 8.13).

The Bill prohibits registered health practitioners from performing or assisting with the performance of terminations, and ART (assisted reproductive technology) providers from providing ART treatment, for the purposes of sex selection. No exceptions are provided to these prohibitions, including on medical grounds.

The Committee notes that existing applicable guidelines currently prohibit the performance of terminations and provision of ART treatment for the purpose of sex selection, except on limited medical grounds. Specifically, guidelines issued under section 14 of the *Abortion Law Reform Act 2019* provide that if termination is requested for the sole purpose of sex selection, the practitioner must not perform the termination unless not doing so would create a significant risk to the woman's health or safety. Registered health practitioners must comply with these guidelines when performing or assisting in the performance of terminations. That guideline also provides that its provisions do not apply termination due to the possibility of a sex-linked medical condition in the foetus. Additionally, guidelines issued by the National Health and Medical Research Council of Australia provide that sex selection techniques may not be used in ART treatment unless it is to reduce the risk of transmission of a genetic condition, disease or abnormality that would severely limit the quality of life of the person who would be born.

The Bill does not provide any exceptions to the prohibitions. Further, the phrase 'for the purposes of sex selection', which is the criteria for limiting conduct, is not defined in the Bill or either Act amended by the Bill, although the *Abortion Law Reform Act 2019* includes, but does not define, the phrase 'for the purpose of sex selection'. It is therefore unclear whether terminations can be performed or ART treatment provided for the purpose of sex selection on medical grounds, including those mentioned above. Additionally, it is unclear whether persons can access termination or ART treatment in these circumstances.

The Committee considers that clarifying the scope of the prohibitions is particularly important given that an individual may incur significant penalties for contravention (see below) and may limit access to certain medical procedures. The Committee refers this issue to the Parliament for its consideration.

Strict liability and significant penalties

14. The Bill inserts section 11A to the *Abortion Law Reform Act 2019*, which prohibits registered health practitioners from performing or assisting with the performance of terminations for the purposes of sex selection.

15. The Bill amends the *Health Practitioner Regulation (Adoption of National Law) Act 2009* so that contravention of section 11A constitutes 'professional misconduct' of a registered health practitioner. This essentially renders a practitioner strictly liable for professional misconduct. Under that Act, professional misconduct is grounds for making a complaint about a registered health practitioner, the imposition of a fine of not more than 250 penalty units ($27 500) and suspension or cancellation of the practitioner's registration.

16. The Bill also amends the *Health Care Liability Act* to void an approved professional indemnity insurance to the extent that it provides cover for a registered health practitioner who performs, or assists in the performance of, a termination on a person for the purpose of sex selection.

17. The Bill inserts section 29A to the *Assisted Reproductive Technology Act 2007*, which prohibits an ART provider from providing ART treatment to a woman using a gamete or an embryo, or performing the treatment in a particular way, with the purpose of producing a child of a particular sex.

18. An 'ART provider' means a person who provides ART services and includes a registered ART provider, but does not include a person who provides ART services on behalf of a registered ART provider either under contract or in the course of the person's employment by the registered ART provider. Refer to paragraph 11 above regarding the definition of 'ART treatment', such treatment forming part of 'ART service'.

19. Section 29A is a strict liability offence, with contravention incurring a maximum penalty for an individual of 200 penalty units ($22 000) or 5 years' imprisonment, or both. A corporation is liable for a maximum penalty of 400 penalty units ($44 000).

The Bill prohibits registered health practitioners from performing or assisting with the performance of terminations, and ART providers from providing ART treatment, for the purposes of sex selection.

These offences are strict liability offences. 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. It also acknowledges that strict liability offences are not uncommon in regulatory settings and encourage compliance. However, the Committee considers that the significance of the penalties may warrant the Parliament's further consideration.

Specifically, the Bill amends the *Health Practitioner Regulation (Adoption of National Law) Act 2009* so that a registered health practitioner that performs or assists with the performance of a termination for the purposes of sex selection is strictly liable for professional misconduct. Professional misconduct is grounds for making a complaint about the practitioner, the imposition of a fine and suspension or cancellation of the practitioner's registration. The Bill also amends the *Health Care Liability Act* to void approved professional indemnity insurance to the extent it provides cover for a registered health practitioner who performs or assists in the performance of an abortion for the purpose of sex selection. This may result in the practitioner being exposed to a significant monetary burden or risk. Given the significance of the penalty and statutory exclusion of professional indemnity insurance as a protection for the practitioner, the Committee refers this matter to Parliament for its consideration.

An ART provider that is an individual who provides ART treatment for the purpose of producing a child of a particular sex is strictly liable for a maximum penalty of 200 penalty units ($22 000) or imprisonment for 5 years, or both. Given the potential custodial sentence and/or large monetary penalty that may be imposed on a person for this offence, the Committee refers this matter to the Parliament for its consideration.

2. Climate Change (Emissions Targets) Bill 2021 (Dib) and Climate Change (Emissions Targets) Bill 2021 (Sharpe)*

Date introduced	18 November 2021
Houses introduced	Legislative Assembly and Legislative Council
Members responsible	Mr Jihad Dib MP The Hon. Penny Sharpe MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The objects of these Bills are—

   (a) to establish principles to guide action to address climate change that must be taken into account by the NSW Government in developing and implementing government policy, and

   (b) to set 2030 and 2050 targets for the reduction of greenhouse gas emissions in New South Wales, and

   (c) to establish the Net Zero Commission to monitor and report on progress towards the 2030 and 2050 targets.

BACKGROUND

2. These Bills seek to enact in law principles to guide actions addressing the issue of climate change, legislatively set 2030 and 2050 greenhouse gas emissions targets for New South Wales and statutorily establish a Net Zero Commission in relation to those targets.

3. Although they are distinct Bills separately introduced in both Houses of Parliament, the Climate Change (Emissions Targets) Bill 2021 introduced by Mr Jihad Dib MP in the Legislative Assembly and the Climate Change (Emissions Targets) Bill 2021 introduced by the Hon. Penny Sharpe MLC in the Legislative Council contain identical provisions. Therefore, the Bills have been considered in the one report.

4. In his second reading speech to the Climate Change (Emissions Targets) Bill 2021 (Dib), Mr Dib emphasised that there is an imperative need for the Bill for four reasons:

> First, New South Wales currently does not have a credible or guaranteed path to net zero by 2050. Secondly, green investment is being jeopardised by Australia's international reputation. Thirdly, it reflects the widespread community support for net zero emissions by 2050. And fourthly, the rest of the world is acting and New South Wales risks being left behind.

5. Ms Sharpe also spoke to the need to address the issue of climate change in her second reading speech to the Climate Change (Emissions Targets) Bill 2021 (Sharpe) in the Legislative Council:

> Without urgent action, our neighbours in the Pacific will lose their ability to live on their land and millions of people in low-lying areas of the world will become refugees. We cannot turn away from our neighbours in the Pacific, or indeed the other humans that we share the planet with. Climate change is not of their making, but they are living with the consequences. Without urgent action, the cost to communities will dwarf any government's ability to pay for the adaptation that is required. This is, of course, bad news, but the good news is that we know what is causing the change and we can act to turn it around. There is hope, and it is not too late.

6. The Bills propose to legislate under section 6 that New South Wales must reduce greenhouse gas emissions to achieve:

   (a) zero net greenhouse gas emissions by 31 December 2050; and

   (b) at least a 50% reduction in greenhouse gas emissions compared to net emissions in the year 2005 by 31 December 2030.

7. Mr Dib stated in his second reading speech in the Legislative Assembly that legislating emissions targets "provides necessary certainty to domestic and international investors looking to support so-called green jobs and green growth". He further stated that "[a]ttracting this investment is critical to reaching net zero [emissions] in New South Wales". Ms Sharpe also emphasised in her second reading speech that the Bill would "ensure that the NSW Government has its targets legislated and in place, regardless of who is in power and their beliefs".

8. Another key provision of the Bill is section 5, which sets a number of guiding principles in respect to the need for and implementation of action to address the issue of climate change. The principles set out in these Bills were summarised by Mr Dib as follows:

> … first, the critical need to act to address climate change; secondly, the need to act now to ensure the cost and impact of action is as low as possible, recognising both the economic and environmental cost of inaction; thirdly, the need to recognise the principles of fiscal responsibility; fourthly, the need to maximise job creation, both in low-carbon energy generation, as well as manufacturing and the supply chain for renewable energy in New South Wales… and policy settings must have regard to maximising local jobs as global trends tell us that inaction now is tantamount to exporting future jobs overseas; fifthly, supporting the responsibility to ensure diversification of local economies, including the protection of jobs, industry and local procurement because every town and every city deserves a future; and, sixthly, the need for skills diversification and the critical role of TAFE, which is underpinned by government investment in TAFE…

9. Speaking on the intended operation of the principles, Ms Sharpe explained that the guiding principles are intended to "underpin the way we move forward to address climate change in New South Wales".

10. To facilitate the achievement of the emissions targets in accordance with the guiding principles, the Bills provide for the imposition of various responsibilities on the NSW Government towards that end. Specifically, the Bills provide that:

- The NSW Premier and Minister for Environment must ensure the emissions targets are met; and

- The NSW Government must take the emission targets and guiding principles into account when developing and implementing government policy.

11. Under Part 3, the Bills also seek to establish in statute the Net Zero Commission. Subsection 10(1) sets out the functions of the commission. In her second reading speech in the Legislative Council, Ms Sharpe summarised the functions of the commission as follows:

> They are to develop a plan for New South Wales to meet the 2030 and 2050 targets, to review and update this plan at least once every five years, to monitor and review the plan and make recommendations to the Minister and to report annually to the Parliament…

12. The Bills also make provisions setting responsibilities of the Minister of Environment in relation to the exercise of the commission's functions. These provisions require, amongst other things, the Minister to:

- publicly respond to recommendations of the commission within 3 months;

- give any report prepared by the commission on matters relating to climate change to the Presiding Officer of each House of Parliament within 28 days of receipt;

- ensure that the NSW Government responds to each annual report of the commission, which must set out the Government's response to each recommendation in the report; and

- give the annual reports of the commission and the NSW Government's response to that report and its recommendations to the Presiding Officer of each House of Parliament within 28 days of receipt of the report.

13. In that respect, Ms Sharpe further stated that it is intended that the commission will provide:

> … frank and fearless advice from a commission with the right expertise to make sure that we can deliver on the commitment that we have given to the people of New South Wales, which is that we will do what is necessary and pull our weight in the global project to reduce emissions to save our planet. The commission will provide accountability. It will develop, monitor and report on the plan.

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. Electoral Amendment (COVID-19) Bill 2021

Date introduced	16 November 2021
House introduced	Legislative Council
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Special Minister of State and Public Service and Employee Relations, Aboriginal Affairs, and the Arts

PURPOSE AND DESCRIPTION

1. The object of this Bill is to make special provision for by-elections held during the COVID-19 pandemic.

2. Schedule 1 inserts proposed Division 3 into the *Electoral Act 2017*, Part 10 in relation to a by-election.

3. The proposed Division provides—

   (a) all electors may apply for early voting and certain electors may apply to vote by post, and

   (b) the regulations may, in certain circumstances, modify the Electoral Act 2017 for the purposes of responding to the public health emergency caused by the COVID-19 pandemic.

4. The provisions have effect until the end of 30 June 2022.

BACKGROUND

5. The Bill amends the *Electoral Act 2017* ('the Act') by inserting proposed Division 3 in Part 10 which provides for the conduct of by-elections held in the period starting from the commencement date of the Bill (as an Act) and ending on 30 June 2022 ('the prescribed period'). It also provides that, at the end of the prescribed period on 30 June 2022, proposed Division 3 is repealed.

6. The Hon. Don Harwin MLC noted in his second reading speech to the Bill that these amendments were being introduced as:

> … there are significant uncertainties and public health risks to be managed when conducting events during the pandemic. If a State by-election is held during the pandemic, the NSW Electoral Commission will need to implement a number of measures to ensure that voting can be carried out safely and effectively and that vulnerable members of the community are not disenfranchised. While most of those measures can be implemented within the existing framework of the Act, the commission has requested amendments to support vulnerable electors and ensure that the uncertainties and public health risks of the pandemic can be managed more effectively.

7. Specifically, the Bill provides that any elector may choose to vote early in accordance with section 113 of the Act for any relevant by-election held during the prescribed period. The Minister noted that this provision was drafted in accordance with a request from the Electoral Commission, and is intended to "reduce crowding and allow for greater social distancing at voting centres on election day".

8. The Bill also provides that an elector may vote by post in accordance with section 143 of the Act if they meet one of the following criteria:

    - They are self-isolating for reasons related to COVID-19;
    - They reasonably believe attending a voting centre on election day will pose a risk to their or another person's health or safety because of the COVID-19 pandemic; or
    - They are a permanent or temporary resident in a hospital, nursing home, retirement village or similar facility.

9. In commenting on the expanded access to postal and early voting proposed by the Bill, the Minister noted that the existing regime under the Act:

> … only allows electors to access postal voting or to attend an early voting centre if they are "unable to attend at a voting centre on election day" as deemed by section 6 of the Act. The circumstances in which an elector is deemed to be unable to attend at a voting centre on election day in section 6 do not specifically include COVID-19 impacts.

10. The Minister further stated that these amendments "are also expected to increase access to voting for vulnerable electors unwilling to attend a voting centre on election day because of perceived public health risks". However, he emphasised that these provisions:

> … are drafted to only apply to by-elections and are only intended to apply during the pandemic. They will be automatically repealed on 30 June 2022. It is also worth emphasising that the changes do not expand access to iVote. The changes only affect eligibility for postal and early voting.

11. Section 274 proposed by the Bill provides that regulations may be made to modify the application of the Act on by-elections held during the prescribed period for the purposes of responding to the COVID-19 public health emergency.

ISSUES CONSIDERED BY COMMITTEE

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

Wide regulation-making power

12. The Act sets the legislative framework for the conduct of State parliamentary elections in New South Wales. Section 3 provides that the objects of the Act include:

> …
>
> (b) to promote and maintain an electoral system characterised by accessibility, integrity and fairness that provides for the election of members of Parliament of New South Wales in accordance with the *Constitution Act 1902*,

…

(e) to enable the citizens of New South Wales to participate freely in fair and transparent electoral processes,

(f) to facilitate the fair and transparent conduct of elections in New South Wales…

13. The Bill proposes section 274 which allows for the making of regulations that may modify the application of the Act for a by-election held during the prescribed period, for the purposes of responding to the COVID-19 pandemic. Subsection 274(3) provides that the regulations which may be made under this section are not limited by the general power to make regulations under the Act, and may override other provisions in the Act.

14. In his second reading speech to the Bill, the Minister stated that the regulation-making power under section 274:

> … is intended to avoid by-elections failing or voters being disenfranchised due to inflexible requirements in the Electoral Act 2017 not accommodating uncertain COVID-19 impacts. For example, a regulation could potentially be necessary to modify the requirement for a postal vote to be completed in the presence of a witness.

15. However, subsection 274(2) limits this regulation-making power. Specifically, it provides that the Minister can only recommend the Governor make such regulations under this section if the proposed regulations are both:

(a) in accordance with advice issued by the Electoral Commissioner, and

(b) reasonable to protect the health, safety and welfare of persons from risk of harm caused by the COVID-19 pandemic.

16. In addition, subsection 274(4) prohibits any regulations made under this section which would enable a by-election to be conducted exclusively by postal voting, or postal and technology assisted voting. Under section 151 of the Act, technology assisted voting means " a method of voting where an eligible elector votes by means of an electronic device (whether networked or not), such as by a telephone or by a computer".

17. Subsection 274(5) clarifies that any regulation made under this section is repealed at the end of the prescribed period, on 30 June 2022.

The Bill amends the *Electoral Act 2017* to provide that regulations may be made which modify the application of the Act's provisions to by-elections held prior to 30 June 2022, for the purpose of responding to the COVID-19 pandemic. It further provides that the regulations made under this power are not limited by general regulation-making powers under the Act, and may override the other provisions in the Act. In doing so, the Bill may grant the Minister a broad power to modify the conduct of parliamentary elections ordinarily regulated by the statute.

The Committee notes that voters for specified by-elections may be subject to different electoral rules as modified by regulations, which may result in individuals being uncertain as to their electoral rights and responsibilities. While the Bill provides explicit limits on this regulation-making power, it also notes the provisions allow for regulations which may abrogate existing electoral protections under the Act.

The Bill may thereby include a broad regulation-making power that may impact an individual's right to political franchise and democratic participation contained in Article 25 of the ICCPR.[6] The right to political franchise and democratic participation protects the right of individuals to vote by universal and equal suffrage.

However, the Committee notes that these provisions are an emergency measure, allowing authorities the necessary flexibility to safely conduct parliamentary by-elections held during the COVID-19 pandemic. It also acknowledges that the exercise of this power is limited for the purpose of protecting public health and safety during the COVID-19 public health emergency. Accordingly, the provisions and any regulations made under them are time limited to expire at the end of 30 June 2022. In the circumstances, the Committee makes no further comment.

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

Henry VIII clause

18. As discussed earlier, the regulation-making power proposed by the Bill would enable the making of regulations which "may modify the application of [the] Act for a by-election held during the prescribed period". These regulations are not limited by general regulation-making powers under the Act and can override other provisions of the Act. However, as per subsection 274(5), any regulation is repealed at the end of 30 June 2022.

19. The Minister stated in his second reading speech that this proposed regulation-making power was recommended by the Electoral Commissioner. He further stated that the Bill's provisions mirror the recent amendments to the *Local Government Act 1993* that provided for:

> … a regulation-making power to modify the operation of the provisions in the Act that apply to the 2021 local government elections. … The Electoral Commissioner strongly advocated for this power to avoid the local government elections failing due to unexpected technical irregularities or missed deadlines because of COVID-19 impacts.

The Bill inserts section 274 into the *Electoral Act 2017* which enables the making of regulations that modify the application of the Act to State parliamentary by-elections held prior to 30 June 2022. The regulations may also override the provisions of the Act and are not limited by the regulation-making power in the Act.

In its Digest No 35/57, the Committee commented on the Local Government Amendment (COVID-19 Elections Special Provisions) Bill 2021 which provided for mirror regulation-making powers in relation to the ordinary local government elections held during the COVID-19 pandemic.

Consistent with those comments, the Committee notes that these provisions amount to a Henry VIII clause, allowing the Executive to legislate and amend any Act by way of regulation without reference to the Parliament. In ordinary

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

circumstances, these provisions would be an inappropriate delegation of legislative powers.

However, the Committee acknowledges that in the extraordinary circumstances created by the COVID-19 pandemic, the Bill's provisions may provide flexibility to facilitate the safe conduct of parliamentary by-elections in a timely and responsive manner during the public health emergency. It also recognises that the regulation-making power is somewhat limited to allow only those regulations reasonable and for the purpose of protecting public health and safety from risks resulting from the pandemic. In the circumstances, the Committee makes no further comment.

4. Fiscal Responsibility Amendment (Privatisation Restrictions) Bill 2021*

Date introduced	18 November 2021
House introduced	Legislative Council
Minister responsible	The Hon. Daniel Mookhey MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of the Fiscal Responsibility Amendment (Privatisation Restrictions) Bill 2021 (the **Bill**) is to amend the *Fiscal Responsibility Act 2012* to prevent the sale, disposal or lease of certain state owned assets unless the proposed transaction has been reviewed by a parliamentary committee and approved by both Houses of Parliament.

BACKGROUND

2. The Bill inserts section 8A into the *Fiscal Responsibility Act 2012*, which prevents the Crown from selling, otherwise disposing of or granting a lease of a state owned asset (or causing the same) unless:

    1. a joint parliamentary committee reviews the proposed sale, disposal or lease,

    2. a report of the committee's review is tabled in each House of Parliament, such report containing a description of the proposed transaction's terms, the committee's recommendation on whether the proposed transaction should proceed and reasons for the recommendation, and

    3. the proposed transaction is approved by each House of Parliament.

3. A transaction that breaches these requirements is void.

4. A 'state owned asset' means, and includes a related body corporate and asset of:

    1. Alpha Distribution Ministerial Holding Corporation,

    2. Electricity Retained Interest Corporation—Ausgrid,

    3. Electricity Retained Interest Corporation—Endeavour Energy,

    4. Essential Energy,

    5. Forestry Corporation,

    6. Hunter Water Corporation,

    7. Insurance and Care NSW,

8. Landcom,
9. New South Wales Treasury Corporation,
10. Newcastle Port Corporation,
11. Sydney Water Corporation,
12. toll road operation rights for the Sydney Harbour Bridge,
13. toll road operation rights for the Sydney Harbour Tunnel,
14. Transport Asset Holding Entity of New South Wales,
15. Water NSW,
16. another asset prescribed by the regulations.

5. In the Second Reading Speech, the Hon. Daniel Mookhey MLC explained that the Bill would implement a 'parliamentary hurdle' to asset sales and privatisation and provide parliamentary scrutiny of a proposed transaction. He stated:

> The bill does not preclude the Government from seeking to sell the assets. It still has the ability to go ahead and do that, if it so wishes, but it first has to come to the Parliament.

6. The Committee notes the Bill would impact on any sales, disposals or leases of state owned assets from the date of assent of the Bill (as an Act). In particular, it would limit the ability of the Crown and its counterparties to enter into a relevant transaction, making it contingent on parliamentary approval. The Bill would also void a transaction which does not adhere to its requirements.

7. The Committee notes that the parties affected include the Crown and counterparties to the relevant transactions, typically including corporations or companies. However, the Committee generally limits its comment on Bills to those provisions that impact upon individuals and personal rights under section 8A of the *Legislation Review Act 1987* rather than corporations and other legal persons. In the circumstances, the Committee makes no further comment.

ISSUES CONSIDERED BY COMMITTEE

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

5. Government Grants Administration Bill 2021*

Date introduced	17 November 2021
House introduced	Legislative Council
Member responsible	The Hon. John Graham MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows—

(a) to provide for the administration of government grant schemes,

(b) to enable the Auditor-General to conduct audits and report on whether government agencies and Ministers comply with the requirements of this Act,

(c) to enable the Auditor-General to conduct "follow the dollar" audits and report on an entity that receives government money under a government grant scheme,

(d) to establish a register of government grant schemes (the NSW grants register) that is freely available on the internet for inspection by the public,

(e) to require a review of this Act to be conducted within 12 months, including a review of the allocation of government money under government grant schemes to regional and metropolitan areas.

BACKGROUND

2. The Bill sets out a legislative framework for the awarding of grants and seeks to implement a higher standard of transparency than current requirements.

3. Part 2 of the Bill sets out the provisions of the administration of government grant schemes, including the proposed government grant guidelines that incorporate recommendations by the Auditor General and the ICAC parliamentary committee. Government sector finance (GSF) agencies are required to follow these guidelines in the awarding of grants.

4. Part 3 sets out provisions for performance audits of non-government entities, including allowing the Auditor General to conduct and report on a "follow the dollar" audit on the performance of an entity that receives government money under a government grant scheme.

5. Part 4 sets out miscellaneous provisions, including the requirement that the Secretary to establish the NSW grants register, containing the government grant scheme guidelines, the details of each scheme and other matters. The register is to be in the form determined by the Secretary and freely available on the internet for inspection by the public.

Additionally, the Minister administering the proposed Act is required to review its provisions in 12 months and, in particular, review whether government money is appropriately and fairly allocated to regional and metropolitan areas.

6. In the second reading speech to the Bill, the Hon. John Graham stated:

> We outline the principles we would apply to the giving of grants in government. We believe that New South Wales can do better. For Labor, this is not just the standard we hope to hold the Government to. This is the standard we would hold ourselves to in government. We defend the right of elected Ministers to make decisions and to overrule departments. There are times when that is in the public interest. However, we say that when that happens, it should be done in writing and with reasons provided. If it cannot be done in writing and justified by reasons and is not in the public interest, it should not happen.

7. Mr Graham further noted the Legislative Council Public Accountability Committee inquiry report into the integrity, efficacy and value for money of NSW Government grant programs.[7] This inquiry received submissions from public agencies, including the Independent Commission Against Corruption (ICAC), which Mr Graham noted included the types of probity issues that can arise in a grants scheme such as, but not limited to, the absence of an open, public application process, no eligibility or selection criteria, and a public official having an undisclosed conflict of interest. ICAC noted that "While the Commission would not necessarily expect very small, one-off grants to be the subject of detailed procedural requirements, any established grants scheme should be administered so that the risk of these probity issues is minimised".[8]

8. In the second reading speech, Mr Graham noted that the Bill contained six principles to provide transparency in grant making that aligned with the Public Accountability Committee report.

> The first principle is that the Department of Premier and Cabinet [DPC] circular issued in 2010, C2010-16 Good Practice Grants Administration is an important starting framework of guidelines.
>
> … The second principle is that Ministers have a responsibility to maintain the public trust that has been placed in them by performing their duties with honesty and integrity, incompliance with the rule of law and to advance the common good of the people of New South Wales. That is the Ministerial Code of Conduct.
>
> The third principle is that grants programs should have clear, transparent and public guidelines, time frames and eligibility criteria that inform the awarding of grants. It sounds like common sense when you say it, but it is an important principle that has not been observed in all these examples. The fourth principle is that agency recommendations should be in writing and compare applications to the selection criteria. Where Ministers depart from the advice of their agencies in the awarding of grants, they should do so in writing and provide reasons.
>
> … The fifth principle is that the Audit Office of New South Wales be given "follow the dollar" powers. The sixth and final principle is that it is unacceptable for large regional cities such

[7] Legislative Council Public Accountability Committee, Report No 8 – NSW Government grant programs – First Report, 30 March 2021.

[8] Submission 92, Independent Commission Against Corruption NSW, pp13-14, as quoted by Mr Graham in his second reading speech to the bill.

as Wollongong and Newcastle to be excluded when complementary grants programs are designed for both metropolitan and regional areas.

ISSUES CONSIDERED BY COMMITTEE

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

Guidelines not subject to disallowance

9. The Bill creates a new legislative framework for the awarding of government grants. Proposed section 5 provides that a 'government grants scheme' means a scheme established to allocate government money to a non-government entity (a government grant), and for the purposes of the non-government entity conducting or delivering a State policy objective. It further provides that a government grant scheme does not include compensation given to a non-government entity, or any other scheme, payment or thing prescribed by the regulations

10. Section 6 defines government grant scheme guidelines to mean one of the following, whichever is published later—

    (a) the Good Practice Guide to Grants Administration, published on the website of the Department of Premier and Cabinet, 26 May 2010,

    (b) guidelines issued by the Minister administering this Act from time to time in relation to the design and administration of government grant schemes.

11. Government grant scheme guidelines issued by the Minister must provide for information, if any, prescribed by the regulations and be published on the NSW grants register.

12. Before the Minister issues government grant scheme guidelines, the Secretary must give the Minister written notice of, and the Minister must have regard to, any relevant recommendations made by the Auditor-General and the Committee on the Independent Commission Against Corruption constituted under the *Independent Commission Against Corruption Act 1988*.

13. Section 7 provides that the government sector finance (GSF) agency administering a government grant scheme must ensure that it is administered in accordance with the government grant scheme guidelines. Section 8 further requires a government agency to publish details about each government grant scheme administered by the agency on the agency's website and on the NSW grants register.

    The Bill sets out a new framework for establishing a government grants scheme to allocate government money to a non-government entity (a government grant), and for the purposes of the non-government entity conducting or delivering a State policy objective. A government sector finance (GSF) agency administering a government grant scheme must ensure that it is administered in accordance with the government grant scheme guidelines. These guidelines are issued by the Minister and must provide for the information, if any, prescribed by the regulations and be published on the NSW grants register. The Committee notes that under the Bill there is no requirement for these guidelines 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 legislative requirements to be included in primary legislation rather than separate materials.

However the Committee recognises that the guidelines issued by the Minister must provide for the information, if any, prescribed by the regulations and be published on the NSW grants register. Therefore, the guidelines contain information from the regulations that would be subject to disallowance. The Committee also recognises that publishing the guidelines and related information online provides flexibility for the guidelines to adapt to changing circumstances quickly. The guidelines must also have regards to any relevant recommendations made by the Auditor General and the Committee on the Independent Commission Against Corruption constituted under the *Independent Commission Against Corruption Act 1988*. In these circumstances the Committee makes no further comment.

Delegation to the regulations

14. As noted above, section 5 defines the meaning of a government grant scheme, and specifies that it does not include any other scheme, payment or thing prescribed by the regulations. Additionally, the regulations may prescribe a scheme, or class of schemes, to be a government grant scheme for the purposes of this Act.

15. Section 18 also provides for the general regulation-making power that the Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

The Bill defers certain matters to the regulations. Section 5 provides that a government grant scheme does not include any other scheme, payment or thing prescribed by the regulations. Additionally, the regulations may prescribe a scheme, or class of schemes, to be a government grant scheme for the purposes of this Act. Section 18 also sets out the general regulation-making power of the Governor with respect to any matter required or permitted by the Act.

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. Additionally, the Committee recognises that under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance which facilitates a level of Parliamentary oversight. In these circumstances, the Committee makes no further comment.

6. Great Koala Protected Area Bill 2021*

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

PURPOSE AND DESCRIPTION

1. The objects of the Great Koala Protected Area Bill 2021 (the **Bill**) are to—

    1. establish the Great Koala Protected Area and include certain land within it,

    2. require the Secretary of the Department of Planning, Industry and Environment (the Department) to include further land in the Great Koala Protected Area that is land within State forests or state conservation areas by reserving the land as, or as part of, a national park, regional park, nature reserve or Aboriginal area,

    3. require the Secretary to prepare a plan of management for the Great Koala Protected Area to ensure the Area is managed in a way that promotes the conservation and growth of the koala population and koala habitat,

    4. require the Secretary to prepare a transition plan for the inclusion of land as part of the Great Koala Protected Area to provide for—

        1. the transition of persons employed in connection with forestry operations on the land to alternative employment consistent with the principles of ecologically sustainable development, and

        2. opportunities for developing public understanding and appreciation of heritage values associated with the koala population.

BACKGROUND

2. The Bill creates the Great Koala Protected Area (the Protected Area), which is an area of land designated to the implementation of strategies to reverse the trend of koala population decline.

3. The Bill responds to findings made by the World Wildlife Fund following a specially commissioned survey which found that an overall decline of 71 per cent of koala numbers was reported in six key locations during the 2020 bushfires. Those locations included Wardell, Royal Camp State Forest, Braemar State Forest, Lake Innes State Conservation Area, Kiwarrak State Forest and Khappinghat Nature Reserve on the North Coast of New South Wales.

4. The Bill was drafted in consultation with the National Parks Association and research by the Hunter Research Foundation Centre and the University of Newcastle which found that the establishment of the Protected Area and the ongoing protection of koalas may also bring with it financial benefits to the state.

5. In her second reading speech Ms Cate Faehrmann MLC stated:

> The rates of decline in recent years of our koalas are depressingly high. Between 1990 and 2010 population numbers across New South Wales dropped by a third in only three koala generations. Many populations have become locally extinct. Estimates of the losses from the Black Summer fires range from 5,000 to 10,000 koalas out of a population of only a few tens of thousands. In particular, at least 24 per cent of the North Coast koala population and at least 21 per cent of the southern New South Wales population was lost.
>
> The fires decimated huge amounts of koala habitat as well. On the North Coast, 49 per cent of State forests were burned, with 30 per cent of high and very high suitable koala habitat being within the fire grounds. That is one-third of koala habitat in that area burned in the fires. Over two million hectares of habitat was destroyed overall. The tragic Black Summer bushfires were just another attack on koala habitat that has been under threat for many years.

6. Section 7 of the Bill states that the purpose of the Bill will be achieved by requiring land in the Protected Area to be managed to promote the conservation and growth of the koala population and habitat.

7. Division 1 of Part 2 requires the Secretary of the Department to prepare a plan of management and a secondary plan of management for the Protected Area within 12 months of its establishment. The plan must be consistent with the primary purpose of reversing the current trend of koala population decline. Those plans must provide for, among other matters, the prohibition of works and activities that may harm the koala population or damage koala habitat. Once drafted, the Secretary is required to publish the draft plan online and invite the public to make comments and submissions for a period of 28 days that must then be considered.

8. Division 2 stipulates the land to be used within the Protected Area includes national parks, regional parks, nature reserves and Aboriginal areas. Under this Division, land is taken to have been reserved by the Governor, pursuant to Division 1 of the *National Parks and Wildlife Act 1974.*

9. Section 12 cancels all national park and nature reserve licences of land areas specified in Schedule 1 of the Bill, irrespective of those licences being valid under the *National Parks and Wildlife Act 1974.* Section 12 also cancels any licence or permit affecting a national park or nature reserve if that land is reserved by the Protected Area.

10. Division 3 of Part 1 establishes the requirement of a transition plan and sets out the requirements of that plan. Schedule 1 of the Bill lists reserve lands included in the Protected Area. Schedule 2 lists land to be reserved and included in the Protected Area.

ISSUES CONSIDERED BY COMMITTEE

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

Cultural rights – impact on Aboriginal areas

11. Section 11 requires the Secretary, within 2 years of establishing the Protected Area, to reserve State forests or state conservation areas listed in Schedule 2 of the Bill. Schedule 2 lists 45 State forests and 7 state conservation areas. A reservation of land revokes the dedication of land as a State forest or state conservation area and the land becomes part of the Protected Area. These provisions do not apply to segments of land which are considered plantations. Plantations are defined under the *Forestry Act 2012* as areas of land with trees planted for the purposes of timber production, protection of the environment or other purposes.

12. Licences or permits to operate a national park or nature reserve are granted under the *National Parks and Wildlife Act 1974* and the *Forestry Act 2012.* Reserved land under section 11 includes national parks, regional parks, nature reserves and Aboriginal areas. Under this Division, land is taken to have been reserved by the Governor under Division 1 of the *National Parks and Wildlife Act 1974.*

13. Section 30A(1) of the *National Parks and Wildlife Act 1974* gives the Governor the power to reserve land by notice published in the Gazette.

14. In her second reading speech, Ms Faehrmann stated:

> By combining 52 State forests and State conservation areas with 42 national parks, the protected area will connect hundreds of thousands of hectares of habitat at risk of fragmentation and create the largest and only koala protected area in Australia. That protected area has been the dream of many ecologists, activists and community members for many years. Incredible amounts of time and effort have gone into the creation of the protected area to ensure that the bill will deliver the greatest good for koalas.
>
> The proposed protected area, which comprises land across the North Coast, contains 44 per cent of all identified koala hubs.

15. Section 62(4) of that Act states that lands within an Aboriginal area shall be deemed to be reserved for the purpose of preserving, protecting and preventing damage to Aboriginal objects or Aboriginal places therein.

16. Section 30K of that Act states Aboriginal areas are to be managed under the following principles:

    1. the conservation of natural values, buildings, places, objects, features and landscapes of cultural value to Aboriginal people in accordance with the cultural values of the Aboriginal people to whose heritage the buildings, places, objects, features or landscapes belong,

    2. the conservation of natural or other cultural values,

    3. allowing the use of the Aboriginal area by Aboriginal people for cultural purposes,

4. the promotion of public understanding and appreciation of the Aboriginal area's natural and cultural values and significance where appropriate,

5. provision for appropriate research and monitoring, in accordance with the cultural values of the Aboriginal people,

6. provision for the carrying out of development in any part of a special area (within the meaning of the Hunter Water Act 1991) in the Aboriginal area that is permitted under section 185A having regard to the conservation of the Aboriginal area's natural and cultural values,

7. provision for sustainable visitor or tourist use and enjoyment that is compatible with the Aboriginal area's natural and cultural values and the cultural values of the Aboriginal people,

8. provision for sustainable use (including adaptive reuse) of any buildings or structures or modified natural areas having regard to the Aboriginal area's natural and cultural values and the cultural values of the Aboriginal people.

The Bill establishes the Greater Protected Koala Area (the Protected Area) to reverse the current trend of koala population decline by promoting conservation and growth of the koala population and habitat in those lands. Provisions under the Bill authorise the Department to reserve State forests and state conservation lands in order to be included in the Protected Area.

The Committee acknowledges the bill's purpose to protect and conserve the native koala population, particularly given the devastating effects of the 2020 bushfires on koala habitat and population.

However, the Committee also notes it is not clear from the Bill's provisions whether the designation of a Protected Area may impact on the purpose of designated Aboriginal areas which is to preserve, protect and prevent damage to Aboriginal objects or Aboriginal places therein. Schedule 1 of the Bill includes the Nambucca Aboriginal area and the Nunguu Mirral Aboriginal Area under the Protected Area. It is unclear from the second reading speech whether inclusion of those areas into the Protected Area is in consultation with Indigenous representatives. This may impact on the cultural rights of those persons tied to the Aboriginal area.

Concerns surrounding the reservation of Aboriginal areas may be safeguarded by consultation with the Department, Aboriginal Land Councils, the Aboriginal Cultural Heritage Advisory Committee or the Aboriginal Negotiating Panel under the *National Parks and Wildlife Act 1974*. Such consultations may foreshadow any concerns over the use of Aboriginal areas as well as claims for native title, particularly as the Bill is silent on compensatory rights as a result of reserving land. In the 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

Review of licence cancellations

17. Section 12 states that a licence or permit held to operate as a national park or nature reserve is cancelled once that land is reserved under the Protected Area. Licences or permits to for national parks or nature reserve are granted under the *National Parks and Wildlife Act 1974* and the *Forestry Act 2012.*

18. Section 42(2) of the *National Parks and Wildlife Act 1974* states all licences and permits affecting lands within a national park or historic site continue in force until the expiration of the respective terms for which they are granted. Section 12 of the Bill cancels licences under the *National Parks and Wildlife Act 1974* once land is reserved.

19. A licence may authorise the exclusive use of the land, buildings and structures concerned, this includes the erection of a new building or structure and the modification of an existing building or structure.

20. Section 55(2) of the *Forestry Act 2012* provides that the Forestry Corporation may recover money from the person who takes forest products or forest materials without lawful authority as a debt. Under section 12(1) of the Bill, section 55(2) of the *Forestry Act 2012* will not apply to land reserved for the purpose of the Protected Area.

> **The Bill cancels licences held under the *National Parks and Wildlife Act 1974* and the *Forestry Act 2012* which give licence holders certain rights and uses of specific land and land materials. The Bill allows the Department to reserve land for the Great Koala Protected Area (the Protected Area) which in consequence, will cancel licences or permits held under those Acts.**
>
> **The Committee acknowledges the bill's purpose to prioritise the population and habitat of koalas, particularly following the 2020 bushfires, in order to reverse the trend of koala population decline.**
>
> **However, the Committee notes the cancellation of licences under the *National Parks and Wildlife Act 1974* and the *Forestry Act 2012* may result in a loss of rights to use or profit from land which licence holders enjoy. Further, the Committee notes the Bill does not create an avenue of review for licence holders who have lost their licence as a result of land being reserved for the Protected Area.**
>
> **Nevertheless, existing requirements relating to notice of reservations of land may offer safeguards to licence holders. When land is reserved, the Governor must publish notice of that reservation in the Gazette. In addition, licence holders may engage in the public consultations required under the plan of management under section 8 of the Bill. Traditional avenues of review through the NSW Civil and Administrative Tribunal may also be available. In the circumstances, the Committee makes no further comment.**

7. Licensing and Registration (Uniform Procedures) Amendment Bill 2021

Date introduced	17 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The objects of the Licensing and Registration (Uniform Procedures) Amendment Bill 2021 (the **Bill**) are—

    1. to amend the *Licensing and Registration (Uniform Procedures) Act 2002* (the **Act** or **LRUPA**)—

        1. to streamline procedures for certain licences, registrations and other authorisations, and

        2. to make provision for issuing digital licences, and

    2. to make consequential amendments to other legislation.

BACKGROUND

2. The Bill amends uniform licensing provisions and enacts digital licence provisions. In the Second Reading Speech, the Hon. Victor Dominello MP, Minister for Customer Service, explained the application of the Act's provisions (including the proposed digital licence provisions):

Uniform licensing provisions are opt in, with all regulators that do adopt LRUPA retaining the ability to modify its application to facilitate their unique requirements. However, the information sharing and digital licence provisions will be opt out to ensure that all regulators have the ability to benefit from these provisions.

3. The Explanatory Note states that the Bill replaces Parts 2 and 3 of the Act with a single proposed Part setting out uniform procedures for authorisations. Currently, Parts 2 and 3 of the Act essentially duplicate the procedures for licenses and registration, respectively.

4. The Explanatory Note also indicates that the principal reforms made to current licensing and registration procedures are:

    1. adding objects for the Act to assist with its interpretation,

    2. defining key words and expressions to clarify the application of provisions and provide for the consistent use of terminology in the Act,

3. modernising references to technology and communication by removing references to defunct processes and technologies like facsimile transmissions to facilitate digital service delivery,

4. adding further provisions to enable relevant regulatory authorities to conduct public consultation when required by excluding the time taken to consult from the time frame for dealing with applications,

5. implementing a single longer period for the renewal of authorisations to make it easier for customers to renew their authorisations,

6. enabling relevant regulatory authorities to restore authorisations without an application if they are cancelled in error,

7. allowing customers to apply to amend the name or address for their authorisations,

8. providing for uniform procedures for taking disciplinary actions, including by requiring relevant regulatory authorities to provide show cause notices,

9. ensuring relevant regulatory authorities indicate in the notice for a decision the provisions relied on when an application for an authorisation has been refused or an authorisation granted with conditions,

10. requiring relevant regulatory authorities to offer internal review for reviewable decisions even if the decisions are not reviewable by the Civil and Administrative Tribunal, and

11. providing relevant regulatory authorities.

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

> The amendments made in the bill aim to update uniform licensing and registration procedures to current best practice. It will also establish a consistent framework for licensing procedures that can be used by a wider variety of regulators across the New South Wales Government. These improvements will make the Act easier and more appealing for licensing authorities to onboard, which will have significant benefits for regulators and customers. …The bill will modernise the Act's language and provisions to make it easier to follow.

ISSUES CONSIDERED BY COMMITTEE

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

Commencement by proclamation

6. Section 2 of the Bill provides that the Bill commences (as an Act) on a day or days to be appointed by proclamation, except for Schedules 1.1, 2.10 and 2.15[1] of the Bill which commence on the date of assent.

7. Schedule 1.1 creates Part 4B, which would allow licences to be issued in a digital form and provides for related provisions. Schedules 2.10 and 2.15[1] make consequential amendments, repealing the digital licence provisions in the *Design and Building*

Practitioners Regulation 2021 and *Home Building Regulation 2014* so that the new Part 4B can apply instead.

8. Regarding the commencement of these provisions by assent, the Minister explained in his Second Reading Speech:

> The digital licence amendments are to be commenced on assent to ensure the immediate enablement of digital licence development in New South Wales.

9. The remainder of the Bill's provisions update the uniform licensing provisions in the Act and make consequential amendments to other legislation. These provisions commence by proclamation. In the Second Reading Speech, the Minister stated:

> These amendments to LRUPA's uniform procedures will commence on proclamation to ensure that regulators currently using the Act have the opportunity to adapt their systems and processes to the new requirements.

> **The Bill's provisions amending the uniform licensing and registration procedures in the *Licensing and Registration (Uniform Procedures) Act 2002* commence on proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected persons. However, the Committee notes the Minister's comment that the flexible start date will ensure regulators currently using the Act's licensing provisions can adapt their systems and processes to the new requirements. In the circumstances, the Committee makes no further comment.**

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

Deferral to the regulations – exempting decision from requirement for internal review

10. Section 23(1)-(2) provide that:

> 1. an applicant who is aggrieved by the relevant regulatory authority's decision to refuse the application, or to grant the application subject to discretionary conditions, or
>
> 2. an objector aggrieved by the relevant authority's decision to grant an advertised application, either generally or because the authority failed to impose particular discretionary decisions,

Section 23(1)-(2) may also apply for a review of the decision:

> 3. if the relevant regulatory legislation provides a right of appeal or review—in accordance with the right provided, or
>
> 4. if the relevant regulatory legislation does not provide a right of appeal or review—to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997*.

11. Section 23(3) provides that, if the relevant regulatory legislation provides a right of appeal or review of the decision, the right may be exercised only if an internal review has been

finalised or taken to be finalised, or the decision is exempted from the requirement for an internal review.

12. The Bill includes a note (such note not forming part of the Bill's provisions) that the *Administrative Decisions Review Act 1997* provides for internal reviews of decisions that are administratively reviewable by the Civil and Administrative Tribunal. It appears that section 23(3) therefore requires relevant regulatory authorities to offer an internal review for reviewable decisions even if the decisions are not reviewable by the Civil and Administrative Appeals Tribunal.

13. In relation to internal reviews of decisions mentioned in section 23(3), section 23(4)(d) provides the regulations may provide for (among other things) the circumstances in which an internal review is finalised or taken to be finalised, and exempting decisions from the requirement for internal reviews.

> **Section 23(3) of the Bill provides that, where relevant regulatory legislation provides a right of appeal or review of certain decisions, that right can only be exercised if an internal review is finalised or taken to be finalised, or the decision is exempted from the requirement for an internal review.**
>
> **The Committee notes that this requirement for internal review generally appears to broaden the right of review. However, the Bill provides that the regulations may provide for the particulars regarding internal reviews. Specifically, the regulations may provide for the circumstances in which an internal review is finalised or taken to be finalised, or exempting decisions from the requirement for internal reviews. These matters inform a person's exercise of their right to review or appeal under section 23(3).**
>
> **The Committee generally prefers matters informing the exercise of rights to be included in the primary legislation, to provide affected persons with clarity and to facilitate an appropriate level of parliamentary oversight. In this case, the Committee notes that section 23(3) may not operate effectively until the regulations include the relevant matters, in particular the circumstances in which an internal review is finalised or taken to be finalised. However, we acknowledge that including matters in the regulations builds flexibility into the regulatory framework, which is particularly important in relation to the 'opt-in' uniform licensing provisions. The Committee refers this matter to the Parliament for its consideration.**

8. National Parks and Wildlife Amendment Bill 2021

Date introduced	17 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Portfolio	Energy and Environment

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *National Parks and Wildlife Act 1974* (***the Act***) and regulations made under the Act as follows—

(a) to streamline processes for preparing plans of management for national parks and reserves,

(b) to enable the Minister to approve priority conservation actions and visitor infrastructure projects that are not provided for or not consistent with a plan of management, in certain circumstances,

(c) to enable the Minister to create biodiversity credits for management actions carried out on land reserved or acquired under the Act, which are taken to be biodiversity credits under the biodiversity offsets scheme established by the *Biodiversity Conservation Act 2016*, Part 6, Division 4, subject to the modification and exclusion of provisions of that Act for biodiversity credits created under the Act,

(d) to enable the Minister, or for certain land, an Aboriginal Land Council, to create, acquire, hold, sell or otherwise deal with carbon sequestration rights in land reserved or acquired under the Act, if doing so is consistent with the objects of the Act,

(e) to establish a corporate non-profit entity to receive tax deductible donations which can be applied to the conservation and management of national parks,

(f) to provide for the identification of relevant conservation values when land is declared an asset of intergenerational significance,

(g) to enable the location of land declared an asset of intergenerational significance, and other information in relation to that land, to be kept confidential when considered necessary for conservation purposes,

(h) to provide for penalties for offences against land declared an asset of intergenerational significance,

(i) to enable the use of digital images and data for compliance and enforcement actions relating to vehicles entering or using a park,

(j) to provide for a power to make regulations about monitoring and reporting on the ecological health of parks.

BACKGROUND

2. The Bill enacts significant reforms to the *National Parks and Wildlife Act 1974* ('the Act') and the *National Parks and Wildlife Regulation 2019* ('the Regulation'), as it also makes consequential amendments to other laws and statutory instruments.

3. In his second reading speech on the Bill, the Hon. Matt Kean MP, Minister for Energy and Environment, summarised that the Bill aims to:

> … strengthen the National Parks and Wildlife Act 1974 to improve conservation outcomes, to establish the iconic Gardens of Stone conservation reserves, to streamline park management planning and approvals, and to harness philanthropic donations in support of our State's national parks. These amendments support the Government's vision to ensure that our national parks in New South Wales are the best-managed national parks in the world and that they provide the community with accessible, world-class visitor experiences.

4. The Bill proposes to amend the Act so that the relevant authority is the Secretary of the Department of Planning, Industry and Environment rather than the Chief Executive of the Office of Heritage and the Environment. It further provides a limited scope for the Minister to approve priority infrastructure projects and conservation actions, even if they are not in accordance with an approved management plan.

5. As the Minister highlighted, the Bill also provides for the power to make regulations requiring the Department Secretary to design and implement a program to monitor and report on the ecological health of national parks. The Minister further stated that the implementation of a regular ecological monitoring program will "help the National Parks and Wildlife Service continually improve park management, delivering the best ecological return on our investment in national parks".

6. A key amendment to the Act introduced by the Bill is the proposed insertion of Parts 5A and 5B which will enable the Minister to create, hold and deal respectively with biodiversity credits in accordance with Part 6 of the *Biodiversity Conservation Act 2016* and carbon sequestration rights as defined under the Act.

7. The Minister commented on the significance of the carbon sequestration scheme as it applies to the management of the State's national parks:

> Any income from carbon sequestration rights must be invested in national park management. However, the activities giving rise to the right can be carried out only if consistent with the objects of the Act. This provision highlights the need for carbon sequestration activities on land reserved under the Act—whether it be tree planting, feral animal control or other activities—to be carried out in a manner that is consistent with and supportive of biodiversity conservation and the protection of cultural heritage. This is also central to the National Parks and Wildlife Service's carbon positive strategy. It is significant that this bill through these provisions recognises the need for an integrated approach to two of the biggest challenges faced by our planet: climate change and the loss of biodiversity.

8. Speaking on the operation of the biodiversity credit scheme, the Minister explained how the scheme will strengthen conservation efforts in national parks:

> … the bill sets out a very clear additionality test with two limbs. For both existing and new national parks, the proposed management actions will be eligible to generate credits only if they are likely to deliver biodiversity outcomes that are greater than the outcomes typically delivered in the five previous years. In other words, credits can only be generated by actions that are likely to generate outcomes that are better than a baseline determined by looking back over the previous five years.
>
> In addition, for land that was reserved at the time the relevant provisions commenced—that is, an existing national park—there is an additional threshold additionality test. The proposed actions must not be part of routine park management… that is, there is no reward for merely addressing a previous failure to deliver routine park management or for business as usual.

9. In discussing the creation of these credit schemes, the Minister emphasised that the Bill recognises the significant opportunities presented for Aboriginal-owned parks and will provide that any decision to participate in these schemes will be made by relevant Aboriginal owners of such parks.

10. The Bill also proposes to insert Part 12A into the Act to provide for the management of assets of intergenerational significance. Part 12A relocates and amends section 188H of the Act, which currently provides for the declaration of assets of intergenerational significance, and makes provisions to limit the actions which may be taken in respect to declared land.

11. Noting the State's extinction record, the Minister stated that the provisions will:

> … help support the zero extinction target and allows us to draw a line in the sand, making our national parks the centrepiece of our efforts to halt and turn back the tide of extinctions and biodiversity loss.

12. To further the protection of biodiversity in these declared lands, the Minister highlighted that the Bill also provides for penalty offences against land declared to be an asset of intergenerational significance. The Minister also noted that the Bill provides for the conversion of "31,575 hectares of unproductive State forests and Crown land to create a new Gardens of Stone State Conservation Area, as well as additions to the Wollemi and Gardens of Stone national parks."

13. The Bill further makes key amendments in respect to plans of management which must be prepared for every park and reserve. Importantly, the Minister noted that these amendments will:

> … make the process for preparing plans of management more consistent with modern standards of good government and administration, and will remove unnecessary duplication and red tape without compromising the integrity of the planning process.

14. The Minister further stated that the proposed amendments are intended to "rationalise this process" by streamlining and reducing time periods at each stage of the process.

15. Another key amendment introduced by the Bill is the establishment of the National Parks and Wildlife Conservation Trust under proposed Part 7. In his second reading speech, the Minister explained that the trust is intended to operate as:

> … a charitable entity that works in a tightly integrated manner with the National Parks and Wildlife Service, which is focused specifically on raising philanthropic funds for New South Wales national parks and which allows citizens to donate directly in support of New South Wales national parks.

16. Relevantly, the Bill sets out the objects, powers and functions of the trust, amongst related provisions, and explicitly includes requirements of the trust which closely align it to those requirements for environmental organisations under Commonwealth law.

17. Finally, the Bill proposes amendments in relation to the National Parks and Wildlife Service Digital NSW Parks Pass program, which employs digital technologies to facilitate the payment of park visitation fees. Specifically, as stated by the Minister, the Bill:

> … proposes to amend the Act to enable digital images and data to be used in enforcement proceedings for non-payment. Such evidentiary provisions are used in other legislation, such as the Roads Act 1993 to confirm the accuracy and operation of approved toll road cameras.

ISSUES CONSIDERED BY COMMITTEE

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

Strict liability offences/reversal of onus of proof

18. The Bill proposes to remake and amend section 188H as Part 12A of the Act dealing with assets of intergenerational significance. Under Part 12A, section 153G provides that the Minister may declare land to be an asset of intergenerational significance by order published in the Gazette.

19. Proposed section 153I introduces an offence for an individual or corporation who interferes with, damages, harms or disturbs an environmental or cultural value of declared land. These offences carry a maximum penalty of $1.1 million for corporations, and either or both $550,000 or 2 years' imprisonment for an individual.

20. However, subsection 153I(2) provides defences to the offence of harm to environmental or cultural value of land declared an asset of intergenerational significance. Those defences include where:

- the conduct constituting the offence was an action taken with authorisation by another law, a regulation or a conservation action plan, or

- the person can prove that they did not know the land was so declared because the declared land or the relevant value harmed was not published in the Gazette as a result of the Minister's exercise of the power to exempt the disclosure of that information.

The Bill amends the *National Parks and Wildlife Act 1974* to introduce an offence for causing harm to an environmental or cultural value of land declared to be an asset of intergenerational significance. This offence carries a maximum penalty for individuals of either or both $550,000 or 2 years' imprisonment. 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 Bill also provides that a person can rely on various defences to this offence. This includes a defence that they did not know their conduct would cause harm to land that was declared to be an asset of intergenerational significance, or to the environmental or cultural value of declared land, because the Minister exercised a power to exempt disclosure of that relevant information under the Act. While this operates as a defence to the strict liability offence, it may amount to a reverse onus by requiring accused persons to prove that they did not have a required mental element otherwise presumed.

In regards to criminal actions, a reverse onus may undermine a person's right to the presumption of innocence as contained in Article 14 of the ICCPR.[9] The right to the presumption of innocence protects an accused person's privilege to be presumed innocent until proved guilty according to law.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. It also recognises that the declaration of lands under the Act is intended to strengthen the protection of the environmental or cultural values it presents to the public.

However, it notes that individuals who are convicted of the strict liability offence may be sentenced to a maximum custodial penalty of 2 years' imprisonment. It further notes that, unless the offending conduct was otherwise authorised by a relevant law or statutory instrument, the only defence available to an accused person imposes a reverse onus on them to prove they did not have knowledge which is implicitly presumed under the Act. For these reasons, the Committee refers the matter to Parliament for consideration.

Procedural fairness – prima facie evidence in respect to strict liability offence

21. The Bill proposes to insert sections 197A and 197B into the Act which provides for the use of information obtained from digital cameras approved for use across national parks.

22. Proposed section 197A enables the use of certain information obtained from this digital imaging program in proceedings for a vehicle entry offence, defined as an offence against the Act or Regulation for entering a park by motor vehicle without paying the requisite fee or charge (or otherwise an offence prescribed by the regulations).

23. Specifically, subsection 197A(1) provides that a digital image purportedly taken by such an approved camera is admissible prima facie evidence of the matters it shows or records and that it is an unaltered record taken at the place and day specified on it. Subsection 197A(2) also provides that a certificate purporting to be signed by the Secretary is admissible prima facie evidence of various particulars relating to evidence in subsection 197A(1), including that the approved camera which recorded the evidence was found to be operating correctly upon inspection.

24. Section 197B proposed by the Bill prohibits the copying, use or giving of information obtained under section 197A unless that information is given for the exercise of a function

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

relating to fees and charges under the Act, for the enforcement of a vehicle entry offence or any other function prescribed by the regulations.

25. However, under subsection 197B(2), that prohibition does not apply to information given by an authorised officer to various State enforcement agencies and oversight bodies as well as the Australian Crime Commission and any person prescribed by the regulations to receive that information. Subsection 197B(3) does limit the provision of that information to these agencies and bodies to only information acquired about a motor vehicle driven in connection with a vehicle entry offence.

> **The Bill amends the *National Parks and Wildlife Act 1974* to allow the use of information obtained from digital cameras approved for use in national parks as admissible prima facie evidence in criminal proceedings for a vehicle entry offence. It also permits the sharing of that information to relevant government enforcement agencies and oversight bodies.**
>
> **As a vehicle entry offence is a strict liability offence, this may impact an accused person's right to procedural fairness as it enables the admission of evidence as prima facie proof of matters which may establish the commission of the offence. It may also impact a person's right to privacy as it permits the sharing of personal information to other government law enforcement agencies and oversight bodies.**
>
> **However, the Committee notes that the sharing of information is between government agencies and required to be in accordance with existing privacy principles. It also recognises that the Bill does not prevent an accused person from rebutting the matters which is established prima facie under the Act. In the circumstances, the Committee makes no further comment.**

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

Henry VIII clauses

26. The Bill proposes to insert Part 5A into the Act which provides for the creation, acquisition, dealing and retirement of biodiversity credits in accordance with Part 6 of the *Biodiversity Conservation Act 2016* for national park lands. Relevantly, proposed section 82S provides for a power to make regulations that set out provisions about:

> (a) a necessary modification to the operation of a provision of the *Biodiversity Conservation Act 2016* in relation to a biodiversity credit created under this Part, if the provision commences after the commencement of this section,
>
> (b) a matter for which a regulation may be made under the *Biodiversity Conservation Act 2016* for the purposes of this Part,
>
> (c) extending, modifying or excluding the operation of provision of a regulation made under the *Biodiversity Conservation Act 2016* for the purposes of this Part.

27. The Bill also provides under subsections 153G(4) and (5) that regulations may authorise actions to be taken for the management of lands declared to be an asset of intergenerational significance despite a plan of management which might apply to that land. Relevantly, proposed subsection 81(4) provides that despite anything in the Act or

other laws, no operations may be undertaken which are not in accordance with a plan of management unless approved by the Minister under section 81AA.

The Bill amends the *National Parks and Wildlife Act 1974* to provide regulation-making powers in respect to national parks land. Specifically, section 82S provides the Minister the power to make regulations which modify the operation of a provision in the *Biodiversity Conservation Act 2016* relating to a biodiversity credit. Section 153G also enables regulations to authorise actions which would otherwise be prohibited under other provisions of the *National Parks and Wildlife Act 1974*.

These provisions amount to a Henry VIII clause, allowing the Executive to legislate and amend the operation of statutes by way of regulation without reference to the Parliament. In ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers.

However, the Committee acknowledges that these regulations are intended to facilitate the management of public national parks lands in a manner consistent with the Bill's biodiversity conservation objectives. It also recognises that the provisions are a reasonable measure to allow the Minister to authorise actions to manage national park land in a flexible and timely manner. In the circumstances, the Committee makes no further comment.

Commences by proclamation

28. Clause 2 of the Bill provides that the amendments under Schedules 1.2 and 3.2[3] and [4] commence a day or days to be appointed by proclamation, no later than 30 June 2022. These provisions amend the Act and the *Biodiversity Conservation Regulation 2017* following other amendments proposed by the Bill to commence on the date of assent (as an Act).

29. Schedules 1.2 and 3.2[3] and [4] of the Bill relate to the management of Aboriginal-owned parks. The Minister stated that these amendments are not intended to commence "until after Aboriginal owners have been formally consulted".

Parts of the Bill commence 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 of these provisions and the Minister's proposed consultation period with Aboriginal park owners prior to commencement may assist with the effective implementation of the new credit schemes in accordance with principles of self-determination for Indigenous park owners. In the circumstances, the Committee makes no further comment.

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 – termination by website publications

30. Section 82H proposed by the Bill enables the Minister to make a statement of commitment in respect to national park land which must include, amongst other things, the management actions to be carried out on the committed land.

31. Relevantly, subsection 82H(6) requires the publication of these statements on the NSW Government website. Proposed subsection 82J(2) also clarifies that the statement has effect in perpetuity unless it is terminated.

32. The Bill also proposes to insert section 82U which sets out provisions for proposals by public authorities which affect committed land. Subsection 82U(1) prohibits a public authority from carrying out development on committed land unless it has both given written notice of the proposed development to the Minister and received written notice of consent from the Minister.

33. Subsection 82U(6) also enables the Minister to vary or terminate a statement of commitment where necessary to enable the carrying out of such a development. That variation or termination may occur by publication on the Department's website.

> **The Bill amends the *National Parks and Wildlife Act 1974* to provide for the commitment of national park lands to specified biodiversity management actions by publication of a statement of commitment on the government website. It also provides that the Minister may vary or terminate a statement by publication on the Department's website, to allow the carrying out of otherwise prohibited development on committed land.**
>
> **As a statement of commitment by the Minister attracts certain rights and responsibilities including for other public authorities, the Committee would prefer for these publications to be set out in the regulation or otherwise published in the Gazette to ensure an appropriate level of parliamentary oversight. Given that no such notification requirement applies to publications on government or departmental websites, the Committee refers this matter to Parliament for consideration.**

9. Road Transport Amendment (Medicinal Cannabis-Exemptions from Offences) Bill 2021*

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

PURPOSE AND DESCRIPTION

1. The object of the Road Transport Amendment (Medicinal Cannabis – Exemptions from Offences) Bill 2021 (the **Bill**) is to exclude users of medicinal cannabis from the application of the offences relating to driving while a prescribed illicit drug is present in a person's oral fluid, blood or urine; and for related purposes.

2. The Bill amends the *Road Transport Act 2013* (the Act) Act by creating an exception to an offence under section 111 to state that people who test positive to delta-9-tetrahydrocannabinol (THC) while driving will not be committing an offence. This defence can only be made if THC is the only substance present and where it was obtained and administered according to law.

BACKGROUND

3. The Bill makes an exception to an offence under section 111 which states a person must not drive while there is present in the person's oral fluid, blood or urine any prescribed illicit drug.

4. Proposed section 111(1A) will allow persons using THC for a medical purpose and in accordance with the *Therapeutic Goods Act 1989* or any other state-equivalent Act to drive with the substance present in their body.

5. In her second reading speech, Ms Cate Faehrmann MLC stated the Bill would place New South Wales in line with other states who have introduced similar exceptions to driving rules. Ms Faehrmann also stated that the amendments were made in response to concerns raised by constituents as well as a comprehensive analysis by the University of Sydney Lambert Initiative for Cannabinoid Therapeutics which showed the minimal effect of medically administered cannabis on driving.

6. Ms Faehrmann stated:

> Up to 12 October this year, the TGA had approved over 180,000 applications for medicinal cannabis products. FreshLeaf Analytics, the leading supplier of data on the medicinal cannabis industry in Australia, has reported that the number of active medical patients has grown from 30,000 at the end of 2020 to 70,000 in September. That number is predicted to reach 75,000 by the year's end, with the exponential growth of the industry expected to continue into 2022 and beyond.

ISSUES CONSIDERED BY COMMITTEE

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

Clarity – reversal of onus of proof

7. Proposed section 111(1A) creates an exception to an offence of driving with the presence of prescribed illicit drug in person's oral fluid, blood or urine. The exception enables a person who uses medicinal cannabis, shown in a fluid analysis as delta-9-tetrahydrocannabinol (THC), to drive with THC in their system. An offence under section 111 is not made out where the person driving shows a positive sample for THC but the THC was obtained and administered in accordance with the *Therapeutic Goods Act 1989* or an identical state law. THC is a prescribed illicit drug under section 4 of the Act.

8. The offence carries a maximum penalty of $2200 (20 penalty units) for a first offence or $3300 (30 penalty units) for a second or subsequent offence. A driver may also be automatically disqualified for a period of six months under section 205 of the Act.

9. The meaning of 'medicinal purposes' is prescribed by the Act in section 111(6) as:

    1. A drug prescribed by a medical practitioner taken in accordance with a medical practitioner's prescription, or

    2. A codeine-based medicinal drug purchased from a pharmacy that has been taken in accordance with the manufacturer's instructions.

10. In her second reading speech, the Hon Cate Faehrmann stated:

> Importantly, the defence applies only if THC is the only illicit drug present in a person's system at the time that they test positive. The person must have consumed a legally prescribed medicinal cannabis product and, importantly, they had to have consumed the product according to the guidance of their doctor. That guidance will include how to use the product in such a way as to avoid driving while impaired, as is the case for other prescription drugs like opioids. The bill does not provide a catch-all defence for persons with a medicinal cannabis prescription who are demonstrably impaired. Section 111 (5) of the Road Transport Act 2013 provides a medical defence for those found driving with morphine present in their system if it was consumed for medicinal purposes.

The Bill amends section 111 of the *Road Transport Act 2013* to create an exception to an offence of driving with the presence of a prescribed illicit drug in a person's oral fluid, blood or urine. It changes section 111 by enabling a person who uses medicinal cannabis, or delta-9-tetrahydrocannabinol (THC), to drive with THC in their body in certain circumstances.

The Committee notes the Bill is not clear on the issue of who bears the onus of proof in proving the THC was used for medicinal purposes and was obtained and administered in accordance with the *Therapeutic Goods Act 1989*. If the amendment requires the defendant to prove these facts in issue then this may result in a shift of the onus of proof from the prosecution to the defendant. In criminal proceedings, the onus of proof rests on the prosecution and elements of offences must be proven beyond reasonable doubt. If the onus of proof were to be reversed it may also result in a shift in the standard of proof on a defendant

as the standard of proof for a defence is on the balance of probabilities. This is particularly relevant considering a finding of guilt may result in a fine of up to $2200 for a first offence and $3300 for a second or subsequent offence as well as a licence disqualification of up to 6 months.

In regards to criminal actions, a reversed onus may undermine the presumption of innocence. The legal issues surrounding the mental element of a crime are complex, which may be exacerbated if the accused is unable to obtain legal representation and compromise their right to a fair court proceeding.

It appears the intention behind the amendment according to the Second Reading Speech is for the exception to act as a defence. If so, then the onus of proving the THC was used in accordance with law rests on the defendant on the balance of probabilities. The Crown will bear the onus of proving that the THC was not used in accordance with law by proving it was not used for medicinal purposes or was not obtained or administered in accordance with the *Therapeutic Goods Act 1989*. Given a person may experience high financial penalties and lengthy licence disqualifications, it is important the legislation is drafted with sufficient clarity so that all parties are aware of their rights and obligations in subsequent proceedings. In the circumstances, the Committee refers this issue of clarity to Parliament for its consideration.

10. Stronger Communities Legislation Amendment (Children) Bill 2021

Date introduced	17 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Alister Henskens MP
Portfolio	Families, Communities and Disability Services

PURPOSE AND DESCRIPTION

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

   (a) *Adoption Act 2000*,

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

   (c) *Children and Young Persons (Care and Protection) Act 1998*,

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

   (e) *Children's Guardian Act 2019*,

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

   (g) *Civil and Administrative Tribunal Regulation 2013*.

BACKGROUND

2. The Bill amends several statutes in relation to matters affecting children, including the *Adoption Act 2000*, *Child Protection (Working with Children) Act 2012*, *Children and Young Persons (Care and Protection) Act 1998*, *Children (Detention Centres) Act 1987*, *Children's Guardian Act 2019* and *Civil and Administrative Tribunal Act 2013*. It also makes a consequential amendment to the *Civil and Administrative Tribunal Regulation 2013*.

3. In his second reading speech to the Bill, the Hon. Alister Henskens MP, Minister for Families, Communities and Disability Services, stated that the miscellaneous amendments introduced by the Bill is intended to:

> … address emerging issues, support procedural improvements and clarify uncertainty in legislation. The amendments will provide certainty and improve the clarity of a number of pieces of legislation that affect children and young people in New South Wales. These amendments are necessary to improve the safety, welfare and wellbeing of children and disadvantaged adults, and to improve the juvenile parole framework.

4. One significant reform introduced by the Bill relates to the appointment of a guardian ad litem who independently represent the best interests of children in certain court and tribunal proceedings. Specifically, Schedules 1, 3[3], [4], [10] and [11] and 6 of the Bill amends the *Adoption Act 2000*, *Children and Young Persons (Care and Protection) Act*

1998 and *Civil and Administrative Tribunal Act 2013* to allow for the appointment of a guardian ad litem in NSW Supreme Court adoption proceedings, and proceedings in the NSW Children's Court and NSW Civil and Administrative Tribunal ('NCAT') respectively.

5. These amendments would allow the relevant court or tribunal to make an appointment order without having to explicitly name the person to be appointed in the order. To give effect to that appointment, it also allows the administrator of the Guardian Ad Litem Panel to give written notice to the court or tribunal which names the appointed person. Speaking on the enactment in law for the appointment of guardians ad litem, the Minister noted that these amendments simply "confirm the validity of the longstanding practice of courts and tribunals, which has been in use for at least 12 years".

6. The Bill also includes provisions which preserve existing guardian ad litem appointments prior to the commencement of these amendments. The Minister further noted that these provisions are intended to prevent the risk that:

> … previous appointments of guardians ad litem may be invalidated by a party dissatisfied with an outcome in the relevant proceedings, merely because the appointment was made via an administrative process rather than directly by the court naming the guardian ad litem.

7. Schedule 3 of the Bill also includes amendments to the *Children and Young Persons (Care and Protection) Act 1998* relating to workers who provide statutory or supported out-of-home care for a child or young person only in the course of their professional work or paid employment. These amendments would exclude the application of certain provisions which relate to the rights and responsibilities of "authorised carers" in the statute to these authorised residential care workers.

8. The Bill also seeks to amend the *Child Protection (Working with Children) Act 2012* to include existing criminal offences of serious animal cruelty as a disqualifying offence in relation to applications for a working with children check clearance. It further provides that individuals who have been convicted of such offences are not entitled to apply to NCAT for an administrative review of decisions regarding their application.

9. In addition, the Bill also provides that an animal welfare body can disclose information to the Children's Guardian relating to the commencement of proceedings and/or findings of guilt for an animal cruelty offence against a person. It also proposes to include the commencement of such proceedings as a statutory trigger which requires assessment of whether that person should hold or continue to hold a working with children clearance.

10. Schedule 4 of the Bill provides for significant reforms to the *Children (Detention Centres) Act 1987*. Amongst these amendments, the Bill would clarify that bail decisions concerning juvenile defendants may be made in accordance with the general provisions under section 8 of the *Bail Act 2013* by magistrates outside of the Children's Court. It also clarifies the power of the Children's Court to make orders concerning the revocation of parole for juvenile defendants.

11. The Minister remarked in his second reading speech that these reforms to parole matters involving juvenile offenders:

> … will align the juvenile regime with the adult regime on this issue and provide a specific power in legislation so that it is clear that the Children's Court may, where appropriate, vary, rescind or confirm parole revocation orders.

12. Finally, Schedule 5 of the Bill amends the *Children's Guardian Act 2019* in respect to the Children's Guardian power to exempt certain conduct under Part 4 of the Act. In discussing the amendments to the Children's Guardian's power to exempt certain conduct, the Minister emphasised that the Bill is intended to achieve three aims:

> … first, clarify that the Children's Guardian can give exemptions from the notification requirements for reportable conduct but not change the scope of what constitutes reportable conduct; secondly, clarify that the Children's Guardian and the relevant entity both have responsibilities to ensure that their investigations under the Children's Guardian Act 2019 do not prejudice police investigations; and, thirdly, extend the transitional regulation-making powers until various regulations are consolidated.

13. Specifically, the Bill amends section 30 to provide that the Children's Guardian may exempt certain conduct from mandatory notification requirements under section 29, as opposed to the existing power to exempt certain conduct from being reportable conduct. It also introduces a requirement, where there are concurrent investigations of reportable allegations by both the Children's Guardian and a separate relevant entity, that the Children's Guardian's investigation not prejudice a police investigation or court proceedings.

ISSUES CONSIDERED BY COMMITTEE

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

Right to presumption of innocence

14. The Bill seeks to insert section 33A into the *Child Protection (Working with Children) Act 2012* which would authorise an animal welfare body, being the RSPCA NSW or Animal Welfare League NSW, to disclose to the Children's Guardian information that:

- the body has commenced proceedings for an animal cruelty offence by a person, and/or
- a person has been found guilty of such an offence, regardless of whether a conviction is recorded.

15. Subsection 33A(2) defines an animal cruelty offence to include the criminal offences for bestiality and serious animal cruelty under sections 79 and 530 of the *Crimes Act 1900* respectively, as well as offences of animal cruelty and aggravated animal cruelty under sections 5(1), (2) and (6) of the *Prevention of Cruelty to Animals Act 1979* respectively.

16. Schedule 2[4] of the Bill also proposes to include in Schedule 1 of the *Child Protection (Working with Children) Act 2012* the commencement of proceedings against a person in relation to animal cruelty offences under subsections 5(1) and (2) of the *Prevention of Cruelty to Animals Act 1979*. This would mean the commencement of such proceedings statutorily triggers provisions under the *Child Protection (Working with Children) Act 2012* that require the Children's Guardian to assess whether the person should hold or continue to hold a working with children check clearance.

17. In acknowledging that there are existing provisions in the Act which flag offences of animal cruelty under the working with children check regime, the Minister explained that these amendments "will expand the relevance of animal cruelty offences when assessing working with children clearances and resolve unintended loopholes" where individuals are convicted of a criminal animal cruelty offence not separately the subject of proceedings by an animal welfare body. He further stated that:

> This is an important amendment because it will allow these animal welfare groups to give an early indication to the Children's Guardian if any applicant for a Working With Children's clearance has been charged with one of these offences and not yet convicted.

The Bill amends the *Child Protection (Working with Children) Act 2012* to authorise an animal welfare body to disclose information to the Children's Guardian that proceedings have been commenced, or a finding of guilt(even if not recorded), has been made against a person in relation to an animal cruelty offence. It further provides that the commencement of such proceedings is a matter which will trigger provisions under the Act requiring the Children's Guardian to assess the suitability of a person to hold or continue to hold a working with children check clearance. This may mean that a person who has not yet been found guilty of an animal cruelty offence by an animal welfare body may still have their charges considered by the Children's Guardian in considering their application for a check clearance or otherwise in their suitability to continue holding such a clearance.

The provisions may thereby impact a person's right to the presumption of innocence as contained in Article 14 of the ICCPR.[10] The right to the presumption of innocence protects an accused person's privilege to be presumed innocent until proved guilty according to law.

However, the Committee acknowledges that the statutory triggers under the Act do not require the Children's Guardian to assess the accused person's application for or validity of a working with children check clearance against the person's favour. It also recognises that similar statutory triggers currently apply under the Act in relation to aggravated animal cruelty offences. In the circumstances, the Committee makes no further comment.

Right to liberty and freedom from arbitrary detention – revocation of parole

18. Section 67 of the *Children (Detention Centres) Act 1987* currently enables the Children's Court to hold a hearing to determine whether a juvenile offence has failed to comply with their obligations under a parole order, or whether there are other grounds to revoke the parole order. Subsections 67(2) and (3) allows the court to revoke a parole order for a juvenile offender without holding such a hearing, however, requires a hearing be held within 28 days of the juvenile offender receiving notice of the revocation.

19. Schedule 4[3] of the Bill amends section 67 of the Act. Specifically, it seeks to insert subsection 67(5) to provide that, when determining a hearing required under subsection 67(3) after the revocation of a parole order, the Children's Court may "take into account

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

the behaviour of the juvenile offender while released on parole or after the revocation of the parole order".

> **The Bill amends section 67 of the *Children (Detention Centres) Act 1987* in relation to a reconsideration hearing required under the Act after making an order in the absence of a hearing which revokes a parole order for a juvenile offender. Specifically, it allows magistrates of the Children's Court to take into account the juvenile offender's behaviour while released on parole or after the revocation of their parole order in determining whether to rescind, vary or confirm the order for revocation. This may mean that behaviour of a juvenile offender which does not constitute a breach or non-compliance with their parole could be taken into account in varying or confirming the revocation of their parole order.**
>
> **As the revocation of a parole order may result in a juvenile offender being returned to custody, the Bill 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. This is of particular concern as the Bill concerns the liberty of juvenile offenders to be released from custody on parole.**
>
> **However, the Committee acknowledges that the ability to consider the behaviour of juvenile offenders while released on parole or after the revocation of their parole orders is a matter of judicial discretion. It further recognises that the imposition of conditions for release on parole is a common measure intended to balance the rights of offenders who can demonstrate reformed behaviour and the need to protect public safety. In the circumstances, the Committee makes no further comment.**

Compensation rights – indemnity of authorised carers

20. The Bill proposes to amend section 147 of the *Children and Young Persons (Care and Protection) Act 1998* to exclude an "authorised residential care worker" from being entitled to indemnification by the Minister for any loss or damage suffered in the course of providing care to a child or young person under the Act.

21. Under section 137AA proposed by the Bill, an authorised residential care worker is an individual who is authorised by a designated agency as an authorised carer and only provides statutory or supported out-of-home care in the course of their professional work or paid employment.

22. In his second reading speech, the Minister explained that the objective of distinguishing authorised residential care workers is to "ensure that residential careworkers are not unintentionally covered by five provisions that are relevant to foster carers only".

23. The Minister also specifically addressed the exclusion of these workers from indemnity entitlements under the Act. In that respect, the Minister noted that:

> Unlike foster carers, residential careworkers have a direct employment relationship through which they may be entitled to be compensated for loss or damage suffered in the course of their employment, so it is not appropriate for such workers to be indemnified by the Minister.

The Bill amends the *Children and Young Persons (Care and Protection) Act 1998* to exclude the specified class of authorised residential care workers from an entitlement to indemnity from the Minister for loss and damage suffered in the course of providing authorised care to a child or young person. This may impact the right of individuals to be compensated for loss or damage caused as a result of performing the duties of their employment.

However, the Committee notes that these amendments apply to those care workers who provide authorised care only in the course of their professional work or paid employment, and thus may be separately entitled to compensation from their employer. It acknowledges the statements from the Minister that the indemnity provision under the Act is intended to benefit authorised carers like foster carers and that it would not be appropriate for the Minister to additionally indemnify residential care workers. In the 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

Excludes administrative review

24. The Bill also proposes to include the criminal offences of bestiality and serious animal cruelty under the *Crimes Act 1900* in subsection 26(1)(a) of the *Child Protection (Working with Children) Act 2012*. That subsection excludes individuals who have been convicted of listed criminal offences from making an application to NCAT under Part 4 of the Act to administratively review working with children check clearance decisions.

25. Subsection 18(1)(a) of the Act provides that a person is disqualified from holding a valid working with children check clearance if they have ever been convicted as an adult of a disqualifying offence specified in Schedule 2 of the Act. Schedule 2[4] of the Bill proposes to include criminal offences of serious animal cruelty under section 530 of the *Crimes Act 1900*. Relevantly, criminal offences of bestiality under section 79 of the *Crimes Act 1900* is already a disqualifying offence listed under Schedule 2.

26. This would mean that a person convicted as an adult of a criminal offence of bestiality or serious animal cruelty is both disqualified from ever holding a working with children check clearance and excluded from exercising the right to make an application for review by NCAT of such a clearance decision provided under the statute.

27. The Minister explained the rationale for these amendments in his second reading speech as follows:

> The object of the Child Protection (Working With Children) Act is to protect children by not permitting certain persons to engage in child-related work and by mandating those engaged in child-related work to obtain a Working with Children Check clearance. … Research has shown for some time that there is a link between people who abuse animals and those who commit other offences, including other violent offences. Given that we know that people who abuse animals are more likely to be involved in criminal activity, it stands to reason that animal cruelty offences should be flagged when someone applies for a working with children clearance, and that serious animal cruelty offences disqualify a person from working with children.

28. The Minister further noted that these amendments "will bring New South Wales in line with the national standards for Working With Children checks" which likewise provides that convictions for animal cruelty offences are disqualifying offences and grounds for excluding rights to appeal.

> **The Bill amends the *Child Protection (Working with Children) Act 2012* to disqualify a person who has been convicted of a criminal offence of bestiality or serious animal cruelty from ever holding a working with children check clearance. It further excludes a person who has been so convicted from making an application to the NSW Civil and Administrative Tribunal for an administrative review of such clearance decisions. By excluding this entitlement for administrative review under the Act, this may impact on the rights of affected persons to have those administrative decisions independently reviewed.**
>
> **However, the Committee acknowledges that the Act is intended to protect children by limiting who is suitable to engage in child-related work. It also recognises that individuals who have committed animal cruelty offences engage in violent behaviour and that other violent offences are also similarly treated in the Act. In the circumstances, the Committee makes no further comment.**

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

Matters deferred to the regulations

29. Clause 1 of Schedule 4 of the *Children's Guardian Act 2019* provides for a transitional regulation-making power under the Act. Specifically, subclause 1(1) provides that a transitional regulation may provide about a matter for which:

> (a) it is necessary to make provision to allow or facilitate the doing of any thing to achieve the transition from the operation of the relevant provisions to the operation of this Act, and
>
> (b) this Act does not make provision or sufficient provision.

30. In addition, subclause 1(2) provides that any transitional regulation may have retrospective operation to a day not earlier than the date of the Act's commencement.

31. Schedule 5[7] of the Bill proposes to amend subclause 1(4) to postpone the expiration of clause 1 and any transitional regulations made under it to 1 September 2022. The Minister explained that the purpose of extending the operation of transitional regulations for a further six months is to make their expiry date:

> … consistent with the date for expiry of schedule 4 (2) to the Children's Guardian Act, which preserves those existing regulations as if they were regulations under the Children's Guardian Act until 1 September 2022. The amendment dovetails the two expiry dates of schedule 4 (1) and (2) to allow for consolidation to occur by that date. An extension of the transitional provision will ensure that any regulations required to be made to facilitate the consolidation can be made up until the specified date for consolidation.

> **The Bill amends the *Children's Guardian Act 2019* to extend the operation of transitional regulations and the power to make transitional regulations under clause 1 of Schedule 4 of the Act for a further six months. Clause 1 provides that**

these transitional regulations may make provisions in respect to a wide range of matters and which may have retrospective application not predating the commencement date of the Act.

The Committee generally prefers substantive matters to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the matters may have retrospective application which may run counter to the rule of law principle that people are entitled to know the law to which they are subject at any given time.

However, the Committee acknowledges that the extended operation of the transitional regulation-making power is intended to ensure internal consistency with other regulation-making powers under the Act. It also recognises that the operation of these transitional regulations as well as the power to make these regulations are time limited to expire on 1 September 2022. In the circumstances, the Committee makes no further comment.

Commencement by proclamation

32. Clause 2(2) of the Bill provides that certain provisions amending the *Child Protection (Working with Children) Act 2012* and the *Children and Young Persons (Care and Protection) Act 1998* commence on a day or days to be appointed by proclamation.

Parts of the Bill commence 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 a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments to the State legislative regimes in respect working with children check clearances and authorised residential care workers. In the circumstances, the Committee makes no further comment.

11. Teacher Accreditation Amendment Bill 2021

Date introduced	16 November 2021
House introduced	Legislative Council
Minister responsible	The Hon. Sarah Mitchell MLC
Portfolio	Education and Early Childhood Learning

Purpose and description

1. The object of this Bill is to amend the *Teacher Accreditation Act 2004* (the ***Act***) as follows—

(a) to ensure the protection of children is paramount in the administration of the Act,

(b) to enable the NSW Education Standards Authority (the Authority), instead of teacher accreditation authorities, to grant all types and levels of accreditation for teachers in schools and early childhood education centres,

(c) to enable the Authority to carry out assessments of suitability to teach in relation to certain individuals in certain circumstances,

(d) to make it clear that a person who supports and leads the development and implementation of the delivery and assessment of educational programs and courses in a school or early childhood education centre, for example a principal, is required to be accredited,

(e) to abolish the Quality Teaching Committee,

(f) to enable the Authority to obtain information from, and share information with, certain other government agencies, schools, centres and organisations,

(g) to make other consequential amendments.

BACKGROUND

2. The Bill was introduced in response to recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse and makes a range of improvements to streamline the process of accrediting teachers. In her second reading speech, the Hon. Sarah Mitchell MLC, Minister for Education and Early Childhood Learning stated:

> Findings from the recent New South Wales Auditor-General's performance audit report Ensuring teaching quality in NSW public schools identified that improvements were required to ensure the consistency and equity of teacher accreditation decisions across all schools, systems and regions of New South Wales. The Legislative Council Education Committee made similar findings. Centralising teacher accreditation decisions with NESA will address this recommendation from the Auditor-General and create further opportunities to reduce existing administrative burden on teachers and schools. This bill amends the Teacher Accreditation Act 2004 and also requires minor

> consequential amendments to the Education Standards Authority Act 2013 in order to bring about these significant changes.

3. Under the current Act, accreditation of teachers at the 'proficient teacher', 'highly accomplished' and 'lead teacher' levels is regulated by Teacher Accreditation Authorities. The current Act mandatorily requires teachers, including graduate teachers, to be accredited at a Proficient Teacher Level.

4. The Bill changes the child protection requirements for teacher accreditation and the processes governing the teacher accreditation scheme. Schedule 1[7] of the Bill amends section 4 and introduces a requirement that the safety, welfare and wellbeing of the child or young person be paramount to an action or decision concerning a child or young person.

5. Proposed sections 21-23 will enable the Authority to carry out 'assessments of suitability to teach' as a condition of initial and ongoing accreditation. The change streamlines the accreditation process for teachers across New South Wales by centralising the review and accreditation process as a function of the Authority.

6. Sections 21-23 and 35 establish the circumstances in which the Authority may assess accreditations. Section 24 enables the Authority to revoke an accreditation where that person is assessed as not suitable to teach. Additional powers conferred to the Authority under the amendments include checking criminal and disciplinary histories in their assessments. In her second reading speech, the Minister stated:

> The current Teacher Accreditation Authorities structure consists of employing authorities, their delegates, school principals and system authorities who are designated to exercise the decision-making powers to grant accreditation on behalf of NESA. This is a cumbersome process, and these changes will streamline teacher accreditation as well as remove a layer of administrative burden from teachers and schools.
>
> Giving NESA the power to make accreditation decisions for all accreditation levels will also mitigate the experience of some teachers where the Teacher Accreditation Authority has added unnecessary and unwarranted additional compliance burdens. It is appropriate that, as the New South Wales regulator of teacher quality, NESA makes these significant decisions. However, it is important to note that these decisions will be made on advice from schools, which are uniquely placed to make an appropriate recommendation to NESA about whether a teacher continues to meet the Australian Professional Standards for Teachers. This amendment removes an entire layer of regulation, compliance and accountability which will result in less red tape and will remove the administrative oversight of the Teacher Accreditation Authorities scheme. NESA will consult with the teaching profession, including the Department of Education, Catholic Schools NSW and the Association of Independent Schools, in developing the new accreditation policies and procedures to implement this important change. It will be an opportunity to align new streamlined school registration processes with NESA's oversight of the school accreditation practices, leading to recommendations for accreditation.

7. Schedule 1[8] enables the Authority to obtain and disclose relevant information for an authorised purpose to the Children's Guardian, the Commissioner of Police, a school or early childhood centre or a suitably assessed organisation. 'Authorised purpose' and 'relevant information' are defined under the Bill.

8. Schedule [10] requires the Authority to establish a public register of accredited teachers to be maintained on the Authority's website. The Authority must also maintain its own private list and new section 18 specifies the information which must be kept by the Authority.

9. Schedule 1[17] of the Bill omits an existing requirement for NESA to provide 14 days' written notice of the suspension or revocation of a person's accreditation under certain circumstances. In her second reading speech, the Minister stated:

> Currently, teachers must continue to be accredited for 14 days after the Office of the Children's Guardian has informed NESA that there has been a stop placed on their Working with Children Check clearance. This change is important. It will mean that NESA will be able to immediately suspend a teacher and ensure that they are no longer able to work with children. A decision by the Office of the Children's Guardian to remove a person's Working with Children Check clearance already provides procedural fairness, and so it is not necessary for NESA to apply that same fairness when the NESA decision is solely based on the decision already made by the guardian. Further, an amendment to clarify that any person applying for accreditation must have a Working with Children Check clearance that authorises the person to engage in paid child-related work has been made to strengthen this requirement. These changes again provide confidence to our parents and school communities that children and young people are being kept safe.

10. Schedule 1[17] gives the Authority further power to require a person subject of a suitability assessment to give the Authority more information, require them to make a statutory declaration if their criminal history is unobtainable or undergo a health assessment. The Authority may also refer the matter to the Children's Guardian, a law enforcement agency, the employer or other organisation for further investigation under proposed section 38. Upon carrying out a suitability assessment, the Authority has the power to declare someone unsuitable to teach. New section 38A outlines a non-exhaustive list of factors taken into account by the Authority in that assessment.

11. Schedule 1[31] creates obligations on employees of accredited teachers to notify the Authority if a relevant decision is made and requires the employer to give the Authority information relevant to the decision. An employer must also notify the Authority if they have or are aware of relevant grounds for which a person's accreditation may be revoked. An offence is created and punishable by a penalty unit amount of $5500 (50 penalty units) if an employer does not comply with any of these obligations.

12. Schedule 3 of the Bill abolishes the Quality Teaching Committee (QTC) which exists under Part 2, Division 4 of the Act. The Quality Teaching Committee is currently responsible for functions that the Authority will take over on the date of repeal. These functions include but are not limited to advising and assisting other teacher accreditation authorities in accrediting persons under the Act and monitoring the accreditation process across all schools. QTC members will cease to hold their positions as committee members and are not entitled to remuneration or compensation because of cessation under schedule 3 of the Bill.

13. The savings and transitional provisions state that decisions on accreditations in force prior to the repeal date are to be taken as accreditations granted by the Authority.

ISSUES CONSIDERED BY COMMITTEE

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

Right to privacy of information

14. The Bill makes various amendments to the processes involved with accreditation of teachers, including authorising the Authority to share information for the purposes of accreditation and investigation. Section 17 also creates a public register of accredited teachers to be published on the Authority's website.

15. Proposed section 7 allows the Authority to obtain relevant information from, and disclose relevant information to relevant entities for an authorised purpose. The Bill specifies the Children's Guardian, the Commissioner of Police, a school or early childhood education centre (or equivalent entity), or an organisation referred to for investigation.

16. Section 7(2) defines authorised purpose as a purpose for, or in connection with, the execution or administration of the Act, including—

    1. the verification of the identity of a person who is an applicant for, or the holder of, an accreditation under this Act,

    2. the consideration and determination of a person's application under this Act,

    3. assessing and determining under Part 4, Division 2 whether to suspend or revoke a person's accreditation,

    4. assessing and determining under Part 4, Division 4 whether a person is suitable to teach.

17. Section 7(2) further defines relevant information about a person to include—

    1. information relevant to the verification of the identity of the person,

    2. information about the person disclosed by the person to a relevant entity,

    3. information about the person's criminal history in this jurisdiction or another jurisdiction,

    4. information about disciplinary proceedings against the person in this jurisdiction or another jurisdiction,

    5. information about the person's clearance history,

    6. information about whether the person continues to comply with accreditation requirements and teaching standards under the professional teaching standards,

    7. other information relevant to assessing the person's suitability to teach, including a relevant complaint.

18. Section 17 requires the Authority to create a public register of accredited teachers to be available on the Authority's website. Information which must be contained in the Register

includes the person's full name, accreditation number and the type or level of accreditation. There is currently no publically available register of accredited teachers. In her second reading speech, the Minister said:

> New section 17 in item [10] outlines a requirement for NESA to publish a register of accredited teachers on their website. In line with other jurisdictions that have a public register of teachers, the register would only include information relevant to a teacher's accreditation. This disclosure is important. It will mean parents, students and the broader education community can be confident that the teachers in their school or early childhood service are accredited and are meeting the required levels of professional standards.

19. Section 36 gives the Authority the power to check criminal and disciplinary histories. This power authorises the Authority to obtain written reports from the Commissioner of Police, the Children's Guardian, the person's employer and any other body inside or outside Australia that carries relevant criminal or disciplinary records.

20. Section 38 gives the Authority the power to refer a matter relevant to an assessment of suitability to an appropriate entity for further investigation. An assessment of suitability refers to an assessment by the Authority under Division 4 of the proposed amended Act. These assessments may be undertaken at various stages of a person's accreditation, including but not limited to when the person applies for accreditation and where a complaint is received by the Authority.

21. Proposed section 38A states that upon referral for investigation, if the Authority determines a person is unsuitable for teaching, the Authority must refuse an application for accreditation. If the person already holds an accreditation at the time of the investigation and determines that person is unsuitable to teach, the Authority must either impose conditions on the accreditation or suspend or revoke the accreditation.

> **The Bill gives the NSW Education Standards Authority the power to share and disclose relevant information to external bodies in their accreditation applications and investigations. This includes the power to obtain information from, and disclose that information to relevant entities for an authorised purpose, check criminal and disciplinary histories, and to refer a matter relevant to an assessment of suitability to an appropriate entity for further investigation (sections 7, 36 and 38). Where the Authority relies on information in an investigation and deems a person unsuitable for teaching, the Authority then has the power to refuse an application or suspend, revoke or impose conditions on an accreditation. Additionally, the Authority is required to establish a publically available register of accredited teachers (section 17).**
>
> **The Committee notes the sharing of information relevant to a teacher seeking accreditation, or a teacher who holds an accreditation, may infringe on that person's right to privacy of information, and may breach confidence between the person and the Authority. Sharing of information may also result in the subsequent denial of an accreditation application or the suspension, revocation or imposition of conditions on an accreditation. This has the potential to affect a person's ability to continue teaching as a result of information being shared between appropriate entities.**

Further, the establishment of a public register of accredited teachers may interfere with a right to privacy, particularly for persons with existing accreditations, as they may not have consented to the provision of their information on the register.

However, the Committee acknowledges the above information sharing and disclosure powers are for the purpose of determining the suitability of a person's accreditation status as a teacher to work with children and young people. The Committee also notes the importance of the Authority having access to all information that may affect the accreditation suitability of an applicant or accreditation holder.

Further, a person who has been affected by a decision under sections 7, 36 and 38 of the Bill has available avenues for review under the *Administrative Decisions Review Act 1997*. The Committee also notes that the Bill places limits on what constitutes 'relevant information' and an 'authorised purpose', which in turn provides some additional protection. By keeping a public register of accredited teachers, the Authority may provide greater transparency to future employers in a manner similar to that of the Register of practitioners kept by the Australian Health Practitioner Regulation Agency or other regulatory agencies such as the Law Society of New South Wales. As such, the Committee makes no further comment.

Strict liability

22. The Bill inserts section 42B(1) which requires employers to notify the Authority of relevant decisions and give the Authority all information relevant to that decision. Failure to provide this information constitutes a contravention of the Act and may incur a maximum penalty of $5500 (50 penalty units).

23. Section 42B(3) also creates a mandatory obligation on employers to notify the Authority, if the employer has, or is aware of, information relevant to the grounds suspending or revoking a person's accreditation by the Authority. Failure to do so constitutes a contravention of the Act and may incur a maximum penalty of $5500 (50 penalty units).

24. In her second reading speech, the Minister stated:

> Item [30] of schedule 1 provides at section 42B of the Teacher Accreditation Act that employers will be legally required to provide NESA with information that relates to any misconduct that may result in a teacher having their accreditation suspended or revoked. At present the Act does not explicitly require a teacher employer to provide NESA with all the information relating to a finding of misconduct. The employer is only required to notify NESA if they have made a decision to dismiss a teacher for reasons that could lead to their accreditation being suspended or revoked. As the regulator of teacher accreditation in New South Wales, NESA requires information to make a judgement in relation to any matters that would lead to the suspension or revocation of a teacher.

Section 42B requires employers to notify the Authority of relevant decisions and provide all relevant information regarding those decisions. Employers must also provide the Authority with information relevant to a decision to suspend or revoke a person's accreditation. Employers that fail to do so may incur a maximum penalty of $5500 (50 penalty units). These provisions amount to strict

liability provisions as they do not require proof of the mental element of an offence.

The Committee generally comments on strict 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 offences are not uncommon in regulatory settings to encourage compliance. However, it does not appear that safeguards are available to protect persons from being penalised incorrectly. For example, where an employer is unaware of any relevant information to disclose that the Authority later becomes aware of and relies on to make an accreditation decision. As such, the Committee refers the matter back to Parliament for consideration.

Right to fair and just compensation on dismissal of employment

25. Schedule 3 of the Bill abolishes the Quality Teaching Committee (QTC) which exists under Part 2, Division 4 of the Act. The Quality Teaching Committee is currently responsible for functions that the Authority will take over on the date of repeal. These functions include, but are not limited to, advising and assisting other teacher accreditation authorities in accrediting persons under the Act and monitoring the accreditation process across all schools.

26. The current Act requires the QTC to consist of 5 elected accredited persons and 6 persons who are appointed by the Minister.

27. Under schedule 2 of the Act an appointed member holds office for no longer than 3 years and may be re-appointed. An elected member holds office for a period of 3 years.

28. Schedule 2 also provides that a member of the QTC is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.

29. In abolishing the QTC, the Bill expressly provides that each member of the QTC will cease to hold their positions as committee members and are not entitled to remuneration or compensation because of cessation.

Schedule 3 of the Bill abolishes the Quality Teaching Committee which exists under Part 2, Division 4 of the Act. In abolishing the QTC, the Bill expressly provides that each member of the QTC will cease to hold their positions as committee members and members will not be entitled to remuneration or compensation because of loss of office.

A member who lost office as a result of the Bill would also lose any corresponding remuneration to which he or she would otherwise have been entitled to cover the remainder of his or her term. By providing that the member would receive no compensation for the loss of this remuneration, the Bill thereby impacts on panel members' compensation rights.

The Committee notes existing members of the QTC will not be eligible to fair remuneration on abolishment of the QTC upon repeal of the Act. The repealing provision may infringe on other award rights afforded under the national

employment standards, a contract of employment or entitlements in other legislation. The Committee refers the matter to Parliament to consider whether it is an undue trespass on the right of Panel members to compensation for loss of remuneration.

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

Wide and ill-defined power – power of Authority to suspend or revoke accreditation where person's accreditation is on hold or while on leave of absence

30. Proposed section 24D(3A) of the Act allows the Authority to suspend or revoke a person's accreditation while it is on hold due to being on a leave of absence. The provision does not disentitle the person from undertaking courses or duties that enable them to satisfy requirements of the professional teaching standards during that time.

31. In her second reading speech, the Minister said the amendment was aimed at making it clear that a person may be suspended or have their accreditation revoked for misconduct even though their accreditation has been placed on hold while they are on leave.

32. Section 24D(1) of the current Act states the Authority may, on application by an accredited person, place the person's accreditation on hold during any period that the person takes leave of absence from teaching in New South Wales. Ordinarily that leave may not be less than 6 months or more than 5 years in duration.

Proposed section 24D(3A) of the Act allows the NSW Education Standards Authority to suspend or revoke a person's accreditation while their accreditation is on hold due to being on a leave of absence. Many teachers are required to be accredited in order to remain employed in accordance with the Authority. The effect of a revocation is that a person is disentitled to teach in a school or in a childhood education centre, while a suspension voids the accreditation for a certain period of time.

The Committee notes section 24D(3A) creates a wide and ill-defined power for the Authority to suspend a person even where that person has taken a leave of absence. This may result in greater difficulty for a person re-entering the workforce upon taking that leave of absence from teaching. The Committee also prefers clearer provisions relating to the specific circumstances in which revocations or suspensions may be issued particularly where it affects the employment rights of individuals.

However, the Committee understands that this provision is aimed at clarifying that a person may be suspended or have their accreditation revoked for misconduct even though their accreditation has been placed on hold while they are on leave. The provision does not prevent a person, while on leave or while their accreditation is on hold, from engaging in training or development to satisfy professional teaching standards. The Committee also notes the existence of statutory safeguards requiring the Authority to notify, in writing, a person affected by an accreditation decision. Also available to a person affected by a decision is the avenue of review under section 27 of the Act. In these circumstances, the Committee makes no further comment.

12. Workers Compensation Amendment Bill 2021

Date introduced	17 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service and Digital

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Workers Compensation Act 1987* to abolish presumptive rights to workers compensation for certain workers who contract COVID-19.

2. The Bill also makes a consequential amendment to the *Workers Compensation Regulation 2016*.

BACKGROUND

3. This Bill amends the *Workers Compensation Act 1987* ('the Act') to remove the application of section 19B for injuries received after its commencement (as an Act). It also makes consequential amendments to the *Workers Compensation Regulation 2016* ('the Regulation').

4. The key amendment proposed by the Bill is the removal of statutory presumptions for workers compensation in relation to contracting COVID-19 in prescribed employment. However, the Bill also includes provisions that would entitle a worker to rely on those statutory presumptions under section 19B if they contracted COVID-19 prior to the commencement of the Bill as an Act.

5. The Bill also amends the Regulation to omit clauses 5B to 5D which prescribe clinical criteria, matters relating to incapacity and employment related to COVID-19 disease injuries under the Act, as well as omitting Part 2 of Schedule 2 which prescribes positive medical test results for COVID-19.

6. In his second reading speech to the Bill, the Hon. Victor Dominello MP, Minister for Customer Service, noted that the Bill revokes amendments passed in May 2020:

> … designed to provide additional assurance to workers at a time when little was known about the impacts of COVID-19 and vaccinations were simply a work in progress.

7. However, the Minister then highlighted that the State has since:

> … come a long way, with the circumstances in New South Wales markedly different. … With the further easing of restrictions on 8 November for fully vaccinated people in New South Wales, in line with the New South Wales road map for easing COVID-19 restrictions, it is now business as usual for New South Wales living with COVID-19. Our Government believes that this should extend to workers compensation matters.

ISSUES CONSIDERED BY COMMITTEE

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

Compensation rights – workers compensation

8. The Act provides the legislative framework for the payment of workers compensation by employers for workers. Under that framework, an employer is liable to pay compensation to a worker who contracts a disease in the course of their employment if their employment was the main contributing factor to contracting that disease.

9. Clause 3(1) of the Bill proposes to omit section 19B from the Act. Relevantly, subsection 19B(1) of the Act currently provides that:

> (1) If a worker, during a time when the worker is engaged in prescribed employment, contracts the disease COVID-19 (also known as Novel Coronavirus 2019), then for the purposes of this Act, it is presumed (unless the contrary is established)—
>
> (a) that the disease was contracted by the worker in the course of the employment, and
>
> (b) the employment—
>
> (i) in the case of a person to whom clause 25 of Part 19H of Schedule 6 applies—was a substantial contributing factor to contracting the disease, or
>
> (ii) in any other case—was the main contributing factor to contracting the disease.

10. Subsection 19B(9) defines "prescribed employment", as to entitle individuals employed in the following businesses to the presumptions under the section:

- the retail industry (other than businesses providing only on-line retail),
- the health care sector, including ambulance officers and public health employees,
- disability and aged care facilities,
- educational institutions, including pre-schools, schools and tertiary institutions (other than establishments providing only on-line teaching services),
- police and emergency services (including fire brigades and rural fire services),
- refuges, halfway houses and homeless shelters,
- passenger transport services,
- libraries,
- courts and tribunals,
- correctional centres and detention centres,
- restaurants, clubs and hotels,

- the construction industry,
- places of public entertainment or instruction (including cinemas, museums, galleries, cultural institutions and casinos),
- the cleaning industry,
- any other type of employment prescribed by the Regulations, which includes cafes, supermarkets, funeral homes and child care facilities.

11. By omitting section 19B from the Act, the Bill removes the existing statutory presumption that a prescribed worker who contracts COVID-19 is entitled under the Act to workers compensation payable by their employer. It also consequentially amends the Regulation to remove clauses pertaining to COVID-19 related matters.

12. However, the Bill seeks to insert into Schedule 6 of the Act provisions that limit the application of these amendments to only those injuries received after the commencement of the Bill as an Act.

13. In his second reading speech, the Minister explained that the intention of these amendments is to maintain "affordable workers compensation insurance premiums". He further stated that the Bill:

> … seeks to address some of those concerns by ensuring that workers compensation premium increases are minimised and that New South Wales businesses in frontline industries such as cafes, restaurants, and retail do not have to bear a disproportionate cost of the COVID-19 health impacts... without these legislative amendments, employers in some industries could be looking at premium increases of up to 27 per cent, which will hit small businesses hard.

14. The Minister explained that the Bill will achieve this goal as the "most significant driver of the anticipated cost" is the existing statutory presumption under section 19B of the Act. He further stated that removing the presumption may reduce the impact of workers compensation claims relying upon section 19B.

15. In remarking that it is appropriate to remove that presumption given high vaccination rates in NSW, the Minister emphasised that the Bill:

> … does not seek to remove the right of a worker to make a workers compensation claim when they have contracted COVID-19 because of their employment. Workers affected by the removal of the COVID-19 presumption will retain the right to make a workers compensation claim if they are able to demonstrate, like any other workplace injury, that they contracted COVID-19 at work.

The Bill amends the *Workers Compensation Act 1987* to remove existing presumptions under the Act which would entitle a worker in a prescribed employment who contracts COVID-19 to workers compensation. These amendments may restrict an individual's access to workers compensation for COVID-19 related injuries by requiring applicants prove their eligibility where previously they may have been automatically entitled under the presumptions. This is of particular concern as the prescribed employments are generally unable to be performed from home which may result in prescribed workers who

contract COVID-19 not accessing compensation, in circumstances where they are required by authorities to self-isolate and cannot work.

However, the Committee acknowledges that these changes would not prevent an individual from applying for workers compensation due to contracting COVID-19 in the course of, and as a result of, their employment. It also recognises the Minister's statements that the statutory presumptions may have a disproportionate financial burden on small businesses in New South Wales, which the amendments are intended to alleviate as NSW moves beyond the COVID-19 public health emergency. In the circumstances, the Committee makes no further comment.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

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

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

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

i trespasses unduly on personal rights and liberties, or

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

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

iv inappropriately delegates legislative powers, or

v insufficiently subjects the exercise of legislative power to parliamentary scrutiny

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

9 Functions with respect to Regulations

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

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

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

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

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

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

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

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

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

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

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

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

2 Further functions of the Committee are:

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

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

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

Appendix Two – Regulations without papers

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

1. Environmental Planning and Assessment Amendment (Rhodes Precinct) Regulation 2021

   The object of this Regulation is to require applications for development consent relating to the Rhodes Precinct to be accompanied by an assessment of the consistency of the development with the *Rhodes Place Strategy*.

   This Regulation amends the *Environmental Planning and Assessment Regulation 2000* to insert this of the Department of Planning and Environment, as in force on 30 October 2021. requirement as a new clause 275E. That clause provides that the *Rhodes Place Strategy* is published on the website.

2. Forestry Amendment (Transitional Arrangements) Regulation 2021

   The object of this Regulation is to extend, until 9 November 2022, the transitional arrangements under the *Forestry Act 2012*, Schedule 3, clause 17A relating to bee-keeping and grazing carried out in accordance with an integrated forestry operations approval in force immediately before 9 November 2018. On 9 November 2018, bee-keeping and grazing ceased to be matters for which an integrated forestry operations approval may provide.

   This Regulation is made under the *Forestry Act 2012*, including section 92 (the general regulation-making power) and Schedule 3, clause 1.

3. Road Amendment (Miscellaneous) Rule 2021

   The object of this Rule is to—
   (a) amend the *Road Rules 2014* to—
      i. enable children who are at least 7 years of age but less than 16 years of age to use an approved child safety harness or an approved Type G child restraint, and
      ii. allow the use of a *do not overtake turning vehicle sign if it complies with VSB 12—National Code of Practice—Rear Marking Plates*, and
      iii. expand the list of approved standards for motor bike helmets, and
      iv. remove a spent provision, and
   (b) amend the *Light Vehicle Standards Rules* set out in the *Road Transport (Vehicle Registration) Regulation 2017*, Schedule 2 to make a minor amendment to correct a cross-reference.

This Rule is made under the Road Transport Act 2013, including sections 23, the general regulation-making and rule-making power, 24 and 25 and Schedule 1.

4. Motor Dealers and Repairers Amendment (Miscellaneous) Regulation 2021

The objects of this Regulation are as follows—

(a) to expand the class of repair work that is electrical accessory fitting work so that it no longer excludes work involving cutting, splicing or altering wiring harnesses,

(b) to provide for alternative qualifications for individuals to be granted tradesperson's certificates for classes of repair work that are body maker and glazing work,

(c) to make amendments consequent on the enactment of certain Commonwealth Acts.

This Regulation is made under the *Motor Dealers and Repairers Act 2013*, including sections 62 and 100 and section 186, the general regulation-making power.

5. Community Land Management Amendment (Meetings of Associations) Regulation 2021

The object of this Regulation is to amend the Community Land Management Regulation 2021 to extend the time within which an original owner must hold the first general meeting of an association under the Act, section 12(1).

The *Community Land Management Regulation 2021* commences on 1 December 2021.

6. Environmental Planning and Assessment Amendment (Norwest Innovation Precinct) Regulation 2021

The object of this Regulation is to specify the maximum rate of the contributions levy for development on land subject to a contributions plan for the Norwest Innovation Precinct.

This Regulation amends the *Environmental Planning and Assessment Regulation 2000*.

Appendix Three – Letters received from Ministers and Members responding to the Committee's Comments (17 June 2021 – 23 November 2021)

Note: The index lists responses received to the Committee's comments on bills and regulations since Digest 32 (23 June 2021). All responses are published to the Committee's website on an ongoing basis as resolved by the Committee and hyperlinked below.

Number	Digest Number	Minister/Member and Date of Letter	Bills/Regulations Covered by Letter
1.	29/57	The Hon Kevin Anderson MP – 21 June 2021	*Greyhound Racing Amendment (Miscellaneous) Regulation 2020* *Retirement Villages Amendment (Asset Management Plans) Regulation 2021* *Retirement Villages Amendment (Exit Entitlement) Regulation 2021*
2.	29/57	The Hon. Matt Kean MP – 28 October 2021	*National Parks and Wildlife Amendment Regulation 2021*
3.	29/57	The Hon Adam Marshall MP – 15 September 2021	*Biosecurity Order (Permitted Activities) Amendment (Cattle Tick Carriers) Order 2020*
4.	31/57	The Hon. Victor Dominello MP – 30 June 2021	*Liquor Amendment (Miscellaneous) Regulation 2021*
5.	31/57	The Hon Kevin Anderson MP – 2 July 2021	*Better Regulation Legislation Amendment (Miscellaneous) Bill 2021* *Building Legislation Amendment Bill 2021*
6.	32/57	The Hon. Rob Stokes MP – 23 August 2021	*Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Regulation 2021*
7.	33/57	The Hon. Kevin Anderson MP – 9 November 2021	*Charitable Fundraising Regulation 2021* *Fair Trading Amendment (Code of Conduct for Short-term Rental Accommodation Industry) Regulation 2021* *Retirement Villages (Asset Management Plans and Exit Entitlements) Amendment Regulation 2021*

8.	33/57	The Hon. Victor Dominello MP – 20 October 2021	*State Insurance and Care Governance Regulation 2021*
9.	34/57	The Hon Kevin Anderson MP – 14 October 2021	*Building and Development Certifiers Amendment (Cladding) Regulation 2021*