PARLIAMENT OF NEW SOUTH WALES

Legislation Review Committee

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

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Guide to the Digest

Comment on Bills

1.1 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 section 8A(1)(b) of the *Legislation Review Act 1987* (**LRA**).

Comment on Regulations

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

Summary of Conclusions

PART ONE – BILLS

1. CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) AMENDMENT (*FAMILY IS CULTURE* REVIEW) BILL 2021*

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

Reversal of the onus of proof – defence to strict liability offence

The Bill amends section 105 of the *Children and Young Persons (Care and Protection) Act 1998* to allow for a defence to the strict liability offence of publishing or broadcasting the name of a child or young person involved in Children's Court proceedings. This defence would require the accused person to prove that they acted in good faith and either promote the safety, welfare or wellbeing of the child/young person, or otherwise in the public interest. 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 have a certain mental element (acting in good faith) and that their conduct was justified.

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.

However, the Committee 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 no defences are otherwise available to accused persons charged with this offence and therefore such a reverse onus of proof allows the accused an avenue to prove their conduct was justified. In the circumstances, the Committee makes no further comment.

Equal treatment of children and young persons

The Bill amends the *Children and Young Persons (Care and Protection) Act 1998* and the *Adoption Act 2000* to prohibit the adoption of Aboriginal and/or Torres Strait Islander children and young people. It also provides for particular considerations and the distinct conduct of care proceedings involving Aboriginal and/or Torres Strait Islander children and young people. This permits the operation of the Bill's provisions to differentiate the treatment of Aboriginal and/or Torres Strait Islander and non-Aboriginal and/or Torres Strait Islander children and young people within the child protection system in New South Wales.

However, the Committee notes that the provisions seek to address recommendations of the *Family is Culture* Report to limit the particular harm of removal caused to Aboriginal and/or Torres Strait Islander children and young people, enhance their right to self-determination and reduce their overrepresentation in out-of-home care. In these circumstances, the Committee considers this may fit within the exceptions for special measures to meet particular needs of a specific group under state and federal laws, and does not constitute discrimination on the basis of race.

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

Inconsistency within the legislation

The Bill amends section 63 of the *Children and Young Persons (Care and Protection) Act 1998* to include provisions enabling the Children's Court to dismiss a care application or discharge a child or young person from care if information provided by the Department demonstrates alternative to care order were not adequately considered. However, subsection 63(2) provides that the Children's Court must not so dismiss or discharge a care application by reason only that alternative action could have been taken but was not considered or taken. The laws concerning these powers of the Children's Court to determine care applications may therefore conflict.

The Committee generally comments where provisions may be contrary to other laws or statutory provisions, as this makes the law applicable to individuals hard to ascertain and understand. This is of particular concern where the laws concern the rights and treatment of individuals in the care of the State.

The Committee recognises that the provisions are intended to ensure that alternatives to removal are considered before State intervention and removal of children is carried out. However, care applications concern children who have been removed and placed in the care of the State, who are particularly vulnerable and require more assistance understanding the laws which affect them. The Committee refers these provisions to the Parliament for its consideration as to whether the provisions may be clarified to address any inconsistency.

2. COVID-19 AND OTHER LEGISLATION AMENDMENT (REGULATORY REFORMS) BILL 2022

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

Procedural fairness – mental health examination by AVL

The Bill amends the *Mental Health Act 2007* to enable accredited persons under the Act to conduct mental health examination of involuntarily admitted persons by audio visual link, the determination of which may subject the person to ongoing detention. This would, in effect, permanently implement existing temporary provisions enacted in response to the COVID-19 pandemic, which were due to automatically repeal on 31 March 2022.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 12/57, and when they were further extended, in its Digest No. 28/57. It notes that the Committee's previous reporting considered the broader context of the COVID-19 pandemic at the time, and that the current context has changed as New South Wales transitions to post-pandemic life.

Consistent with the Committee's previous comments, the conduct of mental health examinations by AVL may impact the extent to which individuals can fully participate in which concern their involuntary detention. It also may impact the accuracy of the examination process if the use of AVL reduces the ability of examiners to assess a person's demeanour, particularly where the examination is conducted by an accredited person who may not have any formal medical or psychological health training.

However, the Committee notes that the conduct of mental health examinations by AVL and/or by individuals who are not psychiatrists are subject to certain safeguards, including requirements to seek psychiatric advice where reasonably practicable and to ascertain that the examination can be sufficiently conducted by AVL to ascertain the required opinion. It further acknowledges that the operation of these provisions is intended to reduce waiting times to obtain such an assessment, particularly in rural and regional areas where relevantly qualified medical practitioners are scarcer, and thereby to minimise the period of time during which individuals are involuntarily detained. In these circumstances, the Committee makes no further comment.

Procedural fairness – compulsory interview by AVL

The Bill repeals certain time limiting provisions in various environmental protection legislation. This would permanently enable authorised officers to require mandatory questioning of individuals occur by video link rather than in person in the course of investigating possible contraventions under those Acts. The Committee previously reported on these provisions when they were first introduced, in its Digest No. 28/57.

Consistent with the Committee's previous comments, the permanent implementation of these provisions may impact the extent to which individuals are able to meaningfully participate in the investigation process of contraventions under the relevant Act. This impact a person's right to procedural fairness, particularly where environmental protection legislation provides that individuals are not excused from answering questions that may tend to incriminate them, contravening the common law privilege against self-incrimination.

The Committee acknowledges that the permanent implementation of these measures is intended to continue delivering economic benefits by reducing administrative costs associated with the investigation of environmental offences. However, it notes that the provisions were introduced as an extraordinary measure in response to the COVID-19 public health emergency at the time, and that context has since changed in New South Wales as the State transitions to post-pandemic life. For these reasons, the Committee refers this matter to Parliament for its consideration.

Civic engagement – meaningful participation in planning hearings

The Bill amends the *Environmental Planning and Assessment Act 1979* to enable the Independent Planning Commission to electronically conduct public hearings it is required to hold under the Act on environmental and planning matters. This may impact the ability of individuals to meaningfully participate and be heard on matters of public concern which might affect their local environment by reason of the person's technological proficiency. Therefore, these provisions may limit a person's civic engagement in local public decision-making. This is of particular concern in circumstances where a person may be liable for an offence of failing to attend an electronic hearing.

The Committee acknowledges that the provisions are intended to provide flexibility to planning bodies and provide administrative costs-saving in the conduct of such public hearings. It further notes that the provisions allow for individuals to make written submissions on matters relevant to the public hearing. However, the provisions do not require a public hearing conducted electronically be widely accessible, so long as a member of the public can view or hear it at the time, which may disadvantage individuals without internet access or technological proficiency. Given the potential penalties for failing to attend if required and possible technological disadvantages, the Committee refers this matter to Parliament for its consideration.

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

Henry VIII clauses

The Bill inserts section 89 into the *Retail Leases Act 1994* to provide that savings or transitional provisions in the regulations consequent on the making or repeal of COVID-19 legislative provisions will have effect despite anything contrary in the Act. The Committee notes that these provisions allow for regulations to alter the operation of provisions contained in their parent Act by overriding contrary statutory provisions.

The Bill also inserts sub-section 88(1A) to extend the operation of the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* beyond its repeal. In its Digest No. 28/57, the

Committee commented on the *COVID-19 Recovery Bill 2021* which introduced provisions similarly extending the application of the *Retail and Other Commercial Leases (COVID-19 Regulation (No 3) 2020* beyond its repeal. Consistent with those comments, the Committee notes that these provisions also allows for regulations to alter the effect of provisions contained in the parent Act.

The Committee notes that these provisions amount to Henry VIII clauses, 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 the provisions are intended to preserve the protections enacted in the extraordinary circumstances created by the COVID-19 pandemic. It notes that the provisions provide consistency to retail tenants in respect to lease matters arising during the COVID-19 pandemic. 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's legislative regimes in respect to the management of community land and strata schemes, accessing long service leave and mental health examinations for possible detainees. In the circumstances, the Committee makes no further comment.

3. ELECTRONIC CONVEYANCING (ADOPTION OF NATIONAL LAW) AMENDMENT BILL 2022

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

Power of registrar to contravene privacy or confidentiality laws

The Bill inserts Part 4 to the Appendix contained in the Act, which sets out the Electronic Conveyancing National Law (ECNL). Within that Part, proposed section 43 provides that the NSW Registrar General may disclose information about certain matters to the Australian Registrars National Electronic Conveyancing Council (ARNECC). This includes matters regarding Electronic Lodgment Network Operators (ELNOs), subscriber compliance with participation rules, compliance examinations, and any other matters relating to the Registrar's functions.

Subsection 43(2) also provides that the Registrar may carry out this function despite any law of this jurisdiction relating to privacy or confidentiality. This may create a wide power to contravene privacy and confidentiality legislation in NSW, which may impact individuals that have personal information contained in the ELNO system.

The Committee usually comments on Bills that exclude the operation of privacy and confidentiality legislation, as this legislation provides an important safeguard to protect the private information of persons and businesses. However, the Committee acknowledges that the Bill only provides for information to be disclosed to the ARNCC, which is a regulatory body, and that information can only be disclosed in certain circumstances focussed on the lawful operation of eConveyancing in NSW. Given the circumstances, the Committee makes no further comment.

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

Subdelegation of the Registrar's powers and functions

Section 16 of the Bill inserts a new section 37(2) to the ECNL, allowing the Registrar to authorise a delegate to subdelegate powers in relation to:

a) Monitoring the activities in an Electronic Lodgment Network (ELN); and

b) Undertaking investigations (known as 'compliance examinations') in relation to an ELNO.

The Committee notes that Schedule 1, section 29 of the ECNL provides that exercise of the power of delegation or subdelegation does not have to be made by a Regulation or statutory instrument, and therefore would not be subject to parliamentary scrutiny. It is noted that the subdelegated powers under the Bill includes the powers of the Registrar to investigate ELNOs.

The Committee usually comments when wide or significant powers can be delegated. However it is also acknowledged that the Bill does not allow the Registrar to delegate all functions and that subdelegation may promote the efficient delivery of government services and conveyancing transactions in NSW. This may further provide an appropriate level of oversight of the eConveyancing industry during a time of significant transition. Given the circumstances, the Committee makes no further comment.

4. ENVIRONMENT LEGISLATION AMENDMENT BILL 2021

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

Proportionality – introduction of cumulative penalties and significant increases in monetary penalties

The Bill significantly increases existing maximum monetary penalties by 2-15 times magnitude for various offences established under the *Contaminated Land Management Act 1997* and the *Protection of the Environment Operations Act 1997* relating to the functions of regulatory authorities. It also introduces cumulative monetary penalties for each additional day a relevant offence continues. As the substantive elements of these offences are not changed, these provisions significantly increase the potential severity of penalties for the same offending conduct, including some strict liability offences. This may impact the criminal justice principle of proportionality if individuals receive much harsher penalties than those given for similar past offences.

However, the Committee acknowledges that the significant increases are intended to deter criminal activities and better reflect the public harm caused by environmental protection and contamination offences. It also recognises that the increased penalties are intended to align with comparable offences in other environmental protection laws. In the circumstances, the Committee makes no further comment.

Proportionality – introduction of custodial penalties

The Bill amends the *Contaminated Land Management Act 1997* and the *Protection of the Environment Operations Act 1997* to introduce a maximum 18 month custodial penalty for certain offences established under those Acts relating to individuals knowingly withholding material relevant information or knowingly/recklessly providing materially false or misleading information. These custodial penalties may be sentenced by a court as an alternative to or in combination with the maximum monetary penalty carried by the relevant offence. This may impact the criminal justice principle of proportionality if certain individuals are sentenced to terms of imprisonment for similar offending conduct which previously attracted only fines.

However, the Committee notes that the custodial penalties are introduced only for those offences where knowledge is a requisite element. It also acknowledges that the amendments are intended to deter individuals from knowingly misleading regulatory authorities in the

exercise of their functions relating to the prevention or remedy environmental damage. The Committee further recognises the harm caused to the wider community by environmental crimes, and that these knowledge offences intentionally obstruct the regulatory framework established to prevent and minimise these harms. In the circumstances, the Committee makes no further comment.

Offence regime – strict liability offences, new offences and reverse onus of proof

The Bill amends the *Protection of the Environment Operations Act 1997* to introduce new tiered regimes consisting of strict liability and knowledge offences for specified conduct. These regimes distinguish between the strict liability and knowledge offences, providing more severe monetary penalties for the knowledge offences as well as possible custodial sentence for the offence of knowingly providing false or misleading information. 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.

Specifically, the Bill establishes under section 211(3)-(3B) a tiered offence regime for individuals who delay, obstruct, assault, threaten or intimidate an authorised officer in the exercise of the EPA's investigation powers. The Bill likewise establishes such an offence regime under section 167A for the conduct of giving materially false or misleading information to the EPA.

Section 167A(2) provides a defence to the strict liability offence of giving materially false or misleading information to the EPA if the accused can establish they took all reasonable steps to ensure the information was not materially false or misleading. While this operates as a defence to the strict liability offence, it may amount to a reverse onus by requiring an 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. As the offence regime allows for the court to make an alternative verdict of the strict liability offence, an accused person charged with knowingly providing materially false or misleading information may still need to establish the defence in criminal proceedings.

However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. It further notes that these offences are intended to deter interference with the EPA's safe exercise of its regulatory functions which aim to protect the wider community from environmental damage. It also acknowledges that the maximum penalties carried by the strict liability offences are not custodial and only monetary. In these circumstances, the Committee makes no further comment.

Executive liability offences – broad extension of criminal liability, widely defined term, standard of proof and additional punishment

The Bill amends the *Contaminated Land Management Act 1997*, the *Pesticides Act 1999*, the *Protection of Environment Operations Act 1997* and the *Radiation Control Act 1990* to extend criminal liability for the commission of offences under those Acts by corporations to its executives, related corporate entities and managers. Specifically, the Bill establishes an offence for any such persons or entities to receive monetary benefits from the commission by a corporation of an offence under the respective Act. It also inserts a wide definition for "monetary benefits" to include any benefits of a monetary, financial or economic nature.

This amounts to a strict liability offence as a director, manager or related body corporate of a corporation may be prosecuted for unknowingly or unintentionally receiving a wide spectrum of benefits from an offence committed by the corporation. 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 the underlying offence from which executive liability arises may include offences for which the corporation was not convicted but received an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999*. This may mean an accused person may be convicted of an offence arising from corporate criminal conduct not otherwise punished by law.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. It also acknowledges that the offences are intended to address an existing regulatory loophole which has enabled corporations to commit environmental crimes without being held appropriately accountable for the harm caused by these offences to the wider community.

However, it notes that individuals who are convicted of the executive liability offence may be sentenced to the maximum penalty carried by the underlying offence which was committed by the corporation. For individuals, a number of offences under these environmental protection laws have maximum penalties that include custodial sentences. It further notes that this may result in individuals being punished more severely than the corporations guilty of committing the underlying offence. For these reasons, the Committee refers the matter to Parliament for its consideration.

Freedom of contract and real property rights

The Bill amends the *Protection of Environment Operations Act 1997* to enable the EPA to impose a restriction on the use of land or a public positive covenant for the purposes of enforcing the conditions of a current, suspended, revoked or surrendered licence. It further enables the EPA to execute the memorandum or deed imposing that restriction/covenant unilaterally against the land's owners, lessees or mortgagees without requiring the execution or agreement of any other person. This may impact the common law principle of freedom of contract, which is that persons are free to choose the contractual terms to which they are subject.

As such restrictions or covenants limiting the free use of land may be unilaterally imposed against land owners, lessees or mortgagees, the provisions may also impact on the property rights of individuals.

However, the Committee acknowledges that statutory limitations on freedom of contract are not uncommon e.g. where this is deemed necessary to address the unequal bargaining power of parties. It further notes that the Bill only limits the free use of land for the limited purpose of enforcing the conditions of a licence intended to minimise environmental damage, which poses a broader public harm. In the circumstances, the Committee makes no further comment.

Retrospectivity

The Bill provides for the retrospective application of particular amendments to the *Contaminated Land Management Act 1997*, the *Pesticides Act 1999* and the *Protection of Environment Operations Act 1997* in relation to extended enforcement powers of the EPA and broadened orders which the court may make in civil and criminal proceedings under these environmental protection laws. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

Whilst the Committee acknowledges that the retrospective application of these provisions is intended to ensure accountability for environmental damage, a person may be subject to extended enforcement powers or may have broader orders imposed on them by the court which

were not available at the commencement of the proceedings. The Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

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

Henry VIII clauses – prescription of "environmental protection legislation"

The Bill amends the *Protection of the Environment Operations Act 1997* to extend the wide and coercive investigation powers under Chapter 7 to "any other environment protection legislation prescribed by the regulations" for that purpose. This may allow regulations to extend the application of statutory official powers in subordinate legislation. 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.

The Committee acknowledges that the prescription of such legislation in the regulation builds flexibility into the overall environmental regulatory framework. It also notes that this may further the Bill's objects to update the existing framework so that it better responds to evolving environmental crimes. However, the regulations may subject individuals to coercive official powers that could trespass upon their personal rights and liberties without parliamentary scrutiny. For these reasons, the Committee refers this delegation of legislative power to the Parliament for its consideration.

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

Removal of Ministerial oversight – pesticide control order

The Bill amends section 38 of the *Pesticides Act 1999* to remove the requirement for Ministerial approval in exercising the EPA's power to make pesticide control orders. The Committee notes that, unlike statutory rules and regulations, there is no requirement to table pesticide control orders in Parliament and therefore is not subject to disallowance. It further notes that publication of these orders in the Gazette does not mean they are subject to disallowance.

By removing the requirement for Ministerial approval to make, amend or repeal pesticide control orders, this may mean that such orders are not subject to parliamentary scrutiny. This is of particular concern where the contravention of such orders amounts to a strict liability offence.

However, the Committee acknowledges that the intention of the amendment is to expedite the process of making pesticide control orders, and to strengthen the independency of such orders. It also recognises that these orders are intended to protect public safety and minimise the harm from the use of restricted pesticides. In the circumstances, the Committee makes no further comment.

5. MOTOR SPORTS BILL 2021

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

Freedom of movement

The Bill provides that individuals may be excluded from the race area during the event, and that failing to comply with certain directions may also lead to their exclusion from the area and a maximum penalty of 50 units ($5,500). Major motor race events covered by the Bill happen largely on public roads, which may border individual's homes, businesses and property. The Bill provides that individual's may be excluded for a time from accessing their land using the adjacent public infrastructure that they commonly rely on for access.

The Committee acknowledges that the provisions may assist in preventing anti-social and disruptive behaviour in a race area, which could be dangerous for race participants and spectators. However, by excluding individuals from certain areas, the provisions may impact on their freedom of movement to access public land or potentially private property. The Committee refers the matter to Parliament for its consideration.

Self-incrimination

The Bill states at section 62(1) that a person is not excused from the requirement to provide the information on the ground that it may incriminate themselves. The Bill thereby impacts on the right to silence and the right against self-incrimination. The Committee notes that the Bill includes some safeguards including that the compelled information is not admissible in evidence against the person in criminal proceedings unless the person was not warned at the time that they could object to giving the information on the grounds that it was self-incriminatory, or if they were warned and objected to providing the information. However, this safeguard does not apply to any civil proceedings, or offences under the *Crimes Act 1990,* Part 5A or certain offences under the Bill.

The Committee acknowledges the right to silence and right against self-incrimination are well-established legal principles and the Committee refers the matter to Parliament to consider whether the Bill unduly trespasses on these rights.

Risk of arbitrary search - property

The Bill allows authorised officers to enter a private premises or conduct a search without a warrant for the purposes of obliterating or removing any advertising material that does not comply with the Act, and for investigating, monitoring and enforcing compliance with the requirements imposed by or under this Act. This thereby expands the search powers of authorised officers connected to a motor race event. As authorised officers are not required to obtain a warrant from an independent judicial officer to conduct such searches this may increase the risk of arbitrary search, impacting on the right to privacy and personal physical integrity.

The Bill allows authorised officers who enter the premises of a business to search the property and question persons present in order to monitor the administration of the Bill. This may potentially include persons who are not in breach of the Bill and not involved in criminal activities. The Bill may thereby compound the possible increased risk of arbitrary searches taking place.

The Committee acknowledges that large public gatherings, which often occur at motor races, may give rise to security challenges that require sufficient search powers. However, the search powers contained in the bill provide that the authorised officer may do what is reasonably necessary for the authorised purpose during a search which may allow a wide power of search specifically for motor race events. The Committee refers the expanded search powers to Parliament to consider whether they are reasonable and proportionate in the circumstances.

Risk of arbitrary search - persons

The Bill allows authorised officers to search persons who wish to attend the area where a motor race is being held. This includes a physical search of their outer clothing, possessions and vehicle. This search can be undertaken without the authorised officer needing to suspect that the person is likely to be in breach of the Bill or pose any threat to themselves or others.

The Committee notes that while this power allows all patrons to be searched, the physical aspects of the allowable search is limited to their outer clothing and possessions, and recognises that the power to search must be balanced against the protection of public safety. In these circumstances, the Committee makes no further comment.

Liability of directors and managers for offences by corporation

The Bill contains executive liability offences under section 66. This means that a director or certain managers of a corporation may be prosecuted for an offence committed by the corporation. The Committee notes that the prosecution is required to prove actual knowledge of the offence on the part of the accused.

The Committee notes that this is a high threshold for the mental element in a regulatory context. The Committee also notes that the while maximum penalty for an individual is a significant value of 250 penalty units ($27,500), it does not include a term of imprisonment. For these reasons, the Committee makes no further comment.

Freedom of contract and right to carry on a lawful business

The Bill provides under section 53 that restrictions can be placed on the display of advertising materials within the advertising controlled site during the event by way of a notification published in the Gazette. A failure to comply with these restrictions may lead to a significant fine with a maximum penalty of 250 penalty units ($27,500) for individuals, or 5000 penalty units ($55,000) for corporations. Further, section 54 allows authorised advertising enforcement officers to enter commercial premises to obliterate or remove advertising material. There is no requirement for the officers to have a warrant to do so.

These sections may undermine the capacity for a businesses within the advertising controlled site to fulfil contractual obligations in regards to the display of advertising. These obligations may arise prior to the Minister providing authorisation for a motor race to take place in the area, and therefore operates in a manner that could be considered retrospective. The Committee generally comments on retrospectivity as it runs counter to the rule of law principle that people are entitled to know the law to which they are subject at any given time. This is particularly the case where a Bill seeks to retrospectively remove rights or impose obligations.

The Committee notes that the period where advertising may have to be removed during a race is likely to be short, and that the intent of the Bill is to ensure that motor races can effectively seek sponsorship agreements which commonly require other advertising to be removed. Considering these policy reasons and the small period of time in which businesses are likely to be effected, the Committee makes no further comment.

Quiet use and enjoyment of land

The Bill proposes some measures to reduce the impact on businesses and residents that live and work adjacent to a motor race event area, including the requirement to undertake consultation with the affected parties (section 13). However, neither the Minister or the government coordinating agency is bound by the Bill to minimise the impact on affected persons, though the Minister and government coordinating agency does have the power to imposed conditions on the promoter that could functionally serve to protect these interests.

Section 17(2) provides that works approval must only authorise carrying out works to the extent that they are reasonably necessary for the purpose of the motor race, associated events and ancillary activities. Section 20 further provides that the promoter must remove rubbish and undertake reinstatement works within a reasonable time after the event period, and if they fail to do so the government coordinating agency may do so instead and recover the costs from the promoter in a court of competent jurisdiction. The Committee notes that these sections seek to limit the scope of works and ensure remediation to limit the impact on the environment and affected persons.

The Committee also notes that motor race events typically run for a small number of days and therefore the disruption is inherently minimised. However, the Committee notes that

infrastructure including lights, telecommunications infrastructure and large structures may create a significant disturbance. However, the Committee notes that the Bill limits the avenues by which affected persons may have their concerns addressed. Section 49 specifically provides that the promoter cannot be held liable in nuisance for any works undertaken lawfully in accordance with the Bill. Taking action in nuisance allows for an individual to enforce their established common law right to the quiet use and enjoyment of their land. Removing this common law right without providing a statutory equivalent has an impact on property rights. The Committee refers these matters to Parliament for its consideration of whether the possible impacts on property rights are reasonable in the circumstances.

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 – conditions for event promoters

The Bill provides that the government coordinating agency, the Minister and the Premier have powers in regards to authorising major motor race events, providing orders in relation to major motor events and take action to ensure the administration of the Bill.

These powers, including the powers of a government coordinating agency to authorise a works order, have effect despite any environmental planning instrument or development consent (section 46). Additionally, section 7(1) grants the Minister with the power to impose conditions on the promoter of a major the motor race event. A promoter who fails to comply with a condition is guilty of an offence which carries a maximum penalty for an individual of $250 000, or for a corporation $1 000 000. Considering the broad scope of possible conditions and the significant impact they may have on the promoter and other affected parties (including persons whose property is adjacent to the proposed race area), the Bill may grant the government coordinating agency a wide and ill-defined administrative power.

The Committee acknowledges that the provisions are designed to allow the Minister and the government coordinating agency to work flexibly to adapt the major motor race event to its particular location. While not an exhaustive list, section 7(1) provides the Minister with guidance on what conditions may be imposed and section 16 requires the government coordinating agency to consult with local councils and affected persons prior to authorising work orders. Further, the provisions are time limited, only applying for a maximum of 12 months after motor races typically occur over a short period of days which limits the impact on the broader community. However, given the scope of such powers, the Committee refers the matter to Parliament for further consideration of whether they are proportionate in the circumstances.

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

Matters deferred to the regulations

The Bill enables regulations to be made under the proposed Act for the effective operation of the Bill, including regulations that can create offences and impose penalties. These regulations may be about a broad range of matters including the fees and charges that can be imposed, access to an event area or motor race, the provision of services for a motor race and the conduct of persons and their exclusion from an area or a motor race.

The Committee acknowledges that it may be useful to delegate matters of an administrative nature to the regulations, especially when dealing with specific or technical information, that is not required to be in the primary legislation. However, the Committee notes that section 10(4) and 69(3) provide that regulations may contain offences with a maximum penalty of 110 units ($11 000). Section 10(4) provides that the regulations may create both a condition of a particular

kind that a promoter must comply with, and an offence for failing to comply with that condition. Section 56 also provides that the regulations may require a promoter to pay a fee for the exercise of any function of the Minister or a government sector agency under Part 2 in relation to a motor race.

The Committee prefers that provisions containing offences and penalties be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The Committee also notes that the regulation may impose new and onerous conditions on a promoter after they have accepted the position, including the payment of unspecified fees. The Committee considers that these regulations may have an impact on the rights or obligations of promoters that could not be anticipated when committing to promote a major motor race event, however the Committee does note the defences available to promoters under section 10(6). The Committee refers this matter to Parliament for its consideration.

PART TWO – REGULATIONS

1. AGEING AND DISABILITY COMMISSIONER AMENDMENT REGULATION 2021

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

Right to privacy

The Regulation broadens the statutory information sharing framework under the *Ageing and Disability Commissioner Act 2019,* by enabling the exchange of 'relevant information' between the Ageing and Disability Commissioner and additional persons and bodies prescribed as a 'relevant agency' by the Regulation. 'Relevant information' is information concerning a report under the Act, or the safety, welfare, wellbeing, abuse, neglect or exploitation of an adult with disability or older adult. It appears this could include sensitive health and medical information about an adult with disability or older adult. However, in accordance with section 15 it does not generally include the identity of a person who makes a report, with the enforcement of this protection supported by the offence in section 31 for disclosure of information obtained in connection with the administration or execution of the Act. The sharing of information under the Act may interfere with a person's right to privacy.

The Act also states that it does not limit the operation of any other Act or law authorising or requiring a relevant agency is disclose information to another person or body. It appears that information may therefore be shared more widely than between the Commissioner and relevant agencies specified under this Act. This may further interfere with a person's right to privacy.

However, a person's relevant information may only be shared under the Act for certain purposes. Specifically, the Commissioner can only share information to enable or assist a relevant agency to provide a service or take action regarding an adult with disability or older adult, make a decision or assessment in relation to the safety, welfare or wellbeing of an adult with disability or older adult, or take action in respect of safety, welfare or wellbeing of adults with disability or older adults generally. A relevant agency can only provide information to the Commissioner to enable or assist the Commissioner in the exercise of its functions under the Act.

The Committee acknowledges the specificity of these purposes and their intent to protect adults with disability and older adults from abuse, neglect and exploitation, in accordance with the objects of the Act. It also appears that the broadening of the information sharing framework may uphold this object and assist with the efficient administration of the Act. In the circumstances, the Committee makes no further comment.

2. CHILDREN (DETENTION CENTRES) AMENDMENT (X-RAY SCANNING DEVICES) REGULATION 2021

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

Right to personal physical integrity

The Regulation amends clause 11A of the *Children (Detention Centres) Regulation 2015* to provide an additional method for a juvenile justice officer to search a detainee for the purpose of ensuring the security, safety and good order of a detention centre, specifically by scanning with an X-ray scanning device. The other methods provided to search a detainee under clause 11A include running a hand-held metal detector over the detainee's outer garments, a pat-down and a partially clothed search.

Generally, searching detainees impacts on their right to bodily autonomy and, in certain circumstances, may limit their right to humane treatment in detention. However, the Committee recognises that juvenile justice officers need adequate tools to detect contraband and ensure the safety, security and good order of detention centres. It also notes that certain safeguards are included in clause 11A, and that the NSW Ombudsman has recommended additional legislative safeguards for the protection of young people in custody.

This amendment aims to provide an alternative to more intrusive methods of searching a detainee under clause 11A, in particular through partially clothed searches, and can be utilised to minimise the need to strip search children and young people detained in detention centres. In the circumstances, the Committee makes no further comment.

3. DISTRICT COURT CRIMINAL PRACTICE NOTE 24– APPLICATIONS FOR LEAVE FOR IN PERSON APPEARANCES IN TRIALS AND SENTENCE HEARINGS OF WHS PROSECUTIONS

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

Access to justice

The Practice Note requires that persons wishing to attend the District Court of NSW in person for appearances in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* satisfy the List Judge or trial Judge that they are vaccinated. This requirement appears to apply to court participants including (among others) counsel, witnesses appearing in person, interpreters, victims or the victims' family members and their support persons.

All other matters will be heard by use of the virtual courtroom. The Committee understands that hybrid in person and remote District Court proceedings are facilitated by provisions of other practice notes and applicable legislation, including the *Evidence (Audio and Audio-Visual Links) Act 1998.*

The use of the virtual courtroom may affect procedural fairness because the Court cannot closely monitor the conduct of a person appearing including what material they have access to, if other persons are in the room or if they are recording the trial on their own device. It may also affect consistency in the quality of evidence between witnesses who appear in person or remotely, particularly if the virtual courtroom experiences technical failures. Additionally, appearing remotely may impact a defendant's access to justice, as the Court does not have the benefit of observing any nuanced behavioural cues of the defendant.

The Committee acknowledges that the use of the virtual courtroom has practical benefits in the circumstances, specifically to protect against the risk of COVID-19 and protect the safety of other court participants. In the circumstances, the Committee makes no further comment.

Open justice

The Practice Note requires that persons wishing to attend the District Court of NSW in person for appearances in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* satisfy the List Judge or trial Judge that they are vaccinated. This requirement appears to apply to court participants including (among others) counsel, witnesses appearing in person, interpreters, court reporters, victims or the victims' family members and their support persons. All other matters will be heard by use of the virtual courtroom.

The Practice Note also requires members of media who wish to attend a trial or hearing provide evidence they are vaccinated to the List Judge or trial Judge. It does not permit members of the public to attend the Court. Both groups have access to the virtual courtroom, on request and subject to any orders made by the trial Judge concerning the conduct of the trial.

The Committee notes that this may create a barrier to the principles of open justice. That is, that the administration of justice take place in open court subjected to public and professional scrutiny. However, the Committee acknowledges that the limitations on access are in response to the current COVID-19 pandemic with the intention of safeguarding broader public health. It considers that the alternative arrangements of a virtual courtroom assist in upholding open justice in the circumstances, particularly considering the other limitations on movement in the Court given the continued requirement to maintain social distancing. The Committee makes no further comment.

Retrospective application

The Practice Note commenced on 29 October 2021, before it was notified in the NSW Government Gazette on 5 November 2021. It also applies to trials and hearings listed on or after 25 October 2021, which is prior to both the date of the Practice Note's commencement and publication. It therefore appears the Practice Note's provisions are intended to apply retrospectively, both because the Note commences 6 days before the publication date and the provisions apply to trials and hearings listed 4 days before the Note commences.

The Committee generally comments on provisions drafted to have retrospective effect, especially where rights may be retrospectively limited, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. The Committee would therefore prefer that the Practice Note commence, and its provisions apply to trials and hearings listed after, the publication date to provide to provide sufficient clarity for persons implementing the Practice Note and those whose rights may be affected. It notes that this approach was taken in District Court Criminal Practice Note 25. That Practice Note was published in the NSW Government Gazette No 586 of 12 November 2021, commenced on 15 November 2021 and applied to sentence proceedings listed for hearing on or after 15 November 2021. While this practice note has been temporarily suspended at the time of writing, the Committee refers this issue to the Parliament for its consideration.

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

Period of application and review date

The Practice Note does not include a specific end date, although it will be reviewed in mid-November 2021 or as otherwise may be necessary. The Committee would prefer that the Practice Note include a fixed date for review, to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on access to justice and open justice, and that it responds to COVID-19, the Practice Note may also benefit from including an end date. The Committee notes repeal or end

dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

4. DISTRICT COURT PRACTICE NOTE 25 – APPLICATIONS FOR LEAVE FOR IN PERSON APPEARANCES IN SENTENCE PROCEEDINGS

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

Open justice

The Practice Note requires any person who seeks to attend Court in person for sentence proceedings to apply for leave at least three business days prior to the listing. Leave will not be granted to any person to attend the Court in person unless the relevant Judge is satisfied that he or she is vaccinated. The Practice Note also requires solicitors for the parties to enquire with participants to confirm their vaccination status.

The Committee notes that this may create a barrier to the principles of open justice for legal representatives, defendants, victims and witnesses involved in sentence proceedings. Open justice requires that the administration of justice take place in open court subjected to public and professional scrutiny. This may particularly affect defendants in custody who face access barriers to the courts. Additionally, it may disenfranchise unvaccinated persons from gaining full access to the open court system.

However, while the Practice Note limits in person appearances, the Committee acknowledges that such requirements are in response to the current COVID-19 pandemic with the intention of broader public health. The Committee also considers the alternative arrangements of a virtual courtroom adequate in the circumstances. The Committee makes no further comment.

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

Period of application and review date

The Practice Note does not include a specific end date nor a timeframe in which the Practice Note will be reviewed. The Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on a person's rights, including their right to participate in the administration of justice as an accused person, the Practice Note may also benefit from the inclusion of an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

5. ELECTRICITY INFRASTRUCTURE INVESTMENT AMENDMENT (SAFEGUARD) REGULATION 2021

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

Penalty notice offences – right to a fair trial

The Regulation amends the *Electricity Infrastructure Investment Regulation 2021* to insert Schedule 2 which prescribes certain offences set out in provisions of the *Electricity Infrastructure Investment Act 2020* as penalty notice offences. Schedule 2 also prescribes the amount payable for a penalty notice issued under the provision, which can range from $22 000 to $55 000 for corporations and $1 100 to $2 750 for individuals.

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person’s right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee acknowledges that individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, it notes that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice, and that the amount payable by penalty notices are less than half of the maximum penalty which the respective offences carry. In the circumstances, the Committee makes no further comment.

6. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (OWNER'S CONSENT AND BASIX CERTIFICATES) REGULATION 2021

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

Real property rights

The Regulation amends the *Environmental Planning and Assessment Regulation 2000* to provide that the consent of the owner of land on which State significant infrastructure is to be carried out is not required where an infrastructure application or modification request relates to development for a mining, mining related works or underground coal gasification purpose. Although an owner's consent is not required, an owner would receive notice of the infrastructure application or modification request in accordance with statutory requirements.

This appears to impede the affected land owner's right to consent to changes to the use of their land. The Committee notes that, given the specified purposes, the amendment may likely impact land owners in rural and regional areas. The Committee refers this issue to the Parliament for its consideration.

7. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (SHORT-TERM RENTAL ACCOMMODATION) AMENDMENT REGULATION (NO 2) 2021

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

Strict liability offence

The Regulation prohibits a person from providing a dwelling for the purposes of short-term rental accommodation unless the dwelling is included on the register maintained by the Planning Secretary, and the registration is in force. Contravention results in a person being strictly liable for a maximum penalty of 20 penalty units ($2200).

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. In this case, the offence upholds the safety of persons attending the dwelling, as the register must include a description of how the dwelling complies with the fire safety standard. In the circumstances, the Committee makes no further comment.

8. FAIR TRADING AMENDMENT (CODE OF CONDUCT FOR SHORT-TERM RENTAL ACCOMMODATION INDUSTRY) REGULATION (NO 2) 2021

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

Significant penalties for strict liability offences

The Code of Conduct for the Short-term Rental Accommodation Industry, declared by the Regulation, imposes a mandatory obligation under clause 2.2.6 on booking platforms to provide prescribed information to the Department of Planning, Industry and Environment in a format and at the times determined by the Department. It appears that the term 'booking platform' may capture corporations and other entities, including small business owners, depending on

who provides the online booking service. The requirement to provide information specified by the Department was previously conditional on a request by the Department.

Further, that section 2.2.6 has been amended to require a booking platform to provide information in the format and at the times determined by the Department. As such, the amendments appear to broaden the circumstances in which a booking platform may contravene section 2.2.6. Conduct contravening this section attracts a significant penalty under sections 54C or 54D of the *Fair Trading Act 1987* (where that contravention is essentially the same act or omission). As noted in Digest No 27/57, the monetary penalties under these sections are substantial.

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. In this case, the additional regulatory requirements carry significant maximum penalties of 1000 penalty units ($110 000) for corporations and 200 penalty units ($22 000) in any other case, which may impact on the business community. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. In these circumstances, the Committee makes no further comment.

9. LOCAL GOVERNMENT (GENERAL) AMENDMENT (ELECTIONS) REGULATION 2021

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

Political franchise and right to democratic participation – voting without discrimination

The Regulation amends the *Local Government (General) Regulation 2021* to include a risk to public health related to COVID-19 as a reason for an election manager to temporarily suspend voting at a polling place on election day. It also extends the allowable period of time for adjourning a suspended election beyond the existing 13 day cap to a later day, provided that it is necessary to comply with a public health order or reduce the risk of infection from COVID-19.

This may mean certain voters are unable to cast their ballots in elections for councillors and mayors for an unknown period of time, and thereby 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, Article 25 also recognises that the right to vote may be subject to restrictions based on objective and reasonable criteria. The Committee notes that these provisions are extraordinary measures in response to the COVID-19 pandemic and are intended to protect public health. It also acknowledges that the Regulation does not prevent or remove an impacted individual's right to cast a relevant ballot. In the circumstances, the Committee makes no further comment.

Right to take part in public affairs and elections – freedom of political communication and to run for public office

The Regulation amends the *Local Government (General) Regulation 2021* to empower election managers to restrict the personal delivery of nomination papers for proposed candidates in councillors and mayor elections for public health and/or COVID-19 related reasons. It also repeals the time limiting provisions which previously repealed the power of election managers to make COVID-19 related directions on 31 December 2021. As a result, election managers will have an ongoing power to make directions that restrict the presence of scrutineers and the display or distribution of physical electoral materials.

In its Digest No 37/57, the Committee commented on the *Local Government (General) Amendment Regulation 2021* which inserted clauses 337A, 356TA and 356TB into the *Local Government (General) Regulation 2005*, which was the predecessor to and remade by the *Local Government (General) Regulation 2021*. Consistent with those comments, the Committee notes that the Regulation 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 guarantees the right of citizens to stand for public office, to vote in elections and to have access to positions in public service.

The Regulation may also limit free political communication about candidates available in electoral materials. Free communication of information and ideas about candidates and electoral matters is an important component of the right to take part in public life and elections. It may also hinder the ability to scrutinise the conduct of polling and the counting of ballots to ensure elections are determined fairly and democratically.

However, Article 25 also recognises that the right to vote may be subject to restrictions based on objective and reasonable criteria. The Committee notes that the provisions seek to manage risks to public health in the conduct of elections, especially those risks arising from the COVID-19 pandemic regarding physical distancing. It also acknowledges that the provisions provide for the alternative presence of scrutineers and the dissemination of electoral materials by electronic means. In the circumstances, the Committee makes no further comment.

10. DUST DISEASES TRIBUNAL OF NSW PRACTICE NOTE, NO. 1 OF 2021

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

Access to justice/procedural fairness

The Practice Note prohibits in-person attendance in hearings before a List Judge, allocated Judge or Registrar in the Dust Diseases Tribunal of NSW of any person who has not been fully vaccinated for COVID-19 at least 14 days prior. It also provides that individuals wishing to attend a hearing in-person, or to conduct the hearing bedside at private homes, must seek leave of the relevant Judge or Registrar, and imposes the responsibility for ensuring the vaccination status of all proposed attendees on the relevant solicitor. In respect to bedside hearings, the tribunal may limit the number of lawyers for a party who may attend the hearing.

By limiting who may attend a tribunal hearing in person, the Practice Note may affect a person's right to access justice. This is of particular concern as the tribunal hears claims from dust disease sufferers or their dependants. Given the degenerative nature of these diseases, plaintiffs may be unduly burdened by virtual attendance, or those who require bedside hearings may be disadvantaged by limitations placed on the attendance of their legal representatives.

However, the Committee acknowledges that the Practice Note is providing for the return of in-person attendance following its suspension due to the COVID-19 pandemic. It also notes that this is a response to the extraordinary and evolving circumstances of the pandemic, and is balancing the rights of individuals to in-person attendance with the need to protect public safety particularly dust disease sufferers who are more vulnerable to serious effects of COVID-19. In the circumstances, the Committee makes no further comment.

Open justice

The Practice Note imposes limitations on the attendance of members of the public and media at tribunal hearings. By prohibiting members of the public attending in-person and limiting in-person attendance of members of the media to those individuals who have sought leave and can show they are fully vaccinated for COVID-19, the Practice Note may impact a person's rights to a fair and public hearing contained in Article 14 of the ICCPR. The right to a fair and public

hearing enshrines principles of open justice which require the administration of justice must take place in courts which the public and the media may access.

However, Article 14 also recognises that the press and public may be excluded for reasons of morals, public order or national security, to protect the interest of the parties' private lives or where publicity would prejudice the interests of justice. In this case, the Practice Note imposes limitations in response to the extraordinary circumstances of the COVID-19 pandemic. The Committee further notes that the Practice Note does not preclude the virtual attendance of members of the public and the media. In the circumstances, the Committee makes no further comment.

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

Period of application and review date

The Practice Note does not include a specific end date. The Committee would prefer that the Practice Note include a fixed date for review, to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on access to justice and open justice, and that it responds to COVID-19, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

11. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) REGULATION (NO 6) 2021

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

Penalty notice offence – right to a fair trial

The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 6) 2021* provides that penalty notices can be issued for an offence of displaying or producing information or evidence purporting to show a person is a fully vaccinated person. The Regulation inserts subclause (c2) to Schedule 4 to prescribe the penalty for a contravention of the provision under the amendment is $5 000 for an individual. Under the amendment the offence will only be made out where the display or production of that information is untrue and inaccurate.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount and in some circumstances may elect to have the matter heard by a court. This may impact a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that penalty notices of $5 000 for an individual are significant monetary amounts to be imposed by way of penalty notice.

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

Part One – Bills

1. Children and Young Persons (Care and Protection) Amendment (*Family is Culture* Review) Bill 2021*

Date introduced	25 November 2021
House introduced	Legislative Council
Member responsible	Mr David Shoebridge MLC
	*Private Members Bill

Purpose and description

1.1 The object of this Bill is to amend the *Children and Young Persons (Care and Protection) Act 1998* and the *Adoption Act 2000* concerning out-of-home care for Aboriginal and/or Torres Strait Islander children and young people and the adoption of Aboriginal and/or Torres Strait Islander children, and for related purposes.

Background

1.2 In his second reading speech to the Bill, Mr David Shoebridge MLC emphasised that the Bill is intended to give effect to many of the recommendations in the 2019 '*Family is Culture – Independent Review of Aboriginal Children and Young People in Out of Home Care (OOHC)*' (the '***Family is Culture* Report**').[1] Mr Shoebridge summarised the driving objective of the Bill as follows:

> I am introducing the bill to enact the urgent legislative changes recommended by the Government's *Family is Culture* report. This bill is based on the fundamental principle that First Nations children belong with kin and on country, and that First Nations families and Elders know what is best for their families and must be empowered decision-makers when it comes to First Nations children. It is grounded in a belief in self-determination. The bill also legislates more robust mechanisms for transparency, oversight and accountability, and mandates more efforts to provide services and support for families to stay together.

1.3 The Family is Culture Report contained 125 recommendations to address the over-representation of and impacts to Aboriginal and/or Torres Strait Islander children and young people in the child protection system of New South Wales. The substance of many recommendations concerned:

[1] Professor Megan Davis, Chairperson, *Family is Culture – Independent Review of Aboriginal Children and Young People in Out of Home Care (OOHC)*, Sydney, 2019.

- The need for greater participation from and consultation with Aboriginal and/or Torres Strait Islander stakeholders through the child protection system, and particularly when making decisions about the care of Aboriginal and/or Torres Strait Islander children and young people;
- Reform of the out-of-home care (**'OOHC'**) system in New South Wales, including better oversight mechanisms and new accreditation schemes;
- Implementing departmental child protection policies which strengthen Aboriginal and/or Torres Strait Islander placement principles, particularly concerning alternatives to removal, prevention and culturally appropriate placements;
- The need for significant amendments to the existing child protection laws which better recognise the Aboriginal Child Placement Principles, reduce the rates of Aboriginal and/or Torres Strait Islander children and young people in OOHC and greater cultural connections and participation of cultural stakeholders;
- A recommendation to prohibit the adoption of Aboriginal children in OOHC; and
- A need for significant reforms to the conduct of Children's Court proceedings concerning care determinations for Aboriginal and/or Torres Strait Islander children and young people.

1.4 Regarding the Bill, Mr Shoebridge noted it amends the child protection laws in New South Wales "in three broad areas", being:

(i) the *Children and Young Persons (Care and Protection) Act 1998* (the '**CYPCPA**') and the *Children and Young Persons (Care and Protection) Regulation 2012* (the '**CYPCPR**');

(ii) the *Adoption Act 2000* (the '**Adoption Act**') and the *Adoption Regulation 2015* (the '**Adoption Regulation**');

(iii) other related Acts, including the *Advocate for Children and Young People Act 2014* (the '**Advocate for CYP Act***'*), the *Children (Protection and Parental Responsibility) Act 1997* (the '**CPPR Act**'), the *Children's Guardian Act 2019* (the '**Children's Guardian Act**') and the *Ombudsman Act 1974* (the '**Ombudsman Act**').

1.5 The Bill makes a number of significant reforms to the *CYPCPA*, which governs the principles underpinning and conduct of care proceedings for children and young people removed from the care of a parent or primary caregiver. These amendments aim to significantly increase, and often require, the participation and consultation of Aboriginal community controlled organisations, wherever Aboriginal children are the subject of care proceedings before the Children's Court.

1.6 Specifically, the Bill amends the principles of the CYPCPA (section 9) to include a presumption that removing an Aboriginal and/or Torres Strait Islander child or young person from their family "causes harm". The Bill also includes this principle

as a rebuttable presumption to apply in care proceedings concerning Aboriginal and/or Torres Strait Islander children or young people. To give effect to that principle, the Bill also inserts sections 13A-13C into the *CYPCPA* which would require the State to take active steps to support Aboriginal and/or Torres Strait Islander families, whose child or young person is the subject of care proceedings, in order to prevent the need to remove the child or young person and place them into OOHC.

1.7 The Bill makes a number of amendments to the CYPCPA which distinguish a more preventative, culturally-focused approach to the long-term placement and care of Aboriginal and/or Torres Strait Islander children and young people. This includes the insertion into section 13 of the Aboriginal and Torres Strait Islander Children and Young Person Placement Principles set out by Professor Davis in the *Family is Culture* Report. The Bill also seeks to prohibit the adoption of Aboriginal and/or Torres Strait Islander children and young people, save for limited cultural adoptions of Torres Strait Islander children and young people.

1.8 In speaking on the significant reforms to the CYPCPA proposed by the Bill, Mr Shoebridge described the harm of removal of Aboriginal and/or Torres Strait Islander children and young people from their families, which included "the serious harm arising from disrupting the child or young person's connection to his or her culture". He also emphasised that the Bill's amendments are intended to implement the right to self-determination, noting that:

> The lack of real self-determination for First Nations people in the child protection system is a key driver of systemic injustice and was cited by stakeholders to the *Family is Culture* report as a core contributor to the Aboriginal child protection crisis in New South Wales. Advocacy by Grandmothers Against Removals led to the 2015 development of the guiding principles for strengthening the participation of the local community in child protection decision-making. Those elements are vital for the exercise of the right to self-determination.

1.9 Mr Shoebridge further stated that these amendments:

> … are consistent with the recommendations in the *Family is Culture* report and will deliver substantial elements of self-determination in the system. … [I]t gives families more support and more time.

1.10 The Bill also proposed reform to the accreditation and oversight of providers of OOHC, including:

- introducing provisions into the CYPCPR which would allow only Aboriginal community controlled organisations be accredited to provide OOHC for Aboriginal and/or Torres Strait Islander children and young people;
- amending section 72 of the *Children's Guardian Act* so that only government sector agencies or non-profit organisations can be accredited as designated agencies providing OOHC; and
- amending the *Advocate for CYP Act* to require the Joint Committee on Children and Young People monitor the functions of the Children's Guardian in accrediting and overseeing agencies providing OOHC.

1.11 In his second reading speech, Mr Shoebridge emphasised that ongoing reforms were needed in order to address the issues raised in the *Family is Culture* Report. He stated that the Bill is "the result of ongoing discussions and assistance from a variety of organisations, First Nations families and individuals" and further that the proposed amendments:

> … are not intended to be the end point of reform in this space. This is the first step on a journey towards self-determination, and much more needs to be done once the reforms are implemented.

Issues considered by the Committee

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

Reversal of the onus of proof – defence to strict liability offence

1.12 Section 105 of the CYPCPA generally prohibits the publication or broadcast of the names of children and young people who are the subject of or involved in care proceedings in the Children's Court until they reach the age of 25 years. Specifically, subsection (5) clarifies that section 105 creates a strict liability offence for contravening that prohibition and subsection (2) sets out that the maximum penalty for this offence is 200 penalty units ($22 000) and/or 2 years imprisonment for individuals, and 2 000 penalty units ($220 000) for a corporation.

1.13 Subsection (5A) proposed by the Bill provides a defence to a prosecution of this offence if it can be proved that the accused acted in good faith and that the publication/broadcast was either to promote the safety, welfare or wellbeing of the child or young person, or otherwise in the public interest.

The Bill amends section 105 of the *Children and Young Persons (Care and Protection) Act 1998* to allow for a defence to the strict liability offence of publishing or broadcasting the name of a child or young person involved in Children's Court proceedings. This defence would require the accused person to prove that they acted in good faith and either promote the safety, welfare or wellbeing of the child/young person, or otherwise in the public interest. 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 have a certain mental element (acting in good faith) and that their conduct was justified.

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.

However, the Committee 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 no defences are otherwise available to accused persons charged with this offence and therefore such a reverse onus of proof allows the accused an avenue to prove their conduct was justified. In the circumstances, the Committee makes no further comment.

Equal treatment of children and young persons

1.14 The Bill's provisions seek to prohibit the adoption of Aboriginal and/or Torres Strait Islander children and young people, save for limited cultural adoptions of Torres Strait Islander children and young people. Specifically, the Bill proposes to insert provisions into the *CYPCPA* to prohibit adoption of Aboriginal and/or Torres Strait Islander children and young people placed into care as an option for permanency placement.

1.15 Likewise, the Bill proposes to insert a similar provision in the *Adoption Act* that explicitly prohibits the court from making an adoption order for Aboriginal and/or Torres Strait Islander children or young people unless it is a cultural adoption of a Torres Strait Islander child or young person. It also makes a number of consequential repeals within these Acts and their Regulations which refer to the adoption of Aboriginal and/or Torres Strait Islander children and young people.

1.16 Speaking on the *Family is Culture* Report's findings on the impacts of adoption for Aboriginal and/or Torres Strait Islander children and young people in care, Mr Shoebridge noted that:

> … [adoption] has caused immense intergenerational trauma for First Nations people over many decades. The bill amends numerous provisions, including in the *Adoption Act* 2000, to ensure that Aboriginal children may not be adopted.

1.17 The Bill also makes numerous amendments to the CYPCPA which distinguishes the conduct of State intervention and care proceedings between Aboriginal and/or Torres Strait Islander and non- Aboriginal and/or Torres Strait Islander children and young people. These amendments include different lengths of time which can be considered a "reasonable period" by the Children's Court, rebuttable presumptions applicable in proceedings concerning Aboriginal and/or Torres Strait Islander children and young people, and additional obligations imposed on the State when intervention involves Aboriginal and/or Torres Strait Islander families.

The Bill amends the *Children and Young Persons (Care and Protection) Act 1998* and the *Adoption Act 2000* to prohibit the adoption of Aboriginal and/or Torres Strait Islander children and young people. It also provides for particular considerations and the distinct conduct of care proceedings involving Aboriginal and/or Torres Strait Islander children and young people. This permits the operation of the Bill's provisions to differentiate the treatment of Aboriginal and/or Torres Strait Islander and non-Aboriginal and/or Torres Strait Islander children and young people within the child protection system in New South Wales.

However, the Committee notes that the provisions seek to address recommendations of the *Family is Culture* Report to limit the particular harm of removal caused to Aboriginal and/or Torres Strait Islander children and young people, enhance their right to self-determination and reduce their overrepresentation in out-of-home care. In these circumstances, the Committee considers this may fit within the exceptions for special measures to meet

particular needs of a specific group under state and federal laws,[2] and does not constitute discrimination on the basis of race.

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

Inconsistency within the legislation

1.18 Section 63(1) of the current CYPCPA provide that the Secretary of the Department must provide to the Children's Court hearing a care application details concerning:

(a) the support and assistance provided for the safety, welfare and well-being of the child or young person, and

(b) the alternatives to a care order that were considered before the application was made and the reasons why those alternatives were rejected.

1.19 The Bill proposes to insert subsections 63(1A) and (1B) into the CYPCPA which would enable the Children's Court to dismiss the care application or discharge the child or young person from the State's care if:

- the Secretary fails to provide the information required under subsection (1); or
- the information provided demonstrates alternatives to a care order were not adequately considered.

1.20 However, under the current CYPCPA, subsection 63(2) provides that the Children's Court must not dismiss the care application or discharge the child or young person from care for the sole reason that "an appropriate alternative action that could have been taken in relation to the child or young person was not considered or taken".

The Bill amends section 63 of the *Children and Young Persons (Care and Protection) Act 1998* to include provisions enabling the Children's Court to dismiss a care application or discharge a child or young person from care if information provided by the Department demonstrates alternative to care order were not adequately considered. However, subsection 63(2) provides that the Children's Court must not so dismiss or discharge a care application by reason only that alternative action could have been taken but was not considered or taken. The laws concerning these powers of the Children's Court to determine care applications may therefore conflict.

The Committee generally comments where provisions may be contrary to other laws or statutory provisions, as this makes the law applicable to individuals hard to ascertain and understand. This is of particular concern where the laws concern the rights and treatment of individuals in the care of the State.

The Committee recognises that the provisions are intended to ensure that alternatives to removal are considered before State intervention and removal of children is carried out. However, care applications concern children who have

[2] *Anti-Discrimination Act 1977* s 21; *Racial Discrimination Act 1975* (Cth) s 8(1).

been removed and placed in the care of the State, who are particularly vulnerable and require more assistance understanding the laws which affect them. The Committee refers these provisions to the Parliament for its consideration as to whether the provisions may be clarified to address any inconsistency.

2. COVID-19 and Other Legislation Amendment (Regulatory Reforms) Bill 2022

Date introduced	15 February 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Member introducing	Ms Felicity Wilson MP
Portfolio	Treasurer Energy

Purpose and description

2.1 The objects of this Bill are to—

(a) implement on a permanent basis particular regulatory measures that were implemented on a temporary basis in response to the COVID-19 pandemic, including measures—

(i) enabling strata owners corporations, strata committees, community land associations, association committees and incorporated associations to meet and vote electronically under the *Associations Incorporation Act 2009*, the *Community Land Management Act 2021* and the *Strata Schemes Management Act 2015*, and

(ii) enabling community land associations and owners corporations to validly execute documents under the *Community Land Management Act 2021* and the *Strata Schemes Management Act 2015* by affixing the corporation's or association's common seal electronically or by using a prescribed alternative to affixing the seal, and

(iii) reducing the waiting period to access long service leave for contract cleaners from 20 weeks to 10 weeks under the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010*, and

(iv) providing greater flexibility for employees and businesses to access long service leave under the *Long Service Leave Act 1955*, and

(v) allowing interviews and questioning to be conducted remotely by audio link or audio visual link under the *Biodiversity Conservation Act 2016*, *Crown Land Management Act 2016*, the *Fisheries Management Act 1994*, the *Mining Act 1992*, the *Protection of the Environment Operations Act 1997* and the *Water Management Act 2000*, and

(vi) allowing mental health examinations or observations of a person detained in a mental health facility under the *Mental Health Act 2007* to be conducted by audio visual link, and

(vii) allowing planning panels and the Independent Planning Commission to hold public hearings and meetings online or in person under the *Environmental Planning and Assessment Act 1979*, and

(viii) enabling retirement village operators to obtain consent of residents in different ways, including electronically, under the *Retirement Villages Act 1999*, and

(b) preserve the rights of eligible tenants accrued during the prescribed period under the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* and allow savings and transitional regulations to be made in relation to any future commercial leasing protections implemented in response to the COVID-19 pandemic, and

(c) extend, until 26 March 2023, the *Constitution Act 1902*, Schedule 8, which was enacted in response to the COVID-19 pandemic and enables the regulations to prescribe the ways and forms in which Bills may presented to, and assented to by, the Governor and Executive Council meetings are to be held and to allow for the further extension of that Schedule by regulation for a period of not more than 6 months, and

(d) amend the *Interpretation Act 1987* to clarify that a reference in an Act or statutory rule to the tabling of a document in a House of Parliament includes a reference to taking any action allowed or required under the Standing Rules or Orders of the House for the tabling documents in the House when the House is not sitting.

Background

2.2 The Bill amends a number of Acts and regulations to permanently implement or otherwise extend the operation of legislative provisions enacted in response to the pandemic.

2.3 Ms Felicity Wilson MP, as the Parliamentary Secretary to the Treasurer and for COVID Recovery, introduced the Bill on behalf of the Treasurer, the Hon. Matt Kean MP. In her second reading speech to the Bill, Ms Wilson remarked on the evolving context of the COVID-19 pandemic since emergency measures were introduced two years ago. In particular, Ms Wilson noted that the measures were "necessary and appropriate" to support businesses, jobs and access to critical goods and services:

> We heard from businesses and communities that many of the temporary measures introduced were practical, sensible and helpful, even outside of pandemic circumstances. … Maintaining this increased flexibility will allow businesses to build upon new business models, adapt to changing customer preferences and recover faster. The New South Wales Government is committed to building on the insights and lessons learned during the pandemic as we move towards a new normal.

2.4 Towards that end, the Bill amends the *Associations Incorporation Act 2009*, the *Community Land Management Act 2021*, the *Environmental Planning and Assessment Act 1979*, the *Mental Health Act 2007*, the *Retirement Villages Act 1999* and the *Strata Schemes Management Act 2015* to permanently incorporate existing time-limited legislative measures implemented in response to the COVID-19 pandemic into these laws. These measures enable the conduct of meetings and public hearings, voting and ballot-taking, transmission of documents, the storage and affixing of corporate seals, mental health examination and conferencing to occur by electronic means or other alternative means which would not require physical contact. It also repeals provisions in some of these statutes which enable the making of COVID-19 regulations.

2.5 The Bill also omits specific automatic repeal provisions set out in the *Biodiversity Conservation Act 2016*, the *Crown Land Management Act 2016*, the *Fisheries Management Act 1994*, the *Mining Act 1992*, the *Protection of the Environment Operations Act 1997* and the *Water Management Act 2000*. The repeal of these provisions would effectively allow the continued exercise through electronic interviews of environmental investigative powers to require answers.

2.6 Speaking to the rationale for permanently implementing these measures initially enacted to respond to the COVID-19 pandemic, Ms Wilson highlighted that "COVID-19 continues to pose public health risks" even as New South Wales transitions towards living with COVID-19 as an endemic virus, and further clarified that:

> The recent Omicron outbreak has made retaining these measures all the more important as we continue to deal with the challenges of living with the virus. However, without legislative amendments the measures will sunset, commencing in March 2022. This bill will permanently extend a number of temporary measures that have proven to be both popular and effective and, after consultation and evaluation, have demonstrated real and ongoing benefits for businesses and communities.

2.7 Ms Wilson further highlighted the economic benefits of these reforms, stating that they are in line with the recommendation in the NSW Productivity Commission's white paper on retaining certain COVID-19 legislative changes and that it is expected to deliver:

> … net economic benefits of $2.4 billion over the next decade through greater flexibility and time savings, that $500 million of these net benefits will come from removing barriers to digital processes in areas such as electronic meetings for strata schemes and regulatory interviews.

2.8 The Bill also amends the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* and the *Long Service Leave Act 1955* to permanently implement provisions introduced as a temporary response to the pandemic, which reduced waiting and notice periods for, and amended the manner in which employees and contract cleaners can utilise their accrued long service leave. During her second reading speech, Ms Wilson noted that these changes to the state's long service leave scheme are expected to deliver $1.9 billion of net benefits "for both employees and employers".

2.9 In addition to permanent implementation, the Bill extends the operation of COVID-19 responsive provisions under Schedule 8 of the *Constitution Act 1902* by one year.

It amends the *Interpretation Act 1987* to clarify that tabling documents in Parliament includes tabling that occurs while Parliament is not sitting.

2.10 Finally, the Bill amends the *Retail Leases Act 1994* to preserve the operation of certain retail leases obtained under temporary provisions enacted in response to the COVID-19 pandemic.

2.11 The Committee notes that the Bill seeks to permanently implement many provisions of the *COVID-19 Recovery Bill 2021* which received assent on 25 March 2021 and was reported on by this Committee in Digest No. 28/57 (28 March 2021). This report draws upon the analysis of the *COVID-19 Recovery Bill 2021* bill report.[3]

Issues considered by the Committee

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

Procedural fairness – mental health examination by AVL

2.12 Chapter 3 of the *Mental Health Act 2007* sets out the legislative regime for the involuntary admission and treatment of persons in and outside of mental health facilities. Under this regime, a person involuntarily detained in a mental health facility may be subject to ongoing detention if medical examinations, conducted in accordance with section 27, determine that person to be a "mentally ill" or "mentally disordered person".

2.13 Where it is not reasonably practicable for the authorised medical officer of that facility or other medical practitioner to personally examine the person, section 27A permits that examination to be conducted by:

(a) a medical practitioner using audio visual link ('**AVL**'); or

(b) an accredited person authorised by the facility's medical superintendent.

2.14 However, certain safeguards are provided under section 274A. Specifically, section 274(3) provides that a medical practitioner must not carrying out an AVL examination unless they are satisfied it can be carried out by AVL with sufficient skill and care so as to form the required opinion about the detainee. Section 27A(4) also requires that a medical practitioner who is not a psychiatrist or an accredited person undertaking this examination must seek the advice of a psychiatrist before making a determination if it is reasonably practicable to do so.

2.15 As noted by Ms Wilson during her second reading speech, accredited persons under the pre-existing regime must undertake the medical examination in person and not via AVL.[4] Section 136 sets out that accredited persons are those persons appointed by the Secretary for the purposes of the Act. There are no legislative eligibility requirements for accredited persons, including no requirement for formal psychiatric or psychological medical training.

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[3] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 28/57*, 28 March 2021.

[4] New South Wales Institute of Psychiatry, Mental Health Act 2007 - Accredited Person, 7 April 2017, accessed 16 February 2022.

2.16 The Bill proposes to extend section 27A of the *Mental Health Act 2007* by explicitly providing that, in circumstances where the medical examination is to be conducted by an accredited person, the examination may be done either in person or via AVL. It also extends the safeguard under subsection (3) to accredited persons carrying out an examination by AVL. This amendment would effectively incorporate the time-limited provisions set out in section 203 of the *Mental Health Act 2007*, which the Bill repeals.

2.17 In speaking to this expanded alternative, Ms Wilson explained that, since enabling accredited persons to conduct such examinations during the COVID-19 pandemic:

> …it has become evident that there are benefits for the person, and the system, in facilitating additional alternatives to assess a person, where such an examination can be carried out with sufficient skill and care so as to form the required opinion about the person.
>
> The benefits of the measure are twofold: Most importantly, it reduces the wait time for an assessment. If the person is at a facility where they risk waiting a long time for their assessment due to staffing, they could be seen more quickly if assessed via audiovisual link. This will mean they are either discharged or admitted for inpatient care more quickly. Second, in rural and regional areas, where practitioners with the relevant experience and qualifications are not necessarily available at all times, transportation to another facility that could be hours away could be avoided. Estimated economic net benefits of this measure range between $2 million and $4 million over 10 years.

The Bill amends the *Mental Health Act 2007* to enable accredited persons under the Act to conduct mental health examination of involuntarily admitted persons by audio visual link, the determination of which may subject the person to ongoing detention. This would, in effect, permanently implement existing temporary provisions enacted in response to the COVID-19 pandemic, which were due to automatically repeal on 31 March 2022.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 12/57, and when they were further extended, in its Digest No. 28/57.[5] It notes that the Committee's previous reporting considered the broader context of the COVID-19 pandemic at the time, and that the current context has changed as New South Wales transitions to post-pandemic life.

Consistent with the Committee's previous comments, the conduct of mental health examinations by AVL may impact the extent to which individuals can fully participate in which concern their involuntary detention. It also may impact the accuracy of the examination process if the use of AVL reduces the ability of examiners to assess a person's demeanour, particularly where the examination is conducted by an accredited person who may not have any formal medical or psychological health training.

However, the Committee notes that the conduct of mental health examinations by AVL and/or by individuals who are not psychiatrists are subject to certain

[5] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 12/57, 22 April 2020; Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 28/57*, 28 March 2021.

safeguards, including requirements to seek psychiatric advice where reasonably practicable and to ascertain that the examination can be sufficiently conducted by AVL to ascertain the required opinion. It further acknowledges that the operation of these provisions is intended to reduce waiting times to obtain such an assessment, particularly in rural and regional areas where relevantly qualified medical practitioners are scarcer, and thereby to minimise the period of time during which individuals are involuntarily detained. In these circumstances, the Committee makes no further comment.

Procedural fairness – compulsory interview by AVL

2.18 Section 12.19 of the *Biodiversity Conservation Act 2016*, section 10.23 of the *Crown Land Management Act 2016*, section 256 of the *Fisheries Management Act 1994*, section 248L of the *Mining Act 1992*, section 203 of the *Protection of the Environment Operations Act 1997* and section 338B of the *Water Management Act 2000* each empower authorised officers under those statutes to require a person to answer questions about certain matters relating to possible contraventions of those Acts, if the officer suspects on reasonable grounds that the person has knowledge of those matters. Under these provisions, the officer may authorise the person to answer the questions using an audio or audio visual link of a kind approved by the officer.

2.19 The Bill seeks to repeal provisions under those laws which would automatically repeal the power of officers to authorise those answers be given by AVL on 31 March 2022. Ms Wilson stated that permanent implementation of these measures:

> …are estimated to deliver net economic benefits of $6.5 million over the next 10 years. Both regulators and interviewees stand to gain from the changes, due to travel time and transport costs saved when interviews are conducted online. Depending on the location of the interview, they may also save on other travel expenses like accommodation and meals. These benefits are particularly significant where the interviewee is based in a regional area.

The Bill repeals certain time limiting provisions in various environmental protection legislation. This would permanently enable authorised officers to require mandatory questioning of individuals occur by video link rather than in person in the course of investigating possible contraventions under those Acts. The Committee previously reported on these provisions when they were first introduced, in its Digest No. 28/57.[6]

Consistent with the Committee's previous comments, the permanent implementation of these provisions may impact the extent to which individuals are able to meaningfully participate in the investigation process of contraventions under the relevant Act. This impact a person's right to procedural fairness, particularly where environmental protection legislation provides that individuals are not excused from answering questions that may tend to

[6] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 12/57*, 22 April 2020; Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 28/57*, 28 March 2021.

incriminate them, contravening the common law privilege against self-incrimination.[7]

The Committee acknowledges that the permanent implementation of these measures is intended to continue delivering economic benefits by reducing administrative costs associated with the investigation of environmental offences. However, it notes that the provisions were introduced as an extraordinary measure in response to the COVID-19 public health emergency at the time, and that context has since changed in New South Wales as the State transitions to post-pandemic life. For these reasons, the Committee refers this matter to Parliament for its consideration.

Civic engagement – meaningful participation in planning hearings

2.20 Clause 3 of Schedule 2 to the *Environmental Planning and Assessment Act 1979* provides that the Independent Planning Commission must conduct a public hearing into environmental and planning matters if requested or required by the Minister. That clause also sets out the process for the conduct and advertisement of such a hearing. Under clause 4, the chairperson of the Commission may also require individuals to give evidence either by attending the public hearing or producing relevant documents at a time and place specified in writing. Failure to comply with this requirement to give evidence without reasonable excuse is an offence that carries a maximum penalty of $11 000.

2.21 The Bill amends clause 3 to empower the Commission to hold a public hearing wholly or partially by audio link, AVL or other electronic means. Where a hearing is to be conducted wholly/partially by electronic means, it further clarifies that the Commission satisfies its requirements to conduct a public hearing if a member of the public can hear or view the hearing at the time.

2.22 During her second reading speech, Ms Wilson stated that this new flexibility for planning bodies would also ensure that these bodies:

> … can continue to carry out their functions safely as we move forward into the next phase of the pandemic. Retaining this measure is estimated to lead to benefits of $2 million over the next 10 years, largely due to attendees saving travel time and transport costs when they attend planning body meetings online. Where meetings are held completely online, there will also be venue hire savings for the government agency.

The Bill amends the *Environmental Planning and Assessment Act 1979* to enable the Independent Planning Commission to electronically conduct public hearings it is required to hold under the Act on environmental and planning matters. This may impact the ability of individuals to meaningfully participate and be heard on matters of public concern which might affect their local environment by reason of the person's technological proficiency. Therefore, these provisions may limit a person's civic engagement in local public decision-making. This is of particular

[7] *Biodiversity Conservation Act 2016* s 12.23(2); *Crown Land Management Act 2016* s 10.35(2); *Fisheries Management Act 1994* s 258B(2); *Mining Act 1992* s 248T(2); *Protection of the Environment Operations Act 1997* s 212(2); *Water Management Act 2000* s 340B(2).

concern in circumstances where a person may be liable for an offence of failing to attend an electronic hearing.

The Committee acknowledges that the provisions are intended to provide flexibility to planning bodies and provide administrative costs-saving in the conduct of such public hearings. It further notes that the provisions allow for individuals to make written submissions on matters relevant to the public hearing. However, the provisions do not require a public hearing conducted electronically be widely accessible, so long as a member of the public can view or hear it at the time, which may disadvantage individuals without internet access or technological proficiency. Given the potential penalties for failing to attend if required and possible technological disadvantages, the Committee refers this matter to Parliament for its consideration.

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

Henry VIII clauses

2.23 The Bill proposes to insert sub-section (1A) into section 88 of the *Retail Leases Act 1994*. Sub-section (1A) provides that the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* continues to apply to matters relating to an "impacted lease" within the meaning of that regulation, even after the repeal of the regulation.

2.24 Additionally, the Bill also proposes to insert section 89 into the *Retail Leases Act 1994*. Proposed section 89 sets out a power to make savings or transitional provisions in regulations which are consequent on the enactment or repeal of provisions in the Act that are in response to the COVID-19 pandemic. Specifically, section 89(3) explicitly provides that such COVID-19 savings or transitional provisions in the regulations have effect despite anything contrary in the statute.

2.25 Ms Wilson clarified that the provisions are intended to preserve:

> … the protections for eligible tenants acquired during the prescribed period of the Retail and Other Commercial Leases (COVID-19) Regulation 2022 beyond its repeal. The commercial leases regulation is a temporary measure that has provided protections to eligible tenants who have been financially impacted during COVID-19. This amendment will ensure that landlords cannot take action against eligible tenants for circumstances arising during the prescribed period unless they comply with their obligations under the commercial leases regulation, including their obligation to renegotiate rent and attend mediation.

The Bill inserts section 89 into the *Retail Leases Act 1994* to provide that savings or transitional provisions in the regulations consequent on the making or repeal of COVID-19 legislative provisions will have effect despite anything contrary in the Act. The Committee notes that these provisions allow for regulations to alter the operation of provisions contained in their parent Act by overriding contrary statutory provisions.

The Bill also inserts sub-section 88(1A) to extend the operation of the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* beyond its repeal. In its Digest No. 28/57, the Committee commented on the *COVID-19 Recovery Bill 2021* which introduced provisions similarly extending the application of the *Retail and*

Other Commercial Leases (COVID-19 Regulation (No 3) 2020 **beyond its repeal.[8] Consistent with those comments, the Committee notes that these provisions also allows for regulations to alter the effect of provisions contained in the parent Act.**

The Committee notes that these provisions amount to Henry VIII clauses, 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 the provisions are intended to preserve the protections enacted in the extraordinary circumstances created by the COVID-19 pandemic. It notes that the provisions provide consistency to retail tenants in respect to lease matters arising during the COVID-19 pandemic. In the circumstances, the Committee makes no further comment.

Commencement by proclamation

2.26 Clause 2(3) of the Bill provides that certain provisions amending the *Community Land Management Act 2021*, the *Long Service Leave Act 1955*, the *Mental Health Act 2007* and the *Strata Schemes Management Act 2015* 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's legislative regimes in respect to the management of community land and strata schemes, accessing long service leave and mental health examinations for possible detainees. In the circumstances, the Committee makes no further comment.

[8] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 28/57*, 28 March 2021.

3. Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022

Date introduced	15 February 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service and Digital Government

Purpose and description

3.1 The object of this Bill is to amend the Electronic Conveyancing National Law (ECNL) set out in the Appendix to the Electronic Conveyancing (Adoption of National Law) Act 2012. The ECNL provides the basis for a national scheme for the electronic lodgment and processing of conveyancing transactions.

3.2 The proposed amendments to the ECNL include amendments to—

(a) require Electronic Lodgment Network Operators (ELNOs) to ensure an Electronic Lodgment Network (ELN) operated by the ELNO is interoperable, meaning it may be used—

(i) by a subscriber to complete conveyancing transactions involving a subscriber to an ELN operated by another ELNO without requiring the subscriber to be authorised to use both ELNs, and

(ii) to prepare documents in electronic form using data from different ELNs, and

(b) enable the Registrar to waive the requirement specified in paragraph (a) (the ***interoperability requirement***) in certain circumstances, and

(c) enable ELNOs and financial institutions to rely on digital signatures created for a registry instrument or other document in certain circumstances, and

(d) provide that certain matters, including matters relating to the interoperability requirement, may be included in requirements determined by the Registrar relating to the operation of ELNOs and the provision and operation of ELNs (***operating requirements***), and

(e) allow the Registrar to conduct an investigation to determine compliance with the interoperability requirement.

Background

3.3 The Bill amends the Electronic Conveyancing National Law ('ECNL') which is contained in the appendix of the *Electronic Conveyancing (Adoption of National Law) Act 2012*.

3.4 The ECNL provides the basis for the national scheme for the electronic lodgment and processing of conveyancing transactions. The Bill amends the ECNL to provide for a secure national interoperability regime. Under the current ECNL, all parties to a conveyancing transaction must use the same Electronic Lodgment Network Operator (ELNO) to complete the transaction. The Bill will require all ELNOs to ensure their system can interoperate with all other ELNO systems, allowing each parties to a conveyancing transaction to use their preferred ELNO.

3.5 In his second reading speech, the Hon. Victor Dominello MP, Minister for Customer Service and Digital Government, stated that the current system 'restricts the user's choice and stifles competition.' The Minister went on to say that:

> … requiring ELNOs to interoperate will bring certainty to the market and will invite new player to the sector... allow[ing] customers to choose and ELNO that best suits their needs with confidence that the electronic conveyancing systems will be able to work together seamlessly.

3.6 Electronic conveyancing (eConveyancing) under a national framework began in 2012, and now operates in every state and territory, except Tasmania and the Northern Territory, who are expected to join the national scheme in coming years.

3.7 eConveyancing was first facilitated through Property Exchange Australia (PEXA), an ELNO that was established in 2013 as a government-owned entity, which has now been fully privatised. However, PEXA continues to be the largest ELNO in Australia. The Bill seeks to provide a framework that better facilitates new entrants to the market.

3.8 In his Second Reading Speech, the Minister discussed the importance of system interoperability to support increased competition in the eConveyancing market, noting that:

> Ministers responsible for e-conveyancing, Treasurers from each jurisdiction, the ACCC [Australian Competition and Consumer Commission], the Independent Pricing and Regulatory Tribunal of New South Wales [IPART] and the NSW Productivity Commission agree that competition is unlikely to be sustained in the ELNO market without interoperability.

3.9 Under the Bill, ELNOs will be required to ensure their systems interoperate with other ELNOs. In practice, this means that their back-end systems must allow for the exchange of the eConveyancing data with other systems. The Minister in his second reading speech noted that 'the benefits of interoperability are clear but the complexity involved in achieving it cannot be underestimated' and that the reform actioned by the Bill is being led by the industry with the support of government.

3.10 A number of national level consultations have taken place in order to ensure that reform to the industry will ensure continued growth, innovation and competition in the eConveyancing market.

Issues considered by the Committee

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

Power of registrar to contravene privacy or confidentiality laws

3.11 The Bill inserts section 43 of the Appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012* (known as the Electronic Conveyancing National Law (ECNL)). Under this section, the Registrar (the NSW Registrar General) may disclose information about the following matters to the Australian Registrars National Electronic Conveyancing Council (ARNECC), another registrar or a person or body who or which has functions under, or responsibility for the administration or oversight of, this Law or the land titles legislation:

(a) an ELNO's compliance with the operating requirements or the interoperability requirement,

(b) a subscriber's compliance with the participation rules,

(c) a compliance examination conducted under Part 3, Division 5,

(d) any other matter relating to the performance of the Registrar's functions under this Law.

3.12 Subsection 42(2) provides that the Registrar may disclose such information despite any law of this jurisdiction relating to privacy or confidentiality.

The Bill inserts Part 4 to the Appendix contained in the Act, which sets out the Electronic Conveyancing National Law (ECNL). Within that Part, proposed section 43 provides that the NSW Registrar General may disclose information about certain matters to the Australian Registrars National Electronic Conveyancing Council (ARNECC). This includes matters regarding Electronic Lodgment Network Operators (ELNOs), subscriber compliance with participation rules, compliance examinations, and any other matters relating to the Registrar's functions.

Subsection 43(2) also provides that the Registrar may carry out this function despite any law of this jurisdiction relating to privacy or confidentiality. This may create a wide power to contravene privacy and confidentiality legislation in NSW, which may impact individuals that have personal information contained in the ELNO system.

The Committee usually comments on Bills that exclude the operation of privacy and confidentiality legislation, as this legislation provides an important safeguard to protect the private information of persons and businesses. However, the Committee acknowledges that the Bill only provides for information to be disclosed to the ARNCC, which is a regulatory body, and that information can only be disclosed in certain circumstances focussed on the lawful

operation of eConveyancing in NSW. Given the circumstances, the Committee makes no further comment.

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

Subdelegation of the Registrar's powers and functions

3.13 Section 16 of the Bill inserts a new section 37(2) to the ECNL, allowing the Registrar to issue delegates a power of subdelegation.

3.14 Under the current section 37, the Registrar may delegate to any other person:

(a) powers conferred by section 21 to monitor the activities in an Electronic Lodgment Network (ELN); and

(b) any function under Division 5 of Part 3, which allows the Registrar to undertake investigations, known as compliance examinations, in relation to an ELNO.

3.15 Section 16 of the Bill therefore would allow these functions to be further subdelegated with the approval of the Registrar.

Section 16 of the Bill inserts a new section 37(2) to the ECNL, allowing the Registrar to authorise a delegate to subdelegate powers in relation to:

a) Monitoring the activities in an Electronic Lodgment Network (ELN); and

b) Undertaking investigations (known as 'compliance examinations') in relation to an ELNO.

The Committee notes that Schedule 1, section 29 of the ECNL provides that exercise of the power of delegation or subdelegation does not have to be made by a Regulation or statutory instrument, and therefore would not be subject to parliamentary scrutiny. It is noted that the subdelegated powers under the Bill includes the powers of the Registrar to investigate ELNOs.

The Committee usually comments when wide or significant powers can be delegated. However it is also acknowledged that the Bill does not allow the Registrar to delegate all functions and that subdelegation may promote the efficient delivery of government services and conveyancing transactions in NSW. This may further provide an appropriate level of oversight of the eConveyancing industry during a time of significant transition. Given the circumstances, the Committee makes no further comment.

4. Environment Legislation Amendment Bill 2021

Date introduced	24 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Member introducing	Ms Felicity Wilson MP
Portfolio	Energy

Purpose and description

4.1 The objects of this Bill are to—

(a) amend the Contaminated Land Management Act 1997 for the following purposes—

(i) to enable the Environment Protection Authority (the **EPA**) to give clean-up notices and prevention notices as soon as the EPA is notified of contamination of land,

(ii) to enable the EPA to require financial assurances under ongoing maintenance orders, restrictions and public positive covenants,

(iii) to require the EPA to consider the financial capacity of a person before requiring a financial assurance from the person,

(iv) to ensure consistency between the maximum penalties for offences under the *Contaminated Land Management Act 1997* and the maximum penalties for similar offences under the *Protection of the Environment Operations Act 1997*,

(v) to ensure consistency between the court orders available in relation to offences under the *Contaminated Land Management Act 1997* and the court orders available in relation to offences under the *Protection of the Environment Operations Act 1997*,

(vi) to ensure consistency between the evidentiary presumptions under analysts' certificates under the *Contaminated Land Management Act 1997* and corresponding presumptions under other environment protection legislation,

(vii) to enable the EPA to recover monetary benefits from any of the following persons who benefit from the commission of an offence by a corporation—

(A) a person who is, or was, at the time of the commission of the offence, a director of the corporation,

(B) a related body corporate,

(C) a person who is, or was, at the time of the commission of the offence, a director of related bodies corporate,

(viii) to make it an offence for certain persons involved in the management of a corporation or related body corporate and related bodies corporate to receive, acquire or accrue a monetary benefit as a result of the commission by the corporation of an offence,

(ix) to update references to members of the EPA Board consequent on changes to the structure of the EPA Board,

(x) to update references to repealed provisions of the *Environmental Planning and Assessment Act 1979*,

(b) amend the Land and Environment Court Act 1979 to give the Land and Environment Court jurisdiction to hear and dispose of proceedings to recover monetary benefits from any of the following persons who benefit from the commission of an offence by a corporation under environment protection legislation—

(i) a person who is, or was, at the time of the commission of the offence, a director of the corporation,

(ii) related bodies corporate,

(iii) a person who is, or was, at the time of the commission of the offence, a director of related body corporate,

(c) amend the *Pesticides Act 1999* for the following purposes—

(i) to enable the EPA to make a pesticide control order without the Minister's approval,

(ii) to enable the EPA to recover monetary benefits from any of the following persons who benefit from the commission of an offence by a corporation—

(A) a person who is, or was, at the time of the commission of the offence, a director of the corporation,

(B) related bodies corporate,

(C) a person who is, or was, at the time of the commission of the offence, a director of related bodies corporate,

(iii) to make it an offence for certain persons involved in the management of a corporation or related body corporate and related bodies

corporate to receive, acquire or accrue a monetary benefit as a result of the commission by the corporation of an offence,

(iv) to ensure consistency in the court orders available in relation to offences under the *Pesticides Act 1999* and the court orders available in relation to offences under the *Protection of the Environment Operations Act 1997*,

(v) to ensure consistency between the evidentiary presumptions under analysts' certificates under the *Pesticides Act 1999* and the corresponding presumptions under other environment protection legislation,

(vi) to update references to members of the EPA Board consequent on changes to the structure of the EPA Board,

(d) amend the *Protection of the Environment Administration Act 1991* to—

(i) update provisions relating to the structure and administration of the EPA Board to clarify the functions of the Chairperson of the EPA Board, the Chief Executive Officer, and other members of the EPA Board,

(ii) clarify the nature of the directions the Minister may give the EPA,

(iii) extend protections against personal liability to include the Minister and Chief Executive Officer of the EPA in carrying out functions under the ***environment protection legislation*** and other legislation,

(iv) prescribe the legislation that constitutes environment protection legislation,

(e) amend the Protection of the Environment Operations Act 1997 for the following purposes—

(i) to enable the EPA to consider the conduct of the following persons in determining whether a corporation is a fit and proper person when making licensing decisions—

(A) current and former directors of the corporation,

(B) related bodies corporate,

(C) current and former directors of the related bodies corporate,

(ii) to extend the offence of failing to comply with a condition of a licence to a failure to comply with a condition of the suspension, revocation or surrender of a licence by a person to whom the condition has been varied to apply,

(iii) to enable appropriate regulatory authorities to issue clean-up notices and prevention notices to any of the following if a corporation does not comply with an environment protection notice—

(A) current and former directors of the corporation,

(B) related bodies corporate,

(iv) to enable appropriate regulatory authorities to issue clean-up notices to persons reasonably suspected of having contributed to a pollution incident,

(v) to enable the Minister to issue prohibition notices to a occupiers of a class of premises or to a class of persons,

(vi) to extend a public authority's ability to recover the costs of clean-up action taken by the authority in relation to a pollution incident to include persons the authority reasonably suspects contributed to the pollution incident, in addition to occupiers and persons the authority reasonably suspects caused the pollution incident,

(vii) to extend the offence of transporting or depositing waste to include, in addition to the person transporting or depositing the waste and the owner of the waste, the owner of the vehicle in which the waste is transported,

(viii) to provide for the new offences of—

(A) giving false or misleading information to the EPA, and

(B) knowingly giving false or misleading information to the EPA,

(ix) to prescribe the following offences as repeat waste offences, which make an offender liable to an additional penalty of an amount up to the maximum penalty for the relevant waste offence or imprisonment for up to 2 years, or both, if the offender commits a subsequent waste offence within 5 years of being convicted of an earlier waste offence—

(A) wilfully or negligently disposing of waste in a manner that harms or is likely to harm the environment,

(B) supplying information about waste to another person in the course of dealing with the waste, being information that is false or misleading in a material respect,

(x) to enable the EPA to recover monetary benefits from any of the following persons who benefit from the commission of an offence by a corporation—

(A) a person who is, or was, at the time of the commission of the offence, a director of the corporation,

(B) related bodies corporate,

(C) a person who is, or was, at the time of the commission of the offence, a director of related bodies corporate,

(xi) to make it an offence for certain persons involved in the management of a corporation or related body corporate and related bodies corporate to receive, acquire or accrue a monetary benefit as a result of the commission by the corporation of an offence,

(xii) to prescribe the offence of giving false or misleading information to the EPA as an executive liability offence,

(xiii) to provide for the new offence of delaying, obstructing, assaulting, threatening or intimidating an authorised officer in the exercise of the officer's powers, in addition to the existing offence of wilfully delaying or obstructing an authorised officer,

(xiv) to extend the existing offence for wilfully delaying or obstructing an authorised officer in the exercise of the officer's powers to include assaulting, threatening or intimidating the authorised officer,

(xv) to provide a power to prescribe, by regulation, additional legislation to which the investigation provisions under the *Protection of the Environment Operations Act 1997*, Chapter 7 extends,

(xvi) to clarify the time within which summary proceedings for the offence of giving false or misleading information to the EPA may be commenced,

(xvii) to provide that restraining orders may be made in relation to a person against whom proceedings have been commenced that may result in the person being required to pay amounts representing monetary benefits acquired by or accrued to the person as a result of the commission of an offence,

(xviii) to ensure consistency between the evidentiary presumptions under analysts' certificates under the *Protection of the Environment Operations Act 1997* and corresponding presumptions under other environment protection legislation,

(xix) to require the EPA to consider the financial capacity of a person before requiring a financial assurance from the person,

(xx) to enable the EPA to impose restrictions on the use of, or public positive covenants, on land for the purpose of enforcing licence conditions or conditions of licence suspension, revocation or surrender,

(xxi) to increase penalties for particular offences to reflect contemporary community expectations,

(xxii) to clarify that when a licence is transferred, it is subject to the conditions to which the licence is subject at the time of the transfer,

(xxiii) to enable a person other than the holder, or former holder, of a licence, to apply to vary the conditions of the suspension, revocation or surrender of the licence,

(xxiv) to update references to members of the EPA Board consequent on changes to the structure of the EPA Board,

(xxv) to update references to entities consequent on changes in administrative arrangements,

(xxvi) to update references to repealed provisions of the *Environmental Planning and Assessment Act 1979*,

(xxvii) to update the formatting of provisions, and make other amendments of a consequential or ancillary nature,

(f) amend the *Radiation Control Act 1990* for the following purposes—

(i) to enable the EPA to recover monetary benefits from any of the following persons who benefit from the commission of an offence by a corporation—

(A) a person who is, or was, at the time of the commission of the offence, a director of the corporation,

(B) related bodies corporate,

(C) a person who is, or was, at the time of the commission of the offence, a director of related bodies corporate,

(ii) to make it an offence for certain persons involved in the management of a corporation or related body corporate and related bodies corporate to receive, acquire or accrue a monetary benefit as a result of the commission by the corporation of an offence,

(iii) to ensure consistency between the court orders available in relation to offences under the *Radiation Control Act 1990* with the court orders available in relation to offences under the *Protection of the Environment Operations Act 1997*,

(iv) to require the EPA to consider the financial capacity of a person before requiring a financial assurance from the person,

(v) to update references to the EPA and members of the EPA Board consequent on changes to the structure of the EPA Board,

(g) amend the Waste Avoidance and Resource Recovery Act 2001 for the following purposes—

(i) to replace the reference to "commencement of this Part" in section 44 to refer to 1 December 2017, being the commencement of the section, to remove ambiguity given the different dates for commencement of different sections in the Part,

(ii) to update the formatting of provisions.

Background

4.2 Ms Felicity Wilson MP, as the then Parliamentary Secretary for the Environment, introduced the bill on behalf of the Minister, the Hon. Matt Kean MP. In her second reading speech, Ms Wilson spoke of the impetus behind the Bill:

> Environmental legislation needs to be continually improved to ensure that those who commit crimes pay for them and that innocent landholders, communities and the environment are protected from the impacts of those crimes. …
>
> It is time that our environment protection laws are updated to address evolving criminal behaviours and new and emerging environmental issues and to ensure that they continue to set robust penalties and enforcement powers that are effective at preventing, enforcing, managing and remediating environmental crimes. As a consequence of changing criminal behaviours, there are businesses and individuals knowingly breaking the law to profit from their crimes. In the past three years alone these changing criminal behaviours have resulted in the Government or innocent landholders being left with substantial clean-up costs… Criminals have illegally disposed of over 132,000 tonnes of contaminated waste, sterilising land from productive use and removing over $20 million in waste levy revenue.

4.3 Relevantly, the Bill amends the following Acts and regulations which deal with matters of environmental protection, waste management and pollution controls:

- the *Contaminated Land Management Act 1997* (**'CLM Act'**),
- the *Land and Environment Court Act 1979*,
- the *Pesticides Act 1999* (**'Pesticides Act'**),
- the *Protection of the Environment Administration Act 1997*,
- the *Protection of the Environment Operations Act 1997* (**'POEO Act'**),
- the *Protection of the Environment Operations (General) Regulation 2021*,
- the *Radiation Control Act 1990* (**'RC Act'**),
- the *Radiation Control Regulation 2013*, and
- the *Waste Avoidance and Resource Recovery Act 2001*.

4.4 A large substance of these amendments deal with matters of environmental offences established under the broader New South Wales environmental legislative framework. In particular, the amendments focus on extending liability for the commission of environmental offences by corporations to executives and related corporate entities which monetarily benefit from those crimes. It also extends the

enforcement powers of the Environmental Protection Authority ('**EPA**') to enable the authority to hold accountable such executives and individuals who contribute to environmental pollution and waste dumping, and faster remediate such environmental damage without forcing the public to bear the costs of these actions.

4.5 The Bill also establishes the office of the Chief Executive Officer (**'CEO'**) for the EPA, formalising the separation between the officeholder of Chairperson and CEO which had administratively occurred.

4.6 In her concluding remarks on the Bill, Ms Wilson highlighted that the Bill was responding to existing deficiencies raised by the community. She also emphasised the need for the continual remodelling and updating of environmental protection laws in consult with those impacted by them, stating that:

> Significant involvement in consultations with government agencies has occurred, including with those agencies that already hold environment protection licences or those who own land that could be impacted by these proposals. They were involved in the drafting of the bill. Consultation with the regulated community and businesses has to continue over time because the bill already responds to existing deficiencies in legislation. Relevant provisions have been modelled on, or informed by, similar provisions in other jurisdictions.

Issues considered by committee

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

Proportionality – introduction of cumulative penalties and significant increases in monetary penalties

4.7 The Bill significantly increases the maximum monetary penalties for numerous existing offences set out in the CLM Act and the POEO Act. These offences concern non-compliance or other forms of interference with the conduct of the relevant regulatory authority's functions.

4.8 These proposed amendments to the maximum monetary penalties carried for the relevant offences can range in the magnitude of twice to over fifteen times the current maximum penalties. It also proposes to introduce additional monetary penalties for a number of offences, being cumulative additional fines for each day of the continuing offence in the order of $120 000 per day for corporations and $60 000 for individuals.

4.9 Though the amendments would significantly increase the maximum penalties, they maintain the existing distinction between the severity of these offences when committed by corporations and by individuals. The majority of the proposed amendments increase the penalties for corporate criminal offences by a greater magnitude than the penalties for individuals who commit the same offence.

4.10 While the Bill proposes to increase the severity of the maximum penalties carried by these offences, it does not change the substantive provisions establishing the offence under the relevant Act. Therefore, the elements constituting the offences are not altered by the Bill.

4.11 In speaking to the bill on behalf of the Minister, Ms Wilson noted that these amendments are intended to "deter criminal activity and reflect the true cost of those crimes" and "increases maximum penalties to that of comparable offences". She further noted that the increased penalties for contaminated land offences under the CLM Act:

> … make them consistent with other environmental Acts. Some of these penalties have not increased since the Act commenced in 1997 and these changes ensure they reflect the true cost of the crime and provide a deterrent to noncompliance into the future.

The Bill significantly increases existing maximum monetary penalties by 2-15 times magnitude for various offences established under the *Contaminated Land Management Act 1997* and the *Protection of the Environment Operations Act 1997* relating to the functions of regulatory authorities. It also introduces cumulative monetary penalties for each additional day a relevant offence continues. As the substantive elements of these offences are not changed, these provisions significantly increase the potential severity of penalties for the same offending conduct, including some strict liability offences. This may impact the criminal justice principle of proportionality if individuals receive much harsher penalties than those given for similar past offences.

However, the Committee acknowledges that the significant increases are intended to deter criminal activities and better reflect the public harm caused by environmental protection and contamination offences. It also recognises that the increased penalties are intended to align with comparable offences in other environmental protection laws. In the circumstances, the Committee makes no further comment.

Proportionality – introduction of custodial penalties

4.12 Section 3 of the CLM Act sets out that the general object of the Act is to establish a process for investigating and remediating (where appropriate) land that the EPA considers to be contaminated enough to require ongoing maintenance regulation.

4.13 Similarly, the POEO Act establishes a comprehensive statutory framework empowering the functions of appropriate environmental regulatory authorities (including the EPA) in order to achieve its objects, as set out in section 3 of the Act. Towards that end, Chapter 4 of the POEO Act deals with the issuance of environment protection notices which require deemed responsible parties to clean up, take actions to prevent or not carry on any prohibited activity which might cause environmental damage. The EPA is also equipped with wide powers of investigation under Chapter 7 of the POEO Act. Additionally, under Chapter 6 of the POEO Act, environmental audits may be required which provide a documented evaluation of an activity's compliance with environmental protection laws, codes of practice and policies; and/or determine whether that activity can be conducted in a manner which better protects the environment and minimises waste.

4.14 In addition to increasing the maximum monetary penalties for a number of offences, the Bill also proposes to introduce custodial penalties for the following offences:

- CLM Act section 103(1) — giving information in compliance or purported compliance with the CLM Act, knowing that or being reckless as to whether the information is false or misleading in a material particular;
- POEO Act section 113 — making a statement that they know is false or misleading in a material particular in a report required to be lodged with a regulatory authority under Chapter 4 of the POEO Act; and
- POEO Act section 177(1) — providing information to an environmental auditor in connection with a mandatory environmental audit, knowing the information is false or misleading in a material respect;
- POEO Act section 177(2) — failing to provide information to an environmental auditor, as a licence holder, which they know to be materially relevant to a mandatory environmental audit being carried out in relation to that licence;
- POEO Act section 177(3) — including information, as an environmental auditor, in an audit report prepared for a mandatory environmental audit, knowing that information is false or misleading in a material respect;
- POEO Act section 177(4) — failing to provide information, as an environmental auditor, in an audit report prepared for a mandatory environmental audit, knowing that information is materially relevant to the audit; and
- POEO Act section 211(2) —furnishing information or doing anything in purported compliance with the exercise of the EPA's investigation powers that they know is false or misleading in a material respect.

4.15 Specifically, the Bill seeks to amend the maximum penalty carried for these offences, when committed by individuals, to include an 18 month imprisonment term. It also makes clear that a court may give that custodial sentence as an alternative or, notably, in addition to the maximum monetary penalty carried the offence.

4.16 In speaking to the purpose of these amendments, Ms Wilson noted that the proposed custodial penalties are intended to address a gap in the existing laws by introducing "imprisonment as an option for knowledge offences where this is not already provided for".

The Bill amends the *Contaminated Land Management Act 1997* and the *Protection of the Environment Operations Act 1997* to introduce a maximum 18 month custodial penalty for certain offences established under those Acts relating to individuals knowingly withholding material relevant information or knowingly/recklessly providing materially false or misleading information. These custodial penalties may be sentenced by a court as an alternative to or in combination with the maximum monetary penalty carried by the relevant offence. This may impact the criminal justice principle of proportionality if certain individuals are sentenced to terms of imprisonment for similar offending conduct which previously attracted only fines.

However, the Committee notes that the custodial penalties are introduced only for those offences where knowledge is a requisite element. It also acknowledges that the amendments are intended to deter individuals from knowingly

misleading regulatory authorities in the exercise of their functions relating to the prevention or remedy environmental damage. The Committee further recognises the harm caused to the wider community by environmental crimes, and that these knowledge offences intentionally obstruct the regulatory framework established to prevent and minimise these harms. In the circumstances, the Committee makes no further comment.

Offence regime – strict liability offences, new offences and reverse onus of proof

4.17 The Bill establishes new criminal offences under the POEO Act. First, it seeks to insert section 167A into the POEO Act. Subsection (1) creates a general offence for giving information to the EPA that is false or misleading in a material respect.

4.18 This general offence carries a maximum penalty of $500 000 for corporations or $250 000 for individuals. Defendants can rely on the defence provided under subsection (2) to this offence, if they can establish that they "took all reasonable steps to ensure the information was not false or misleading in a material respect".

4.19 Subsection 167A(3) proposed by the Bill also establishes an offence for giving information to the EPA that they know is false or misleading in a material respect. The maximum penalties carried by this knowledge offence is twice that for the strict liability offence under subsection (1)—that is, $1 million for corporations and $500 000 for individuals. However, for individuals convicted of the knowledge offence, there is also a potential 18 months custodial sentence that may be applied in addition to, or as an alternative for, that monetary penalty.

4.20 The Bill explicitly provides under subsection 167A(4) that a person charged with the knowledge offence under subsection (3) may be found guilty of the lesser strict liability offence under subsection (1) if the court is satisfied on the evidence that they are guilty of the strict liability offence but not guilty of the knowledge offence. This provision also clarifies that the accused is accordingly liable for the punishment under subsection (1).

4.21 Ms Wilson explained in her second reading speech on behalf of the Minister that the context for introducing these offences is as follows:

> The EPA has seen increasing instances where individuals or corporations provide false or misleading information to avoid enforcement action or delay an investigation. Currently, it is only an offence for a person to provide false or misleading information if it has been required by legal notice. However, there is no offence if such information is provided voluntarily. The bill addresses this issue and amends the POEO Act to introduce a new general offence of voluntarily providing false or misleading information.

4.22 Finally, the Bill amends section 211 of the POEO Act by inserting new subsections (3)-(3B) which expand upon the existing offence under that provision. Currently, the POEO Act section 211(3) provides that it is an offence to wilfully delay or obstruct an authorised officer in the exercise of the Chapter 7 investigation powers. The proposed amendments would create a tiered offence regime under section 211, whereby:

- under proposed subsection (3), a person who "delays, obstructs, assaults, threatens or intimidates" an authorised officer in the exercise of the Chapter 7 investigation powers is guilty of an offence which carries the same maximum penalty as currently established; and

- under proposed subsection (3A), a person who wilfully carries out the above conduct is guilty of an offence which carries maximum monetary penalties double that of the strict liability offence above.

4.23 Section 211(3B) proposed by the Bill also enables the court to find a person charged with the latter wilful offence under subsection (3A) to convict and accordingly sentence a person for the lesser strict liability offence under subsection (3) if the evidence satisfies the court that the person is only guilty of the strict liability offence.

4.24 In speaking to these amendments, Ms Wilson emphasised that they are intended to:

> … ensure authorised officers can safely undertake their duties without fear of harm or intimidation. This responds to an increasing number of incidents where EPA officers have been physically threatened on the job, including one officer who was shot at with a nail gun and another who was unwillingly detained at a premise. While the police can take action under its legislation, there are limitations that often prevent those threatening EPA officers from being held to account. This bill proposes to address this by creating a strict liability offence for threats made against authorised officers who are simply doing their job.

The Bill amends the *Protection of the Environment Operations Act 1997* to introduce new tiered regimes consisting of strict liability and knowledge offences for specified conduct. These regimes distinguish between the strict liability and knowledge offences, providing more severe monetary penalties for the knowledge offences as well as possible custodial sentence for the offence of knowingly providing false or misleading information. 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.

Specifically, the Bill establishes under section 211(3)-(3B) a tiered offence regime for individuals who delay, obstruct, assault, threaten or intimidate an authorised officer in the exercise of the EPA's investigation powers. The Bill likewise establishes such an offence regime under section 167A for the conduct of giving materially false or misleading information to the EPA.

Section 167A(2) provides a defence to the strict liability offence of giving materially false or misleading information to the EPA if the accused can establish they took all reasonable steps to ensure the information was not materially false or misleading. While this operates as a defence to the strict liability offence, it may amount to a reverse onus by requiring an 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. As the offence regime allows for the court to make an alternative verdict of the strict liability offence, an accused person charged with knowingly providing materially false or misleading information may still need to establish the defence in criminal proceedings.

However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. It further notes that these offences are intended to deter interference with the EPA's safe exercise of its regulatory functions which aim to protect the wider community from environmental damage. It also acknowledges that the maximum penalties carried by the strict liability offences are not custodial and only monetary. In these circumstances, the Committee makes no further comment.

Executive liability offences – broad extension of criminal liability, widely defined term, standard of proof and additional punishment

4.25 The Bill proposes to amend the CLM Act, the Pesticides Act, the POEO Act and the RC Act to extend liability for an offence under those acts committed by a corporation to its current and former directors, related body corporates and other persons involved in its management. Specifically, the Bill proposes to insert identical provisions in each respective Act which establishes an offence of receiving, acquiring or accruing a monetary benefit as the result of a corporation committing a "proved offence" under the Act or its regulation for the following people or entities:

- Anyone who was or is a director of the corporation at the time the underlying offence was committed;
- A related body corporate, within the meaning of the *Corporations Act 2001* (Cth);
- Anyone who was or is a director of the related body corporate at the time the underlying offence was committed; or
- Anyone who was involved in the management of the corporation's/related body corporate's affairs at the time the underlying offence was committed.

4.26 These provisions establishing the executive liability offence for receiving monetary benefits provide that the offence carries the same maximum penalty as the proved underlying offence. Additionally, the establishing provisions also set out that an offence is "proved" if:

(a) the court convicts the offender of the offence, or

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

(b) the court makes an order under the Crimes (Sentencing Procedure) Act 1999, section 10 against the offender in relation to the offence.

4.27 Section 10(1) of the *Crimes (Sentencing Procedure) Act 1999* is set out as follows:

(1) Without proceeding to conviction, a court that finds a person guilty of an offence may make any one of the following orders—

(a) an order directing that the relevant charge be dismissed,

(b) an order discharging the person under a conditional release order (in which case the court proceeds to make a conditional release order under section 9),

(c) an order discharging the person on condition that the person enter into an agreement to participate in an intervention program and to comply with any intervention plan arising out of the program.

4.28 Furthermore, the Bill seeks to include a definition of "monetary benefits" in each respective Act. The definition for "monetary benefits" is widely defined to mean "monetary, financial or economic benefits".

4.29 As emphasised in the EPA's Better Regulation Statement on the Bill, increasingly complex business practices have enabled certain entities and individuals to benefit from environmental crimes without repercussion. These amendments are intended to "hold related body corporates, directors and other persons concerned in the management of a company to account for environmental offences which they have benefitted from".[10]

4.30 In her second reading speech on behalf of the Minister, Ms Wilson also highlighted that:

> Some industry sectors, businesses and individuals have established practices that enable them to deflect accountability and avoid enforcement clean-up and compliance costs by setting up complex corporate structures. Parent companies deliberately set up smaller companies for each licensed entity and they will often deregister them to avoid enforcement action for illegal activities at those sites. These arrangements impact on the Environment Protection Authority's [EPA] ability to hold offenders in the parent company to account and to recover any monetary benefit that they have obtained for their crimes. These evolving corporate structures are becoming more prevalent.

The Bill amends the *Contaminated Land Management Act 1997*, the *Pesticides Act 1999*, the *Protection of Environment Operations Act 1997* and the *Radiation Control Act 1990* to extend criminal liability for the commission of offences under those Acts by corporations to its executives, related corporate entities and managers. Specifically, the Bill establishes an offence for any such persons or entities to receive monetary benefits from the commission by a corporation of an offence under the respective Act. It also inserts a wide definition for

[10] NSW Environmental Protection Authority, *Better Regulation Statement for the Environment Legislation Amendment Bill 2021*, November 2021, pp. 2-3.

"monetary benefits" to include any benefits of a monetary, financial or economic nature.

This amounts to a strict liability offence as a director, manager or related body corporate of a corporation may be prosecuted for unknowingly or unintentionally receiving a wide spectrum of benefits from an offence committed by the corporation. 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 the underlying offence from which executive liability arises may include offences for which the corporation was not convicted but received an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999*. This may mean an accused person may be convicted of an offence arising from corporate criminal conduct not otherwise punished by law.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. It also acknowledges that the offences are intended to address an existing regulatory loophole which has enabled corporations to commit environmental crimes without being held appropriately accountable for the harm caused by these offences to the wider community.

However, it notes that individuals who are convicted of the executive liability offence may be sentenced to the maximum penalty carried by the underlying offence which was committed by the corporation. For individuals, a number of offences under these environmental protection laws have maximum penalties that include custodial sentences. It further notes that this may result in individuals being punished more severely than the corporations guilty of committing the underlying offence. For these reasons, the Committee refers the matter to Parliament for its consideration.

Freedom of contract and real property rights

4.31 The Bill proposes to insert section 307A into the POEO Act. Subsection (2) would enable the EPA to impose (and later vary or release) a restriction on the use of land or a public positive covenant on the land under section 88E of the *Conveyancing Act 1919*. These restrictions or covenants may be imposed for the purpose of enforcing a condition of an applicable licence or the suspension, revocation or surrender of the licence.

4.32 Section 307A(4) of the Bill clarifies that, notwithstanding section 88E of the *Conveyancing Act 1919*, the memorandum or deed by which such a restriction/covenant is imposed may be executed by the EPA alone and further does not require the execution or agreement of any other person. It also provides that the restriction/covenant may be enforced against any owner, lessee or mortgagee of the land. Subsection (5) further states that the EPA may exercise this power regardless of whether it is the "appropriate regulatory authority".

The Bill amends the *Protection of Environment Operations Act 1997* to enable the EPA to impose a restriction on the use of land or a public positive covenant for the purposes of enforcing the conditions of a current, suspended, revoked or

surrendered licence. It further enables the EPA to execute the memorandum or deed imposing that restriction/covenant unilaterally against the land's owners, lessees or mortgagees without requiring the execution or agreement of any other person. This may impact the common law principle of freedom of contract, which is that persons are free to choose the contractual terms to which they are subject.

As such restrictions or covenants limiting the free use of land may be unilaterally imposed against land owners, lessees or mortgagees, the provisions may also impact on the property rights of individuals.

However, the Committee acknowledges that statutory limitations on freedom of contract are not uncommon e.g. where this is deemed necessary to address the unequal bargaining power of parties. It further notes that the Bill only limits the free use of land for the limited purpose of enforcing the conditions of a licence intended to minimise environmental damage, which poses a broader public harm. In the circumstances, the Committee makes no further comment.

Retrospectivity

4.33 Relevantly, the Bill substitutes section 46 of the CLM Act to enable the EPA to issue clean-up or prevention notices for significantly contaminated land or land it has been given notice of under the Act, and amends section 95B to enable the court to make orders requiring an offender and/or their employees carry out specified activities. It also proposes to insert sections 95AA-95AF into the CLM Act which would enable the court to make a broad range of orders relating to restoration, prevention and the recovery of costs, expenses and compensation in the course of criminal prosecutions.

4.34 The Bill also proposes to amend sections 93, 97 and 99 of the Pesticides Act. These amendments would enable the court to make a similar broad range of orders in the course of criminal proceedings for offences under the Pesticides Act.

4.35 Additionally, the Bill amends the POEO Act to extend the power of the EPA to issue clean-up, prevention and prohibition notices under Chapter 4 of the Act. It also amends section 230 of the POEO Act to extend the ability of the court to make restraining orders for new civil liabilities created by the Bill.

4.36 The Bill seeks to amend the CLM Act, the Pesticides Act and the POEO Act in respect to the various matters set out above. It also proposes to insert Part 8 into Schedule 2 of the CLM Act, Part 4 into Schedule 2 of the Pesticides Act and Part 18 into Schedule 5 of the POEO Act. These provisions would respectively enable retrospective application of the powers set out above by the EPA and the court.

The Bill provides for the retrospective application of particular amendments to the *Contaminated Land Management Act 1997*, the *Pesticides Act 1999* and the *Protection of Environment Operations Act 1997* in relation to extended enforcement powers of the EPA and broadened orders which the court may make in civil and criminal proceedings under these environmental protection laws. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

Whilst the Committee acknowledges that the retrospective application of these provisions is intended to ensure accountability for environmental damage, a person may be subject to extended enforcement powers or may have broader orders imposed on them by the court which were not available at the commencement of the proceedings. The Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

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

Henry VIII clauses – prescription of "environmental protection legislation"

4.37 The Bill proposes to amend sections 186 and 213(2) of the POEO Act, which extend the investigation powers of the EPA under Chapter 7 and the application of provisions concerning the conduct of criminal and other proceedings under Chapter 8 respectively. These amendments seek to include "any other environment protection legislation prescribed by the regulations for the purposes of this paragraph" amongst the legislation to which application of those Chapters extend.

4.38 Chapter 7 of the POEO Act enables the EPA with wide and coercive powers of investigation. These investigative powers include:

- powers to require information and records be provided;
- powers of entry and search of premises by foot, vehicle, vessel or aircraft;
- powers to seize samples, records or other things an authorised officer reasonably believes is connected with an offence;
- powers to question and identify persons, including power to require answers or identifying information and to record such answers, which excludes the privilege of self-incrimination;
- powers to inspect and test vehicles, vessels and other articles, and to stop vehicles, vessels and other articles for that purpose; and
- powers to seize motor vehicles or vessels the EPA reasonably believes has been used for the purpose of committing a repeat waste offence.

The Bill amends the *Protection of the Environment Operations Act 1997* to extend the wide and coercive investigation powers under Chapter 7 to "any other environment protection legislation prescribed by the regulations" for that purpose. This may allow regulations to extend the application of statutory official powers in subordinate legislation. 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.

The Committee acknowledges that the prescription of such legislation in the regulation builds flexibility into the overall environmental regulatory framework. It also notes that this may further the Bill's objects to update the existing framework so that it better responds to evolving environmental crimes. However, the regulations may subject individuals to coercive official powers that could trespass upon their personal rights and liberties without parliamentary

scrutiny. For these reasons, the Committee refers this delegation of legislative power to the Parliament for its consideration.

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

Removal of Ministerial oversight – pesticide control order

4.39 Part 4 of the Pesticides Act provides for the making of "pesticide control orders" by the EPA. The operation of pesticide control orders is set out in section 39(1), as follows:

> (1) A pesticide control order may—
>
> (a) prohibit or control the use of a pesticide or class of pesticide that is specified in the order, or
>
> (b) authorise the use or possession of a restricted pesticide or class of restricted pesticide that is specified in the order,
>
> (c) subject to such conditions as may be specified in the order.

4.40 The matters which the pesticide control order may refer to is not limited, however subsection (2) sets out a non-exhaustive, enumerated list of conditions, factors and other limitations which may be set out in the order. Subsection (3) provides that the order can impose additional requirements to those appearing on the pesticide's approved label, and the order prevails in case of any inconsistency with the label. Section 39(4) also establishes a strict liability offence for contravening a pesticide control order. Section 112(1)(m) also extends executive liability for this offence.

4.41 The Bill amends section 38(1) of the Pesticides Act to enable the EPA to make a pesticide control order with no further requirement for Ministerial approval. By reason of the implied power under section 43 of the *Interpretation Act 1987* (the '**Interpretation Act**'), this would also allow the EPA to amend or repeal existing pesticide control orders without Ministerial approval.

4.42 Under subsections (3) and (4), these pesticide control orders are still required to be published in the Government Gazette in order to have effect. Pesticide control orders are not statutory rules under Part 6 of the Interpretation Act and, thus, are not required to be tabled in Parliament nor are subject to disallowance.

4.43 Ms Wilson clarified the purpose of this amendment, stating in her second reading speech to the Bill that the amendment is intended to:

> The bill will also modernise the process for making of pesticide control orders. The EPA will now be able to make these orders to facilitate a more independent and expedited process to ensure the safe use and disposal of restricted pesticides in New South Wales.

The Bill amends section 38 of the *Pesticides Act 1999* to remove the requirement for Ministerial approval in exercising the EPA's power to make pesticide control orders. The Committee notes that, unlike statutory rules and regulations, there is no requirement to table pesticide control orders in Parliament and therefore

is not subject to disallowance. It further notes that publication of these orders in the Gazette does not mean they are subject to disallowance.

By removing the requirement for Ministerial approval to make, amend or repeal pesticide control orders, this may mean that such orders are not subject to parliamentary scrutiny. This is of particular concern where the contravention of such orders amounts to a strict liability offence.

However, the Committee acknowledges that the intention of the amendment is to expedite the process of making pesticide control orders, and to strengthen the independency of such orders. It also recognises that these orders are intended to protect public safety and minimise the harm from the use of restricted pesticides. In the circumstances, the Committee makes no further comment.

5. Motor Sports Bill 2021

Date introduced	23 November 2021
House introduced	Legislative Council
Minister introducing	The Hon. Natalie Ward MLC
Minister responsible	The Hon. Stuart Ayres MP
Portfolio	Tourism and Sport

Purpose and description

5.1 The object of this Bill is to regulate motor sports to –

(a) support the expansion of motor sports in New South Wales, and

(b) facilitate the conduct of major motor sport events in New South Wales.

Background

5.2 The Bill seeks to replace current event-specific legislation that governs individual motor racing events in NSW, providing instead a state-wide framework for motor racing events. The Hon. Natalie Ward MLC described these events in her second reading speech as 'large, rare events that are held on public roads and in general business and residential areas.' The Bill does not govern motor racing that takes place on established racetracks, which are private facilities.

5.3 The Bill repeals and replaces the *Mount Panorama Act 1989,* the *Motor Racing (Sydney and Newcastle) Act 2008* and the *Motor Sports (World Rally Championship) Act 2009*, which operate to provide for motor racing events in specified geographical areas of NSW. The Bill will allow the Sports Minister to make an order under section 5 and 6 to establish an event anywhere in NSW. Promoters will then be invited to organise and host that event. Under section 6, the Minister may provide ongoing authorisation for a motor race for a period of up to 5 years.

5.4 The Bill also provides for the appointment of a government coordinating agency for each event. This agency will work to coordinate the government agencies to support the event, including police, Transport, Health and local government. The Bill acknowledges that works must take place to provide infrastructure for an event, and provides the government coordinating agency with the power to authorise any required works, which must be presented to stakeholders such as councils and affected persons for their comment before being authorised.

5.5 The government coordinating agency will also ensure the promoter selected to hold the event fulfils its obligations, which are outlined in section 7 of the Bill. These obligations include providing plans to be authorised by the government coordinating agency regarding public safety, environmental and heritage protection and noise management. Under section 10, a promoter that fails to meet its obligations may be fined a maximum penalty of $1 million. Further, under sections

10-11 the government coordinating agency and the Premier may take action to cancel a motor race if the promoter fails to fulfil certain obligations.

5.6 The Bill does allow for major motor sport events to override the noise provisions of the *Protection of the Environment Operations Act* as well as some additional environmental legislation, however unlike the *Motor Sports (World Rally Championship) Act 2009*, the Bill does not provide the capacity to override laws relating the National parks and State conservation areas which are set out in the *National Parks and Wildlife Act 1974*.

5.7 The Bill also provides security-related provisions and establishes new offences. In Part 3 the Bill establishes a category of enforcement officers with a range of powers including removing disruptive individuals from the race area (Part 4, Division 2) and refusing entry to and searching persons who are attempting to enter the event area (Division 4). The Bill also creates traffic offences that facilitate the closure of roads for major motor sport events, and allows for searches without a warrant of businesses involved with the administration of a motor race event.

Issues considered by committee

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

Freedom of movement

5.8 Under section 37, individuals must comply with a sign or direction regarding entry to a race area, and failing to comply carries a maximum penalty of 20 units ($2,200). There are a number of grounds for which can individual can be directed to leave the race area, including:

(a) failing to comply with a direction from an authorised officer given for the purpose of securing good order and enjoyment of the area (section 40);

(b) failing to produce a ticket (section 41); and

(c) if an authorised officer believes on reasonable grounds that (section 43(1)):

(i) the person has, or is about to, contravene the Act;

(ii) the person has committed an offence; or

(iii) the person is causing significant disruption or is endangering themselves or another person.

5.9 Under section 43, failing to comply with a direction to leave carries a maximum penalty of 50 units ($5,500) and reasonable force may be used to removed persons who fail to comply.

The Bill provides that individuals may be excluded from the race area during the event, and that failing to comply with certain directions may also lead to their exclusion from the area and a maximum penalty of 50 units ($5,500). Major motor race events covered by the Bill happen largely on public roads, which may border individual's homes, businesses and property. The Bill provides that

individual's may be excluded for a time from accessing their land using the adjacent public infrastructure that they commonly rely on for access.

The Committee acknowledges that the provisions may assist in preventing anti-social and disruptive behaviour in a race area, which could be dangerous for race participants and spectators. However, by excluding individuals from certain areas, the provisions may impact on their freedom of movement to access public land or potentially private property. The Committee refers the matter to Parliament for its consideration.

Self-incrimination

5.10 Under section 62(1) a person is not excused from the requirement to provide the information on the ground that it may incriminate themselves. The compelled information is not admissible in evidence against the person in criminal proceedings unless:

(a) the person was not warned at the time that they could object to giving the information on the grounds that it was self-incriminatory; or

(b) if they were warned and objected to providing the information.

5.11 However, this safeguard does not apply to any civil proceedings, or offences under the *Crimes Act 1990*, Part 5A or certain offences under the Bill.

The Bill states at section 62(1) that a person is not excused from the requirement to provide the information on the ground that it may incriminate themselves. The Bill thereby impacts on the right to silence and the right against self-incrimination. The Committee notes that the Bill includes some safeguards including that the compelled information is not admissible in evidence against the person in criminal proceedings unless the person was not warned at the time that they could object to giving the information on the grounds that it was self-incriminatory, or if they were warned and objected to providing the information. However, this safeguard does not apply to any civil proceedings, or offences under the *Crimes Act 1990,* Part 5A or certain offences under the Bill.

The Committee acknowledges the right to silence and right against self-incrimination are well-established legal principles and the Committee refers the matter to Parliament to consider whether the Bill unduly trespasses on these rights.

Risk of arbitrary search - property

5.12 The Bill provides that an authorised officer can enter a private premises or conduct a search without a warrant under two circumstances.

5.13 Firstly, section 54 provides that the government coordinating agency for a motor race may authorise a person as an advertising enforcement officer for the motor race for the purposes of this section. Under this section, authorised advertising enforcement officers may enter land and obliterate or remove any advertising material that is in breach of the obligations in section 53 to not have advertising displayed in certain areas during a race event. The officers must not enter residential premises and must cause as little damage as possible, however these restrictions

leave significant scope for imposition on private property and no warrant is required to undertake this search.

5.14 Secondly, section 59 provides that authorised officers may enter premises if they are:

(a) investigating, monitoring and enforcing compliance with the requirements imposed by or under this Act;

(b) obtaining information for purposes connected with the administration of this Act; or

(c) enforcing, administering or executing this Act.

5.15 Authorised officers may enter premises at a reasonable time during the day or when business is being carried out on a premises and undertake activities including searching, inspecting documents and seizing evidence. Under section 59(3)(g) an officer can not only conduct a physical search, but also require a person to answer questions or otherwise give information. Officers may not enter a residential premises without a search warrant or permission of the occupier.

5.16 Failing to comply with a requirement to give information, giving false information or obstructing or interfering with an officer undertaking their duties in accordance with section 54 or 59 carries a maximum penalty of 50 units ($5,500).

The Bill allows authorised officers to enter a private premises or conduct a search without a warrant for the purposes of obliterating or removing any advertising material that does not comply with the Act, and for investigating, monitoring and enforcing compliance with the requirements imposed by or under this Act. This thereby expands the search powers of authorised officers connected to a motor race event. As authorised officers are not required to obtain a warrant from an independent judicial officer to conduct such searches this may increase the risk of arbitrary search, impacting on the right to privacy and personal physical integrity.

The Bill allows authorised officers who enter the premises of a business to search the property and question persons present in order to monitor the administration of the Bill. This may potentially include persons who are not in breach of the Bill and not involved in criminal activities. The Bill may thereby compound the possible increased risk of arbitrary searches taking place.

The Committee acknowledges that large public gatherings, which often occur at motor races, may give rise to security challenges that require sufficient search powers. However, the search powers contained in the bill provide that the authorised officer may do what is reasonably necessary for the authorised purpose during a search which may allow a wide power of search specifically for motor race events. The Committee refers the expanded search powers to Parliament to consider whether they are reasonable and proportionate in the circumstances.

Risk of arbitrary search - persons

5.17 Under section 38, an authorised officer may ask a person who wishes to enter an event area for a motor race to undergo a search. This search may include:

(a) using a hand-held or walk-through electronic scanning device;

(b) a physical search of the person's possessions;

(c) removal of an outer layer of clothing for it to be searches;

(d) if the person enters in a vehicle or vessel, a manual search of that vehicle or vessel.

5.18 Failure to comply with the search is ground for the person to be directed to leave the area, and a failure to comply with that direction may result in a maximum penalty of 50 units ($5,500) under section 43(3).

The Bill allows authorised officers to search persons who wish to attend the area where a motor race is being held. This includes a physical search of their outer clothing, possessions and vehicle. This search can be undertaken without the authorised officer needing to suspect that the person is likely to be in breach of the Bill or pose any threat to themselves or others.

The Committee notes that while this power allows all patrons to be searched, the physical aspects of the allowable search is limited to their outer clothing and possessions, and recognises that the power to search must be balanced against the protection of public safety. In these circumstances, the Committee makes no further comment.

Liability of directors and managers for offences by corporation

5.19 Under section 66, a person who is a director or concerned in the management of the corporation, and knowingly authorised or permitted the contravention of the Bill by that corporation, is also taken to have contravened a provision of the Bill. Under subsection 66(2), the person may be proceeded against and convicted even if the corporation has not been proceeded against or convicted, and both persons and the associated corporation can be liable for the commission of a breach.

The Bill contains executive liability offences under section 66. This means that a director or certain managers of a corporation may be prosecuted for an offence committed by the corporation. The Committee notes that the prosecution is required to prove actual knowledge of the offence on the part of the accused.

The Committee notes that this is a high threshold for the mental element in a regulatory context. The Committee also notes that the while maximum penalty for an individual is a significant value of 250 penalty units ($27,500), it does not include a term of imprisonment. For these reasons, the Committee makes no further comment.

Freedom of contract and right to carry on a lawful business

5.20 The government coordinating agency may deem areas to be 'advertising controlled sites' by an order published in the Gazette. Under section 53, no advertising material

of an area of more than 1 square metre can appear on any builds or structure in the advertising controlled site area for the event period unless exempted from this section by the regulations. A failure to comply with this prohibition can lead to a maximum penalty of 250 units for an individual ($27,500), or 500 ($55,000) units for a corporation.

5.21 Section 54 allows authorised advertisement enforcement officers to enter land an obliterate or remove any advertising material that is in breach of section 53. The officers must not enter residential premises and must cause as little damage as possible, however this may still leave scope for imposition on the business property.

The Bill provides under section 53 that restrictions can be placed on the display of advertising materials within the advertising controlled site during the event by way of a notification published in the Gazette. A failure to comply with these restrictions may lead to a significant fine with a maximum penalty of 250 penalty units ($27,500) for individuals, or 5000 penalty units ($55,000) for corporations. Further, section 54 allows authorised advertising enforcement officers to enter commercial premises to obliterate or remove advertising material. There is no requirement for the officers to have a warrant to do so.

These sections may undermine the capacity for a businesses within the advertising controlled site to fulfil contractual obligations in regards to the display of advertising. These obligations may arise prior to the Minister providing authorisation for a motor race to take place in the area, and therefore operates in a manner that could be considered retrospective. The Committee generally comments on retrospectivity as it runs counter to the rule of law principle that people are entitled to know the law to which they are subject at any given time. This is particularly the case where a Bill seeks to retrospectively remove rights or impose obligations.

The Committee notes that the period where advertising may have to be removed during a race is likely to be short, and that the intent of the Bill is to ensure that motor races can effectively seek sponsorship agreements which commonly require other advertising to be removed. Considering these policy reasons and the small period of time in which businesses are likely to be effected, the Committee makes no further comment.

Quiet use and enjoyment of land

5.22 Division 2 provides a scheme for promoters to apply to the government coordinating agency to have works approved. These works include:

(a) service roads, ramps and parking;

(b) traffic control facilities including signage;

(c) telecommunications, broadcast and lighting facilities;

(d) advertising signage; and

(e) structures to support crew, media and spectators including seating, stands, shading, catering, direction signage and toilet facilities.

5.23 Prior to providing approval for the works, the government coordinating agency must undertake consultation with the local council for the affected lands and other affected persons, and be satisfied that the promoter will ensure that harm to the environment or heritage and disruption to the lawful activities of other persons will be minimised or prevented. The government coordinating agency may also impose conditions on the works, such as in regards to environmental protection, noise requirements and insurance.

5.24 After the event, section 20 provides that the promoter must within a reasonable time remove all rubbish and reinstate the land as far as is practicable to the condition it was in before the event, including repairing all damage. If the promoter fails to do so, the government coordinating agency may provide for reinstatement and recover the cost of those works in court proceedings.

The Bill proposes some measures to reduce the impact on businesses and residents that live and work adjacent to a motor race event area, including the requirement to undertake consultation with the affected parties (section 13). However, neither the Minister or the government coordinating agency is bound by the Bill to minimise the impact on affected persons, though the Minister and government coordinating agency does have the power to imposed conditions on the promoter that could functionally serve to protect these interests.

Section 17(2) provides that works approval must only authorise carrying out works to the extent that they are reasonably necessary for the purpose of the motor race, associated events and ancillary activities. Section 20 further provides that the promoter must remove rubbish and undertake reinstatement works within a reasonable time after the event period, and if they fail to do so the government coordinating agency may do so instead and recover the costs from the promoter in a court of competent jurisdiction. The Committee notes that these sections seek to limit the scope of works and ensure remediation to limit the impact on the environment and affected persons.

The Committee also notes that motor race events typically run for a small number of days and therefore the disruption is inherently minimised. However, the Committee notes that infrastructure including lights, telecommunications infrastructure and large structures may create a significant disturbance. However, the Committee notes that the Bill limits the avenues by which affected persons may have their concerns addressed. Section 49 specifically provides that the promoter cannot be held liable in nuisance for any works undertaken lawfully in accordance with the Bill. Taking action in nuisance allows for an individual to enforce their established common law right to the quiet use and enjoyment of their land. Removing this common law right without providing a statutory equivalent has an impact on property rights. The Committee refers these matters to Parliament for its consideration of whether the possible impacts on property rights are reasonable in the circumstances.

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 – conditions for event promoters

5.25 Under section 7(1), the Minister can make a race authorisation subject to any conditions the Minister considers it is reasonable to propose, including conditions relating to;

(a) public safety,

(b) public health,

(c) environmental protection,

(d) noise management,

(e) insurance,

(f) reporting requirements,

(g) transport arrangements,

(h) reinstatement of land,

(i) consultation requirements,

(j) financial arrangements, including the provision of security,

(k) event and works planning requirements,

(l) engineering certification requirements,

(m) the exercise of powers under Division 4.

5.26 The Minister may change the conditions at any time, by providing written notice to the promoter that they intend to do so.

5.27 This power is broad, as the list of conditions provided in section 7(1) is non-exhaustive, allowing the Minister to impose a broad range of conditions on a promoter at any time, including after a promoter may have made significant financial outlays in relation to the event that may be unable to be recouped or unnecessary due to the conditions being amended. The government coordinating agency for the event must review the conditions to decide whether they remain appropriate (section 7(4)) however this does not limit the Minister's power to impose conditions they consider are reasonable.

5.28 There are three ways a promoter may be penalised if they fail to comply with the conditions of the authorisation with the order of the Minister.

5.29 Under section 10(2), the government coordinating agency may cancel the race authorisation if satisfied that:

(a) the promoter for the race has failed to comply with a condition;

(b) the failure is of a serious or continuing nature; and

(c) it is appropriate to cancel the race authorisation in the circumstances.

5.30 Further, under section 11 the Premier may also cancel or vary an order of the Minister concerning the motor race, or the motor race authorisation in two circumstances. The Premier must either:

(a) have advice of the Commissioner of any of the Police, Fire and Rescue NSW, the NSW Fire Service, the State Emergency Service or the Chief Health Officer that the Premier should take that action; or

(b) be reasonably satisfied that taking the action is necessary because of a significant risk of harm to persons rom a natural or other threat.

5.31 Lastly, a promoter who fails to comply with a condition is guilty of an offence which carries a maximum penalty for an individual of $250,000, or for a corporation $1,000,000.

5.32 Section 10(6) does provide that it is a defence if the promoter can establish that the offence was due to causes over which it had no control, and that it took reasonable precautions and exercised due diligence to prevent the offence from occurring.

The Bill provides that the government coordinating agency, the Minister and the Premier have powers in regards to authorising major motor race events, providing orders in relation to major motor events and take action to ensure the administration of the Bill.

These powers, including the powers of a government coordinating agency to authorise a works order, have effect despite any environmental planning instrument or development consent (section 46). Additionally, section 7(1) grants the Minister with the power to impose conditions on the promoter of a major the motor race event. A promoter who fails to comply with a condition is guilty of an offence which carries a maximum penalty for an individual of $250 000, or for a corporation $1 000 000. Considering the broad scope of possible conditions and the significant impact they may have on the promoter and other affected parties (including persons whose property is adjacent to the proposed race area), the Bill may grant the government coordinating agency a wide and ill-defined administrative power.

The Committee acknowledges that the provisions are designed to allow the Minister and the government coordinating agency to work flexibly to adapt the major motor race event to its particular location. While not an exhaustive list, section 7(1) provides the Minister with guidance on what conditions may be imposed and section 16 requires the government coordinating agency to consult with local councils and affected persons prior to authorising work orders. Further, the provisions are time limited, only applying for a maximum of 12 months after motor races typically occur over a short period of days which limits the impact on the broader community. However, given the scope of such powers, the Committee refers the matter to Parliament for further consideration of whether they are proportionate in the circumstances.

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

Matters deferred to the regulations

5.33 The Bill provides for regulations to be created for the effective operation of the Bill. This includes permitting such regulations to create offences.

5.34 The Bill at section 69(5) provides that regulations may be made about the following matters:

(a) the fees and charges that may be imposed for the purposes of this Act,

(b) the fees that may be charged or collected by the promoter for a motor race for admission to the event area for the motor race,

(c) the provision of services by the promoter for a motor race,

(d) access to an event area for a motor race,

(e) the conduct of persons in an event area for a motor race and the exclusion or expulsion of persons from the area,

(f) (restricting or prohibiting the bringing of liquor into, or consumption of liquor within, an event area for a motor race during the event period,

(g) specifying site or event specific requirements for particular motor races,

(h) the driving or parking of motor vehicles within an event area for a motor race, including enabling the government coordinating agency for the motor race, with the concurrence of the roads authority, to remove prescribed restrictions on parking that apply in the area,

(i) conferring on the government coordinating agency for a motor race a function that may be exercised by a local council in relation to a public place.

5.35 Subsection 69(1) also provides the Governor with the powers to make regulations and associated offences about:

(a) matters this Act expressly requires to be prescribed by regulations,

(b) matters this Act expressly permits to be prescribed by regulations,

(c) other matters, but only to the extent that making regulations about the matters is necessary or convenient to give effect to this Act.

5.36 Subsection 10(4) provides that regulations may also create an offence of failing to comply with a condition of a particular kind. Subsection 69(3) further provides that the maximum penalty that may be imposed for an offence created by the regulations is 100 penalty units ($11,000).

The Bill enables regulations to be made under the proposed Act for the effective operation of the Bill, including regulations that can create offences and impose penalties. These regulations may be about a broad range of matters including the

fees and charges that can be imposed, access to an event area or motor race, the provision of services for a motor race and the conduct of persons and their exclusion from an area or a motor race.

The Committee acknowledges that it may be useful to delegate matters of an administrative nature to the regulations, especially when dealing with specific or technical information, that is not required to be in the primary legislation. However, the Committee notes that section 10(4) and 69(3) provide that regulations may contain offences with a maximum penalty of 110 units ($11 000). Section 10(4) provides that the regulations may create both a condition of a particular kind that a promoter must comply with, and an offence for failing to comply with that condition. Section 56 also provides that the regulations may require a promoter to pay a fee for the exercise of any function of the Minister or a government sector agency under Part 2 in relation to a motor race.

The Committee prefers that provisions containing offences and penalties be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The Committee also notes that the regulation may impose new and onerous conditions on a promoter after they have accepted the position, including the payment of unspecified fees. The Committee considers that these regulations may have an impact on the rights or obligations of promoters that could not be anticipated when committing to promote a major motor race event, however the Committee does note the defences available to promoters under section 10(6). The Committee refers this matter to Parliament for its consideration.

Part Two – Regulations

1. Ageing and Disability Commissioner Amendment Regulation 2021

Date tabled	LA: 9 November 2021 LC: 9 November 2021
Disallowance date	LA: 22 February 2022 LC: 22 March 2022
Ministers responsible	The Hon. Mark Coure MP The Hon. Natasha Maclaren-Jones MLC
Portfolios	Seniors Disability Services

Purpose and description

1.1 The objects of the Ageing and Disability Commissioner Amendment Regulation 2021 (the **Regulation**) are to—

(a) prescribe additional persons and bodies that may exchange information with the Ageing and Disability Commissioner about adults with disability and older adults, and

(b) enable registered nurses and speech pathologists to accompany an authorised officer when executing a search warrant as part of an investigation of an allegation of abuse, neglect or exploitation of an adult with disability or an older adult.

1.2 Section 3 of the Ageing and Disability Commissioner Act 2019 (the **Act**) provides that:

(a) 'disability' has the same meaning as in the *Disability Inclusion Act 2014*. That Act states that disability, in relation to a person, includes a long-term physical, psychiatric, intellectual or sensory impairment that, in interaction with various barriers, may hinder the person's full and effective participation in the community on an equal basis with others.

(b) 'older adult' means a person who is aged:

(i) 50 years or over, in the case of an Aboriginal or Torres Strait Islander person, or

(ii) 65 years or over, in any other case.

1.3 The Committee commented on the impact of the information sharing and exchange framework under the *Ageing and Disability Commissioner Regulation 2019* on the right to privacy in Digest No 3/57.[11] It also commented on the *Ageing and Disability Commissioner Bill 2019* in Digest No 1/57.[12]

1.4 This Regulation is made under sections 14(8)(f), 17(6) and 35 (the general regulation-making power) of the *Ageing and Disability Commissioner Act 2019* (the **Act**).

Issues considered by committee

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

Right to privacy

1.5 Section 14(1) of the Act states that the Ageing and Disability Commissioner (the **Commissioner**) may provide relevant information to a relevant agency for the purposes of enabling or assisting the relevant agency:

(a) to provide a service to, or take other action in respect of, an adult with disability or older adult, or

(b) to make a decision or assessment in relation to the safety, welfare or well-being of an adult with disability or older adult, or

(c) to take action in respect of the safety, welfare or well-being of adults with disability or older adults generally.

1.6 Section 14(2) states that a relevant agency may provide relevant information to the Commissioner for the purposes of enabling or assisting the Commissioner's exercise of its functions. The Commissioner's functions are set out in section 12 and include, among other functions:

(a) to deal with allegations of abuse, neglect and exploitation of adults with disability and older adults, whether on the basis of a report made to the Commissioner or at the Commissioner's own initiative, including by referring matters to appropriate persons or bodies and by conducting investigations, and

(b) to take further action, following an investigation into an allegation of abuse, neglect or exploitation of an adult with disability or older adult, that the Commissioner considers necessary to protect the adult from abuse, neglect and exploitation, including by making an application to a court or tribunal in respect of the adult.

1.7 Section 14(8) defines 'relevant agency', providing that it means certain bodies (as specified) and includes any other person or body prescribed by the regulations.

1.8 The Regulation amends clause 5 of the *Ageing and Disability Commissioner Regulation 2019* to prescribe 7 additional persons and bodies as relevant agencies,

[11] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No 3/57, 20 August 2019.

[12] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No 1/57, 6 August 2019.

thereby allowing the Commissioner to exchange information under section 14 of the Act with:

(a) the chief executive officer of Services Australia of the Commonwealth, or a successor of that agency,

(b) the Secretary of the Department of Health of the Commonwealth, or a successor of that Department,

(c) the Workers Compensation Nominal Insurer established by the *Workers Compensation Act 1987*,

(d) the Lifetime Care and Support Authority of New South Wales constituted by the *Motor Accidents (Lifetime Care and Support) Act 2006*,

(e) the Workers Compensation (Dust Diseases) Authority constituted by the *Workers' Compensation (Dust Diseases) Act 1942*,

(f) the NSW Self Insurance Corporation constituted by the *NSW Self Insurance Corporation Act 2004*.

1.9 The 'relevant information' held by the Commissioner or a relevant agency that may be shared under section 14 is limited to information concerning:

(a) a report under the Act, being a report made to the Commissioner under section 13 and includes a matter dealt with as a report by the Commissioner under that section or section 22(3). Under section 13, a person can make a report about:

(i) an adult with disability or older adult if the person has reasonable grounds to believe the adult is subject to, or at risk of abuse, neglect or exploitation, or

(ii) circumstances that the person has reasonable grounds to believe will result in the abuse, neglect or exploitation of an adult with disability or older adult,

(iii) the safety, welfare or well-being of an adult with disability or older adult,

(iv) the abuse, neglect or exploitation of an adult with disability or older adult,

(v) any other matter prescribed by the regulations, noting that no other matters are currently prescribed by the regulations of the purposes of this definition.

1.10 Regarding reports under the Act, section 15 provides that the identity of a person who makes a report to the Commissioner in good faith, or information from which the identity of that person could be deduced, must not be disclosed to any person or body unless the disclosure is:

(a) made with the consent of the person who made the report,

(b) necessary for the purposes of law enforcement, or

(c) necessary for any other purposes prescribed by regulations, noting that no other purposes are currently prescribed by the regulations for the purposes of section 15.

1.11 It is an offence under section 31 for a person to disclose any information obtained in connection with the administration or execution of the Act except in certain circumstances. A maximum penalty of 50 penalty units ($5500) applies.

1.12 Section 14(7) provides the section does not limit the operation of any other Act or law under which a relevant agency is authorised or required to disclose information to another person or body.

The Regulation broadens the statutory information sharing framework under the *Ageing and Disability Commissioner Act 2019,* by enabling the exchange of 'relevant information' between the Ageing and Disability Commissioner and additional persons and bodies prescribed as a 'relevant agency' by the Regulation. 'Relevant information' is information concerning a report under the Act, or the safety, welfare, wellbeing, abuse, neglect or exploitation of an adult with disability or older adult. It appears this could include sensitive health and medical information about an adult with disability or older adult. However, in accordance with section 15 it does not generally include the identity of a person who makes a report, with the enforcement of this protection supported by the offence in section 31 for disclosure of information obtained in connection with the administration or execution of the Act. The sharing of information under the Act may interfere with a person's right to privacy.

The Act also states that it does not limit the operation of any other Act or law authorising or requiring a relevant agency is disclose information to another person or body. It appears that information may therefore be shared more widely than between the Commissioner and relevant agencies specified under this Act. This may further interfere with a person's right to privacy.

However, a person's relevant information may only be shared under the Act for certain purposes. Specifically, the Commissioner can only share information to enable or assist a relevant agency to provide a service or take action regarding an adult with disability or older adult, make a decision or assessment in relation to the safety, welfare or wellbeing of an adult with disability or older adult, or take action in respect of safety, welfare or wellbeing of adults with disability or older adults generally. A relevant agency can only provide information to the Commissioner to enable or assist the Commissioner in the exercise of its functions under the Act.

The Committee acknowledges the specificity of these purposes and their intent to protect adults with disability and older adults from abuse, neglect and exploitation, in accordance with the objects of the Act. It also appears that the broadening of the information sharing framework may uphold this object and

assist with the efficient administration of the Act. In the circumstances, the Committee makes no further comment.

2. Children (Detention Centres) Amendment (X-ray Scanning Devices) Regulation 2021

Date tabled	LA: 16 November 2021 LC: 16 November 2021
Disallowance date	LA: 23 March 2022 LC: 30 March 2022
Minister responsible	The Hon. Natasha Maclaren-Jones MLC
Portfolio	Families and Communities

Purpose and description

2.1 The object of the *Children (Detention Centres) Amendment (X-ray Scanning Devices) Regulation 2021* (the **Regulation**) is to amend the *Children (Detention Centres) Regulation 2015* to permit the use of an X-ray scanning device to search detainees in detention centres.

2.2 The Regulation is made under the Children *(Detention Centres) Act 1987* (the **Act**), including sections 32A and 109 (the general regulation marking power).

2.3 There are currently 6 detention centres in NSW declared under the Act. Under Part 3 of the Act, those centres may hold persons on remand or subject to control up to the age of 21 years in certain circumstances.

2.4 A person subject to control or on remand is a 'detainee'. A detainee does not include a person absent from the detention centre pursuant to an order granting leave, removal or discharge under section 24 of the Act.

2.5 The Committee commented on the introduction of clause 11A, which permits the searching of detainees, in Digest No. 1/57.[13]

2.6 The Committee noted that a 2018 report published by the Inspector of Custodial Services raised the impact and frequency of strip searches as an issue.[14] The Inspector noted that the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) recommended that governments consider implementing strategies for detecting contraband, such as risk assessments or body scanners, to minimise the need for strip searching children,[15] such search requiring

[13] New South Wales Parliament, Legislation Review Committee, *Legislation Review Digest No 1/57*, 6 August 2019.

[14] New South Wales, Inspector of Custodial Services, *Use of force, separation, segregation and confinement in NSW juvenile justice centres*, November 2018 (**ICS report**).

[15] ICS report, p161 citing Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Contemporary detention environments*, vol 15, pp 117–188 and Recommendation 15.4.

the removal of all or some of the child's clothing.[16] The Inspector recommended (among other things) that Juvenile Justice should not carry out strip searching routinely and instead conduct a rigorous risk-based assessment process to target trafficking and contraband.[17] As stated by the Committee in Digest No. 1/57, the NSW government responded that it supported all of the Inspector's recommendations regarding this issue, and indicated action on them had been completed.

2.7 The Committee concluded that searching detainees, particularly through partially clothed searches, impacts on a detainee's right to bodily autonomy. It also recognised the need to detect contraband and ensure the safety, security and good order of detention centres. In the circumstances, the Committee made no further comment.

Issues considered by committee

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

Right to personal physical integrity

2.8 Clause 11A of the *Children (Detention Centres) Regulation 2015* allows a juvenile justice officer to search a detainee and a detainee's room and any property in the room for the purpose of ensuring the security, safety and good order of a detention centre. The search may only be conducted by the stated means.

2.9 The Regulation amends clause 11A to provide an additional an additional means to search a detainee. That additional means is scanning with an X-ray scanning device.

2.10 The other means to search a detainee under clause 11A include:

(a) running a hand-held metal detector over the detainee's outer garments,

(b) a pat-down, with a juvenile justice officer running their hands over a detainee's outer garments and examining anything worn or carried by the detainee conveniently removed by the detainee, and

(c) a partially clothed search, meaning:

(i) requiring the detainee to remove clothes from the top half or bottom half of their body for examination of the clothes (and repeating the process for the other half), or

(ii) visually examining the detainees body, or

(iii) requiring the detainee to open their mouth to enable visual examination, or

(iv) examining the detainee's removed clothes by touch,

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[16] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Contemporary detention environments*, vol 15, p92.

[17] ICS report, p161.

(v) but does not allow the juvenile justice officer to require the detainee to remove all their clothes at once, search the detainee's body cavities (other than their mouth) or examine the detainee's body by touch.

2.11 The Regulation provides that a search must be conducted with due regard to the detainee's dignity, self-respect and well-being and as quickly as reasonably practicable.

2.12 In addition, except in the case of an emergency, a pat-down or partially clothed search must be conducted by a person of the same sex as the detainee (or chosen by a transgender or intersex detainee) and in the presence of another person. A partially clothed search must not be conducted as part of the general routine of a detention centre, except where a detainee is admitted or returns to a detention centre following day leave or overnight leave.

2.13 A report by the New South Wales Ombudsman published on 8 June 2021 provided that 'the purpose of any search is to detect contraband an unauthorised property', and made recommendations:

> …aimed at ensuring alternative searching methods are used for young people when appropriate, including pat down searches in conjunction with metal wands or body scanners.

2.14 The report referred to the Royal Commission's recommendation that governments consider strategies for detecting contraband, such as risk assessments or body scanners, be used to minimise the need for strip searching children. It stated that 'this may be considered to apply equally to young people'.[18] As noted at paragraph 6 above, the term 'strip searching' in the Royal Commission's report refers to a search that may require the removal of some or all of the child's clothes. This term would therefore include a partially clothed search under clause 11A.

2.15 The Ombudsman's report noted that, in contrast to the search powers of Youth Justice NSW staff at that time under the *Children (Detention Centres) Regulation 2015*, Corrective Services NSW officers could lawfully conduct searches using a low dose X-ray body scanner to scan the body under the *Crimes (Administration of Sentences) Regulation 2014*.[19]

2.16 The report also recommended that the responsible minister consider legislative amendments, including expanding the provisions of clause 11A to provide additional safeguards for young people searched in custody.[20]

The Regulation amends clause 11A of the *Children (Detention Centres) Regulation 2015* to provide an additional method for a juvenile justice officer to search a detainee for the purpose of ensuring the security, safety and good order of a detention centre, specifically by scanning with an X-ray scanning device. The other methods provided to search a detainee under clause 11A include running

[18] State of New South Wales, New South Wales Ombudsman, *Strip searches conducted after an incident at Frank Baxter Youth Justice Centre*, 8 June 2021, p29 (**Ombudsman report**).

[19] Ombudsman report, p35.

[20] Ombudsman report, p14.

a hand-held metal detector over the detainee's outer garments, a pat-down and a partially clothed search.

Generally, searching detainees impacts on their right to bodily autonomy and, in certain circumstances, may limit their right to humane treatment in detention. However, the Committee recognises that juvenile justice officers need adequate tools to detect contraband and ensure the safety, security and good order of detention centres. It also notes that certain safeguards are included in clause 11A, and that the NSW Ombudsman has recommended additional legislative safeguards for the protection of young people in custody.[21]

This amendment aims to provide an alternative to more intrusive methods of searching a detainee under clause 11A, in particular through partially clothed searches, and can be utilised to minimise the need to strip search children and young people detained in detention centres. In the circumstances, the Committee makes no further comment.

[21] State of New South Wales, New South Wales Ombudsman, *Strip searches conducted after an incident at Frank Baxter Youth Justice Centre*, 8 June 2021, p14.

3. District Court Criminal Practice Note 24– Applications for Leave for In Person Appearances in Trials and Sentence Hearings of WHS Prosecutions

Date tabled	LA: 9 November 2021 LC: 9 November 2021
Disallowance date	LA: 22 February 2022 LC: 22 March 2022
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

3.1 The District Court Criminal Practice Note 24 titled 'Applications for leave for in person appearances in Trials and Sentence Hearings of WHS Prosecutions' (the **Practice Note**) was published in NSW Government Gazette No 574 on 5 November 2021.

3.2 The Practice Note provides:

> In person appearances have been temporarily suspended due to COVID-19. With the easing of restrictions and increased vaccination rates, applications may be made for leave to be granted for in person appearances in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* (NSW) (referred to collectively as trials in this Practice Note), which are listed for hearing on or after 25 October 2021.

3.3 This Practice Note is made under the *District Court Act 1973*.

Issues considered by committee

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

Access to justice

3.4 The Practice Note provides that leave will not be granted for any person to attend the Court to appear in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* in person unless the List Judge or trial Judge is satisfied they are vaccinated. An application for leave is made to the List Judge or (where allocated) the trial Judge.

3.5 All other matters will continue to be heard by virtual courtroom.

3.6 Solicitors for the parties must enquire as to the vaccination status of their proposed court participants and provide that information to the List Judge or trial Judge.

3.7 'Court participants' includes judges, associates, tipstaves, counsel representing a party to proceedings, solicitors, parties to proceedings, Sheriff's officers, court officers, witnesses who appear in person (not by audio-visual link), interpreters, RSB court reporters, sound reporters and third party contractors, victims or victims' family members and their support persons.

3.8 'Vaccinated' means the person:

(a) has either completed a two-dose schedule of Pfizer Australia Pty Ltd, AstraZeneca Pty Ltd or Moderna Australia Pty Ltd, or received a single dose of Janssen-Cilag Pty Ltd, and

(b) at least 14 days has elapsed since completing their vaccination schedule.

The Practice Note requires that persons wishing to attend the District Court of NSW in person for appearances in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* satisfy the List Judge or trial Judge that they are vaccinated. This requirement appears to apply to court participants including (among others) counsel, witnesses appearing in person, interpreters, victims or the victims' family members and their support persons.

All other matters will be heard by use of the virtual courtroom. The Committee understands that hybrid in person and remote District Court proceedings are facilitated by provisions of other practice notes and applicable legislation, including the *Evidence (Audio and Audio-Visual Links) Act 1998.*

The use of the virtual courtroom may affect procedural fairness because the Court cannot closely monitor the conduct of a person appearing including what material they have access to, if other persons are in the room or if they are recording the trial on their own device. It may also affect consistency in the quality of evidence between witnesses who appear in person or remotely, particularly if the virtual courtroom experiences technical failures. Additionally, appearing remotely may impact a defendant's access to justice, as the Court does not have the benefit of observing any nuanced behavioural cues of the defendant.

The Committee acknowledges that the use of the virtual courtroom has practical benefits in the circumstances, specifically to protect against the risk of COVID-19 and protect the safety of other court participants. In the circumstances, the Committee makes no further comment.

Open justice

3.9 The Practice Note provides that leave will not be granted for any person to attend the Court to appear in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* in person unless the List Judge or trial Judge is satisfied they are vaccinated. An application for leave is made to the List Judge or (where allocated) the trial Judge.

3.10 All other matters will continue to be heard by virtual courtroom.

3.11 Solicitors for the parties must enquire as to the vaccination status of their proposed court participants and provide that information to the List Judge or trial Judge. As noted above, 'court participants' include (among others) counsel representing a party to proceedings, solicitors, parties to proceedings, witnesses who appear in person (not by audio-visual link), interpreters, RSB court reporters, victims or victims' family members and their support persons.

3.12 A member of the media who wishes to attend a trial or hearing in person must also provide evidence to the List Judge or (where allocated) the trial Judge that he or she is vaccinated. If a member of the media declines to provide their vaccination status, attendance will be permitted by the use of the virtual courtroom, on request and subject to orders made by the trial Judge concerning the conduct of the trial. Any attendance in person must not infringe the $4m^2$ rule.

3.13 Members of the public may not attend the court in person, but may also access the virtual courtroom on request and subject to orders made by the trial Judge concerning the conduct of the trial.

3.14 As noted above, 'vaccinated' means that a person has either received the full dosage of a vaccine recognised by the Therapeutic Goods Administration and at least 14 days has elapsed since completing their vaccination schedule.

The Practice Note requires that persons wishing to attend the District Court of NSW in person for appearances in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* satisfy the List Judge or trial Judge that they are vaccinated. This requirement appears to apply to court participants including (among others) counsel, witnesses appearing in person, interpreters, court reporters, victims or the victims' family members and their support persons. All other matters will be heard by use of the virtual courtroom.

The Practice Note also requires members of media who wish to attend a trial or hearing provide evidence they are vaccinated to the List Judge or trial Judge. It does not permit members of the public to attend the Court. Both groups have access to the virtual courtroom, on request and subject to any orders made by the trial Judge concerning the conduct of the trial.

The Committee notes that this may create a barrier to the principles of open justice. That is, that the administration of justice take place in open court subjected to public and professional scrutiny. However, the Committee acknowledges that the limitations on access are in response to the current COVID-19 pandemic with the intention of safeguarding broader public health. It considers that the alternative arrangements of a virtual courtroom assist in upholding open justice in the circumstances, particularly considering the other limitations on movement in the Court given the continued requirement to maintain social distancing. The Committee makes no further comment.

Retrospective application

3.15 The Practice Note commences on 29 October 2021 and was published in NSW Government Gazette No 574 of 5 November.

3.16 Paragraph 3 provides that applications may be made for leave to be granted for in person appearances in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* listed for hearing on or after 25 October 2021.

The Practice Note commenced on 29 October 2021, before it was notified in the NSW Government Gazette on 5 November 2021. It also applies to trials and hearings listed on or after 25 October 2021, which is prior to both the date of the Practice Note's commencement and publication. It therefore appears the Practice Note's provisions are intended to apply retrospectively, both because the Note commences 6 days before the publication date and the provisions apply to trials and hearings listed 4 days before the Note commences.

The Committee generally comments on provisions drafted to have retrospective effect, especially where rights may be retrospectively limited, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. The Committee would therefore prefer that the Practice Note commence, and its provisions apply to trials and hearings listed after, the publication date to provide to provide sufficient clarity for persons implementing the Practice Note and those whose rights may be affected. It notes that this approach was taken in District Court Criminal Practice Note 25. That Practice Note was published in the NSW Government Gazette No 586 of 12 November 2021, commenced on 15 November 2021 and applied to sentence proceedings listed for hearing on or after 15 November 2021.[22] While this practice note has been temporarily suspended at the time of writing,[23] the Committee refers this issue to the Parliament for its consideration.

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

Period of application and review date

3.17 The Practice Note commences on 29 October 2021.

3.18 Paragraph 2 states that the Practice Note will be reviewed in mid-November 2021 or as otherwise may be necessary.

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

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[22] New South Wales Government, *District Court Criminal Practice Note 25 – Applications for Leave for In Person Appearances in Sentence Proceedings*, NSW Government Gazette No 586 - Other, 12 November 2021.

[23] District Court New South Wales, Practice Notes Criminal Jurisdiction, Item 24 District Court Criminal Practice Note 24, viewed 16 February 2021.

4. District Court Practice Note 25 – Applications for Leave for In Person Appearances in Sentence Proceedings

Date tabled	LA: 16 November 2021 LC: 16 November 2021
Disallowance date	LA: 23 March 2022 LC: 30 March 2022
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

1. The purpose of Practice Note 25, 'Applications for Leave for In Person Appearances in Sentence Proceedings,' (the **Practice Note**) is to revise the former Practice Note 25. Former Practice Note 25, which was signed on 8 November 2021, was to commence on 15 November 2021.[24] As the content of these practice notes are substantially similar, save for minor updates, the Committee has not commented separately on the earlier revision of this Practice Note.

2. The current Practice Note makes provisions for the granting of leave for in person appearances in sentence proceedings listed for hearing on or after 15 November 2021.

3. The Practice Note was published in NSW Government Gazette No 586 on 12 November 2021 and is made under the *District Court Act 1973.*

4. The introduction of the Practice Note provides:

    i. Under District Court Criminal Practice Notes 23 and 24, in person appearances are permitted in jury trials, judge alone trials and WHS Prosecutions trials and sentence hearings.

    ii. With the further easing of restrictions and increased vaccination rates, applications may now be made for leave to be granted for in person appearances in sentence proceedings which are listed for hearing on or after 15 November 2021.

    iii. All other matters will continue to be heard by use of the virtual courtroom.

5. The Practice Note applies to all District Court venues with specific provisions made for Sydney District Court (Downing Centre and John Maddison Tower).

[24] Government Gazette No 586 of Friday 12 November 2021, District Court Practice Note 25, n2021-2470 and n2021-2477.

Issues considered by committee

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

Open justice

6. The Practice Note provides that where an application for leave for in person appearances at sentence proceedings is sought, the below conditions must be satisfied:

    i. solicitors for the parties must enquire as to the vaccination status of all their proposed court participants and forward that information in the form annexed to the relevant Judge, confirming that each proposed court participant is vaccinated.

    ii. the solicitor must sight his or her COVID-19 certificate provided by the Australian Government before providing that information to the relevant Judge in the form annexed to the Practice Note.

7. Paragraph 8 of the Practice Note prescribes the destruction of the completed annexed form once the outcome of the leave application has been finalised.

8. Applications for leave must be made at least three business days prior to the hearing date by emailing the Judge's Associate. Where the sentence has not been allocated, the application must be made by emailing the Associate of the Chief Judge at Sydney District Court or in the case of any other court, the Senior Judge. This process applies to both proceedings that have not commenced and proceedings that are part-heard.

9. Leave will not be granted to any person to attend the Court in person unless the relevant Judge is satisfied that he or she is vaccinated.

10. Under the Practice Note, 'Vaccinated' means that a person:

    i. has either completed a two-dose schedule of Pfizer Australia Pty Ltd, AstraZeneca Pty Ltd or Moderna Australia Pty Ltd, or received a single dose of Janssen-Cilag Pty Ltd; and at least 14 days has elapsed since completing their vaccination schedule; or

    ii. is exempt from vaccination pursuant to NSW Public Health Orders; or

    iii. is taken to be a “fully vaccinated person” pursuant to NSW Public Health Orders.

11. The Practice Note applies to sentence proceedings listed on or after 15 November 2021.

    The Practice Note requires any person who seeks to attend Court in person for sentence proceedings to apply for leave at least three business days prior to the listing. Leave will not be granted to any person to attend the Court in person unless the relevant Judge is satisfied that he or she is vaccinated. The Practice Note also requires solicitors for the parties to enquire with participants to confirm their vaccination status.

    The Committee notes that this may create a barrier to the principles of open justice for legal representatives, defendants, victims and witnesses involved in

sentence proceedings. Open justice requires that the administration of justice take place in open court subjected to public and professional scrutiny. This may particularly affect defendants in custody who face access barriers to the courts. Additionally, it may disenfranchise unvaccinated persons from gaining full access to the open court system.

However, while the Practice Note limits in person appearances, the Committee acknowledges that such requirements are in response to the current COVID-19 pandemic with the intention of broader public health. The Committee also considers the alternative arrangements of a virtual courtroom adequate in the circumstances. The Committee makes no further comment.

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

Period of application and review date

12. The Practice Note applies to sentence proceedings listed on or after 15 November 2021.

The Practice Note does not include a specific end date nor a timeframe in which the Practice Note will be reviewed. The Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on a person's rights, including their right to participate in the administration of justice as an accused person, the Practice Note may also benefit from the inclusion of an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

5. Electricity Infrastructure Investment Amendment (Safeguard) Regulation 2021

Date tabled	LA: 16 November 2021 LC: 16 November 2021
Disallowance date	LA: 23 March 2022 LC: 30 March 2022
Minister responsible	The Hon. Matt Kean MP
Portfolio	Energy

Purpose and description

5.1 The objects of this Regulation are as follows—

(a) to further provide for the electricity infrastructure investment safeguard under the *Electricity Infrastructure Investment Act 2020*, Part 6, including in relation to—

(i) the consumer trustee's reports about the infrastructure investment objectives, and

(ii) how tenders for long-term energy service agreements are conducted, and

(iii) the risk management framework prepared by the consumer trustee,

(b) to further provide for the functions of the infrastructure planner,

(c) to provide that, if the Australian Energy Regulator (AER) is appointed as the regulator under the Electricity Infrastructure Investment Act 2020, AER is an authorised officer for the purposes of issuing penalty notices,

(d) to specify the offences under the Electricity Infrastructure Investment Act 2020 for which a penalty notice may be issued and specify the penalty notice amount payable.

Issues considered by committee

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

Penalty notice offences – right to a fair trial

5.2 The Regulation amends the Electricity Infrastructure Investment Regulation 2021 to insert proposed Schedule 2 which prescribes for penalty notice offences.

Specifically, Schedule 2 prescribes what offences created by a provision of the Electricity Infrastructure Investment Act 2020 ('the Act') constitute penalty notice offences, and the respective amount payable for the penalty notice.

5.3 These provisions are made for the purpose of subsection 76(2) of the Act which provides that "[a] penalty notice offence is an offence against this Act or the regulations that is prescribed by the regulations as a penalty notice offence".

The Regulation amends the *Electricity Infrastructure Investment Regulation 2021* to insert Schedule 2 which prescribes certain offences set out in provisions of the *Electricity Infrastructure Investment Act 2020* as penalty notice offences. Schedule 2 also prescribes the amount payable for a penalty notice issued under the provision, which can range from $22 000 to $55 000 for corporations and $1 100 to $2 750 for individuals.

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee acknowledges that individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, it notes that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice, and that the amount payable by penalty notices are less than half of the maximum penalty which the respective offences carry. In the circumstances, the Committee makes no further comment.

6. Environmental Planning and Assessment Amendment (Owner's Consent and BASIX Certificates) Regulation 2021

Date tabled	LA: 9 November 2021 LC: 9 November 2021
Disallowance date	LA: 22 February 2022 LC: 22 March 2022
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Planning

Purpose and description

6.1 The objects of the *Environmental Planning and Assessment Amendment (Owner's Consent and BASIX Certificates) Regulation 2021* (the **Regulation**) are as follows:

(i) to provide that the consent of the land owner is not required for infrastructure applications or modification requests relating to certain State significant infrastructure,

(ii) to require that a development application for State significant development must be accompanied by a BASIX certificate if the application is for BASIX affected development.

6.2 The Regulation is made under the *Environmental Planning and Assessment Act 1979*.

Issues considered by committee

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

Real property rights

6.3 Clause 193(1) of the *Environmental Planning and Assessment Regulation 2000* provides that the consent of the land owner is generally required for an infrastructure application or modification request, unless the application or request relates to certain circumstances set out in that clause. For example, where it is critical State significant infrastructure, under subclause(b).

6.4 The Regulation amends clause 193 to include that an owner's consent is not required where the application or request relates to development for a purpose specified in the *State Environmental Planning Policy (State and Regional Development) 2011*, Schedule 1, clause 5(1)–(4). These purposes relate to mining, specifically:

(a) Development for the purpose of mining that:

(i) is coal or mineral sands mining, or

(ii) is in an environmentally sensitive area of State significance, or

(iii) has a capital investment of more than $30 million.

(b) Extracting a bulk sample as part of resource appraisal of more than 20,000 tonnes of coal or of any mineral ore.

(c) Development for the purpose of mining related works (including primary processing plants or facilities for storage, loading or transporting any mineral, ore or waste material) that:

(i) is ancillary to or an extension of another State significant development project, or

(ii) has a capital investment value of more than $30 million.

(d) Development for the purpose of underground coal gasification.

6.5 Clause 193(4) of the *Environmental Planning and Assessment Regulation 2000* provides that if the consent of the owner of the land is not required, the proponent is required to publish a notice of the application or request on the NSW planning portal and by:

(a) written notice to the owner of the land before, or no later than 14 days after, the infrastructure application or modification request is made, or

(b) advertisement published in a newspaper circulating in the area in which the infrastructure is to be carried out:

(c) for an infrastructure application, at least 14 days before the environmental impact statement relating to the infrastructure is placed on public exhibition, or

(d) for a modification request, no later than 14 days after the request is made.

The Regulation amends the *Environmental Planning and Assessment Regulation 2000* to provide that the consent of the owner of land on which State significant infrastructure is to be carried out is not required where an infrastructure application or modification request relates to development for a mining, mining related works or underground coal gasification purpose. Although an owner's consent is not required, an owner would receive notice of the infrastructure application or modification request in accordance with statutory requirements.

This appears to impede the affected land owner's right to consent to changes to the use of their land. The Committee notes that, given the specified purposes, the amendment may likely impact land owners in rural and regional areas. The Committee refers this issue to the Parliament for its consideration.

7. Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Amendment Regulation (No 2) 2021

Date tabled	LA: 9 November 2021 LC: 9 November 2021
Disallowance date	LA: 22 February 2022 LC: 22 March 2022
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Planning

Purpose and description

7.1 The object of the Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Amendment Regulation (No 2) 2021 (the **Regulation**) is to amend the Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Regulation 2021 (the **Amended Regulation**), which commenced on 1 November 2021, as follows—

(a) to allow the letting agent of a dwelling used for the purposes of short-term rental accommodation to register the dwelling, including renewing a registration,

(b) to require the host or letting agent of a dwelling to provide the Planning Secretary with a declaration, on, or no earlier than 5 days before, the first day of an arrangement to lease the dwelling, that the dwelling meets the fire safety standards and the number of days of the arrangement.

7.2 The Amended Regulation was due to commence on 30 July 2021, but commencement was postponed to 1 November 2021. Its provisions include a new Division 7D concerning fire safety for short-term rental accommodation into the *Environmental Planning and Assessment Regulation 2000*, and expansion of the penalty notices offences under that regulation to include contravention of clause 186W(1) (included in Division 7D).

7.3 This Regulation replaces Division 7D as set out in the Amended Regulation.

7.4 The Committee reported on the Amended Regulation in Digest No 32/57[25], including regarding the right to a fair trial, right to privacy, additional costs of providing short-term rental accommodation, creation of offences by the regulation and

[25] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest 32/57, 22 June 2021.

incorporation of an external standard not subject to disallowance. This report does not address issues raised by the Regulation which have already been commented on in Digest No 32/57 in relation to the Amended Regulation.

7.5 The Regulation is made under the Environmental Planning and Assessment Act 1979.

Issues considered by committee

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

Strict liability offence

7.6 The Regulation requires the Planning Secretary to establish and maintain a register on the NSW planning portal of dwellings used for the purposes of short-term rental accommodation under clause 186X. This register must include (among other things) a description of how the dwelling complies with the fire safety standard, being the *Short-term Rental Accommodation Fire Safety Standard* approved by the Planning Secretary and published on the Department's website, as in force from time to time.

7.7 Clause 186X(3) states that a person must not provide a dwelling for the purposes of short-term rental accommodation unless the dwelling is included on the register and the registration is in force. A maximum penalty of 20 penalty units ($2200) applies for contravention of this requirement.

The Regulation prohibits a person from providing a dwelling for the purposes of short-term rental accommodation unless the dwelling is included on the register maintained by the Planning Secretary, and the registration is in force. Contravention results in a person being strictly liable for a maximum penalty of 20 penalty units ($2200).

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. In this case, the offence upholds the safety of persons attending the dwelling, as the register must include a description of how the dwelling complies with the fire safety standard. In the circumstances, the Committee makes no further comment.

8. Fair Trading Amendment (Code of Conduct for Short-term Rental Accommodation Industry) Regulation (No 2) 2021

Date tabled	LA: 9 November 2021 LC: 9 November 2021
Disallowance date	LA: 22 February 2022 LC: 22 March 2022
Minister responsible	The Hon. Eleni Petinos MP
Portfolio	Fair Trading

Purpose and description

8.1 The object of the *Fair Trading Amendment (Code of Conduct for Short-term Rental Accommodation Industry) Regulation (No 2) 2021* (the **Regulation**) is to declare a new code of conduct for the short-term rental accommodation industry.

8.2 The Regulation amends the *Fair Trading Regulation 2019* and provides that the Code declared is the *Code of Conduct for the Short-term Rental Accommodation Industry,* published in the Gazette on 22 October 2021 (the **Code**).

8.3 The Regulation is made under the *Fair Trading Act 1987*, including sections 54B(1) and 92 (general regulation-making power).

8.4 The Committee has commented on previous versions of the Code. It commented on the code published in the Gazette on 22 October 2020 in Digest No 27/57[26] in relation to strict liability offences with large penalties. It also commented on the code published in Gazette on 28 May 2021, the predecessor to the Code prescribed by this Regulation, in Digest No 33/57,[27] regarding the issues of penalty notice offences, vicarious liability, restrictions on rights of people listed on the Exclusion Register to participate in the short-term accommodation industry and additional obligations on small businesses. The Committee notes, but has not restated, issues set out in previous Digests except where raised by amendments to the Code.

[26] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 27/57, 16 March 2021.

[27] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 33/57, 7 September 2021.

Issues considered by committee

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

Significant penalties for strict liability offences

8.5 The Code is amended so that an obligation on booking platforms that was previously conditional on the request of the premises register operator is now mandatory. A 'booking platform' means a person who in trade or commerce, provides an online booking service that enables persons to enter into short-term rental accommodation arrangements.

8.6 Section 2.2.6 is amended to provide that, on and from the day that registration on the premises register becomes mandatory under the planning laws, a booking platform must give the premises register operator, being the Department of Planning, Industry and Environment, 'relevant information' about each short-term rental accommodation arrangement relating to a short-term rental accommodation premises. The 'relevant information' is set out by clause 2.2.6 and includes:

(a) the property ID and postcode of the short-term rental accommodation premises, and

(b) the booking reference number, request type, start date and end date of the short-term rental accommodation arrangement.

8.7 Under the predecessor code, a booking platform only had to provide specified information about short-term rental accommodation premises on the request of the premises register operator. The 'specified information' was not set out in that code.

8.8 Section 2.2.6 is also amended to require a booking platform to provide the relevant information in a format and at the times determined by the premises register operator.

8.9 Section 2.2.6 is an offence provision under section 54C of the *Fair Trading Act 1987* and a civil penalty provision under section 54D of that Act:

(a) section 54C provides that a maximum penalty of 1000 penalty units ($110 000) for a corporation or 200 penalty units ($22 000) in any other case attaches to contravention of an offence provision.

(b) Section 54D provides that a court may, on application by the Secretary or a person authorised by the Secretary, order the payment of a monetary penalty if it is satisfied that a civil penalty provision has been contravened. Such amount must not to exceed the amount prescribed by the regulations, being 10 000 penalty units ($1 100 000) for a corporation and 2000 penalty units ($220 000) in any other case. Although, the monetary penalty imposed by the Local Court under section 54D appears to be capped at 200 penalty units ($22 000) by section 11F(3) of the *Fair Trading Regulation 2019.*

8.10 Section 54D provides that a short term accommodation industry participant (in this case, the booking platform) cannot be liable offence against section 54C and subject

to an order under section 54D if the contravention is essentially the same act or omission.

The Code of Conduct for the Short-term Rental Accommodation Industry, declared by the Regulation, imposes a mandatory obligation under clause 2.2.6 on booking platforms to provide prescribed information to the Department of Planning, Industry and Environment in a format and at the times determined by the Department. It appears that the term 'booking platform' may capture corporations and other entities, including small business owners, depending on who provides the online booking service. The requirement to provide information specified by the Department was previously conditional on a request by the Department.

Further, that section 2.2.6 has been amended to require a booking platform to provide information in the format and at the times determined by the Department. As such, the amendments appear to broaden the circumstances in which a booking platform may contravene section 2.2.6. Conduct contravening this section attracts a significant penalty under sections 54C or 54D of the *Fair Trading Act 1987* (where that contravention is essentially the same act or omission). As noted in Digest No 27/57, the monetary penalties under these sections are substantial.

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. In this case, the additional regulatory requirements carry significant maximum penalties of 1000 penalty units ($110 000) for corporations and 200 penalty units ($22 000) in any other case, which may impact on the business community. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. In these circumstances, the Committee makes no further comment.

9. Local Government (General) Amendment (Elections) Regulation 2021

Date tabled	LA: 9 November 2021 LC: 9 November 2021
Disallowance date	LA: 22 February 2022 LC: 22 March 2022
Minister responsible	The Hon. Wendy Tuckerman MP
Portfolio	Local Government

Purpose and description

9.1 The object of *the Local Government (General) Amendment (Elections) Regulation 2021* (the **Regulation**) is to amend the *Local Government (General) Regulation 2021* to make further provision regarding the conduct of local government elections during the COVID-19 pandemic.

9.2 The Regulation is made under the *Local Government Act 1993* and commenced on 22 October 2021, being the day on which it was published on the NSW legislation website.

Issues considered by committee

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

Political franchise and right to democratic participation – voting without discrimination

9.3 The Regulation amends several provisions under Part 11 of the *Local Government (General) Regulation 2021* which concerns the conduct of elections of councillors and mayors. These amendments are intended to respond to circumstances arising from the COVID-19 pandemic.

9.4 Under subclause 383(1) of the *Local Government (General) Regulation 2021*, an election manager may temporarily suspend voting at a polling place on election day if they consider it is necessary to do so because of the reasons. Schedule 1[12] of the Regulation includes, as such a reason for suspending voting, "a risk of harm to public health" caused by the attendance of a person infected with or otherwise required to self-isolate due to COVID-19.

9.5 The Regulation also amends subclause 383A(4)(b). Clause 383A of the *Local Government (General) Regulation 2021* requires the election manager, who has exercised that power to suspend voting, to adjourn the taking of a poll to a later day if voting cannot be reopened that election day or if they are of the opinion a person was prevented from voting because they could not reasonably have voted at any other polling place.

9.6 Specifically, subclause 383A(4) permits the election manager to adjourn the election to a day that is as soon as practicable after the day of postponement. However, under subclause 383A(4)(b), that day must be 1-13 days after the election day. The Regulation creates an exception under clause 383(4)(b)(ii), that the election manager can adjourn the election to a day later than that thirteenth subsequent day where they are satisfied "it is necessary to comply with a public health order, or to reduce the risk of infection from COVID-19".

The Regulation amends the *Local Government (General) Regulation 2021* to include a risk to public health related to COVID-19 as a reason for an election manager to temporarily suspend voting at a polling place on election day. It also extends the allowable period of time for adjourning a suspended election beyond the existing 13 day cap to a later day, provided that it is necessary to comply with a public health order or reduce the risk of infection from COVID-19.

This may mean certain voters are unable to cast their ballots in elections for councillors and mayors for an unknown period of time, and thereby may impact an individual's right to political franchise and democratic participation contained in Article 25 of the ICCPR.[28] The right to political franchise and democratic participation protects the right of individuals to vote by universal and equal suffrage.

However, Article 25 also recognises that the right to vote may be subject to restrictions based on objective and reasonable criteria.[29] The Committee notes that these provisions are extraordinary measures in response to the COVID-19 pandemic and are intended to protect public health. It also acknowledges that the Regulation does not prevent or remove an impacted individual's right to cast a relevant ballot. In the circumstances, the Committee makes no further comment.

Right to take part in public affairs and elections – freedom of political communication and to run for public office

9.7 Clause 289 of the *Local Government (General) Regulation 2021* regulates the nomination of a candidate for an election of councillors and mayors which is to be provided in the relevant form. Specifically, subclause 289(5) states that a nomination paper "is to be made by lodging it with the returning officer by 12 noon on the nomination day". In accordance with subclause 289(5AA), that nomination paper may be lodged by personal delivery, post, transmission by facsimile or email, or through an approved website or online electronic nomination system.

9.8 The Regulation amends subclause 289(5AA)(a) to require lodgement by personal delivery be made to an "approved place". It further inserts subclauses 289(5AC)-(5AE) which provide for the publication of an approved place for that purpose. If satisfied that it is necessary to comply with a public health order or to reduce the

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

[29] United Nations, Office of the High Commissioner for Human Rights, CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 1996.

risk of infection from COVID-19, proposed subclause 289(5AE) enables the election manager by order published on their website to either:

(a) limit the times and dates that a nomination proposal may be lodged by personal delivery at an approved place, or

(b) prohibit the lodgement of nomination proposals by personal delivery at an approved place.

9.9 Division 8, Part 11 of the *Local Government (General) Regulation 2021* regulates the conduct of ordinary voting at attendance elections. A candidate may appoint a scrutineer in accordance with clause 119 of the *Electoral Act 2017* to represent them at each place at which polling is conducted, ballot-papers are scrutinised or votes are counted.

9.10 However, clause 337A enables the election manager to publish a direction which either prohibits or caps scrutineers from being physically present at a relevant place. The election manager may only make that direction if they are satisfied that it is necessary either to comply with a public health order currently in force or to reduce the risk of infection from COVID-19 at each relevant place, and there are alternative scrutiny arrangements.

9.11 Division 9A of Part 11 sets out provisions relating to activities undertaken during the regulated period of an election. Subdivisions 3 to 5 sets out a number of provisions and offences in respect to the creation, registration, display and distribution of electoral materials during the regulated period. These offences are intended to regulate the electoral materials and other pieces of communication containing electoral materials which are permissible for display or distribution during the regulated period, including on election day.

9.12 However, clauses 356TA and 356TB respectively enables an election manager to make directions by publication to the manager's website that a person not display a poster or hand out tangible electoral inside, on the premises of or within 100 metres of a pre-polling office or polling place. Such a direction may only be given if the election manager is satisfied that it is necessary to comply with a current public health order or to reduce the risk of infection from COVID-19.

9.13 The Regulation amends clauses 337A, 356TA and 356TB by repealing subclauses 337A(6), 356TA(7) and 356TB(8) which time limited these clauses to expire on 31 December 2021. This extends indefinitely the power of election managers to make relevant directions limiting the presence of scrutineers, display of posters and distribution of physical electoral materials for reasons relating to COVID-19 and/or public health.

The Regulation amends the *Local Government (General) Regulation 2021* to empower election managers to restrict the personal delivery of nomination papers for proposed candidates in councillors and mayor elections for public health and/or COVID-19 related reasons. It also repeals the time limiting provisions which previously repealed the power of election managers to make COVID-19 related directions on 31 December 2021. As a result, election managers will have an ongoing power to make directions that restrict the presence of scrutineers and the display or distribution of physical electoral materials.

In its Digest No 37/57, the Committee commented on the *Local Government (General) Amendment Regulation 2021* which inserted clauses 337A, 356TA and 356TB into the *Local Government (General) Regulation 2005*, which was the predecessor to and remade by the *Local Government (General) Regulation 2021*. Consistent with those comments, the Committee notes that the Regulation 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 guarantees the right of citizens to stand for public office, to vote in elections and to have access to positions in public service.[30]

The Regulation may also limit free political communication about candidates available in electoral materials. Free communication of information and ideas about candidates and electoral matters is an important component of the right to take part in public life and elections. It may also hinder the ability to scrutinise the conduct of polling and the counting of ballots to ensure elections are determined fairly and democratically.

However, Article 25 also recognises that the right to vote may be subject to restrictions based on objective and reasonable criteria. The Committee notes that the provisions seek to manage risks to public health in the conduct of elections, especially those risks arising from the COVID-19 pandemic regarding physical distancing. It also acknowledges that the provisions provide for the alternative presence of scrutineers and the dissemination of electoral materials by electronic means. In the circumstances, the Committee makes no further comment.

[30] Australian Government Attorney-General's Department, Right to take part in public affairs and elections [website] (accessed 24 November 2021).

10. Dust Diseases Tribunal of NSW Practice Note, No. 1 of 2021

Date tabled	LA: 9 November 2021 LC: 9 November 2021
Disallowance date	LA: 22 February 2022 LC: 22 March 2022
Minister Responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

10.1 This Practice Note commenced on 14 October 2021, and will be reviewed in mid-November 2021 or as otherwise may be necessary.

10.2 The purpose of this Practice Note is to allow for the making of applications for leave to be granted in person appearances in hearings, which includes bedside hearings at private homes and Issues and Listings Conferences (ILC) before the Registrar, that are listed for hearing on or after 25 October 2021. These applications would allow the return of in person appearances, which were temporarily suspended due to COVID-19, in certain hearings whilst all other matters will continue to be heard by use of the virtual courtroom.

Issues considered by committee

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

Access to justice/procedural fairness

10.3 Paragraphs 6 to 10 of the Practice Note sets out requirements in relation to leave granting in person appearance at relevant hearings of the Dust Diseases Tribunal of NSW. It sets out that individuals wishing to appear in person must make an application for leave to the relevant List Judge, allocated Judge or Registrar at the time the hearing is listed, but otherwise no later than one business day prior.

10.4 The Practice Note states that leave will not be granted to any person unless the relevant List Judge, Judge or Registrar allocated is satisfied that they are vaccinated. This is defined in the Practice Note as a person who has received all necessary doses of an approved COVID-19 vaccine at least 14 days prior. Paragraph 10 of the Practice Note also imposes a responsibility on solicitors to enquire of the vaccination status and sight a valid COVID-19 certificate (where applicable) for all participants they propose to attend tribunal. That information must be provided to the List Judge or Judge for the hearing.

10.5 Paragraph 8 of the Practice Note concerns applications for leave to conduct bedside hearings at private homes. Amongst the considerations set out when determining whether to grant leave for such hearings, the List Judge, allocated Judge or Registrar

will consider the plaintiff's wishes, the premises including whether the hearing can be held outside and the number of parties in the litigation. It also provides that limitations may placed on a party as to the number of lawyers who can attend a bedside hearing at private homes.

The Practice Note prohibits in-person attendance in hearings before a List Judge, allocated Judge or Registrar in the Dust Diseases Tribunal of NSW of any person who has not been fully vaccinated for COVID-19 at least 14 days prior. It also provides that individuals wishing to attend a hearing in-person, or to conduct the hearing bedside at private homes, must seek leave of the relevant Judge or Registrar, and imposes the responsibility for ensuring the vaccination status of all proposed attendees on the relevant solicitor. In respect to bedside hearings, the tribunal may limit the number of lawyers for a party who may attend the hearing.

By limiting who may attend a tribunal hearing in person, the Practice Note may affect a person's right to access justice. This is of particular concern as the tribunal hears claims from dust disease sufferers or their dependants. Given the degenerative nature of these diseases, plaintiffs may be unduly burdened by virtual attendance, or those who require bedside hearings may be disadvantaged by limitations placed on the attendance of their legal representatives.

However, the Committee acknowledges that the Practice Note is providing for the return of in-person attendance following its suspension due to the COVID-19 pandemic. It also notes that this is a response to the extraordinary and evolving circumstances of the pandemic, and is balancing the rights of individuals to in-person attendance with the need to protect public safety particularly dust disease sufferers who are more vulnerable to serious effects of COVID-19. In the circumstances, the Committee makes no further comment.

Open justice

10.6 Paragraphs 13 and 14 of the Practice Note set limitations on the attendance of third parties at tribunal hearings. The policy rationale for these limitations is set out in paragraph 12, which states that:

> The Tribunal remains committed to the principles of open justice. However, the risk of COVID-19 requires the Tribunal to limit the persons who may attend a hearing in person.

10.7 In-person attendance at tribunal hearings by members of the public are prohibited under paragraph 13. However, a member of the public may be permitted to virtually attend a hearing other than a bedside hearing or Issues and Listings Conference. This attendance by a virtual courtroom will be facilitated by email request to the relevant Judge's associate.

10.8 Attendance by members of the media is also limited by paragraph 14 of the Practice Note. Specifically, a member of the media who wishes to attend a hearing in person must provide evidence to the List Judge or Judge that they are vaccinated, and any in-person attendance must abide by the $4m^2$ rule. Members of the media who do not wish to provide evidence of their vaccination status may virtually attend by email request to the relevant Judge's associate.

The Practice Note imposes limitations on the attendance of members of the public and media at tribunal hearings. By prohibiting members of the public attending in-person and limiting in-person attendance of members of the media to those individuals who have sought leave and can show they are fully vaccinated for COVID-19, the Practice Note may impact a person's rights to a fair and public hearing contained in Article 14 of the ICCPR.[31] The right to a fair and public hearing enshrines principles of open justice which require the administration of justice must take place in courts which the public and the media may access.

However, Article 14 also recognises that the press and public may be excluded for reasons of morals, public order or national security, to protect the interest of the parties' private lives or where publicity would prejudice the interests of justice. In this case, the Practice Note imposes limitations in response to the extraordinary circumstances of the COVID-19 pandemic. The Committee further notes that the Practice Note does not preclude the virtual attendance of members of the public and the media. In the circumstances, the Committee makes no further comment.

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

Period of application and review date

10.9 The Practice Note commenced on 14 October 2021.

The Practice Note does not include a specific end date. The Committee would prefer that the Practice Note include a fixed date for review, to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on access to justice and open justice, and that it responds to COVID-19, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

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

11. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 6) 2021

Date tabled	LA: 9 November 2021 LC: 9 November 2021
Disallowance date	LA: 22 February 2022 LC: 22 March 2022
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

11.1 The object of the *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 6) 2021* (the **Regulation**) is to prescribe a penalty notice offence amount of $5,000 for the offence of failing to comply with the direction prohibiting the provision, display or production of information or evidence purporting to show a person is a fully vaccinated person that is not true and accurate.

11.2 The Regulation is made under the delegation of the *Public Health Act 2010* and takes effect from the date on which the Regulation was published; 27 October 2021.

Issues considered by committee

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

Penalty notice offence – right to a fair trial

11.3 The Regulation amends Schedule 4 of the *Public Health Regulation 2012* to enable a penalty notice to be issued for an offence of displaying or producing information or evidence purporting to show a person is a fully vaccinated person. The penalty for a contravention of the provision under the amendment is $5 000 for an individual. The amendment does not create an offence against a corporation.

The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 6) 2021* provides that penalty notices can be issued for an offence of displaying or producing information or evidence purporting to show a person is a fully vaccinated person. The Regulation inserts subclause (c2) to Schedule 4 to prescribe the penalty for a contravention of the provision under the amendment is $5 000 for an individual. Under the amendment the offence will only be made out where the display or production of that information is untrue and inaccurate.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount and in some circumstances may elect to have the matter heard by a court. This may impact a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial

decision maker. The Committee also notes that penalty notices of $5 000 for an individual are significant monetary amounts to be imposed by way of penalty notice.

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

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.

(1A) The Committee is not precluded from exercising its functions under subsection (1) in relation to a regulation after it has ceased to be subject to disallowance if, while it is subject to disallowance, the Committee resolves to review and report to Parliament on the regulation.

(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.

(3) The functions of the Committee with respect to regulations 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. Amendment of Work Health and Safety (Mines and Petroleum Sites) Regulation 2014
The object of this Regulation is to amend the *Work Health and Safety (Mines and Petroleum Sites) Regulation 2014* for the following purposes—
(a) to prescribe carbon dioxide exposure standards for underground coal mines to ensure the standards are not exceeded,
(b) to make minor amendments in the nature of statute law revision.

   This Regulation is made under the *Work Health and Safety (Mines and Petroleum Sites) Act 2013*, including sections 4 and 76, the general regulation-making power, and Schedule 2. See also the Work Health and Safety Act 2011, including section 276, the general regulation-making power, and Schedule 2.

2. Casino Control Amendment (Crown Casino) Regulation 2021
The object of this Regulation is to amend the *Casino Control Regulation 2019* to—

   (a) declare certain land at Pyrmont and Barangaroo to be a casino precinct for the purposes of enabling the Commissioner of Police to direct casino operators to exclude persons from the casino precinct, and

   (b) modify an applied provision of the Liquor Act 2007 allowing the Independent Liquor and Gaming Authority to grant a licence to a casino operator to sell or supply liquor on specified casino premises to a resident for consumption away from the licensed premises if certain requirements are complied with.

3. Community Land Management Amendment (COVID-19) Regulation (No 3) 2021
The object of this Regulation is to provide for the following matters under the Community Land Management Act 2021 for the purpose of responding to the public health emergency caused by the COVID-19 pandemic— (a) altered arrangements for convening, and voting at, meetings of an association or association committee, (b) allowing instruments and documents, instead of being affixed with the seal of an association in the presence of certain persons, to be signed, and the signatures to be witnessed, by those persons.

4. Electoral Funding Amendment (Political Donations Disclosure Period) Regulation 2021
The object of this Regulation is to extend the period for making disclosures of political donations made during the half-year ending on 31 December 2021 from 4 weeks to 8 weeks after the end of the half-year.

   The Regulation prescribes a period of 8 weeks to make disclosures of political donations which are not "reportable political donations" under the Electoral Funding Act 2018. Section 15(1)(b) of the Act provides that the Regulations may prescribe a period longer than 4 weeks for making such disclosures.

5. Energy and Utilities Administration Amendment (Net Zero Implementation) Regulation 2021

   The Net Zero Emissions and Clean Economy Board established in accordance with the Energy and Utilities Administration Act 1987 is required to consider the State's emissions reduction objectives in exercising its functions. The object of this Regulation is to update a reference to the State's 2030 emissions reduction objective from a reduction of at least 35% of 2005 emissions levels to a reduction of at least 50% of 2005 emissions levels.

6. Environmental Planning and Assessment Amendment (Activation Precincts) Regulation 2021

   The object of this Regulation is to amend the *Environmental Planning and Assessment Regulation 2000* and the *Environmental Planning and Assessment Amendment (Wagga Wagga Activation Precinct) Regulation 2021* in relation the Parkes, Wagga Wagga and Moree Activation Precincts under *State Environmental Planning Policy (Activation Precincts) 2020*.

   The amendments introduced by the Regulation are intended to align the existing provisions of the *Environmental Planning and Assessment Regulation 2000* and the *Environmental Planning and Assessment Amendment (Wagga Wagga Activation Precinct) Regulation 2021* with the updated *Wagga Wagga Special Activation Precinct Master Plan* published in April 2021.

7. Environmental Planning and Assessment Amendment (Compliance Cost Notices) Regulation 2021

   The objects of this Regulation are to—

   (a) remove the requirement for specific matters relating to the costs and expenses claimed under a compliance cost notice to be included in the notice, and

   (b) remove the cap on the amount payable under a compliance cost notice in relation to an investigation that leads to the giving of the development control order to which the compliance cost notice relates, and

   (c) increase, from $500 to $750, the cap on the amount payable under a compliance cost notice in relation to the preparation or serving of the notice of the intention to give the development control order to which the compliance cost notice relates.

8. Environmental Planning and Assessment Amendment (Complying Development Certificates) Regulation 2021

   The object of this Regulation is to prescribe documents that must accompany an application for a complying development certificate for certain complying development in relation to industrial and business buildings. Specifically, for complying development under Part 5A of the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.*

   The Regulation is made under the *Environmental Planning and Assessment Act 1979*.

9. Environmental Planning and Assessment Amendment (Consultation, Concurrence and Approval) Regulation 2021

The objects of this Regulation are as follows—

(a) to require a consent authority to consult with, or obtain the concurrence of, certain persons by using the NSW planning portal,
(b) to require a consent authority to obtain the general terms of an approval proposed to be granted by certain persons in relation to integrated development by using the NSW planning portal,
(c) to require certain persons to use the NSW planning portal to respond to the consent authority's consultation, or request for concurrence or general approval,
(d) to omit a redundant reference.

The Regulation amends the *Environmental Planning and Assessment Regulation 2000* to provide that consultations and approvals required under the *Environmental Planning and Assessment Act 1979* between consent authorities and relevant authorities/persons to be done through the NSW planning portal.

10. Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021

The object of this Regulation is to repeal and remake, with amendments, certain provisions of the Environmental Planning and Assessment Regulation 2000, which will be repealed on 1 March 2022 under the Subordinate Legislation Act 1989, section 10(2).

This Regulation deals with the following matters—

(a) certification of development for the purposes of the Environmental Planning and Assessment Act 1979, Part 6, including compliance certificates, construction certificates, subdivision works certificates, occupation certificates and subdivision certificates,
(b) fire safety of buildings and obligations on persons relating to fire and building safety,
(c) other minor related matters.

This Regulation primarily comprises or relates to matters under the Environmental Planning and Assessment Act 1979, Part 6 and section 10.13(1)(d). The Subordinate Legislation Act 1989, Schedule 5, clause 12(2) provides that a regulatory impact statement is not required.

11. Environmental Planning and Assessment Amendment (Development Levy) Regulation 2021

The object of this Regulation is to provide for the maximum percentage of the cost of a proposed development in Central Sydney that may be imposed as a levy as a condition of consent to the development.

The Regulation amends the *Environmental Planning and Assessment Regulation 2000* to set the maximum percentage of the proposed cost of carrying out the Central Sydney Development Contributions Plan 2020 that may be imposed by a levy.

12. Environmental Planning and Assessment Amendment (Frenchs Forest Precinct) Regulation 2021

    The object of this Regulation is to specify documents that must accompany certain development applications on land known as the Frenchs Forest Precinct. The Regulation amends the Environmental Planning and Assessment Regulation 2000 to mandate that development in the Frenchs Forest Precinct must be accompanied by a consistency assessment strategy within the Frenchs Forest 2041 Place Strategy. An application must include a traffic and transport study that is endorsed by Transport for NSW and demonstrates there will be adequate transport infrastructure and capacity to service a particular site at the Precinct.

    This Regulation is made under the Environmental Planning and Assessment Act 1979.

13. Environmental Planning and Assessment Amendment (Wilton Town Centre Precinct) Regulation 2021

    The object of this Regulation is to amend the *Environmental Planning and Assessment Regulation 2000*, clause 275A consequential on the making of the *State Environmental Planning Policy (Sydney Region Growth Centres) Amendment (Wilton Town Centre Precinct) 2021*.

    The Regulation is made under the *Environmental Planning and Assessment Act 1979* and commences on 31 March 2022.

    The Regulation inserts clause 275A into the *Environmental Planning and Assessment Regulation 2000* to require all development consent applications relevant to Wilton Precincts land include an assessment of the consistency of the proposed development with the relevant structure plan.

14. Firearms Amendment (Exemptions and Compliance Requirements) Regulation 2021

    The objects of this Regulation are—

    (a) to enable the Commissioner of Police—

        i. to grant exemptions during public emergencies from participation requirements for certain holders of firearm licences who are club members, and

        ii. to approve longer periods within which security guards who possesses firearms must undertake approved continuing firearms safety training courses, and

    (b) to extend for 12 months an exemption granted to persons who are current category D licence holders in whose name military self-loading centre-fire rifles are registered if their licences are renewed.

    This Regulation is made under the Firearms Act 1996.

15. Gas and Electricity (Consumer Safety) Amendment (Electrical Meter Installation Safety) Regulation 2021

    The object of this Regulation is to exempt retailers and metering coordinators from obligations under the *Gas and Electricity (Consumer Safety) Act 2017* in relation to the installation of advanced electrical meters, subject to conditions. It achieves this through amendments to the *Gas and Electricity (Consumer Safety) Regulation 2018*.

The obligations under the sections 38AB and 38AC of the Act aim to ensure the safe provision, installation, maintenance and repair of advanced meters. Penalties attach to contraventions of certain obligations, with a metering coordinator that is a corporation liable for 500 penalty units ($55 000) and an individual liable for 250 penalty units ($25 000) under sections 38AC(1) and (5). The exemptions apply where a metering provider is engaged and the relevant safety obligations are met by that metering provider and (where relevant) the metering coordinator and/or the retailer.

This Regulation is made under section 75(3) of the Act.

16. Gas Supply and Pipelines Amendment Regulation 2021

The objects of this Regulation are to include a definition of natural gas in the Gas Supply (Safety and Network Management) Regulation 2013 and to make consequential amendments Gas Supply (Natural Gas Retail) Regulation 2014 and the Pipelines Regulation
2013 on commencement of the Energy Legislation Amendment Act 2021.

The Regulation omits the omits the term 'gas' from clause 3(1) of the Gas Supply (Natural Gas Retail) Regulation 2014 and replaces it with a new definition of 'natural gas' as used under clause 3 of the Gas Supply (Safety and Network Management) Regulation 2013.

The Regulation is made under the Gas Supply Act 1996 and the Pipelines Act 1967.

17. Liquor Amendment (Special Events Extended Trading) Regulation 2021

The objects of this Regulation are as follows—

(a) to enable certain hotels and clubs to trade during extended hours for certain special events,

(b) to prescribe a fee for applications under the *Liquor Act 2007*, section 94B.

The Regulation provides for certain classes of hotels or clubs to operate with extended trading hours for special events, being the Bathurst 1000 and specific matches during Australian Open. It also provides for an uncertain commencement of the amendment to fees, being the later of the assent to the *Customer Service Legislation Amendment Act 2021* or the date of the Regulation's publication. However, as the date of the Act's assent was prior to the publication date of the Regulation, all amendments in the Regulation commenced on publication.

18. Liquor Amendment (Special Events Extended Trading) Regulation (No 2) 2021

The object of this Regulation is to enable certain hotels and clubs to trade during extended hours for the following special events that will be held from January to October 2022—

(a) Tamworth Country Music Festival,
(b) Asian Football Confederation (AFC) Asian Cup,
(c) Newcastle 500,
(d) Vivid Sydney,
(e) Coonamble Rodeo and Campdraft,
(f) NRL State of Origin Game 2,
(g) NRL Grand Final.

This Regulation is made under the *Liquor Act 2007*, including sections 13 and 159, the general regulation-making power.

Like the *Liquor Amendment (Special Events Extended Trading) Regulation 2021* above, the Regulation provides for certain classes of hotels or clubs to operate with extended trading hours for the above listed special events.

19. Local Government (General) Amendment (Annual Reports) Regulation 2021
The object of this Regulation is to prescribe information and materials that must be contained in a council's annual report.

Specifically, the Regulation amends clause 217 of the *Local Government (General) Regulation 2021* to require an annual report of a council to additionally include a statement of the total number of persons who performed paid work for a council on a relevant day (such day chosen by the Secretary and published on the Department's website) including, in separate statements, the total number of persons employed under specified employment arrangements.

The Regulation is made under the *Local Government Act 1993.*

20. Local Government (General) Amendment (Model Code of Meeting Practice) Regulation 2021
The objects of the Regulation are to prescribe a new model code of meeting practice for the conduct of meetings of councils and certain committees of councils, and to extend by 6 months, until 30 June 2022, the period during which councils are exempt from a provision of the former model code that requires councillors to be personally present at certain meetings.

The regulation updates the Local Government (General) Regulation 2021 to provide for the most recent Code published in Gazette 556 on 29 October 2021. Additionally, the amendment extends the operation of clause 237(3) to state that the section will repeal on 30 June 2022, in place of 31 December 2021. The extension enables councillors to appear at council meetings by audio-visual link with approval.

The Regulation is made under the Local Government Act 1993.

21. Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Amendment (Displaced Persons) Regulation 2021
The object of this Regulation is to amend the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021 to—permit the manager of a caravan park or camping ground to authorise a displaced person, including a person displaced as a result of a natural disaster or the COVID-19 pandemic, to stay in the caravan park or camping ground for up to 2 years, and to enable councils to extend, by a local approvals policy, the period within which a moveable dwelling or associated structure, installed without the need for council approval to accommodate a displaced person, can remain installed.

The Regulation amends section 73 of schedule 1 to replace the meaning of a 'displaced person' from 'a person who has been displaced because of a bush fire' to 'a person

displaced as a result of a natural disaster or a pandemic.' By amending the meaning of a displaced person, the regulation broadens the conditions of approval to operate a caravan park or camping ground. Under the amendment, the manager of a caravan park or camping ground may authorise a person to stay in a caravan park or camping ground for a period of up to 2 years if reasonably satisfied that the person is a displaced person.

The Regulation is made under the Local Government Act 1993.

22. Motor Accident Guidelines - Version 8 - 29 October 2021

The *Motor Accident Injuries Act 2017* (the Act) establishes a scheme of CTP insurance and the provision of benefits and support relating to the death of, or injury to, people injured as a consequence of motor accidents in New South Wales (NSW) on or after 1 December 2017. The *Motor Accident Injuries Regulation 2017* (the Regulation) contains provisions that supplement the implementation and operation of the Act in a number of key areas.

These Guidelines are made under section 10.2 of the Act, which enables the Authority to issue Motor Accident Guidelines with respect to any matter that is authorised or required by the Act.

The Guidelines support the delivery of the objects of the Act and the Regulation by establishing clear processes and procedures, scheme objectives and compliance requirements. In particular, the Guidelines describe and clarify expectations that apply to respective stakeholders in the scheme. The Authority expects stakeholders to comply with relevant parts of the Guidelines that apply to them.

The Guidelines substantially reproduce its predecessor (Version 7) with amendments to reflect administrative changes and correct typographical errors. Substantive changes made in this version of the Guidelines expand protections for insured claimants, particularly in respect to the exercise of insurer's investigation powers.

23. Motor Accident Guidelines - Version 8.1 - 17 December 2021

The *Motor Accident Injuries Act 2017* (the Act) establishes a scheme of CTP insurance and the provision of benefits and support relating to the death of, or injury to, people injured as a consequence of motor accidents in New South Wales (NSW) on or after 1 December 2017. The *Motor Accident Injuries Regulation 2017* (the Regulation) contains provisions that supplement the implementation and operation of the Act in a number of key areas.

These Guidelines are made under section 10.2 of the Act, which enables the Authority to issue Motor Accident Guidelines with respect to any matter that is authorised or required by the Act.

The Guidelines substantially reproduce its predecessor (Version 8) with few amendments. These amendments are largely to make provisions for certain matters which were absent from Version 8, being the submission of accident claims using online systems, and certain formatting changes.

24. Motor Vehicles Taxation Amendment (CPI Adjustment) Regulation 2021
The object of this Regulation is to amend the *Motor Vehicles Taxation Regulation 2016* to adjust motor vehicle tax amounts for the 2022 calendar year.

The Regulation updates the amount of tax payable on specified motor vehicles under Schedule 1 of the *Motor Vehicles Taxation Regulation 2016* as applicable for the 2022 calendar year. These taxable amounts have been increased nominally to account for inflation and otherwise does not substantially change the taxes owed under Schedule 1.

25. Notification of District Court Criminal Practice Note 23 (n2021-2297)
The object of the Practice Note is to revise District Court Criminal Practice Note 23, which
outlines the procedure for the resumption of jury trials in light of the easing of restrictions due to COVID-19. on 13 October 2021. The Practice Note commences on 21 October 2021.

Revision of Practice Note 23 establishes processes for the resumption District Court trials for persons who are both vaccinated and not vaccinated against COVD-19. The revised Practice Note allows for the vacation of trials where parties do not consent to their vaccination status being shared or refuse rapid antigen testing. Vacation of trials in all circumstances must be decided on in the interests of justice, public health risks and other relevant matters under the Practice Note.

26. Professional Standards Act 1994—Notification of The Queensland Law Society Professional Standards Scheme (2021-2469)
The Queensland Law Society (the Society) has made an application to the Professional Standards Council for the approval of a scheme under the *Professional Standards Act 2004* (Qld). The Scheme has been prepared by the Society for the purposes of limiting the occupational liability of Participating Members to the extent such liability may be limited under the Act. The Scheme limits damages to be awarded against a Participating Member to the monetary ceiling specified for that Participating Member if the Participating Member has the benefit of Insurance as required by the Scheme.

The scheme will operate in NSW pursuant to section 13 of the *Professional Standards Act 1994* (NSW) and will commence on 1 July 2022.

27. Protection of the Environment Operations (General) Amendment (Kooragang Island Premises) Regulation 2021
The object of this Regulation is to declare the Environment Protection Authority to be the appropriate regulatory authority for non-scheduled activities carried on at certain premises at Kooragang Island. The Regulation amends the Protection of the Environment Operations (General) Regulation 2021 by inserting clause 120A which declares the Environmental Protection Authority as the appropriate regulatory authority for non-scheduled activities at the premises. The Regulation streamlines the application of section 118 of the parent Regulation which states EPA is declared, under section 6(3) of the Act, to be the appropriate regulatory authority for non-scheduled activities to which this clause applies.

The Regulation is made under the Protection of the Environment Operations Act 1997.

28. Referable Debt Order (2021-736)
Pursuant to section 7(2) of the *State Debt Recovery Act 2018*, act of grace payments made by the Government which are recoverable under section 5.7(3) of the *Government Sector Finance Act 2018* for the purpose of the Commercial Landlord Hardship Fund, payable to Service NSW, are declared to be referable debts.

29. Referable Debt Order (2021-769)
Pursuant to section 7(2) of the *State Debt Recovery Act 2018*, act of grace payments made by the Government which are recoverable under section 5.7(3) of the Government Sector Finance Act 2018 for the purpose of the Stay & Rediscover accommodation voucher scheme, payable to Service NSW, are declared to be referable debts.

30. Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2021
The object of this Regulation is to repeal the *Retail and Other Commercial Leases (COVID-19) Regulation 2021* and the *Conveyancing (General) Regulation 2018*, Schedule 5 and to save protections that occurred under the repealed provisions.

The *Retail and Other Commercial Leases (COVID-19) Regulation 2021* and *Conveyancing (General) Regulation 2018*, Schedule 5 continue to apply, despite their repeal, to anything occurring in relation to a lease while the lease was an impacted lease within the meaning of the regulation and schedule, respectively. These provisions preserve the rights accrued while the regulation and schedule were in force.

Commentary on the repealed legislation is included in Digest No. 37/57,[32] including regarding the limitation on property rights and freedom of contract, and the requirement that businesses incur a loss.

This Regulation is made under—
(a) the *Retail Leases Act 1994*, including sections 85, the general regulation-making power, and 87, and
(b) the *Conveyancing Act 1919*, section 202, the general regulation-making power.

This Regulation is made with the agreement of the Minister for Customer Service, being the Minister administering the *Conveyancing Act 1919*.

31. Road Transport (General) Amendment (Miscellaneous) Regulation 2021
The object of this Regulation is to make law revision amendments to the Road Transport (General) Regulation 2021 and the Road Rules 2014 to correct certain layout and typographical errors.

32. Road Transport (Vehicle Registration) Amendment (CPI Adjustment) Regulation 2021
The object of this Regulation is to amend the Road Transport (Vehicle Registration) Regulation 2017 to adjust the registration charge amounts for primary producers' vehicles for the 2022 calendar year.

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[32] New South Wales Parliament, Legislation Review Committee, *Legislation Review Digest No. 37/57*, 16 November 2021.

33. State Authorities Non-contributory Superannuation Amendment Regulation 2021
The object of this Regulation is to amend the State Authorities Non-contributory Superannuation Regulation 2020 to increase the salary percentage prescribed for additional employer contributions by amounts that match the increments of increases to the superannuation guarantee charge percentage specified in the Superannuation Guarantee (Administration) Act 1992 of the Commonwealth.

34. Strata Schemes Management Amendment (COVID-19) Regulation (No 3) 2021
The object of this Regulation is to provide for the following matters under the *Strata Schemes Management Act 2015* for the purpose of responding to the public health emergency caused by the COVID-19 pandemic—
(a) altered arrangements for convening and voting at meetings of an owners corporation or a strata committee,
(b) allowing instruments and documents, instead of being affixed with the seal of an owners corporation in the presence of certain persons, to be signed, and the signatures to be witnessed, by those persons.

The Regulation provides for alternative arrangements for convening and voting at strata meetings, and an alternative to affixing the owners corporation seal, during the COVID-19 pandemic. The provisions are time limited to expire on 31 May 2022.

35. Water Management (General) Amendment (Metering Equipment) Regulation 2021

The object of this Regulation is to amend the *Water Management (General) Regulation 2018* to provide for a temporary exemption to the mandatory metering equipment condition for water supply works used to take water pursuant to a domestic and stock access licence, or both a basic landholder right and a domestic and stock access licence, in certain circumstances. The Regulation inserts clause 230(2A) into the *Water Management (General) Regulation 2018* to create these exemptions and states the exemptions apply to only work done before 1 December 2024 and which satisfy specific criteria under the provision.

The Regulation is created under the *Water Management Act 2000.*