Legislation Review Committee

PARLIAMENT OF NEW SOUTH WALES

Legislation Review Digest No. 46/57 - 9 August 2022

New South Wales Parliamentary Library cataloguing-in-publication data:

A catalogue record for this
book is available from the
National Library of Australia

ISSN: 1448-6954

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

Contents

Membership

Chair	Mr Dave Layzell MP, Member for the Upper Hunter
Deputy Chair	Mr Lee Evans MP, Member for Heathcote
Members	The Hon. Scott Barrett MLC Ms Abigail Boyd MLC Mr David Mehan MP, Member for the Entrance The Hon. Shaoquett Moselmane MLC Mr Peter Sidgreaves MP Mr Nathaniel Smith MP, Member for Wollondilly
Contact details	Legislation Review Committee Parliament of New South Wales 6 Macquarie Street Sydney NSW 2000
Telephone	(02) 9230 2144 / (02) 9230 2390
E-mail	Legislation.Review@parliament.nsw.gov.au
Website	www.parliament.nsw.gov.au/lrc

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. ABORIGINAL CULTURAL HERITAGE (CULTURE IS IDENTITY) BILL 2022*

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

Limited capacity to seek compensation

Section 35 provides that a person is not entitled to compensation for loss resulting from an operation of Part 3, which sets out rights and duties in relation to Aboriginal cultural heritage. Part 3 gives the ACH Council powers to control the management of Aboriginal cultural heritage, as well as limiting what can be done to land that is the site of Aboriginal cultural heritage and creating related offences.

In particular, the powers in relation to the management of heritage are that the ACH Council under section 41(a) may arrange for Aboriginal ancestral remains to be transferred into its custody and be returned to a custodian of those remains. This may affect the ownership of, or access to, real or personal property that may be subject to a transfer of custody. Under both common and statute law in NSW, the compulsory acquisition of real property may give rise to a right to financial compensation, and section 35 of the Bill extinguishes this right. Given the wide ambit of section 35 to remove entitlement to any loss occurring from the operation of Part 3, the Committee refers this matter to Parliament for its consideration.

Strict liability offences

The Bill creates a number of strict liability offences for conduct relating to the protection and maintenance of Aboriginal cultural heritage. For example, section 159 states that a person who is given a remediation order must comply with the directions given in that order. A maximum penalty of up to 5000 penalty units ($550 000) may apply for contravening this offence, plus an additional 250 penalty units ($27 500) per for each day that the offence continues. This may apply to individuals and corporations. The Bill is silent on whether any specific defences may apply to negate or diminish criminal liability.

The Committee generally comments on strict liability offences as they depart from the common law principles that the mental element of an offence is relevant to the imposition of liability. The Committee notes that strict liability offences are not uncommon in a regulatory context to encourage compliance. However, the Committee notes that the high maximum penalties that may be applied. In the circumstances, the Committee refers the matter to Parliament for its consideration.

Double punishment

The Bill provides two instances where a person may be charged with an offence under separate sections for the same circumstances. First, under section 66, it provides that a person who contravenes a condition of a protected area declaration may also be subject to an offence under Part 5 for the same circumstances. Second, under section 101, a person may be charged with an offence for contravening a condition of a ACH permit and may also be subject to an offence under Part 5 for the same circumstances. Part 5 sets out offences for harming Aboriginal cultural heritage.

This could result in a person being subject to proceedings for an offence under either of these sections, and also for an offence under Part 5 for the same conduct. This may result in a person

being functionally punished twice for the same conduct. The Committee refers the matter to Parliament for its consideration.

Reversed onus of proof

Section 234 of the Bill provides that a person that alleges that they had a reasonable excuse for conduct that would otherwise be prohibited under the Bill, has the onus of proving that matter. This is in relation to two offences, firstly for contravening a direction given to a person by an Inspector (section 215) and secondly for failing to return an identity card after ceasing to be an Inspector or Aboriginal Inspector (section 196(2)). The maximum penalty for the first offence is 200 penalty units ($22 000) and for the second offence is 100 penalty units ($11 000).

In regards to these offences, 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 and accused person's privilege to be presumed innocent until proven guilty according to law. However, the Committee notes that the onus for proving the factual circumstance of these offences is still primarily on the prosecution. Additionally, the reversed onus provides a defence for the accused persons to prove that their conduct was justified. In the circumstances, the Committee makes no further comment.

Inspection and search powers

The Bill provides inspectors with significant entry, search and seizure powers in relation to enforcing provisions under the Act. For example, inspectors may enter and search property to ascertain whether an offence has been or is being committed. Inspectors are also not required to obtain a warrant from an independent judicial officer to authorise the use of these powers. This may impact upon a person's right to privacy, property rights and personal physical integrity, and the right to be free from arbitrary search.

The powers of inspectors are wide-ranging and include, for example, the power to stop a vehicle for inspection purposes by any means reasonably necessary and detain the vehicle for a reasonable period (section 203).

The Committee acknowledges that inspections may be necessary to give effect to and enforce the protections that Bill provides to Aboriginal cultural heritage. However it notes that the powers given to inspectors are quite broad and do not uniformly apply reasonableness requirements that may ordinarily prevent a risk of arbitrary entry, search and seizure taking place. In the circumstances, the Committee refers the matter to Parliament for its consideration.

Restricting the privilege against self-incrimination

The Bill introduces powers for a person to be compelled to answer questions, or produce a record or thing. Under section 219, a person is not excused from the requirement to provide information, a record or thing of the ground that it may incriminate them. The Bill therefore may impact on the right to silence and the privilege against self-incrimination.

The Committee notes that the Bill includes some safeguards including that compelled information is not admissible in evidence against the person in proceedings except for perjury or an offence relating to giving false or misleading information. However, the right to silence and the privilege against self-incrimination are established legal principles that are impacted by this Bill. In the circumstances the Committee refers the matter to Parliament for its consideration.

Vicarious liability

Part 11 sets out vicarious liability provisions that attach to employers or other individuals or organisations for conduct by third parties. This includes:

a) officers may be liable for offence by body corporates for some offences contained in the Bill (section 224);

b) partners may be liable for offences by the partnership (section 226);

c) principals may be liable for offences by an agent (section 227); and

d) employers may be liable for offences by employees (section 228).

The Committee notes that the Bill does contain some safeguards for these situations. For example, officers are only liable under section 224 if the officer failed to take all reasonable steps to prevent the commission of the offence by the body corporate.

The Committee notes that the prosecution bears the burden of proving certain elements of the liability offences, including whether a party knew or ought to have known of the circumstances of an offence, or took reasonable steps to prevent the offence from occurring. However, the Committee also notes that certain offences require the burden of proof to be placed on the defendant. For example, it is a defence in section 227(3) to prove that the principal took all reasonable steps to prevent the commission of the offence by the agent.

The Committee notes that vicarious liability offences are not unusual in a regulatory context to encourage corporate oversight and compliance. However, the Committee also notes that the maximum penalties for offences under the Bill are significant, being 500 penalty units ($550 000) plus an additional 250 penalty units ($27 500) for each day or part of a day that the offence continues. In the circumstances, the Committee refers the matter to Parliament for its consideration.

Right to a fair trial – certain evidence to be taken as fact

The Bill provides that certain documents are to be taken as fact if they are signed or certified by a member of the ACH Council. Specifically, section 232 states that production of a certificate purporting to be signed by a member in regards to one of the listed matters, is taken to be evidence of the facts stated in that certificate. The matters may relate to whether a specified person was authorised to carry out a certain activity on a specified day or during a specified period under a specified instrument.

This assumption of fact may impact a defendant's right to a fair trial, including the right to be presumed innocent unless guilt is proved beyond reasonable doubt. These sections would prevent a defendant from exercising their right to challenge the validity of evidence that may be central to the claim made against them. The Committee notes that the penalties that may be imposed if a defendant is found guilty of an offence under the Bill are significant, and may include a term of imprisonment.

For example, under section 232 matters that these certificates may relate to include that, on a specified day or during a specified period, a person was or was not an Inspector, an Aboriginal Inspector or a person authorised to assist an Inspector or an Aboriginal Inspector. The penalty for a personal who falsely represents that they are an Inspector or Aboriginal Inspector is 12 months imprisonment, or 200 penalty units ($22 000) or both (section 198). This demonstrates how the assumption of a document being true may directly impact on an individual's right to due process in challenging the relevant evidence at trial.

In the circumstances, the Committee refers the matter to Parliament for its consideration.

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

Limitations on review of decisions made by the ACH Council

The Bill gives the ACH Council significant powers to make decisions about the management of Aboriginal cultural heritage. This may include the consideration of applications, issuing of relevant permits, and extensions to those permits.

In a number of circumstances, ACH Council decisions are not subject to review. Removing the right to administrative review of Council decisions may limit procedural fairness and the right of persons to have decisions independently reviewed. Section 236 further limits which affected persons are able to seek review of reviewable decisions.

An example of a non-reviewable decision of the ACH Council is section 89(1)(c) which provides that the ACH Council may refuse to grant an Aboriginal cultural heritage permit, which is required to carry out tier 1 or tier 2 activity. That is, an activity in an area of Aboriginal cultural heritage that may cause harm. Section 96 also provides that the ACH Council may refuse to grant an extension of this permit, and that is also a non-reviewable decision.

The Committee acknowledges that the objects of the Bill includes recognising that Aboriginal people have custodianship over Aboriginal cultural heritage (section 1(b)(ii), and that NCAT is not an Aboriginal body. However, the right to review administrative decisions provides additional protection for individuals impacted by a decision of the ACH Council. In the circumstances, the Committee refers this matter to the Parliament for its consideration.

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

Matters deferred to the regulations

The Committee generally prefers substantive clauses to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected such as by way of making an application under the Act or the procedure to be followed by Inspectors who are provided with significant powers.

The Committee also notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. However, the Committee also notes that the Bill provides that the regulation may proscribe offences with a provide a maximum penalty not exceeding 200 penalty units ($22 000), which is a significant penalty to impose on an individual. In the circumstances, the Committee refers the matter to Parliament for its consideration.

Delegation powers

Section 251 provides that the Minister may delegate any of their functions, other than this power of delegation, in the Bill to the ACH Council. Further, section 252 provides that the Secretary may delegate their functions, other than this power of delegation, to a person employed or engaged in the Department. Neither section 251 or 252 allows for the functions or powers to be subdelegated. However subsection 252(3) states that this does not limit the ability of the Secretary to perform a function through an officer or agent.

The Committee notes that the ACH Council is not subject to the direction or control of the Minister (section 13(3)) and that the primary role of the Minister under the Bill is to appoint the members of the first ACH Council (Schedule 1, clause 2). The Committee also notes that the Secretary has limited functions in the Bill, which are principally focussed on dealing with seized things under section 209 or executing documents as evidence under section 233.

Further, the ACH Council may delegate its powers or duties in relation to a number of provisions to a member or staff member of the ACH Council, a committee of the ACH Council or a Aboriginal Land Council (section 15). The Committee notes that the ACH Council is provided with significant powers and functions, particularly regarding enforcement powers. The Committee usually prefers that provisions about delegations are drafted with a higher level of specificity. In the circumstances, the Committee refers this matter to the Parliament for its consideration.

Incorporation of extrinsic material

The ACH Council have powers in the Bill to make and issue Guidelines and policies and procedures. The Guidelines are public documents (section 246) that are subject to a public consultation protocol (section 245) that may cover topics including

a) the carrying out of consultation;

b) the identification of persons who are knowledge holders for an area; and

c) the factors to be considered in determining whether Aboriginal cultural heritage is of outstanding significance.

The policies and procedures must be complied with by Local Services and concern topics such as service functions, reporting and financial matters. The ACH Council must undertake consultation on these policies and procedures.

The Guidelines and policies and procedures may have an impact on the rights of individuals to access the services of the ACH Council and Local Services, as well as their responsibilities in regards to Aboriginal cultural heritage. Therefore, the Committee notes that the rights and responsibilities of individuals may be subject to these documents, which are not legislative instruments that are subject to Parliamentary scrutiny or disallowance. In the circumstances, the Committee refers this matter to Parliament for consideration.

2. APPROPRIATION BILL 2022; APPROPRIATION (PARLIAMENT) BILL 2022; STATE REVENUE LEGISLATION AMENDMENT BILL 2022

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

3. BAIL AMENDMENT BILL 2022

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

Procedural fairness - Removal of judicial discretion for sentencing

The Bill inserts section 22B to the Act which requires a court to refuse a person's bail in circumstances where they enter a guilty plea or are found guilty, and where the offender will be sentenced to full-time detention.

By mandating a refusal of bail pending a sentence hearing, this may impact on an offender's common law right to procedural fairness at sentence. Additionally, section 22B may remove or diminish a sentencing officer's judicial discretion, as a decision to refuse bail upon entry of a guilty plea or finding of guilt may imply that the sentencing officer, who may be a different officer to the one who refused bail, must subsequently hand down a sentence of full-time detention. This is particularly important in circumstances where it is unclear whether an offender may receive a sentence of full-time detention or any other sentence, such as an Intensive Correction Order which is also a sentence of imprisonment under the *Crimes (Sentencing Procedure) Act 1999*.

The Committee notes that the definition of conviction in section 22B is expanded to include a finding of guilt and may contradict existing statutory provisions and ordinary use of the word, such as section 4(1) of the Act and section 10A of the *Crimes (Sentencing Procedure) Act 1999*, which would suggest that a conviction is a form of penalty only.

However, the Committee acknowledges that bail may be granted under special or exceptional circumstances. Noting the lack of clarity in the meaning of special or exceptional circumstances, the provisions impact an offender's right to procedural fairness and removes judicial discretion. In the circumstances, the Committee refers these matters to Parliament for its consideration.

The Committee also notes that the Bill was introduced on 21 June 2022. It then passed the Legislative Assembly on 22 June 2022 and the Legislative Council on 23 June 2022. Consequently, the Committee was unable to report on the Bill before the second reading debates or the moving of amendments in either House.

Wide power to refuse bail - no limitation on offences to which section 22B applies

Section 22B of the Bill requires a court to refuse an offender's bail in the period between a finding of guilt and the offender's sentence hearing. This includes where an offender has entered a plea of guilty, as the definition of conviction under the Bill includes a plea of guilty. The limitations on the court's power are limited to entry of a guilty plea or a finding of guilt, where there is a release or detention application made and where the offender will be sentenced to full-time detention.

This may allow the court to have a wide power to refuse bail in these circumstances. This is particularly noting that there does not appear to be a limitation on the offences to which section 22B applies, such as strictly indictable offences or offences which require an election under section 260 of the *Criminal Procedure Act 1986*. This may result in persons being detained who may not necessarily be sentenced to full-time detention at their sentence hearing.

Further, there does not appear to be a limitation on the application of the provision as it relates to offenders who are minors or vulnerable persons. This may result in pre-sentence detention of minors or vulnerable persons if the objective and subjective circumstances relating to their proceedings may lend themselves to a sentence of full-time detention. In the absence of statutory safeguards limiting the power under section 22B, the Committee refers this matter to Parliament for its consideration.

Key terms undefined - 'Special or exceptional circumstances'

The Bill inserts section 22B to the Act which requires the court to refuse a person's bail after they enter a plea of guilty or are found guilty and will be sentenced to full-time detention. The Bill creates one exception to the mandatory refusal of bail in circumstances where the offender establishes that special or exceptional circumstances exist to justify their release. The Committee understands that Parliament intends to rely on the courts to ordain the meaning of special or exceptional circumstances on a case by case basis.

The Committee notes that neither the Bill nor the Act define special or exceptional circumstances. In addition, there is no statutory guidance in the Bill on examples of factual or contextual features of a matter which may amount to special or exceptional circumstances.

As noted in the Minister's second reading speech, the courts have declined to prescribe an exhaustive list of factors that may constitute special or exceptional circumstances. This may result in the inconsistent application of the provision and impact an accused person's rights to a fair trial.

Additionally, the individual rights of accused persons may be impacted if a person is unable to make a release application due to a lack of statutory guidance relating to special or exceptional circumstances which may be relevant to their release application. In the circumstances, the Committee refers the provision to Parliament for its consideration.

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

Delegation to regulations - minimum standards for electronic monitoring

The Bill inserts section 30A to the Act to prescribe certain minimum requirements for electronic monitoring used for the purposes of bail conditions. The provision delegates the making of minimum standards of electronic monitoring used in bail conditions to the regulations.

The Committee generally prefers for provisions relating to requirements for bail conditions to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight. In particular, because they will have a direct impact on the monitoring of persons accused of offences pending court proceedings.

However, the Committee acknowledges that placing this requirement in the regulation may allow the regulator to set the standard minimums for electronic monitoring in line with its relevant technical expertise. Further, this may allow for greater flexibility in making changes to standard minimums as the courts assess the effectiveness of these provisions. In the circumstances, the Committee makes no further comment.

4. CRIMES AMENDMENT (PROHIBITION ON DISPLAY OF NAZI SYMBOLS) BILL 2022

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

Freedom of expression and association

The Bill amends the Crimes Act 1900 to prohibit the public display of Nazi symbols. Under subsection 93ZA(1), a person who, by a public act, displays a Nazi symbol is guilty of an offence that may carry a maximum penalty of 100 penalty units ($11 000) or imprisonment for 12 months, or both, for an individual, or 500 penalty units ($55 000) for a corporation.

A public act is defined in section 93Z of the Crimes Act 1900 to include any form of written or visual communication to the public, including writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods, in addition to the wearing of clothes or the distribution or dissemination of any matter to the public. Section 93Z also specifies that an act may be public even if it occurs on private land.

The Bill therefore places restrictions on a person's freedom of expression and association specifically in regards to the public use of a Nazi symbol. The right to association protects a person's freedom to form and join associations to pursue a common goal, and to exchange ideas and information. The Committee generally comments where legislation limits a person's right to expression or association, as they are core rights contained in Articles 19 and 22 of the International Covenant on Civil and Political Rights (ICCPR).

However, the Committee recognises that the Bill contains exceptions, including that this section does not apply to a swastika used in connection with Hinduism, Buddhism or Jainism, and where a public act is to be done reasonably and in good faith for academic, artistic, or educational purposes, or for another purpose in the public interest.

The Committee recognises that the intent of the Bill is to protect individuals from activity that may incite or amount to hate behaviour or hate crimes, and the harm such symbols have historically caused in connection with the holocaust. The Committee also recognises that

lawful restrictions on the freedom of association and expression may be permitted in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. In these circumstances, and given the exceptions for a public act done in good faith for academic, artistic or educational purposes, or for another purpose in the public interest, and exceptions for the symbol in connection with Hinduism, Buddhism or Jainism, the Committee makes no further comment.

5. CRIMINAL ASSETS RECOVERY AMENDMENT (UNEXPLAINED WEALTH) BILL 2022*

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

Presumption of innocence – reduced standard of proof and reversed burden of proof

The Bill amends the standard of proof required for an unexplained wealth order to be made under section 28A of the *Criminal Assets Recovery Act 1990*. It does so by changing the threshold to the balance of probabilities, compared to the current Act which requires a reasonable suspicion that wealth was acquired illegally. Additionally, it removes the requirement of the person needing to be engaged in serious crime related activities or acquired property from another person's serious crime related activity.

The Bill also specifies that the burden of proof rests with the person alleged to have unexplained wealth to prove that their wealth was obtained lawfully. The Court may, without limitation, consider the person's income and expenditure to assess their unexplained wealth. The Bill also grants the Director of Public Prosecutions the power to make applications for unexplained wealth orders.

By reducing the standard of proof for granting unexplained wealth orders and reversing the burden of proof onto the person alleged, this may curtail a person's right to a presumption of innocence. The presumption of innocence implies a right not to be presumed guilty until proven so. Further, a greater number of unexplained wealth orders may be successfully granted due to the Director of Public Prosecutions being granted the power to make unexplained wealth order applications in addition to the NSW Crime Commission.

However, the Committee notes the statutory safeguards which may mitigate the effect of these provisions. For example, the court cannot consider any current or previous wealth of which the Crime Commission has not provided evidence. As noted in the Second Reading Speech, the intention of the Bill is to deal with significant wealth that has surfaced following the investigation of serious crimes such as murder. However, the Committee notes that the Bill does not set a minimum value of wealth that may be subject to an unexplained wealth order.

The Committee notes that the balance of probabilities is the usual evidentiary standard used in civil proceedings. This standard is generally considered to be sufficient to safeguard the right to a fair trial because civil proceedings result in monetary penalties rather than imprisonment. However, because the Bill both reduces the standard of proof and reverses the onus of proof, which are two key safeguards of the principle of a right to a fair trial, the Committee refers the matter to Parliament for its consideration.

6. ELECTORAL LEGISLATION AMENDMENT BILL 2022

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

Right to participation in public elections – early voting

The Bill amends the earliest allowable commencement date for early voting under section 114 of the *Electoral Act 2017* from the Monday after close of nominations to the Saturday preceding the election day. This would shorten the allowable time period for early voting to

seven days prior to the election, which may impact an individual's right to vote and participate in public elections.

However, the Committee acknowledges that the amendment is intended to enable more time for the registration of electoral materials before the commencement of early voting, to facilitate the provision of such materials to early voters. It also notes that voters who are not able to vote at a voting centre on election day or during the seven day early voting period may still be eligible to vote by postal ballot or technology-assisted means. In the circumstances, the Committee makes no further comment.

Implied freedom of political communication – electoral expenditure caps for third party campaigners

The Bill amends section 29(10) of the *Electoral Funding Act 2018* to set electoral expenditure caps for State election campaigns which apply to third-party campaigners, to $1 288 500 for registered third-party campaigners and $644 300 for all other third-party campaigners.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 55/56 (22 May 2018). Consistent with those comments, election expenditure caps placed on third party campaigners may burden their implied freedom of political communication by limiting their ability to engage in political campaigning.

The Committee acknowledges that the provisions preserve the expenditure caps for third-party campaigners which applied under the statutory predecessor to the Act and the *Electoral Funding Amendment (Savings and Transitional) Regulation 2019*.

However, the imposition of these expenditure caps on third-party campaigners is in addition to the limit under section 35 of the Act. Section 35 provides that it is unlawful for a third-party campaigner to act in concert with another person to exceed applicable expenditure caps. 'Acting in concert' is broadly defined to mean third-party campaigners who, under formal or informal agreement, campaign to achieve the same electoral outcome. The operation of expenditure caps set out in the Bill in conjunction of section 35 may thereby limit the ability of two or more distinct third-party campaigners from engaging in political communication during an election campaign, without risking a breach of either section 29 or 35 of the Act. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Lack of clarity – meaning of "thing"

The Bill amends section 186(2) of the *Electoral Act 2017* to enable the regulations to prescribe "things" or classes of "things" which may be exempt from the offence provisions under subsection (1). That exemption would allow the printing, publication, distribution or public display of these "things" without requiring it legibly showing the contact details for the person who instructed its printing, publication or distribution.

There appears to be no provisions of the Act or Regulation which define or narrow the scope of the ordinary meaning of "things". The Bill may therefore include a broad regulation-making power. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when it commences.

The Committee recognises that regulations build flexibility into the regulatory framework. It also acknowledges that the regulatory power is intended to facilitate political communication without fear of monetary or custodial sanction, where displaying or including the required information is unreasonable or impractical. However, the Committee notes that the

amendment may effectively allow regulations to prescribe exemptions without limit. For these reasons, the Committee refers to Parliament for its consideration whether further clarity may be provided as to the meaning of "thing".

Wide administrative power – disclosure of information

The Bill amends the *Electoral Act 2017* to give the Electoral Commissioner the discretionary power to disclose information obtained in the administration or execution of the Act, otherwise prohibited under section 268, where the information concerns the possible contravention of the Act, the *Electoral Funding Act 2018* or a regulation under either statute. That power may be exercised where the Commissioner is satisfied it is reasonably necessary to disclose that information in order to publicly report the progress or outcome of an investigation, or to provide it to a person who has reported a possible contravention, and that it is in the public interest to make the disclosure.

In doing so, the Bill may grant the Electoral Commissioner a wide and ill-defined administrative power to disclose information obtained in the administration or execution of an election. The provisions do not limit what information may be disclosed and does not exclude personal information, which may impact on an affected individual's right to privacy. Additionally, as the information disclosed may concern ongoing investigations, it may identify suspects of possible contraventions who have not been found to have breached the Act. This may also burden the individual's right to the presumption of innocence.

The Committee acknowledges that the provisions are intended to enhance the transparency of and confidence in the management of elections by the Electoral Commissioner, by facilitating the reporting of investigations into possible electoral breaches. It also recognises that section 268 of the Act provides for disclosure of election information in specified circumstances without offending the prohibition under that section.

However, the Committee notes that the provisions grant a broad discretion for the Electoral Commissioner to publicly report information relating to the investigation of a possible electoral contravention, so long as they are satisfied it is 'in the public interest' to do so. It also provides to the Electoral Commissioner a qualified privilege from defamation action relating to such public interest disclosures. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Commences by proclamation

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

The Committee acknowledges that there may be practical reasons for imposing a flexible starting date, which may allow time for the necessary administrative arrangements to be implemented in order to give effect to the amendments. However, given that some of these provisions are intended to facilitate the upcoming State general election in March 2023, the Committee notes that commencement by proclamation may make it difficult for individuals to ascertain their electoral rights and obligations for the election. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Incorporation of guidelines into legislation

The Bill inserts section 206A into the *Electoral Act 2017* which allows the Electoral Commissioner to publish guidelines for exercising enforcement functions by voting centre managers and election officials under the Act, relating to offences of displaying posters or canvassing within 6 metres of a voting centre's entrance. This section would require voting centre managers and election officials to consider such guidelines before they can exercise those enforcement functions. The Committee notes that, unlike subordinate legislation, there is no requirement that such guidelines be tabled in Parliament and would therefore not be subject to disallowance under section 41 of the *Interpretation Act 1987*.

However, the Committee acknowledges that the guidelines are intended to facilitate the consistent and flexible exercise of enforcement functions by voting centre managers and election officials. It also notes that there otherwise is no defence for contravention of a 6-metre offence. In the circumstances, the Committee makes no further comment.

Matters deferred to the regulations

The Bill makes a number of amendments to the *Electoral Act 2017* which defers those matters to the regulations. In particular, these amendments permit the regulations to prescribe a time period after close of voting (of not more than 13 days) during which postal voting envelopes may be accepted for counting, the manner for compliance with requirements under the section 186(1) offence provisions for election materials that are social media posts and the date on which provisions for the registration and ballot paper inclusion of party logos apply to local government elections.

Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when it commences. The Committee generally prefers substantive matters to be dealt with in the principal legislation to facilitate an appropriate level of parliamentary oversight, particularly where those matters may impact an individual's right to participate and vote in public elections.

The Committee acknowledges that these amendments are intended to build more flexibility into the regulatory framework and allow regulators to better respond to the unique circumstances of any particular election. Additionally, enabling regulations to prescribe the date on which amendments apply to local government elections is intended to allow time for the necessary administrative arrangements to give effect to those changes. The Committee also notes that any regulations are required to be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*.

However, the matters deferred to the regulations relate to the participation and voting in public elections, which may make it difficult for a person to understand how they may meaningfully vote and participate in elections. The Committee notes that regulations may prescribe a time period for accepting postal votes received after close of voting that is either shorter or longer than the previous four days in the legislation. It also notes that the requirements for complying social media posts which can be prescribed by regulations may determine whether a person has committed an offence which carries a possible custodial sentence. For these reasons, the Committee refers this matter to Parliament for its consideration.

7. GOVERNMENT SECTOR FINANCE AMENDMENT (JOBS FOR NSW) BILL 2022

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

Removal of entitlement to remuneration or compensation

The Bill inserts section 23, which provides that upon the abolition of Jobs for NSW, an officeholder as a member or Chairperson of Jobs for NSW ceases to hold office and is not

entitled to remuneration or compensation for the loss of office. This may impact upon the right to remuneration or compensation of the affected persons.

However, under the Jobs for NSW Act 2015, the officeholders are appointed to their office by the Minister and have the primary functions of advising the Minister of opportunities for development and attracting business to NSW. Section 7 of the Act also provides that Jobs for NSW is subject to the direction and control of the Minister, except in relation to the preparation and contents of any report, strategy, recommendation or advice provided to the Minister by Jobs for NSW.

The Committee recognises that the broader aim of the Bill is to repeal the Jobs for NSW Act and have its functions incorporated into the broader Department of Enterprise, Investment and Trade. Given this removes the functions of the members of Jobs for NSW, who are also subject to the direction of the Minister, the Committee makes no further comment.

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

Broad Ministerial power

The Bill provides that the Minister may give directions, without the need for appropriation, regarding what must be done with the residual money in the transitional Fund. In doing so, the Minister may direct some or all of the residual money to be paid to the Department or another GSF agency for its use, or into a fund established by or under another Act or the Consolidated Fund.

The Committee notes that this provides the Minister with a wide power to make directions in relation to the residual money in the transitional Fund.

However, the Committee also notes that the residual money is to be used for the specific purposes outlines in section 27 of the Bill, which includes for purposes of funding job creation incentives and the cost of administering and recovering money owed to the transitional Fund. The Committee also notes that the powers to allocate money from the Fund after the sunset clause is intended to streamline the process of allocating funds and is bound by specific requirements. These requirements include that some or all of the residual money is to be paid to the Department or another GSF agency for its use, or into a fund established by or under another Act or the Consolidated Fund. In the circumstances, the Committee makes no further comment.

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

Wide power of delegation

The Bill permits the Minister to delegate the exercise of a function to the Secretary, who may then subdelegate to a member of staff of the Department, unless specifically excluded by the instrument of delegation or a subsequent instrument given to the Secretary by the Minister. The Committee notes that there are no restrictions on the power to delegate. For example, restricting delegation to employees with a certain level of seniority or expertise.

The Committee also notes that the functions in question deal with directing and administering the Jobs for NSW Transitional Fund. The Committee generally prefers provisions about the persons and class of persons to whom such functions can be delegated to have been drafted with more specificity. In addition, they should be included in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight. The Committee refers the matter to Parliament for its consideration.

8. MUSEUMS OF HISTORY NSW BILL 2022

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

Wide power of delegation

Section 12 of the Bill provides that the Museums of History NSW may delegate the exercise of a function, other than this power of delegation, to one or more of a member of the Board, an advisory committee, the Chief Executive Officer (CEO), or a member of the staff of Museums of History NSW. It also provides that the CEO may delegate or subdelegate the exercise of a function, other than this power of delegation or subdelegation, to a member of staff of Museums of History NSW.

The Committee notes that there are limited restrictions on the power to delegate to members of staff of Museum of History NSW. For example, persons with a certain level of seniority or expertise. The Committee would prefer the provisions about the persons and class of persons to whom such functions can be delegated to have been drafted with more specificity. The Committee refers the matter to Parliament for consideration.

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

Regulations may create offences

The Bill provides that the regulations may create offences with a maximum penalty of 5 penalty units ($550). The Committee prefers that offences be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny.

However, the Committee recognises that the penalties permitted are monetary only and of relatively small size. The Committee also acknowledges that it may be useful to delegate matters of an administrative nature to the regulations, especially where specific or technical information is necessary that is not required to be in the primary legislation. In these circumstances, the Committee makes no further comment.

9. NATIONAL PARKS AND WILDLIFE AMENDMENT (RESERVATIONS) BILL 2022

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

Ministerial discretion to determine compensation

Section 55 of the Bill provides that the land proposed for revocation is vested in the Minister, and that the Minister must not transfer the land to the new owner (which is either a local council or Transport for NSW) unless they are satisfied that the new owner has provided appropriate compensation to the NSW Parks and Wildlife Service for that land.

The Bill does not provide guidance or criteria specifying what the Minister should have regard to when determining if the proposed compensation is appropriate. In failing to do so, the Bill may provide the Minister with a wide power and ill-defined administrative power. However, the Committee acknowledges that vesting this power in the Minister may allow for the efficient transfer of land. In the circumstances, the Committee makes no further comment.

Inappropriately delegates legislative powers (s 8A(1)(b)(iv))

Retrospectivity

Schedule 2 of the Bill is to commence as an Act on the date the Bill was introduced in the Legislative Assembly. This allows provisions to commence before the bill has been passed by either House of Parliament and thereby applies retrospectively.

The Committee prefers that Acts commence on a set date or upon assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or

obligations. The Committee also 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.

While the provisions in question largely amend administrative details within the *National Parks and Wildlife Amendment Act 2021*, the Committee refers this issue to Parliament for consideration of whether the Bill unreasonably applies retrospectively.

10. OMBUDSMAN LEGISLATION AMENDMENT BILL 2022

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

Right to privacy of evidence relating to person's complaint - disclosure of confidential information

The Bill amends sections 19A(3A), 19B(4) and 34(1) of the *Ombudsman Act 1974* and inserts section 34L(1)(c)(vi) of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* which amends or expands confidentiality and disclosure provisions relating to proceedings.

Section 19A(3A)(b) creates an exception to the offence of publishing material that is subject of an Ombudsman direction not to publish. The provision allows material to be lawfully published if the material is provided to an Australian legal practitioner to obtain legal advice or representation in relation to an inquiry. Section 19B(4) similarly allows for the publication of evidence obtained in an Ombudsman inquiry if the material is provided to an Australian legal practitioner to obtain legal advice or representation in relation to an inquiry.

The Bill amends and expands section 34 the Act which lists the circumstances in which disclosing information obtained by the Ombudsman may be lawful. The provision is expanded to include circumstances such as where the information is required for a Commission appointed under the *Royal Commissions Act 1923.*

The Bill also amends section 34L of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* to allow confidential information to be disclosed with the Health Care Complaints Commission in connection with the Commission's functions.

Where the exceptions cannot be proven, offences under both acts attract a maximum penalty of 50 penalty units or 12 months imprisonment or both.

The Committee notes these provisions allow for the publishing of material connected to Ombudsman or Community Services proceedings, which may result in the common law rights to privacy, in addition to waivers of confidence. This may result in complaint details being published, distributed, shared or used in other legal proceedings.

However, the Committee notes the statutory safeguards which may protect a person's rights to privacy. For example, sections 19B(3A) and 19B(4) only create exceptions to offences where the information is to be provided to an Australian legal practitioner to obtain legal advice or representation in relation to an inquiry. Additionally, disclosure of information in connection with Ombudsman proceedings under section 34 of the Act may only occur if that information is required for other proceedings such as for a commission under the *Royal Commissions Act 1923*. Similar protections exist under section 34L of the *Community Services (Complaints, Reviews and Monitoring) Act 1993.* In the circumstances, the Committee makes no further comment.

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

Expansion of Ombudsman's powers – ambiguity in meaning under section 11A

Section 11A of the Bill provides the Act applies to conduct occurring while a person was a public authority in the same way as it applies to a public authority. In his Second Reading Speech, the Hon. Alister Henskens SC MP stated the provision makes clear that in addition to existing public authorities, the Ombudsman's powers extend to former public authorities.

The Committee notes the provision lacks clarity. Though a public authority is defined under section 5 of the Act, the Bill is silent on the meaning of a former public authority. The wording of the provision is also unclear. In the absence of a definition of a former public authority as well as a lack of clarity in the provision's wording, this may result in ambiguity over which matters the Ombudsman has jurisdiction to handle. In the circumstances, the Committee refers this matter to Parliament for its consideration.

11. ROADS AMENDMENT (TOLLING TRANSPARENCY) BILL 2022*

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

Strict liability offences

The Bill creates a new strict liability offence in the *Roads Act 1993*, and incorporates strict liability offences under other legislation into the Act. Specifically, failure by a toll operator to prominently display at every public entrance to a tollway a sign providing information about the tolls payable is a strict liability offence incurring a maximum penalty of 100 penalty units ($11 000). The Bill also incorporates strict liability offences under investigation provisions of the *Independent Pricing and Regulatory Tribunal Act 1992*, including for (without limitation) hindering, obstructing or interfering with the Chairperson or any other member of the Tribunal in the exercise of their functions. A maximum penalty of 100 penalty units ($11 000) or 6 months' imprisonment, or both, applies.

These offences do not require the mental element to be proven and are therefore considered strict liability offences. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. However, the Committee notes that strict liability offences are not uncommon in regulatory contexts or otherwise may be included to encourage compliance. In this case, to encourage compliance with signage requirements and with the Tribunal's investigation so that it may report to the Minister on whether entering into or amending a tolling agreement is in the public interest. In the circumstances, the Committee makes no further comment.

Privacy – publication of personal information

Where it is proposed that a tolling agreement be entered into or substantially amended, the Bill requires that the Minister refer the proposed agreement or amendment to IPART for investigation. The Bill also requires that IPART provide a report to the Minister stating that it is in the public interest to enter into or amend the tolling agreement. IPART's report must be to be tabled in Parliament and published on the website of Transport for NSW. It is unclear whether this report could include personal or sensitive information obtained by IPART in the course of its investigation, which would then be made public in accordance with the Bill. In the case that it does, this may impact upon the privacy of those individuals to which the personal or sensitive information relates. The Committee refers this issue to the Parliament for its consideration.

12. TRANSPORT ADMINISTRATION AMENDMENT (RAIL TRAILS) BILL 2022

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

Wide power to terminate lease and limitation of right to compensation

The Bill allows the Minister, subject to the regulations, to terminate an authorised lease of the subject land entered into between the rail infrastructure owner and a local council or joint organisation if satisfied the subject land is required to be used for transport purposes.

While the Bill permits the regulations to allow the Minister to terminate an authorised lease in accordance with those regulations, the contents and requirements (if any) of such regulations are uncertain. Comparatively, the Bill imposes a consultation requirement on the Minister prior to entering into the lease. As this administrative power impacts on the contractual rights and obligations of the parties to the lease, the Committee refers this issue to the Parliament for its consideration.

The Bill also provides that compensation, which 'includes damages or other forms of monetary compensation', is not payable by or on behalf of the State because the Minister terminates an authorised lease for a transport purpose under the regulations. Compensation is payable for termination in other circumstances.

The definition is drafted broadly and appears to exclude compensation claims against the State in contract or equity. In general, an inclusive definition is not construed as being exhaustive, although in some cases a definition has been interpreted as being limited to those items it is said to 'include'. It is therefore unclear whether the limitation of compensation following the exercise of the Minister's power to terminate excludes all types of compensation, including any compensation payable under the lease. This may impact upon the contractual rights of parties to the lease. The Committee also refers the scope of the limitation on compensation to the Parliament for its consideration.

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

Delegation to the regulations of power to authorise use of disused railway lines

The Bill inserts a regulation making power which allows the Minister to authorise the use of disused railway lines for certain purposes and the removal of railway tracks and other work for these purposes. This circumvents the need for an Act of Parliament to close the railway line in order to use it for these purposes.

By delegating this authorisation to the regulations, the amendment decreases the level of parliamentary oversight applying to the creation of rail trails. However, the Committee notes that the regulations are still subject to disallowance, whereby a member of Parliament may move to disallow a regulation within 15 sitting days of it being tabled in either House. Consultation is also required where the Minister authorises the land be used for recreation, tourism or related purposes. The Committee further notes that the amendment intends to support quicker approval processes and reduce financial pressure on councils. In the circumstances, the Committee makes no further comment.

PART TWO – REGULATIONS

1. LIQUOR AMENDMENT (ONLINE AGE VERIFICATION REQUIREMENTS) REGULATION 2022

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

Privacy

The Regulation requires a person entering into an agreement for the same day delivery of alcohol from a same day delivery provider, or entering into such agreement on a second or

subsequent occasion, to provide certain personal details in order to verify they are over 18 years of age. Specifically, they must provide details and evidence of their name and date of birth.

This information appears to be provided to and/or accessible by the same day delivery service provider and the accredited identity service provider or provisionally accepted service provider. While an accredited identity service provider must comply with privacy laws regarding the protection and privacy of purchasers' personal information, it is unclear whether the same day delivery provider or provisionally accepted service provider are subject to similar obligations under this legislative framework. If not, a purchaser's right to privacy in respect of their personal information may be impacted. The Committee refers this issue to the Parliament for its consideration.

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

Incorporation of external framework not subject to disallowance

The Regulation incorporates the Trusted Digital Identity Framework, published by the Digital Transformation Agency on behalf of the Commonwealth, into the *Liquor Regulation 2018* for the purpose of defining the term 'credentials'. This term is relevant to the form of authentication prescribed for the purposes of section 114HA(2) of the *Liquor Act 2007*.

Unlike regulations, this Framework is not subject to disallowance under section 41 of the *Interpretation Act 1987*. The Committee generally prefers legislative requirements to be included in the legislation to ensure an appropriate level of parliamentary oversight. However, it acknowledges this specialist framework is defined in and referred to elsewhere in the legislation. In the circumstances, it makes no further comment.

2. MOTOR ACCIDENT INJURIES AMENDMENT REGULATION 2022

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

Henry VIII clause

The Regulation amends Schedule 2 of the *Motor Accident Injuries Act 2017*, to provide that certain disputes under the Act about treatment and care provided to an injured person extends to disputes about such treatment and care which is to be provided.

These amendments are made pursuant to a Henry VIII clause in the Act, which allows the Executive to legislate and amend an Act by way of regulation without reference to Parliament. Specifically, section 7.51 of the Act states that the regulations may amend or replace Schedule 2.

The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation, particularly where the amendments may impact personal rights and liberties. In this case, the dispute resolution provisions available to an injured person, including merits review. This is to foster a greater level of parliamentary oversight regarding the changes.

However, the Committee notes that regulations must be tabled in Parliament and are subject to disallowance under sections 40 and 41 of the *Interpretation Act 1987*. It also acknowledges the Act delegates to the regulations the power to amend Schedule 2. In the circumstances, the Committee makes no further comment.

3. NOTIFICATION OF SOUTH AUSTRALIAN BAR ASSOCIATION PROFESSIONAL STANDARDS SCHEME

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

Incorporation of external material not subject to disallowance

The Scheme includes the definition of 'Insurance Standard', being the Insurance Standard approved by the Law Society of South Australia on 21 June 2021 and adopted by the Bar Council of the South Australian Bar Association Incorporated (SABA) on 19 July 2021. The Insurance Standard informs certain persons to whom the Scheme applies under section 4, and the application of the occupational limitation of liability against causes of action under section 6.

The Scheme is tabled and subject to disallowance under sections 40 and 41 of the *Interpretation Act 1987* in accordance with section 13(2) of the *Professional Standards Act 1994*. By comparison, the Insurance Standard is not subject to these requirements. The Committee generally prefers that requirements informing the application of legislation and key legislative requirements are included in the legislation to ensure an appropriate level of parliamentary oversight. In this case, under sections 4 and 6 respectively.

However, the Committee notes that a specific version of the Insurance Standard is incorporated into the Scheme, being the version adopted by SABA on 19 July 2021. The definition of this term does not indicate that any revisions of this document are incorporated, suggesting that the version applying to Scheme members is the specific version identified. Considering that the incorporated document appears to be specifically defined, the Committee makes no further comment.

4. PUBLIC HEALTH AMENDMENT (COVID-19 AIR AND MARITIME ARRIVALS) REGULATION 2022

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

Penalty notice offences – right to a fair trial

The *Public Health Amendment (COVID-19 Air and Maritime Arrivals) Regulation 2022* (Regulation) amends the *Public Health Regulation 2012* (Public Health Regulation) to enable penalty notices to be issued for a breach of a direction made under the *Public Health (COVID-19 Air and Maritime Arrivals) Order (No 2) 2022* or an order that replaces that order. Penalty notices that can be issued in relation to these offences are $5 000 for an individual, or $10 000 for a corporation.

The Regulation previously provided for penalty notices being issued under the *Public Health (COVID-19) Air and Maritime Arrivals) Order (No 1) 2022.* This Regulation therefore extends the operation of the penalty notice provisions that were previously in place, and additionally provides that any orders replacing the current order will automatically be able to result in the issue of penalty notices under the Public Health Regulation.

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.

Further, the Committee notes that this amendment provides that further orders made will be able to authorise the issuing of penalty notices without requiring amendment to the Public Health Regulation, which means that they would not be subject to disallowance.

The Committee also acknowledges individuals and corporations retain the right to elect to have their matter heard and decided by a Court, and the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee further acknowledges that compliance is aimed at reducing the impact of the COVID-19 pandemic.

However, the Committee notes that the value of the penalty notice that can be issued is significant. Further, because the Regulation allows for new orders to replace the current order and be automatically authorised to issue penalty notices, these penalty notices may be issued indefinitely without requiring amending Regulations to be tabled before the Parliament and therefore subject to disallowance. In the circumstances, the Committee refers the mater to Parliament for its consideration.

5. RESIDENTIAL APARTMENT BUILDINGS (COMPLIANCE AND ENFORCEMENT POWERS) AMENDMENT (BUILDING WORK LEVY) REGULATION 2022

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

Retrospectivity

The Regulation provides that the new Part 2, which allows the Secretary to impose a building work levy on developers by written notice and makes related provisions, extends to building work for which the Secretary has been given an expected completion notice prior to the commencement of the Part and for which an occupation certificate has not been issued.

The Regulation therefore has retrospective application, as it affects obligations and rights pre-dating the Regulation's commencement. The Committee generally comments on provisions with retrospective effect because this runs counter to the rule of law principle that a person is entitled to know the law to which they are subject at any given time. However, the Committee acknowledges that the retrospective application of the Part is limited specifically to certain building work. In the circumstances, the Committee refers this matter to Parliament for its consideration.

6. ROAD TRANSPORT (DRIVER LICENSING) AMENDMENT REGULATION 2022

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

Limitations on international and interstate driver licences

The Regulation applies NSW driver licensing laws to drivers that have incurred driving offences under international and interstate driver licenses. This allows TfNSW to issue demerits and restrictions on these drivers as if the offences had taken place in NSW. It also authorises TfNSW to vary, cancel or suspend a driver license in NSW if it has had that adverse action applied to it in another jurisdiction. Lastly, it provides that the demerits point election scheme operated under section 36(1) of the *Road Transport Act 2013* will apply to international and interstate drivers in NSW.

This Regulation therefore defers the charging of the offence and any relevant trial procedure to another jurisdiction, while still applying the equivalent penalty to the NSW license as if the offence had been committed in NSW. In doing so, it applies new restrictions to international and interstate driver licenses that were not previously subject to these restrictions. The Committee usually comments on Regulations that may limit the capacity of individuals to engage in otherwise lawful activities in the community, including driving, where previously they were engaged without restriction.

However, the Committee notes that the broader object of the *Road Transport (Driver Licensing) Regulation 2013* is to assist in providing for the consistent administration and enforcement of a driver licensing system throughout Australia. Therefore the application of penalties and restrictions for equivalent driving offences, particularly in interstate Australian jurisdictions, may assist in administering a consistent driver licencing system. In the circumstances, the Committee makes no further comment.

7. SPORTING VENUES (INVASIONS) AMENDMENT (ADDITIONAL DESIGNATED SPORTING VENUES) REGULATION 2022

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

Strict liability offences and penalty notices

The Regulation amends the *Sporting Venues (Invasions) Regulation 2016* to provide that a 'designated sporting venue' for the purposes of the *Sporting Venues (Invasions) Act 2003* includes a prescribed venue while it is being used for sporting activities by certain teams. It prescribes additional venues and teams for this purpose.

This amendment broadens the application of strict liability offences under the Act for which a police officer can issue penalty notices for offences against Part 2 of the Act, relating to invasion of the playing field of a designated sporting venue during a match.

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 generally comments on penalty notice offences, which allow an individual to pay a specified monetary amount instead of appearing before a court to have their matter heard, as it may impact on a person's right to a fair trial. Specifically, any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that strict liability offences aim to encourage compliance and, in this case, regulate public gatherings in the sporting venues. It also notes the practical benefits of penalty notices including their cost effectiveness and ease of administration. Additionally, that the issuing of a penalty notice does not prevent a person from electing to have the matter proceed to court. In the circumstances, the Committee makes no further comment.

Strict liability offences and freedom of movement

The Regulation amends the Sporting Venues (Invasions) Regulation 2016 to provide that a 'designated sporting venue' for the purposes of the *Sporting Venues (Invasions) Act 2003* includes a prescribed venue while it is being used for sporting activities by certain teams. It prescribes additional venues and teams for this purpose.

This amendment broadens the application of strict liability offences under the Act, pursuant to which an individual found liable for invading the playing field of a venue is banned from entering the venue for 12 months. Further invasion or entry of the sporting venue during their 12 month ban results in a life ban being imposed on the individual.

Bans on entry to sporting venues, in particular a life ban, may limit an individual's right to freedom of movement. However, this right may be limited in certain circumstances, including where the restriction is provided by law, is necessary to protect public order and is consistent with other rights. The Committee acknowledges that the bans limiting individuals' movement flow from conduct which may disturb public order on one or more occasions. In the circumstances, the Committee makes no further comment.

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

Certain updates to regulation not subject to disallowance

The Regulation provides that where an additional designated sporting venue prescribed by the regulations is renamed or known by more than one name, the venue is taken to include the new or additional venue names. Penalty notices can be issued for contravention of strict liability offences at designated sporting venues and an individual banned from a venue for 12 months or life, depending on the circumstances.

The Committee notes that individuals may be liable for strict liability offences committed at venues not explicitly referred to in the legislation, which may run counter to the rule of law principle that a person is entitled to know the law that applies to them at any given time. To uphold this principle, it therefore prefers that legislative provisions be drafted with specificity, particularly where the law can impact an individual's rights and liberties. Additionally, that any amendments to a regulation be subject to disallowance under section 41 of the *Interpretation Act* 1987, to uphold parliamentary oversight.

The Committee notes that this provision allows for flexibility and assists with the administration of the provisions. However, taking into account that penalties apply for contravention of strict liability offences relating to invasions at designated sporting venues not explicitly named in the regulations, the Committee refers this matter to the Parliament for its consideration.

Part One – Bills

1. Aboriginal Cultural Heritage (Culture is Identity) Bill 2022*

Date introduced	22 June 2022
House introduced	Legislative Council
Member responsible	Reverend the Hon. Fred Nile MLC
	*Private Members Bill

Purpose and description

1.1 The object of this Bill is to provide a modern framework for the recognition, protection, conservation and preservation of Aboriginal cultural heritage and recognise the fundamental importance of Aboriginal cultural heritage to Aboriginal people.

1.2 Section 3 of the Bill further outlines the objects of this legislation as being to:

(a) recognise, protect, conserve and preserve Aboriginal cultural heritage;

(b) recognise the importance of Aboriginal cultural heritage to Aboriginal people, and that Aboriginal people have custodianship over this heritage;

(c) promote the management of Aboriginal cultural heritage and provide access to this heritage for future generations;

(d) establish effective processes for conserving, managing and regulating Aboriginal cultural heritage and manage activities that may cause harm to this heritage;

(e) work in partnership with Aboriginal people with appropriate cultural authority; and

(f) promote an appreciation of Aboriginal cultural heritage.

Background

1.3 The Bill establishes a new peak body, the Aboriginal Cultural Heritage Council (the **ACH Council**). This body will be include 11 members of the Aboriginal community as nominated by the community and appointed by the Minister.

1.4 The ACH Council will be an independent advisory and resourcing body that exercises a number of functions, including:

(a) making appointments as required;

(b) providing oversight of the Aboriginal cultural heritage system;

(c) promoting public awareness of Aboriginal cultural heritage;

(d) developing materials to guide the recognition, protection, conservation and management of Aboriginal cultural heritage; and

(e) making decisions in regards to protected areas, Aboriginal cultural heritage permits and management plans.

1.5 The ACH Council will also have the power to declare local Aboriginal Cultural Heritage services (**Local Services**) in consultation with all the Aboriginal stakeholders in the relevant community. The ACH Council will then serves as the connection between Local Services and the Government.

1.6 Local Services will exercise functions including:

(a) Facilitating Aboriginal cultural heritage management plans in their area;

(b) Providing advice regarding the location and nature of Aboriginal cultural heritage in the area;

(c) Provide the ACH Council with local knowledge and information about Aboriginal Cultural heritage; and

(d) Other matters relating to Aboriginal cultural heritage.

1.7 Local Services will receive requests to modify, move, damage or otherwise harm artefacts of Aboriginal cultural heritage, which is non-exhaustively defined in the Bill as including flora, fauna, places waterways and the intangible. The Local Service will make a decision after consultation with the local community and provide this determination to the ACH Council which will then liaise with the proposers about that outcome.

1.8 In his second reading speech, the Reverend the Hon. Fred Nile stated that 'this Bill will not impede growth in New South Wales … rather it will ensure that we build responsibly and respectfully.'

1.9 The Bill also exempts artefacts of Aboriginal cultural heritage from the rules contained in the *Environmental Planning and Assessment Act 1979* which imposes limits on the capacity to appeal planning decisions in relating to state significant developments.

1.10 Part 3 Division 5 further extends the right of a local Aboriginal community to have increased powers to access and use their land for commercial purposes. Commercial purposes can include, but are not limited to, hunting, fishing and farming.

Issues considered by the Committee

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

Limited capacity to seek compensation

1.11 Section 35 provides that a person is not entitled to compensation for loss resulting from an operation of Part 3, which deals with rights and duties in relation to Aboriginal cultural heritage.

1.12 Part 3 provides for the rights and duties of various persons in relation to Aboriginal cultural heritage and deals with the management of Aboriginal ancestral remains and secret or sacred objects. It also establishes a duty for a person to report Aboriginal cultural heritage to the ACH Council and recognises the rights of Aboriginal persons to use their cultural heritage for commercial purposes.

Section 35 provides that a person is not entitled to compensation for loss resulting from an operation of Part 3, which sets out rights and duties in relation to Aboriginal cultural heritage. Part 3 gives the ACH Council powers to control the management of Aboriginal cultural heritage, as well as limiting what can be done to land that is the site of Aboriginal cultural heritage and creating related offences.

In particular, the powers in relation to the management of heritage are that the ACH Council under section 41(a) may arrange for Aboriginal ancestral remains to be transferred into its custody and be returned to a custodian of those remains. This may affect the ownership of, or access to, real or personal property that may be subject to a transfer of custody. Under both common and statute law in NSW, the compulsory acquisition of real property may give rise to a right to financial compensation, and section 35 of the Bill extinguishes this right. Given the wide ambit of section 35 to remove entitlement to any loss occurring from the operation of Part 3, the Committee refers this matter to Parliament for its consideration.

Strict liability offences

1.13 The Bill creates a number of strict liability offences. For example, section 159 states that a person who is given a remediation order must comply with the directions given in that order. Section 101(1) also states that a person who holds a permit from the ACH Council must not contravene a condition to which the permit is subject.

1.14 The penalties for the strict liability offences range from 200 penalty units ($22 000) to a maximum penalty of 500 penalty units ($550 000) plus an additional 250 penalty units ($27 500) per for each day or part of a day that the offence continues, which may be imposed on an individual or a corporation.

The Bill creates a number of strict liability offences for conduct relating to the protection and maintenance of Aboriginal cultural heritage. For example, section 159 states that a person who is given a remediation order must comply with the directions given in that order. A maximum penalty of up to 5000 penalty units ($550 000) may apply for contravening this offence, plus an additional 250 penalty units ($27 500) per for each day that the offence

continues. This may apply to individuals and corporations. The Bill is silent on whether any specific defences may apply to negate or diminish criminal liability.

The Committee generally comments on strict liability offences as they depart from the common law principles that the mental element of an offence is relevant to the imposition of liability. The Committee notes that strict liability offences are not uncommon in a regulatory context to encourage compliance. However, the Committee notes that the high maximum penalties that may be applied. In the circumstances, the Committee refers the matter to Parliament for its consideration.

Double punishment

1.15 The Bill has two sections that allow a person to be charged with multiple offences for conduct arising from the same circumstances.

1.16 Section 66 provides that a person must not contravene a condition to which a protected area declaration is subject. Subsection 66(3) states that a person may be charged with an offence under this section and an offence under Part 5 arising from the same circumstances.

1.17 Further, section 101 provides that a person who holds an ACH permit must not contravene a condition to which the permit is subject. Subsection 101(2) states that a person may be charged with an offence under that section and an offence under Part 5 arising from the same circumstances.

1.18 Part 5 sets out offences for harming Aboriginal cultural heritage.

The Bill provides two instances where a person may be charged with an offence under separate sections for the same circumstances. First, under section 66, it provides that a person who contravenes a condition of a protected area declaration may also be subject to an offence under Part 5 for the same circumstances. Second, under section 101, a person may be charged with an offence for contravening a condition of a ACH permit and may also be subject to an offence under Part 5 for the same circumstances. Part 5 sets out offences for harming Aboriginal cultural heritage.

This could result in a person being subject to proceedings for an offence under either of these sections, and also for an offence under Part 5 for the same conduct. This may result in a person being functionally punished twice for the same conduct. The Committee refers the matter to Parliament for its consideration.

Reversed onus of proof

1.19 Section 234 of the Bill provides that in proceedings for certain offences under the Act, the onus of proving that the conduct was done with a reasonable excuse is placed on the person asserting the matter.

1.20 There are two offences that include a defence of a reasonable excuse. Firstly, section 215 states that a person must not, without reasonable excuse, contravene

a direction given to them by an inspector. A failure to comply carries a maximum penalty of 200 penalty units ($22 000).

1.21 Secondly, subsection 196(2) makes it an offence to, without reasonable excuse, fail to return their identity card once they cease being an inspector or Aboriginal inspector. A failure to comply carries a maximum penalty of 100 penalty units ($11 000)

Section 234 of the Bill provides that a person that alleges that they had a reasonable excuse for conduct that would otherwise be prohibited under the Bill, has the onus of proving that matter. This is in relation to two offences, firstly for contravening a direction given to a person by an Inspector (section 215) and secondly for failing to return an identity card after ceasing to be an Inspector or Aboriginal Inspector (section 196(2)). The maximum penalty for the first offence is 200 penalty units ($22 000) and for the second offence is 100 penalty units ($11 000).

In regards to these offences, 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 and accused person's privilege to be presumed innocent until proven guilty according to law. However, the Committee notes that the onus for proving the factual circumstance of these offences is still primarily on the prosecution. Additionally, the reversed onus provides a defence for the accused persons to prove that their conduct was justified. In the circumstances, the Committee makes no further comment.

Inspection and search powers

1.22 Part 10 sets out compliance provisions for the creation of inspectors and enforcement powers.

1.23 Section 194 proscribes that the ACH Council can appoint persons, and classes of persons to become inspectors for the purposes of the Bill. Police officers are also inspectors under this section.

1.24 Section 195 provides for the ACH Council appointing Aboriginal inspectors, who have the same powers as an inspector for the purposes of the Bill.

1.25 Under section 199, inspectors are authorised to carry out inspections for various purposes, including to ascertain whether the Act or an instrument has been contravened. Section 200 gives inspectors the power to enter places for the purposes of conducting an inspection, and the places that inspector (and their assistant who is authorised to accompany them) can enter are:

(a) any place that is not a dwelling,

(b) a dwelling with the informed consent of the occupier, and

(c) any place in accordance with an entry warrant.

1.26 This entry power is limited by section 201, which provides that, prior to entering a place, the inspector must take all reasonable steps to determine whether it is an Aboriginal place and whether there are restrictions on entry to the place in accordance with the relevant Aboriginal tradition. If there are any such restrictions, subsection (2) only permits the inspector to enter if done in accordance with the tradition, or they are accompanied by a person permitted to enter that place in accordance with the tradition. However, an inspector may enter in breach of the tradition if they consider on reasonable grounds that the entry is necessary to prevent harm to Aboriginal cultural heritage.

1.27 Inspectors are given significant investigative powers including the power to:

(a) stop and enter vehicles by any means reasonably necessary, as well as detain a vehicle for a reasonable period (section 203);

(b) take vehicles onto property to carry out an inspection and inspect and open packages, compartments, cupboards and containers to inspect their contents (section 204);

(c) direct a person to turn over records, or produce copy or a record or operate a computer on which a record is stored (section 205);

(d) direct an occupier of a place or vehicle to provide information about their ownership of property, or to answer questions or grant an Inspector access to a place (section 206);

(e) seize a thing, that is not Aboriginal ancestral remains, if they reasonably suspect that thing is relevant to an offence under the Act an has been unlawfully obtained, or it necessary to seize to preserve its evidentiary value or prevent its destruction (section 207);

(f) conduct a forensic examination of a seized thing (section 211);

(g) apply to an authorised officer for a search warrant (section 212); and

(h) authorise other persons who are not Inspectors to assist in exercising the power as is reasonably necessary in the circumstances (section 217).

The Bill provides inspectors with significant entry, search and seizure powers in relation to enforcing provisions under the Act. For example, inspectors may enter and search property to ascertain whether an offence has been or is being committed. Inspectors are also not required to obtain a warrant from an independent judicial officer to authorise the use of these powers. This may impact upon a person's right to privacy, property rights and personal physical integrity, and the right to be free from arbitrary search.

The powers of inspectors are wide-ranging and include, for example, the power to stop a vehicle for inspection purposes by any means reasonably necessary and detain the vehicle for a reasonable period (section 203).

The Committee acknowledges that inspections may be necessary to give effect to and enforce the protections that Bill provides to Aboriginal cultural heritage.

However it notes that the powers given to inspectors are quite broad and do not uniformly apply reasonableness requirements that may ordinarily prevent a risk of arbitrary entry, search and seizure taking place. In the circumstances, the Committee refers the matter to Parliament for its consideration.

Restricting the privilege against self-incrimination

1.28 Section 219(1) states that an individual is not excused from answering a question, or producing a record or thing, when required by operation of the Bill because the answer, record or thing might incriminate that individual or make them liable to receiving a penalty. Subsection (2) however clarifies that information, records or things provided in compliance with a direction under this section 219(1) are not admissible as evidence in proceedings against the individual other than proceedings for perjury or an offence relating to giving false or misleading information.

The Bill introduces powers for a person to be compelled to answer questions, or produce a record or thing. Under section 219, a person is not excused from the requirement to provide information, a record or thing of the ground that it may incriminate them. The Bill therefore may impact on the right to silence and the privilege against self-incrimination.

The Committee notes that the Bill includes some safeguards including that compelled information is not admissible in evidence against the person in proceedings except for perjury or an offence relating to giving false or misleading information. However, the right to silence and the privilege against self-incrimination are established legal principles that are impacted by this Bill. In the circumstances the Committee refers the matter to Parliament for its consideration.

Vicarious liability

1.29 Part 11 specifies that, in a number of circumstances, employers or other entities or individuals may be held vicariously liable for actions undertaken by their agents. This includes:

(a) officers may be liable for offence by body corporates for some offences contained in the Bill (section 224);

(b) partners may be liable for offences by the partnership (section 226);

(c) principals may be liable for offences by an agent (section 227); and

(d) employers may be liable for offences by employees (section 228).

1.30 The Bill does contain some safeguards in regards to various liability. For example, officers are only liable under section 224 if the officer failed to take all reasonable steps to prevent the commission of the offence by the body corporate. Similarly, it is a defence in section 227(3) to prove that the principal took all reasonable steps to prevent the commission of the offence by the agent.

Part 11 sets out vicarious liability provisions that attach to employers or other individuals or organisations for conduct by third parties. This includes:

a) officers may be liable for offence by body corporates for some offences contained in the Bill (section 224);

b) partners may be liable for offences by the partnership (section 226);

c) principals may be liable for offences by an agent (section 227); and

d) employers may be liable for offences by employees (section 228).

The Committee notes that the Bill does contain some safeguards for these situations. For example, officers are only liable under section 224 if the officer failed to take all reasonable steps to prevent the commission of the offence by the body corporate.

The Committee notes that the prosecution bears the burden of proving certain elements of the liability offences, including whether a party knew or ought to have known of the circumstances of an offence, or took reasonable steps to prevent the offence from occurring. However, the Committee also notes that certain offences require the burden of proof to be placed on the defendant. For example, it is a defence in section 227(3) to prove that the principal took all reasonable steps to prevent the commission of the offence by the agent.

The Committee notes that vicarious liability offences are not unusual in a regulatory context to encourage corporate oversight and compliance. However, the Committee also notes that the maximum penalties for offences under the Bill are significant, being 500 penalty units ($550 000) plus an additional 250 penalty units ($27 500) for each day or part of a day that the offence continues. In the circumstances, the Committee refers the matter to Parliament for its consideration.

Right to a fair trial – certain evidence to be taken as fact

1.31 Section 232 of the Bill states that production of a certificate purporting to be signed by a member and stating 1 or more of the listed matters is, without proof of the member's signature, taken to be evidence of the facts stated in the certificate. Certain listed matters include:

(a) that on a specified day or during a specified period a specified person was or was not authorised to carry out a specified activity under a specified instrument;

(b) that on a specified day or during a specified period a specified person was or was not a native title party for a specified area; and

(c) that on a specified day or during a specified period a specified area did or did not include an area that was part of a protected area.

1.32 Subsection 232(2) provides that certain procedures for providing notice must be followed for the certificates to be taken as evidence of the facts stated in the certificate.

The Bill provides that certain documents are to be taken as fact if they are signed or certified by a member of the ACH Council. Specifically, section 232

states that production of a certificate purporting to be signed by a member in regards to one of the listed matters, is taken to be evidence of the facts stated in that certificate. The matters may relate to whether a specified person was authorised to carry out a certain activity on a specified day or during a specified period under a specified instrument.

This assumption of fact may impact a defendant's right to a fair trial, including the right to be presumed innocent unless guilt is proved beyond reasonable doubt. These sections would prevent a defendant from exercising their right to challenge the validity of evidence that may be central to the claim made against them. The Committee notes that the penalties that may be imposed if a defendant is found guilty of an offence under the Bill are significant, and may include a term of imprisonment.

For example, under section 232 matters that these certificates may relate to include that, on a specified day or during a specified period, a person was or was not an Inspector, an Aboriginal Inspector or a person authorised to assist an Inspector or an Aboriginal Inspector. The penalty for a personal who falsely represents that they are an Inspector or Aboriginal Inspector is 12 months imprisonment, or 200 penalty units ($22 000) or both (section 198). This demonstrates how the assumption of a document being true may directly impact on an individual's right to due process in challenging the relevant evidence at trial.

In the circumstances, the Committee refers the matter to Parliament for its consideration.

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

Limitations on review of decisions made by the ACH Council

1.33 The ACH Council is a body corporate not subject to the direction or control of the Minister.

1.34 Section 236 provides that the NSW Civil and Administrative Tribunal (NCAT) has the jurisdiction to review certain decisions made by the ACH Council. However, this jurisdiction does not cover all Council decisions and may not extend to all affected persons for each reviewable decision.

1.35 Subsection 236(5) provides that the regulations may prescribe further decisions of the ACH Council that may be the subject of review by NACT and persons that may have standing to seek such a review.

1.36 An example of a non-reviewable decision of the ACH Council is section 89(1)(c). This section provides that the ACH Council may refuse to grant an Aboriginal cultural heritage permit, which is required to carry out tier 1 or tier 2 activity, if it includes activity in an area of Aboriginal cultural heritage that may cause harm. Section 96 also provides that the ACH Council may refuse to grant an extension of this permit, and that is also a non-reviewable decision.

1.37 A further example includes section 179, which provides that the Committee may refuse to endorse an Aboriginal cultural heritage protection agreement. These are agreements that may be made between at least one Aboriginal person, group or community and any other person, group or body corporate that seeks to governs the maintenance, protection or use of Aboriginal cultural heritage and land (section 169).

The Bill gives the ACH Council significant powers to make decisions about the management of Aboriginal cultural heritage. This may include the consideration of applications, issuing of relevant permits, and extensions to those permits.

In a number of circumstances, ACH Council decisions are not subject to review. Removing the right to administrative review of Council decisions may limit procedural fairness and the right of persons to have decisions independently reviewed. Section 236 further limits which affected persons are able to seek review of reviewable decisions.

An example of a non-reviewable decision of the ACH Council is section 89(1)(c) which provides that the ACH Council may refuse to grant an Aboriginal cultural heritage permit, which is required to carry out tier 1 or tier 2 activity. That is, an activity in an area of Aboriginal cultural heritage that may cause harm. Section 96 also provides that the ACH Council may refuse to grant an extension of this permit, and that is also a non-reviewable decision.

The Committee acknowledges that the objects of the Bill includes recognising that Aboriginal people have custodianship over Aboriginal cultural heritage (section 1(b)(ii), and that NCAT is not an Aboriginal body. However, the right to review administrative decisions provides additional protection for individuals impacted by a decision of the ACH Council. In the circumstances, the Committee refers this matter to the Parliament for its consideration.

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

Matters deferred to the regulations

1.38 The Bill defers some matters to the regulations. In particular, section 242 provides that a range of matters can be deferred to the regulations including:

(a) any matter that is necessary or convenient to be prescribed for carrying out or giving effect to the Act;

(b) compensation referred to in the Act;

(c) the way applications under the Act are to be made; and

(d) the procedure to be followed by Inspectors and Aboriginal Inspectors in exercising their powers and performing their functions under Part 10.

1.39 Subsection 242(3) further provides that the regulations may impose offences for a contravention of the regulations, and provide a maximum penalty not exceeding 200 penalty units ($22 000).

The Committee generally prefers substantive clauses to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected such as by way of making an application under the Act or the procedure to be followed by Inspectors who are provided with significant powers.

The Committee also notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. However, the Committee also notes that the Bill provides that the regulation may proscribe offences with a provide a maximum penalty not exceeding 200 penalty units ($22 000), which is a significant penalty to impose on an individual. In the circumstances, the Committee refers the matter to Parliament for its consideration.

Delegation powers

1.40 Section 251 provides that the Minister may delegate any of their functions, other than this power of delegation, in the Bill to the ACH Council. Further, section 252 provides that the Secretary may delegate their functions, other than this power of delegation, to a person employed or engaged in the Department.

1.41 Neither section 251 or 252 allows for the functions or powers to be subdelegated. However subsection 252(3) states that this does not limit the ability of the Secretary to perform a function through an officer or agent.

1.42 Section 15 provides that the ACH Council may delegate its powers or duties in relation to a number of provisions to a member or staff member of the ACH Council, a committee of the ACH Council or a Aboriginal Land Council. Subsection 15(3) specifies that these powers or duties cannot be subdelegated.

Section 251 provides that the Minister may delegate any of their functions, other than this power of delegation, in the Bill to the ACH Council. Further, section 252 provides that the Secretary may delegate their functions, other than this power of delegation, to a person employed or engaged in the Department. Neither section 251 or 252 allows for the functions or powers to be subdelegated. However subsection 252(3) states that this does not limit the ability of the Secretary to perform a function through an officer or agent.

The Committee notes that the ACH Council is not subject to the direction or control of the Minister (section 13(3)) and that the primary role of the Minister under the Bill is to appoint the members of the first ACH Council (Schedule 1, clause 2). The Committee also notes that the Secretary has limited functions in the Bill, which are principally focussed on dealing with seized things under section 209 or executing documents as evidence under section 233.

Further, the ACH Council may delegate its powers or duties in relation to a number of provisions to a member or staff member of the ACH Council, a committee of the ACH Council or a Aboriginal Land Council (section 15). The Committee notes that the ACH Council is provided with significant powers and functions, particularly regarding enforcement powers. The Committee usually prefers that provisions about delegations are drafted with a higher level of

specificity. In the circumstances, the Committee refers this matter to the Parliament for its consideration.

Incorporation of extrinsic material

1.43 Part 12, Division 5 provides the ACH Committee the power to issue Guidelines on a range of topics including:

(a) the carrying out of consultation;

(b) the identification of persons who are knowledge holders for an area; and

(c) the factors to be considered in determining whether Aboriginal cultural heritage is of outstanding significance.

1.44 Under section 245, the ACH must undertake public consultation of the proposed guidelines, and once finalised they must be made public in accordance with section 246. If the ACH Council wishes to amend guidelines they must undertake the public consultation process (section 247).

1.45 Further, under section 248, the ACH Council may make policies and procedures that Local Services must comply with in regards to topics including service functions, reporting and financial matters. The ACH Council must undertake consultation on these policies and procedures.

The ACH Council have powers in the Bill to make and issue Guidelines and policies and procedures. The Guidelines are public documents (section 246) that are subject to a public consultation protocol (section 245) that may cover topics including

a) the carrying out of consultation;

b) the identification of persons who are knowledge holders for an area; and

c) the factors to be considered in determining whether Aboriginal cultural heritage is of outstanding significance.

The policies and procedures must be complied with by Local Services and concern topics such as service functions, reporting and financial matters. The ACH Council must undertake consultation on these policies and procedures.

The Guidelines and policies and procedures may have an impact on the rights of individuals to access the services of the ACH Council and Local Services, as well as their responsibilities in regards to Aboriginal cultural heritage. Therefore, the Committee notes that the rights and responsibilities of individuals may be subject to these documents, which are not legislative instruments that are subject to Parliamentary scrutiny or disallowance. In the circumstances, the Committee refers this matter to Parliament for consideration.

2. Appropriation Bill 2022; Appropriation (Parliament) Bill 2022; State Revenue Legislation Amendment Bill 2022

Date introduced	21 June 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Portfolio	Treasury

Purpose and description

Appropriation Bill 2022

2.1 The object of this Bill is to appropriate from the Consolidated Fund various sums of money required during the 2022–23 financial year for the services of the Government, including—

(a) Departments of the Public Service, and

(b) various special offices.

2.2 The Consolidated Fund largely comprises receipts from, and payments out of, taxes, fines, some regulatory fees, Commonwealth grants and income from Crown assets.

2.3 This Bill—

(a) appropriates a single sum for the services of each agency, including recurrent services, capital works and services, and debt repayment, and

(b) contains an additional appropriation that allocates revenue raised in connection with gaming machine taxes to the Minister for Health for spending on health-related services, and

(c) contains provision for transfer payments from the Commonwealth to non-government schools and local government, and

(d) provides for appropriation for the whole of the 2022–23 financial year, and

(e) validates budget variations for the 2021–22 financial year.

Appropriation (Parliament) Bill 2022

2.4 The object of this Bill is to appropriate from the Consolidated Fund a sum for the services of the Legislature during the 2022–23 financial year, including recurrent services, capital works and services and debt repayment.

State Revenue Legislation Amendment Bill 2022

2.5 The object of this Bill is to amend the *Betting Tax Act 2001*, the *Land Tax Act 1956* and the *Payroll Tax Act 2007* for the following purposes—

(a) to change percentage rates of betting tax and the applicable offsets,

(b) to change percentage rates of point of consumption tax,

(c) to change the calculation of the amount of the annual payment of tax revenue to the racing industry under the Betting Tax Act 2001 from 2% of taxable net NSW wagering revenue generated during a financial year to 33% of point of consumption tax collected during a financial year,

(d) to change surcharge land tax payable on residential land owned by foreign persons to 4% of the taxable value of the residential land,

(e) to provide that certain wages paid to employees funded by the Commonwealth Aged Care Workforce Bonus Grant Opportunity are exempt from payroll tax.

2.6 This Bill also makes an amendment to the *Totalizator Act 1997* consequent on the amendments to the *Betting Tax Act 2001*.

Background

2.7 These Bills give effect to the 2022-23 NSW State Budget.

2.8 Although they are separate Acts when operative the *Appropriation Bill 2022*, *Appropriation (Parliament) Bill 2022*, and the *State Revenue Legislation Amendment Bill 2022* are cognate bills and were introduced together. Therefore, all three bills are considered in this one report.

Issues considered by the Committee

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

3. Bail Amendment Bill 2022

Date introduced	21 June 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Member introducing	The Hon. Melinda Pavey MP
Portfolio	Attorney General

Purpose and description

3.1 The object of this Bill is to amend the *Bail Act 2013* (the **Act**) to—

(a) require bail to be refused following conviction and before sentencing for an offence for which the offender will be sentenced to imprisonment, and

(b) require that electronic monitoring imposed as a bail condition must meet any minimum standards prescribed in the regulations.

Background

3.2 The Act establishes a legislative framework for decisions regarding whether an accused person should be detained or released from custody, with or without conditions. The preamble to the Act states that Parliament is to have regard to the need to ensure the safety of victims of crime, individuals and the community, the need to ensure the integrity of the justice system, and the common law presumption of innocence and the general right to be at liberty.

3.3 In the Second Reading Speech, the Hon. Melinda Pavey MP, on behalf of the Attorney General, stated the:

> … amendments are in response to three recent bail matters that were out of step with community expectations. The New South Wales Government is committed to keeping the community safe and to ensuring that our bail laws remain amongst the toughest in the country.

3.4 The *Bail Amendment Bill 2022* (the **Bill**) amends the Act by inserting new sections 22B and 30A. New section 22B will require the court to refuse a person's bail in circumstances where they enter a guilty plea or are found guilty, and where the offender will be sentenced to full-time detention. Section 30A imposes minimum requirements to the standard of electronic monitoring devices used in the imposition of bail conditions. Those standards are delegated to regulations.

3.5 The Bill was introduced on 21 June 2022. It then passed the Legislative Assembly on 22 June 2022 and the Legislative Council on 23 June 2022. Consequently, the Committee was unable to report on the Bill before the second reading debates or the moving of amendments in either House.

3.6 In the second reading speech, Mrs Pavey stated the Bill was introduced in consultation with stakeholders including Corrective Services NSW, Police, and the Law Society of New South Wales, among others.

Issues considered by the Committee

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

Procedural fairness - Removal of judicial discretion for sentencing

3.7 The Bill inserts section 22B to the Act which requires the court to refuse a person's bail in circumstances where they are convicted or are found guilty, and where the offender will be sentenced to full-time detention.

3.8 New section 22B creates a mandatory requirement for offenders to be refused bail unless they can establish that special or exceptional circumstances exist. Existing bail laws allow for the continuation of bail, dispensing of bail or refusal of bail on entry of a plea or finding of guilt pending sentence.

3.9 The provision applies where a release application is made, where bail is dispensed with or where a detention application is made following a finding of guilt or entry of a guilty plea.

3.10 The existing definition of conviction under section 4(1) of the Act includes a finding of guilt. Proposed section 22B of the Bill expands the definition to include a plea of guilty.

3.11 Under section 22B(2) of the Bill, where a person is found guilty or enters a guilty plea to a show cause offence, the first limb of the threshold for an application of bail changes from showing that detention is unjustified, to showing that special or exceptional circumstances exist.

3.12 In the second reading speech, Mrs Pavey stated:

> Bail is not intended to be a prejudgement of someone's guilt or punishment before conviction. However, that does not mean that criminals who have been convicted or plead guilty and who the court is confident will be sentenced to imprisonment by full-time detention should be permitted to walk free in our community while they are waiting to be sentenced. The presumption of innocence does not apply after a conviction or guilty plea.

The Bill inserts section 22B to the Act which requires a court to refuse a person's bail in circumstances where they enter a guilty plea or are found guilty, and where the offender will be sentenced to full-time detention.

By mandating a refusal of bail pending a sentence hearing, this may impact on an offender's common law right to procedural fairness at sentence.[1] Additionally, section 22B may remove or diminish a sentencing officer's judicial discretion, as a decision to refuse bail upon entry of a guilty plea or finding of guilt may imply that the sentencing officer, who may be a different officer to the one who refused bail, must subsequently hand down a sentence of full-time

[1] *Pantorno v The Queen* (1989) 166 CLR 466 at 472–474, 482–483

detention. This is particularly important in circumstances where it is unclear whether an offender may receive a sentence of full-time detention or any other sentence, such as an Intensive Correction Order which is also a sentence of imprisonment under the *Crimes (Sentencing Procedure) Act 1999*.

The Committee notes that the definition of conviction in section 22B is expanded to include a finding of guilt and may contradict existing statutory provisions and ordinary use of the word, such as section 4(1) of the Act and section 10A of the *Crimes (Sentencing Procedure) Act 1999*, which would suggest that a conviction is a form of penalty only.

However, the Committee acknowledges that bail may be granted under special or exceptional circumstances. Noting the lack of clarity in the meaning of special or exceptional circumstances, the provisions impact an offender's right to procedural fairness and removes judicial discretion. In the circumstances, the Committee refers these matters to Parliament for its consideration.

The Committee also notes that the Bill was introduced on 21 June 2022. It then passed the Legislative Assembly on 22 June 2022 and the Legislative Council on 23 June 2022. Consequently, the Committee was unable to report on the Bill before the second reading debates or the moving of amendments in either House.

Wide power to refuse bail - no limitation on offences to which section 22B applies

3.13 The Bill inserts section 22B to the Act which requires the court to refuse a person's bail under certain circumstances. The circumstances in which a person's bail must be refused are limited to:

(a) Where the person has been found guilty or entered a guilty plea (convicted); and

(b) During the period in between which they are found guilty or enter a guilty plea and their sentence hearing; and

(c) On a release application made by the offender or on a detention application made by the prosecutor; and

(d) Where the offender will be sentenced to imprisonment to be served by full-time detention.

Section 22B of the Bill requires a court to refuse an offender's bail in the period between a finding of guilt and the offender's sentence hearing. This includes where an offender has entered a plea of guilty, as the definition of conviction under the Bill includes a plea of guilty. The limitations on the court's power are limited to entry of a guilty plea or a finding of guilt, where there is a release or detention application made and where the offender will be sentenced to full-time detention.

This may allow the court to have a wide power to refuse bail in these circumstances. This is particularly noting that there does not appear to be a limitation on the offences to which section 22B applies, such as strictly

indictable offences or offences which require an election under section 260 of the *Criminal Procedure Act 1986*. This may result in persons being detained who may not necessarily be sentenced to full-time detention at their sentence hearing.

Further, there does not appear to be a limitation on the application of the provision as it relates to offenders who are minors or vulnerable persons. This may result in pre-sentence detention of minors or vulnerable persons if the objective and subjective circumstances relating to their proceedings may lend themselves to a sentence of full-time detention. In the absence of statutory safeguards limiting the power under section 22B, the Committee refers this matter to Parliament for its consideration.

Key terms undefined - 'Special or exceptional circumstances'

3.14 The Bill inserts section 22B to the Act which requires the court to refuse a person's bail after they enter a plea of guilty or are found guilty and will be sentenced to full-time detention. The Bill creates one exception to the mandatory refusal of bail in circumstances where the offender establishes that special or exceptional circumstances exist to justify their release.

3.15 Section 22B(1)(b) of the Bill additionally changes the first limb of the threshold for an application of bail relating to a show cause offence; from showing that detention is unjustified, to showing that special or exceptional circumstances exist. The offender must then establish that their release will not pose an unacceptable risk in accordance with sections 16A-20A of the Act.

3.16 Neither the Bill nor the Act define special or exceptional circumstances. However, in her Second Reading Speech, Mrs Pavey said that it is a high bar to be met. Additionally, Mrs Pavey stated:

> The provision does acknowledge that special or exceptional circumstances may arise from time to time that justify the granting of bail even in these circumstances, consistent with the approach taken in the existing section 22 of the *Bail Act*. Section 22 overrides other sections of the *Bail Act* by providing that in certain situations bail cannot be granted, except in special or exceptional circumstances. The courts have declined to set out an exhaustive list of factors that may constitute "special or exceptional". For example, in *Eli-Hilli and Melville v R* [2015] NSWCCA 146 at [29], Justice Hamill said, their Honours Simpson and Davies agreeing:
>
> "Special or exceptional circumstances" may exist in the combination of factors or in "the coincidence of a number of features" … It is not possible to determine or predict in advance what those features may be.

The Bill inserts section 22B to the Act which requires the court to refuse a person's bail after they enter a plea of guilty or are found guilty and will be sentenced to full-time detention. The Bill creates one exception to the mandatory refusal of bail in circumstances where the offender establishes that special or exceptional circumstances exist to justify their release. The Committee understands that Parliament intends to rely on the courts to ordain the meaning of special or exceptional circumstances on a case by case basis.

The Committee notes that neither the Bill nor the Act define special or exceptional circumstances. In addition, there is no statutory guidance in the Bill on examples of factual or contextual features of a matter which may amount to special or exceptional circumstances.

As noted in the Minister's second reading speech, the courts have declined to prescribe an exhaustive list of factors that may constitute special or exceptional circumstances. This may result in the inconsistent application of the provision and impact an accused person's rights to a fair trial.

Additionally, the individual rights of accused persons may be impacted if a person is unable to make a release application due to a lack of statutory guidance relating to special or exceptional circumstances which may be relevant to their release application. In the circumstances, the Committee refers the provision to Parliament for its consideration.

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

Delegation to regulations - minimum standards for electronic monitoring

3.17 The Bill inserts section 30A to the Act to prescribe certain minimum requirements for electronic monitoring used for the purposes of bail conditions.

3.18 Section 30A requires that a bail authority must be satisfied that electronic monitoring meets minimum standards prescribed by the regulations. It also requires that any electronic monitoring bail condition must satisfy the standards prescribed by the regulations.

The Bill inserts section 30A to the Act to prescribe certain minimum requirements for electronic monitoring used for the purposes of bail conditions. The provision delegates the making of minimum standards of electronic monitoring used in bail conditions to the regulations.

The Committee generally prefers for provisions relating to requirements for bail conditions to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight. In particular, because they will have a direct impact on the monitoring of persons accused of offences pending court proceedings.

However, the Committee acknowledges that placing this requirement in the regulation may allow the regulator to set the standard minimums for electronic monitoring in line with its relevant technical expertise. Further, this may allow for greater flexibility in making changes to standard minimums as the courts assess the effectiveness of these provisions. In the circumstances, the Committee makes no further comment.

4. Crimes Amendment (Prohibition on Display of Nazi Symbols) Bill 2022

Date introduced	21 June 2022
House introduced	Legislative Assembly
Member introducing	The Hon. Gabriel Upton MP
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

4.1 This Bill creates an offence for knowingly displaying Nazi symbols by public act and without reasonable excuse.

Background

4.2 The *Crimes Amendment (Prohibition on Display of Nazi Symbols) Bill 2022* (the **Bill**) amends Part 3A *Crimes Act 1900* (the **Crimes Act**) to insert a new section 93ZA, which prohibits the display of Nazi Symbols by public act and without a reasonable excuse.

4.3 In the second reading speech, Ms Gabrielle Upton MP on behalf of the Attorney General, the Hon. Mark Speakman SC MP, highlighted the harm such symbols cause:

> The display of those symbols causes harm, especially to our Jewish community, who are frequently targeted by these acts, but also to other groups who were persecuted under the Nazi regime, including other diverse cultural groups, the LGBTIQ community and people with disabilities. As an attack on our fundamental social values, these actions harm our community as a whole.

4.4 Ms Upton also acknowledged the harm caused to the Hindu, Buddhist and Jain communities:

> The display of the Nazi Hakenkreuz also has a particular impact on members of the Hindu, Buddhist and Jain communities… Members of those communities report feeling unable to display the symbol for fear that people will mistake it for the Nazi Hakenkreuz. The continued display of this symbol in connection with Nazi ideologies perpetuates this hate and harm.

4.5 While the Bill does not define what constitutes a 'Nazi symbol', Ms Upton explained that "the words are to be given their ordinary, well-understood meaning." A 'public act' takes its meaning from the definition in section 93Z of the Crimes Act.

4.6 The Bill provides that individuals will not be guilty of an offence if they do not knowingly display the symbol, or if they have a reasonable excuse. The Bill sets out a non-exhaustive list of what constitutes a reasonable excuse, including if it is displayed for academic, artistic or educational purposes undertaken reasonably and in good faith, or for another purpose in the public interest. This provides the judiciary with the scope to consider whether a display of a Nazi symbol is an offence based on the particular circumstances.

4.7 The maximum penalty for a breach of section 93ZA is 100 penalty units ($11 000) or 12 months imprisonment, or both, for an individual or 500 penalty units ($55 000) for a corporation.

Issues considered by the Committee

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

Freedom of expression and association

4.8 The Bill amends the *Crimes Act 1900* to insert section 93ZA, which prohibits the public display of Nazi symbols.

4.9 Subsection 93ZA(1) provides that a person who, by a public act, displays a Nazi symbol by public act and without a reasonable excuse, is guilty of an offence. This offence carries a maximum penalty of 100 penalty units ($11 000) or imprisonment for 12 months, or both, for an individual, or 500 penalty units ($55 000) for a corporation.

4.10 Subsection 93ZA(2) provides that this section does not apply if the swastika is displayed in connection with Buddhism, Hinduism or Jainism.

4.11 Subsection 93ZA(3) further provides that a reasonable excuse includes the display of a Nazi symbol done reasonably and in good faith:

(a) for an academic, artistic or educational purpose, or

(b) for another purpose in the public interest.

4.12 Subsection 93ZA(4) imports the definition of public act from section 93Z of the Crimes Act 1900. Section 93Z defined public act to mean:

(a) any form of communication (including speaking, writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods) to the public, and

(b) any conduct (including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia) observable by the public, and

(c) the distribution or dissemination of any matter to the public.

4.13 For the avoidance of doubt, the Crimes Act clarifies that an act may be a public act even if it occurs on private land.

The Bill amends the Crimes Act 1900 to prohibit the public display of Nazi symbols. Under subsection 93ZA(1), a person who, by a public act, displays a

Nazi symbol is guilty of an offence that may carry a maximum penalty of 100 penalty units ($11 000) or imprisonment for 12 months, or both, for an individual, or 500 penalty units ($55 000) for a corporation.

A public act is defined in section 93Z of the Crimes Act 1900 to include any form of written or visual communication to the public, including writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods, in addition to the wearing of clothes or the distribution or dissemination of any matter to the public. Section 93Z also specifies that an act may be public even if it occurs on private land.

The Bill therefore places restrictions on a person's freedom of expression and association specifically in regards to the public use of a Nazi symbol. The right to association protects a person's freedom to form and join associations to pursue a common goal, and to exchange ideas and information. The Committee generally comments where legislation limits a person's right to expression or association, as they are core rights contained in Articles 19 and 22 of the International Covenant on Civil and Political Rights (ICCPR).[2]

However, the Committee recognises that the Bill contains exceptions, including that this section does not apply to a swastika used in connection with Hinduism, Buddhism or Jainism, and where a public act is to be done reasonably and in good faith for academic, artistic, or educational purposes, or for another purpose in the public interest.

The Committee recognises that the intent of the Bill is to protect individuals from activity that may incite or amount to hate behaviour or hate crimes, and the harm such symbols have historically caused in connection with the holocaust. The Committee also recognises that lawful restrictions on the freedom of association and expression may be permitted in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. In these circumstances, and given the exceptions for a public act done in good faith for academic, artistic or educational purposes, or for another purpose in the public interest, and exceptions for the symbol in connection with Hinduism, Buddhism or Jainism, the Committee makes no further comment.

[2] United Nations, International Covenant on Civil and Political Rights, 1976

5. Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2022*

Date introduced	22 June 2022
House introduced	Legislative Council
Member responsible	The Hon. Walter Secord MLC
	*Private Members Bill

Purpose and description

5.1 The object of the *Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2022* (the **Bill**) is to amend the *Criminal Assets Recovery Act 1990* (the **Act**) to provide that an unexplained wealth order may be made where a court is satisfied a person's total wealth is greater than the person's lawfully acquired wealth; and for other purposes.

Background

5.2 The Act provides a framework for the confiscation of property and recovery of unexplained wealth as debt in NSW. The Act allows the Supreme Court to issue civil orders such as restraining orders, assets forfeiture orders, unexplained wealth orders and ancillary orders.

5.3 The Bill amends the Act to provide that the Supreme Court must make an unexplained wealth order if satisfied, on the balance of probabilities, that the total value of the person's current or previous wealth is greater than the value of the person's lawfully acquired wealth. The burden of proof is on the person to prove that the person's current or previous wealth is lawfully acquired.

5.4 Currently, the Supreme Court must make an unexplained wealth order if the Court finds a reasonable suspicion that the person has engaged in serious crime related activities or acquired property from another's person's serious crime related activity. The Bill removes the requirements of being 'engaged in serious crime related activities or acquired property from another's person's serious crime related activity' from the Act.

5.5 The Bill also enables the Director of Public Prosecutions to make an application for an unexplained wealth order. Previously only the NSW Crime Commission was able to make the application.

5.6 In his second reading speech, the Hon. Walter Secord MLC stated the Bill was prepared following 'months of consultation, discussion, research and advice.'

Issues considered by the Committee

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

Presumption of innocence – reduced standard of proof and reversed burden of proof

5.7 Section 28B(1) of the Act provides that the unexplained wealth of a person is the whole or any part of the current or previous wealth of the person that was illegally acquired property or the proceeds of an illegal activity. Current or previous wealth is the sum of all interests in property in accordance with sections 28B(4)-(6) of the Act.

5.8 An unexplained wealth order is a confiscation order under section 4 and Part 3 of the Act. Section 5 of the Act states proceedings on an application for a restraining order or a confiscation order are not criminal proceedings.

5.9 Applications for an unexplained wealth order may be made by the NSW Crime Commission.

5.10 The Bill inserts section 26A(2) to also allow the Director of Public Prosecutions to initiate an unexplained wealth order.

5.11 Section 28A of the Act requires the Supreme Court to make an unexplained wealth order if it finds that there is a reasonable suspicion that the person against whom the order is sought has, at any time before the making of the application for the order—

a) engaged in a serious crime related activity or serious crime related activities, or

b) acquired serious crime derived property from any serious crime related activity of another person (whether or not the person against whom the order is made knew or suspected that the property was derived from illegal activities).

5.12 The Bill omits sections 28A(2) and (3) of the Act and in their place, inserts:

(2) The Supreme Court must make an unexplained wealth order if the Court is satisfied, on the balance of probabilities, that the total value of the person's current or previous wealth is greater than the value of the person's lawfully acquired wealth.

(3) The burden of proof in proceedings against a person for an unexplained wealth order is on the person to prove that the person's current or previous wealth is lawfully acquired.

5.13 Regard may be given to the person's income and expenditure in proving that wealth was lawfully acquired under section 28B(5A) of the Bill.

5.14 In his second reading speech, Mr Secord stated that the changes would make it easier to make unexplained wealth orders by removing the requirement of reasonable suspicion. He further noted that the Bill is intended to deal with

significant wealth that has surfaced following the investigation of serious crimes such as murder.

The Bill amends the standard of proof required for an unexplained wealth order to be made under section 28A of the *Criminal Assets Recovery Act 1990*. It does so by changing the threshold to the balance of probabilities, compared to the current Act which requires a reasonable suspicion that wealth was acquired illegally. Additionally, it removes the requirement of the person needing to be engaged in serious crime related activities or acquired property from another person's serious crime related activity.

The Bill also specifies that the burden of proof rests with the person alleged to have unexplained wealth to prove that their wealth was obtained lawfully. The Court may, without limitation, consider the person's income and expenditure to assess their unexplained wealth. The Bill also grants the Director of Public Prosecutions the power to make applications for unexplained wealth orders.

By reducing the standard of proof for granting unexplained wealth orders and reversing the burden of proof onto the person alleged, this may curtail a person's right to a presumption of innocence. The presumption of innocence implies a right not to be presumed guilty until proven so. Further, a greater number of unexplained wealth orders may be successfully granted due to the Director of Public Prosecutions being granted the power to make unexplained wealth order applications in addition to the NSW Crime Commission.

However, the Committee notes the statutory safeguards which may mitigate the effect of these provisions. For example, the court cannot consider any current or previous wealth of which the Crime Commission has not provided evidence. As noted in the Second Reading Speech, the intention of the Bill is to deal with significant wealth that has surfaced following the investigation of serious crimes such as murder. However, the Committee notes that the Bill does not set a minimum value of wealth that may be subject to an unexplained wealth order.

The Committee notes that the balance of probabilities is the usual evidentiary standard used in civil proceedings. This standard is generally considered to be sufficient to safeguard the right to a fair trial because civil proceedings result in monetary penalties rather than imprisonment. However, because the Bill both reduces the standard of proof and reverses the onus of proof, which are two key safeguards of the principle of a right to a fair trial, the Committee refers the matter to Parliament for its consideration.

6. Electoral Legislation Amendment Bill 2022

Date introduced	22 June 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Member introducing	The Hon. Gabrielle Upton MP
Portfolio	Attorney General

Purpose and description

6.1 The object of the Bill is to make miscellaneous amendments to the *Electoral Act 2017* (the **Electoral Act**) and the *Electoral Funding Act 2018* (the **Funding Act**).

Background

6.2 The Bill proposes a number of amendments to the Electoral Act and the Funding Act ahead of the upcoming 2023 State general election. In her second reading speech to the Bill, the Hon. Gabrielle Upton MP (on behalf of the Hon. Mark Speakman SC MP, Attorney General) noted that these amendments are intended to facilitate the 2023 general election and any State or local government by-election occurring before 25 March 2023.

6.3 Ms Upton also highlighted that the Bill seeks 'to implement recommendations made by the Joint Standing Committee on Electoral Matters in its report on the administration of the 2019 New South Wales State election',[3] particularly those recommendations which had been accepted by the Government.[4] The Committee's report, titled *'Administration of the 2019 NSW State Election'* ('the Committee Report'), made a number of findings in respect to the 2019 state election and recommendations to improve the administration of future state election.[5]

6.4 The amendments proposed by the Bill are grouped within three Schedules, which separately deal with a broader area of reform:

(a) Schedule 1 seeks to amend provisions of the Electoral Act dealing with the conduct of elections, including early voting and scrutiny of ballots;

(b) Schedule 2 seeks to amend provisions of the Electoral Act to enable the registration of party logos and the inclusion of such logos on ballot papers in elections, and

[3] Joint Standing Committee on Electoral Matters, *Administration of the 2019 NSW State Election*, report 1/57, Parliament of New South Wales, October 2020, pp xii-xix.

[4] The Hon. Don Harwin MLC, *Government Response - Administration of the 2019 NSW State election*, 28 April 2021, viewed 5 July 2022.

[5] Joint Standing Committee on Electoral Matters, *Administration of the 2019 NSW State Election*, report 1/57, Parliament of New South Wales, October 2020, p viii.

(c) Schedule 3 seeks to amend provisions of the Funding Act which deal with electoral expenditure during election campaigns and payments to parties and elected members from public funds.

6.5 In her concluding remarks, Ms Upton summarised the motivation behind these amendments:

> …the amendments contained in this bill are sensible. They accord with the recommendations of the committee. Some of them are purely administrative and efficiency amendments. Others are more substantial, but they accord with committee recommendations.

6.6 On Schedule 1, the Bill seeks to amend the allowable time period for early voting and make provisions for the earlier scrutiny of postal ballot papers and the saving of postal ballot papers not inserted in the envelope imprinted with the postal vote certificate. It also seeks to include special provisions for the 2023 general election, as well as for by-elections occurring before 25 March 2023. These provisions would limit technology-assisted voting available at those elections to telephone voting for vision impaired or blind voters. Ms Upton confirmed in her second reading speech that these special provisions reflect the determination not to use the iVote voting system for those elections, made by the Electoral Commissioner on 15 March 2022.[6]

6.7 Schedule 1 also contains provisions dealing with the functions and powers of the Electoral Commission and the Electoral Commissioner. Specifically, it seeks to expand available exceptions to the prohibition on disclosing information obtained from administering elections. Those additional exceptions would enable the Commissioner to disclose information relating to possible contraventions of the Electoral Act. The Bill also proposes to empower the Commissioner to publish guidelines for enforcing prohibitions on certain activities within six metres of a voting centre.

6.8 The amendments sought under Schedule 2 of the Bill would provide for the inclusion of registered party logos on ballot papers in elections for both Chambers of Parliament. In her second reading speech, Ms Upton explained the reasoning for including party logos on ballot papers:

> This change will assist voters to identify their preferred party or candidate and may benefit voters with a disability and voters from a culturally and linguistically diverse background.

6.9 Finally, the Bill proposes a number of amendments to the Funding Act which would change legislative requirements in respect to the disclosures of political donations and the thresholds and operation of electoral expenditure caps set out in the Act. It also seeks to update the scheme for eligible payments to parties and elected members from the Administration Fund and the New Parties Fund.

---

[6] NSW Electoral Commissioner, *Determination that technology assisted voting is not to be used*, 15 March 2022, viewed 5 July 2022.

Issues considered by the Committee

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

Right to participation in public elections – early voting

6.10 Section 113 of the Electoral Act provides that a person who is unable to attend a voting centre on election day may vote early at an early voting centre. Relevantly, section 114 empowers the Commissioner to approve the days and hours of operation for these early voting centres. However, subsection (2) sets limits for those days and hours which the Commissioner may approve.

6.11 The Bill amends section 114(2)(a) of the Electoral Act, which prescribes the earliest day before election day from which an early voting centre can operate. Specifically, the Bill changes that date from 'the Monday after the close of nominations' to 'the Saturday preceding the election day'. This would operate to limit the allowable time period for early voting to seven days.

6.12 Ms Upton confirmed in her second reading speech that the later date for commencing early voting is intended to 'give candidates and parties more time to register their electoral material after the ballot draw', which implements recommendation 1 of the Committee Report.

The Bill amends the earliest allowable commencement date for early voting under section 114 of the *Electoral Act 2017* from the Monday after close of nominations to the Saturday preceding the election day. This would shorten the allowable time period for early voting to seven days prior to the election, which may impact an individual's right to vote and participate in public elections.

However, the Committee acknowledges that the amendment is intended to enable more time for the registration of electoral materials before the commencement of early voting, to facilitate the provision of such materials to early voters. It also notes that voters who are not able to vote at a voting centre on election day or during the seven day early voting period may still be eligible to vote by postal ballot or technology-assisted means. In the circumstances, the Committee makes no further comment.

Implied freedom of political communication – electoral expenditure caps for third party campaigners

6.13 Section 29 of the Funding Act establishes various caps on electoral expenditure for a State election campaign which apply for specified classes of persons or groups, including third-party campaigners under subsection (10).

6.14 Section 35 of the Funding Act sets an additional limit on electoral expenditure for third-party campaigners. Specifically, section 35(1) provides that it is unlawful for a third-party campaigner 'to act in concert' with another person or persons to incur electoral expenditure in relation to an election campaign that exceeds the applicable cap for that election. Subsection (2) defines 'acts in concert' as it relates to section 35, to mean:

> a person ***acts in concert*** with another person if the person acts under an agreement (whether formal or informal) with the other person to campaign with the object, or principal object, of—
>
> (a) having a particular party, elected member or candidate elected, or
>
> (b) opposing the election of a particular party, elected member or candidate.

6.15 The Bill amends section 29(10) of the Funding Act, which sets the monetary cap on electoral expenditure for State election campaigns that applies to a third-party campaigner. Specifically, the Bill increases the legislated caps to $1 288 500 for registered third-party campaigners and $644 300 for all other third-party campaigners.

6.16 In her second reading speech, Ms Upton noted that the caps under section 29(10) of the Funding Act had been determined to be invalid. As a result of the court ruling, no cap under the Funding Act was operative. She further spoke in detail to the rationale for reinstating the expenditure caps set out in the Bill:

> The bill reinstates the expenditure caps for third-party campaigners in State general elections that applied prior to the commencement of the Electoral Funding Act in 2018. That is also consistent with the committee's recommendation. The committee considered that, by reinstating these higher amounts, third-party campaigners would have adequate opportunity to present their case, and that the caps would be proportionate to the expenditure caps that apply to political parties under the Act, and other direct contestants at elections.
>
> The Government has considered the committee's recommendations and reasonings carefully across the board. … The Government has also considered the total amounts previously spent by registered third-party campaigners during the capped expenditure periods for the 2011, 2015 and 2019 State general elections. Notably, the highest amount previously spent by a third-party campaigner at a State general election was under $1 million, which was less than the cap that applied at the time. The amounts implemented by the bill are also consistent with those that applied for the 2019 State general election under the Electoral Funding Amendment (Savings and Transitional) Regulation 2019.

The Bill amends section 29(10) of the *Electoral Funding Act 2018* to set electoral expenditure caps for State election campaigns which apply to third-party campaigners, to $1 288 500 for registered third-party campaigners and $644 300 for all other third-party campaigners.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 55/56 (22 May 2018).[7] Consistent with those comments, election expenditure caps placed on third party campaigners may burden their implied freedom of political communication by limiting their ability to engage in political campaigning.

The Committee acknowledges that the provisions preserve the expenditure caps for third-party campaigners which applied under the statutory predecessor

[7] Legislation Review Committee, *Legislation Review Digest No. 55/56*, Parliament of New South Wales, 22 May 2018.

to the Act and the *Electoral Funding Amendment (Savings and Transitional) Regulation 2019*.

However, the imposition of these expenditure caps on third-party campaigners is in addition to the limit under section 35 of the Act. Section 35 provides that it is unlawful for a third-party campaigner to act in concert with another person to exceed applicable expenditure caps. 'Acting in concert' is broadly defined to mean third-party campaigners who, under formal or informal agreement, campaign to achieve the same electoral outcome. The operation of expenditure caps set out in the Bill in conjunction of section 35 may thereby limit the ability of two or more distinct third-party campaigners from engaging in political communication during an election campaign, without risking a breach of either section 29 or 35 of the Act. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Lack of clarity – meaning of "thing"

6.17 Section 186(1) of the Electoral Act establishes an offence for printing, publishing, distributing or publicly displaying electoral material that does not legibly show the name and address of an individual on whose instructions the material was prepared and the name and address of the printer for the material. This offence carries a maximum penalty of $2 200 and/or 6 months imprisonment for individuals.

6.18 However, section 186(2) exempts certain election materials, including T-shirts and balloons, from the application of the offence provision under subsection (1). Subsection (2)(d) provides that the regulations may prescribe other articles or a class of articles as further exempted election materials.

6.19 The Bill amends subsection 186(2)(d) to provide that the regulations may prescribe any other article 'or thing' (or class of either) which are exempted from the offence under section 186(1).

The Bill amends section 186(2) of the *Electoral Act 2017* to enable the regulations to prescribe "things" or classes of "things" which may be exempt from the offence provisions under subsection (1). That exemption would allow the printing, publication, distribution or public display of these "things" without requiring it legibly showing the contact details for the person who instructed its printing, publication or distribution.

There appears to be no provisions of the Act or Regulation which define or narrow the scope of the ordinary meaning of "things". The Bill may therefore include a broad regulation-making power. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when it commences.

The Committee recognises that regulations build flexibility into the regulatory framework. It also acknowledges that the regulatory power is intended to facilitate political communication without fear of monetary or custodial

sanction, where displaying or including the required information is unreasonable or impractical. However, the Committee notes that the amendment may effectively allow regulations to prescribe exemptions without limit. For these reasons, the Committee refers to Parliament for its consideration whether further clarity may be provided as to the meaning of "thing".

Wide administrative power – disclosure of information

6.20 Section 268 of the Electoral Act establishes an offence for disclosing information obtained in connection with the administration or execution of the Act, which carries a maximum penalty of $110 000. The section also lists limited circumstances under which disclosure is permitted without offending the prohibition.

6.21 The Bill inserts subsections (2)-(4) into section 268 to expand the exempted circumstances when information obtained in connection with the administration or execution of elections may be permitted. Relevantly, subsections (2) and (3) gives the Electoral Commission or the Commissioner a discretion to disclose such information where:

(a) the information concerns a possible contravention of the Electoral Act, the Funding Act or a regulation under either of those statutes, or is disclosed to a person who has given information about a possible contravention, and

(b) it is reasonably necessary for the purpose of reporting to the public or a relevant person of the progress or outcome of an investigation into the possible contravention, and

(c) the Electoral Commission or the Commissioner is satisfied the disclosure is in the public interest.

6.22 Subsection (4) provides that the Electoral Commission and the Commissioner have qualified privilege in any defamation proceedings arising out of a disclosure made under section 268, including discretionary disclosures under subsections (2) and (3).

6.23 During her second reading speech, Ms Upton explained that these discretionary disclosure powers are intended to:

> …enhance transparency and confidence in the management of reports made to the Electoral Commission or Electoral Commissioner about possible breaches of electoral legislation.

The Bill amends the *Electoral Act 2017* to give the Electoral Commissioner the discretionary power to disclose information obtained in the administration or execution of the Act, otherwise prohibited under section 268, where the information concerns the possible contravention of the Act, the *Electoral Funding Act 2018* or a regulation under either statute. That power may be exercised where the Commissioner is satisfied it is reasonably necessary to disclose that information in order to publicly report the progress or outcome of

an investigation, or to provide it to a person who has reported a possible contravention, and that it is in the public interest to make the disclosure.

In doing so, the Bill may grant the Electoral Commissioner a wide and ill-defined administrative power to disclose information obtained in the administration or execution of an election. The provisions do not limit what information may be disclosed and does not exclude personal information, which may impact on an affected individual's right to privacy. Additionally, as the information disclosed may concern ongoing investigations, it may identify suspects of possible contraventions who have not been found to have breached the Act. This may also burden the individual's right to the presumption of innocence.

The Committee acknowledges that the provisions are intended to enhance the transparency of and confidence in the management of elections by the Electoral Commissioner, by facilitating the reporting of investigations into possible electoral breaches. It also recognises that section 268 of the Act provides for disclosure of election information in specified circumstances without offending the prohibition under that section.

However, the Committee notes that the provisions grant a broad discretion for the Electoral Commissioner to publicly report information relating to the investigation of a possible electoral contravention, so long as they are satisfied it is 'in the public interest' to do so. It also provides to the Electoral Commissioner a qualified privilege from defamation action relating to such public interest disclosures. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Commences by proclamation

6.24 Clause 2(1) of the Bill provides that the amendments under Schedules 1 and 3[1]-[23], [29], [30] and [34] commence a day or days to be appointed by proclamation. These amendments include provisions which:

(a) Limit the maximum allowable early voting period to seven days prior to the election.

(b) Extend the length of time for early scrutiny of postal ballot papers, and the time period after close of voting to accept postal voting envelopes.

(c) Amend the enforcement of prohibitions on activities within six metres of voting centres, in accordance with enforcement guidelines published by the Commissioner.

(d) Make special provisions for the 2023 State general election and any by-elections occurring before that 2023 general election, to prohibit the use of any technology-assisted voting that is not telephone voting for vision impaired or blind electors.

(e) Legislate election expenditure caps for third-party campaigners and removes the inclusion of election campaign travel expenditure from election expenditure caps.

(f) Change disclosure and reporting requirements in respect to political donations, including as it relates to disendorsed candidates.

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.

The Committee acknowledges that there may be practical reasons for imposing a flexible starting date, which may allow time for the necessary administrative arrangements to be implemented in order to give effect to the amendments. However, given that some of these provisions are intended to facilitate the upcoming State general election in March 2023, the Committee notes that commencement by proclamation may make it difficult for individuals to ascertain their electoral rights and obligations for the election. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Incorporation of guidelines into legislation

6.25 Part 7, Division 14 of the Electoral Act sets out provisions concerning activities during the election period. This division sets out a number of strict liability offences for displaying posters or canvassing within 6 metres of an entrance to a voting centre or an early voting centre ('a 6-metre offence'). These offences carry a maximum penalty ranging from $1 100 to $2 200 for individuals.

6.26 The Bill inserts section 206A into Division 14 of Part 7, which enables the Commissioner to issue guidelines about voting centre managers and election officials exercising functions under Division 14, in relation to a 6-metre offence. Relevantly, subsection (1) provides that a voting centre manager or an election official may exercise such a function, only if they have considered the guidelines issued by the Commissioner.

6.27 Speaking to section 206A, Ms Upton noted in her second reading speech that the amendment 'will provide managers and officials with guidance regarding the enforcement of the rule'. The provision is also consistent with recommendation 34 of the Committee Report, which the NSW Government accepted in principle.[8] The Committee report noted that the strict liability 6-metre offences did not allow for discretionary enforcement on reasonable grounds.[9]

The Bill inserts section 206A into the *Electoral Act 2017* which allows the Electoral Commissioner to publish guidelines for exercising enforcement functions by voting centre managers and election officials under the Act, relating to offences of displaying posters or canvassing within 6 metres of a voting centre's entrance. This section would require voting centre managers

[8] The Hon. Don Harwin MLC, *Government Response - Administration of the 2019 NSW State election*, 28 April 2021, p 15, viewed 5 July 2022.

[9] Joint Standing Committee on Electoral Matters, *Administration of the 2019 NSW State Election*, report 1/57, Parliament of New South Wales, October 2020, pp 91-94.

and election officials to consider such guidelines before they can exercise those enforcement functions. The Committee notes that, unlike subordinate legislation, there is no requirement that such guidelines be tabled in Parliament and would therefore not be subject to disallowance under section 41 of the *Interpretation Act 1987*.

However, the Committee acknowledges that the guidelines are intended to facilitate the consistent and flexible exercise of enforcement functions by voting centre managers and election officials. It also notes that there otherwise is no defence for contravention of a 6-metre offence. In the circumstances, the Committee makes no further comment.

Matters deferred to the regulations

6.28 The Bill amends section 149(1)(b)(i) of the Electoral Act, which sets the time period after close of voting during which postal voting envelopes can be received and accepted for counting. Specifically, it amends that time period from four days to 'the period prescribed by the regulations, being a period of not more than 13 days'.

6.29 As noted above, section 186(1) of the Electoral Act establishes an offence for not showing on election materials the name and address of the individual on whose instructions the material was printed, published or distributed, carrying a maximum penalty of $2 200 and/or 6 months imprisonment for individuals.

6.30 The Bill also inserts subsection (1A) into section 186, to deal with electoral materials that are social media posts. Specifically, subsection (1A) provides that such social media posts must include the relevant name and address required by section 186(1) 'in a way, if any, prescribed by the regulations'. In her second reading speech, Ms Upton noted that subsection (1A):

> …will clarify the requirements for publication of authorisation details on a variety of social media platforms and help to ensure electoral laws remain relevant and appropriate for emerging forms of social media that are used during campaigning. There remains an exemption from the requirement to have a name and address recorded on social media posts in certain circumstances, as prescribed under section 186(2)(d) of the Electoral Act and clause 8A of the Electoral Regulation 2018.

6.31 Finally, the Bill inserts provisions into Schedule 7 of the Electoral Act to provide that the amendments set out in Schedule 2 of the Bill, relating to the registration and ballot paper inclusion of party logos, do not apply in relation to a local government election 'until a date prescribed by the regulations'.

The Bill makes a number of amendments to the *Electoral Act 2017* which defers those matters to the regulations. In particular, these amendments permit the regulations to prescribe a time period after close of voting (of not more than 13 days) during which postal voting envelopes may be accepted for counting, the manner for compliance with requirements under the section 186(1) offence provisions for election materials that are social media posts and the date on which provisions for the registration and ballot paper inclusion of party logos apply to local government elections.

Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when it commences. The Committee generally prefers substantive matters to be dealt with in the principal legislation to facilitate an appropriate level of parliamentary oversight, particularly where those matters may impact an individual's right to participate and vote in public elections.

The Committee acknowledges that these amendments are intended to build more flexibility into the regulatory framework and allow regulators to better respond to the unique circumstances of any particular election. Additionally, enabling regulations to prescribe the date on which amendments apply to local government elections is intended to allow time for the necessary administrative arrangements to give effect to those changes. The Committee also notes that any regulations are required to be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*.

However, the matters deferred to the regulations relate to the participation and voting in public elections, which may make it difficult for a person to understand how they may meaningfully vote and participate in elections. The Committee notes that regulations may prescribe a time period for accepting postal votes received after close of voting that is either shorter or longer than the previous four days in the legislation. It also notes that the requirements for complying social media posts which can be prescribed by regulations may determine whether a person has committed an offence which carries a possible custodial sentence. For these reasons, the Committee refers this matter to Parliament for its consideration.

7. Government Sector Finance Amendment (Jobs for NSW) Bill 2022

Date introduced	22 June 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Alistair Henskens SC MP
Portfolio	Enterprise, Investment and Trade

Purpose and description

7.1 The object of this Bill is to amend the *Government Sector Finance Act 2018* (the **GSF Act**) to—

(a) repeal the *Jobs for NSW Act 2015* (the **Jobs for NSW Act**), and

(b) provide for transitional matters in relation to the Jobs for NSW Fund consequent on the repeal.

Background

7.2 The Bill amends the GSF Act, which sets outs the legislative framework for the efficient, effective and economical use and management of government resources and related money in accordance with the principles of sound financial management.

7.3 Specifically, the Bill repeals the Jobs for NSW Act, which established Jobs for NSW as a government agency to leverage private sector expertise and provide advice to government for the creation of jobs and investment in NSW.

7.4 In the second reading speech to the Bill, the Minister for Enterprise, Investment and Trade explained the repeal followed the recent statutory review of the Jobs for NSW Act.[10] The review examined whether the Act was necessary to enable the delivery of its objectives to facilitate job creation, investment attraction, economic development and the use of private sector expertise. Primarily, the review found that it was no longer the most efficient way to achieve these objectives:

> It identified that through the establishment of Investment NSW, the Jobs for NSW construct was no longer necessary to fulfil the objectives of the Act. In fact, the review found that many of the Act's functions were being progressed by other parts of government and Jobs for NSW was no longer actively pursuing them nor was it operating as effectively as it could due to outdated governance.

7.5 The Minister also noted that since the introduction of the Act, the new Department of Enterprise, Investment and Trade had also been created, which has

[10] NSW Government, Report on the Statutory Review of the Jobs for NSW Act 2015, July 2021

a focus on creating global business and investment in NSW. In the Statutory Review, It was found that the objectives of Jobs for NSW were duplicated across other parts of government and could be pursued outside of the Jobs for NSW construct.[11]

7.6 Given the overlapping functions and the lack of efficiency, the statutory review recommended that the Act be repealed and transitionary arrangements be introduced to allow the existing contractual obligations to be fulfilled while the Jobs for NSW fund is abolished.[12]

7.7 The Bill therefore repeals the Jobs for NSW Act to be abolished on 30 June 2024 and sets out arrangements transitioning the fund and existing contractual obligations until this date. On these transitionary elements, the Minister stated:

> The bill delivers on the recommendations of the statutory review by repealing the Jobs for NSW Act 2015 and inserting necessary transitional provisions into the Government Sector Finance Act 2018 to allow for a temporary transition fund to be established until 30 June 2024.
>
> … The funds are intended to support the remaining Jobs for NSW initiatives and responsibilities, which include things like the MVP, or minimum viable product, grant program; the Sydney Startup Hub; and the remaining clients for the loan guarantee products, some of which have repayment dates staggered over several years. This approach will enable the Government to satisfy the existing contractual obligations under the Jobs for NSW fund.

Issues considered by the Committee

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

Removal of entitlement to remuneration or compensation

7.8 Proposed section 23 provides for the abolition of Jobs for NSW on the commencement day, which is the date of assent to this Bill as an Act.

7.9 Subsection 23(2) provides that a person who holds either the office as a member or Chairperson for Jobs for NSW ceases to hold office on commencement day.

7.10 Subsection 23(3) provides that such a person is not entitled to remuneration or compensation for the loss of office.

The Bill inserts section 23, which provides that upon the abolition of Jobs for NSW, an officeholder as a member or Chairperson of Jobs for NSW ceases to hold office and is not entitled to remuneration or compensation for the loss of office. This may impact upon the right to remuneration or compensation of the affected persons.

However, under the Jobs for NSW Act 2015, the officeholders are appointed to their office by the Minister and have the primary functions of advising the Minister of opportunities for development and attracting business to NSW.

[11] NSW Government, Report on the Statutory Review of the Jobs for NSW Act 2015, July 2021, p 7

[12] Cite statutory review link if available online

Section 7 of the Act also provides that Jobs for NSW is subject to the direction and control of the Minister, except in relation to the preparation and contents of any report, strategy, recommendation or advice provided to the Minister by Jobs for NSW.

The Committee recognises that the broader aim of the Bill is to repeal the Jobs for NSW Act and have its functions incorporated into the broader Department of Enterprise, Investment and Trade. Given this removes the functions of the members of Jobs for NSW, who are also subject to the direction of the Minister, the Committee makes no further comment.

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

Broad Ministerial power

7.11 Proposed section 24 provides that the existing Fund becomes the Jobs for NSW Fund (the **transitional Fund**) on the commencement date. The Bill specifies that the transitional Fund continues as a fund in the Special Deposits Account, but under its new name. The balance, if any, standing to the credit of the existing Fund is taken, on the commencement day, to be part of the balance in the transitional Fund and may be used for the purposes for which money in the transitional Fund may be used.

7.12 Any money that was payable into the existing Fund immediately before the commencement day must be paid into the transitional Fund, and the Minister may approve a proposal for funding a jobs creation incentive if the proposal—

(i) was made, but not approved, under the repealed Act before the commencement day, or

(ii) is made on or after the commencement day.

7.13 Section 27 specifies for what purpose payment may be made into and out of the Fund. Specifically, the following may be paid into the transitional Fund:

(a) all money appropriated by Parliament for the purposes of this Part,

(b) all other money received by the Minister for the purposes of this Part, including money recovered under clause 26,

(c) all money directed or authorised to be paid into the transitional Fund under this Part or another Act,

(d) the proceeds of the investment of money in the transitional Fund.

7.14 The following may also be paid out of the transitional fund:

(a) amounts the Minister is satisfied are for the purpose of funding jobs creation incentives—

(i) for proposals approved under the repealed Act before the commencement day, or

(ii) for proposals approved by the Minister under clause 24(2)(d),

(b) the costs of administering this Part, including in relation to jobs creation incentives funded under this Part,

(c) the costs of recovering money owed to the transitional Fund, including legal and other expenses,

(d) all money directed or authorised to be paid out of the Fund under this Part or another Act.

7.15 The Minister specified in his second reading speech that the ministerial powers contained in this Part are to only be used for the purposed listed under section 27 for the time required:

> As I explained earlier, the intent of the bill is that the transitional provisions are only in force for the time required, which is why the Government has identified a suitable sunset date for the transitional fund of 30 June 2024. That date was recommended by the statutory review to enable the remainder of the fund's responsibilities to be fulfilled and its activities wound up at an appropriate time.

7.16 Proposed section 28 provides that the Minister may invest money in a transitional Fund for the purposes of the *Government Sector Finance Act 2018*.

7.17 Under section 30, the transitional Fund is abolished on 30 June 2024. The Minister may give directions, without the need for appropriation, about what must be done with the residual money in the Fund. Subsection 30(3) provides that the Minister may direct some or all of the residual money to be paid to the Department or another GSF agency for its use, or into a fund established by or under another Act or the Consolidated Fund.

7.18 The Bill also provides that a direction may specific conditions applicable to the use of residual money paid to a GSF agency.

7.19 In relation to these powers to give directions, the Minister stated:

> To ensure that the bill can also deal with matters after the sunset date, clause 30 of the bill allows the Minister to give directions without the need for an appropriation about what must be done with the balance of the transitional fund. It will also allow directions to be made about any money payable into the transitional fund immediately before its abolition. Consistent with the recommendations of the statutory review, that will streamline the management of any residual money—which is likely to be small in size—and allow for it to be paid to the department, a government sector finance agency, another fund in legislation or the Consolidated Fund. While the money remaining will likely be immaterial, it can be subject to conditions that will enable the Government to direct it towards objectives that are consistent with the Jobs for NSW Act objectives, such as economic development.

The Bill provides that the Minister may give directions, without the need for appropriation, regarding what must be done with the residual money in the transitional Fund. In doing so, the Minister may direct some or all of the residual money to be paid to the Department or another GSF agency for its use, or into a fund established by or under another Act or the Consolidated Fund.

The Committee notes that this provides the Minister with a wide power to make directions in relation to the residual money in the transitional Fund.

However, the Committee also notes that the residual money is to be used for the specific purposes outlines in section 27 of the Bill, which includes for purposes of funding job creation incentives and the cost of administering and recovering money owed to the transitional Fund. The Committee also notes that the powers to allocate money from the Fund after the sunset clause is intended to streamline the process of allocating funds and is bound by specific requirements. These requirements include that some or all of the residual money is to be paid to the Department or another GSF agency for its use, or into a fund established by or under another Act or the Consolidated Fund. In the circumstances, the Committee makes no further comment.

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

Wide power of delegation

7.20 The Bill inserts section 29, which provides that the Minister may delegate the exercise of a function to the Secretary.

7.21 The Secretary may subdelegate the function to a member of staff of the Department unless the function is excluded from subdelegation by the instrument of delegation or a subsequent instrument given to the Secretary by the Minister.

The Bill permits the Minister to delegate the exercise of a function to the Secretary, who may then subdelegate to a member of staff of the Department, unless specifically excluded by the instrument of delegation or a subsequent instrument given to the Secretary by the Minister. The Committee notes that there are no restrictions on the power to delegate. For example, restricting delegation to employees with a certain level of seniority or expertise.

The Committee also notes that the functions in question deal with directing and administering the Jobs for NSW Transitional Fund. The Committee generally prefers provisions about the persons and class of persons to whom such functions can be delegated to have been drafted with more specificity. In addition, they should be included in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight. The Committee refers the matter to Parliament for its consideration.

8. Museums of History NSW Bill 2022

Date introduced	22 June 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. James Griffin MP
Portfolio	Environment and Heritage

Purpose and description

8.1 The objects of this Bill are as follows—

(a) to establish and confer functions on Museums of History NSW, including functions that are currently exercised by the Historic Houses Trust of New South Wales,

(b) to repeal the *Historic Houses Act 1980* and dissolve the Trust,

(c) to transfer the exercise of certain functions relating to records management services and assuming control of, recovering and facilitating public access to, State records, from the State Archives and Records Authority of New South Wales to Museums of History NSW,

(d) to rename the State Archives and Records Authority of New South Wales as State Records Authority NSW,

(e) to make other amendments to the *State Records Act 1998* that relate to the following—

(i) providing that a record need only be made or received in certain circumstances, not kept as well, in order for it to be a State record,

(ii) shortening the period of time that must elapse before a State record enters the open access period from 30 to 20 years,

(iii) making State records, on the commencement of the open access period, the subject of an open to public access direction by default,

(iv) enabling State Records Authority NSW to issue notices requiring public offices to assess and provide a report on record-keeping processes and the office's records management program,

(v) increasing the maximum penalty for an offence relating to protection measures and the period of time within which proceedings must be commenced,

(vi) providing that access arrangements may allow copies of State archives to be altered,

(vii) altering the constitution of the Board of State Records Authority NSW,

(f) to provide for the transfer of assets, liabilities and rights consequent on the establishment of Museums of History NSW,

(g) to make other minor and consequential amendments.

Background

8.2 The Bill establishes the Museums of History NSW as a new cultural institution. It does this by repealing the *Historic Houses Act 1980* and confers its functions exercised by the Historic Houses Trust of New South Wales to the Museums of History NSW .

8.3 In the second reading speech to the Bill, the Minister for Environment and Heritage, the Hon. James Griffin MP, stated that this new institution have the functions of maintaining and growing record keeping in New South Wales and access to the State archives collection.

8.4 The Minister explained that the key outcome of the Bill was to create a new cultural institution to novate the functions, powers and assets of the current Sydney Living Museums and combine those with the commercial and custodial functions and assets of the current SARA into a new history-focused cultural institution called Museums of History NSW. Upon its creation, the *Historic Houses Act 1980* is to be repealed with its functions to be transferred to Museums of History NSW.

8.5 The Bill aims to improve and modernise the *State Records Act 1998* following a statutory review of the Act in 2019.[13] The Minister highlighted that the new Museums of History would have a focus on ensuring continuity and maintenance of the State's records. The Minister further stated:

> The State archives collection is built on good record-keeping practices, and we are the custodians and beneficiaries of perhaps the world's leading collection that documents the wielding of colonial power as a result. The New South Wales State archives collection is valued at in excess of $1 billion and has a cultural worth beyond measure. The bill provides for improvements in record keeping so that that significant collection continues to grow and capture our history, and increases access so that present and future generations learn about our past in order to improve our future.

Issues considered by the Committee

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

Wide power of delegation

8.6 Section 12 of the Bill provides for the general powers of delegation. Specifically, subsection 12(1) provides that Museums of History NSW may delegate the exercise of a function, other than this power of delegation, to one or more of the

[13] Department of Premier and Cabinet, Review of the Act 1998 - Policy Paper State Records State Archives and Records Authority of New South Wales, 8 January 2020

following: a member of the Board, an advisory committee, the Chief Executive Officer, a member of the staff of Museums of History NSW.

8.7 Subsection 12(2) provides that the Chief Executive Officer may delegate or subdelegate the exercise of a function, other than this power of delegation or subdelegation, to a member of staff of Museums of History NSW.

Section 12 of the Bill provides that the Museums of History NSW may delegate the exercise of a function, other than this power of delegation, to one or more of a member of the Board, an advisory committee, the Chief Executive Officer (CEO), or a member of the staff of Museums of History NSW. It also provides that the CEO may delegate or subdelegate the exercise of a function, other than this power of delegation or subdelegation, to a member of staff of Museums of History NSW.

The Committee notes that there are limited restrictions on the power to delegate to members of staff of Museum of History NSW. For example, persons with a certain level of seniority or expertise. The Committee would prefer the provisions about the persons and class of persons to whom such functions can be delegated to have been drafted with more specificity. The Committee refers the matter to Parliament for consideration.

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

Regulations may create offences

8.8 Proposed section 25 provides for the general regulation-making power under the Act.

8.9 Subsection 25(3) provides that the regulations may create offences punishable by a maximum penalty of 5 penalty units ($550).

The Bill provides that the regulations may create offences with a maximum penalty of 5 penalty units ($550). The Committee prefers that offences be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny.

However, the Committee recognises that the penalties permitted are monetary only and of relatively small size. The Committee also acknowledges that it may be useful to delegate matters of an administrative nature to the regulations, especially where specific or technical information is necessary that is not required to be in the primary legislation. In these circumstances, the Committee makes no further comment.

9. National Parks and Wildlife Amendment (Reservations) Bill 2022

Date introduced	21 June 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. James Griffin MP
Portfolio	Environment and Heritage

Purpose and description

9.1 The object of this Bill is to revoke the reservation, and proposed reservation, of certain land under the *National Parks and Wildlife Act 1974*.

Background

9.2 The *National Parks and Wildlife Legislation Amendment (Reservations) Bill 2022* (Bill) amends the *National Parks and Wildlife Act 1974* to remove land totalling approximately 54.3 hectares from the national parks system.

9.3 In his second reading speech, the Hon. James Griffin MP, Minister for Environment and Heritage, stated that the revocations were intended to allow better management of the national parks:

> Revocations of our national parks estate are only ever considered as a last resort; however, it is a routine process that is required from time to time to enable minor adjustments to be made and ensure sensible and efficient management of the national parks estate.

9.4 The areas that will be subject to revocation include Blue Mountains National Park, the Hartley Historic Site, the Parma Creek Nature Reserve, Conjola National Park, Corramy Regional Park and Limeburners Creek National Park. Clause 55 of the Bill provides the land will not be formally transferred until the Minister is satisfied that appropriate compensation for the land has been provided.

9.5 The Bill also makes provision for the Mayiyingu Marragu Aboriginal place to be excluded from the Garden of Stone State Conservation Area, which will be reserved on 30 June 2022 as a result of a proclamation made on 6 May 2022. In his second reading speech, the Minister stated that this exclusion was because of the concerns raised about the inclusion of this Aboriginal place in the conservation area:

> The Mingaan Wiradjuri Aboriginal Corporation has raised concerns about the inclusion of this Aboriginal place in the Gardens of Stone reserves and the implications of reservation for future management arrangements.

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

Ministerial discretion to determine compensation

9.6 Section 55 of the Bill provides that the land proposed for revocation is vested in the Minister, and that the Minister must not transfer the land to the new owner unless they are satisfied appropriate compensation for the land has been provided.

9.7 The Minister explained in his second reading speech that the new owner who provides the compensation is either a local council or Transport for NSW, depending on which authority is receiving the land. The authority that will receive the compensation is the NSW Parks and Wildlife Service.

Section 55 of the Bill provides that the land proposed for revocation is vested in the Minister, and that the Minister must not transfer the land to the new owner (which is either a local council or Transport for NSW) unless they are satisfied that the new owner has provided appropriate compensation to the NSW Parks and Wildlife Service for that land.

The Bill does not provide guidance or criteria specifying what the Minister should have regard to when determining if the proposed compensation is appropriate. In failing to do so, the Bill may provide the Minister with a wide power and ill-defined administrative power. However, the Committee acknowledges that vesting this power in the Minister may allow for the efficient transfer of land. In the circumstances, the Committee makes no further comment.

Inappropriately delegates legislative powers (s 8A(1)(b)(iv))

Retrospectivity

9.8 Section 2 of the Bill provides that Schedule 2 is to commence on the date the Bill for the *National Parks and Wildlife Amendment (Reservations) Act 2022* is introduced in the Legislative Assembly.

9.9 Provisions in Schedule 2 amend the *National Parks and Wildlife Amendment Act 2021*. Specifically, it amends administrative details pertaining to the number of hectares, lot numbers, and certain land diagram titles.

9.10 The *National Parks and Wildlife Amendment Act 2021* was set to commence on 30 June 2022, and the *National Parks and Wildlife Amendment (Reservations) Act 2022* was introduced in the Legislative Assembly on 21 June 2022.

9.11 All other sections of the Bill is to commence on the date of assent to this Act.

Schedule 2 of the Bill is to commence as an Act on the date the Bill was introduced in the Legislative Assembly. This allows provisions to commence before the bill has been passed by either House of Parliament and thereby applies retrospectively.

The Committee prefers that Acts commence on a set date or upon assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. The Committee also 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.

While the provisions in question largely amend administrative details within the *National Parks and Wildlife Amendment Act 2021*, the Committee refers this issue to Parliament for consideration of whether the Bill unreasonably applies retrospectively.

10. Ombudsman Legislation Amendment Bill 2022

Date introduced	21 June 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Introduced by	The Hon. Alister Henskens SC MP
Portfolio	Attorney General

Purpose and description

10.1 The object of the *Ombudsman Legislation Amendment Bill 2022* (Bill) is to make various amendments to the *Ombudsman Act 1974* (Act) and the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (CSCRM Act).

Background

10.2 The Act establishes a framework for the operation of the NSW Ombudsman, including by providing for the appointment of an Ombudsman and defining the functions of the Ombudsman.

10.3 A primary role of the Ombudsman is to handle complaints about NSW government agencies, local councils and community service providers. Other functions include reviewing the deaths of children in circumstances of neglect, monitoring Aboriginal programs and the provision of training and education to encourage good administrative practice.

10.4 In his Second Reading Speech, The Hon Alister Henskens SC MP stated the Bill will 'clarify and enhance the Ombudsman's powers, resolve inconsistencies and update legislation.'

10.5 The Bill makes amendments to the Act relating to appointments of a deputy Ombudsman, the rights of detained persons to make complaints as well as provisions relating to disclosure and publication of material obtained in an inquiry or otherwise. It additionally inserts section 11A to provide that the Ombudsman's powers in relation to a public authority extend to a former public authority.

10.6 The Bill inserts section 25A to the Act to allow the Ombudsman to review the how public authorities handle complaints. In his Second Reading Speech Mr Henskens stated:

> Currently, the Ombudsman has audit and monitoring powers over agencies performing functions under particular Acts—for example, a power to review the complaint-handling systems of service providers under section 14 of the *Community Services (Complaints, Reviews and Monitoring) Act*—and has broad powers to conduct investigations about the conduct of a public authority under part 3 of the

> Ombudsman Act but does not have a general power to review the complaint-handling systems of public authorities.
>
> The proposed power will enable the Ombudsman to assist agencies, in a collaborative manner, to improve their own complaint-handling systems. The function will add further value to public sector complaints handling and service delivery without the expense of the Ombudsman conducting formal investigations.

10.7 Mr Henskens also stated:

> The proposed oversight function was recommended by a 31 August 2018 special report to Parliament by the former Ombudsman, and the 2019 Annual Customer Satisfaction Measurement Survey by the Customer Service Commission.

10.8 Additionally, the Bill expands the list of circumstances in which disclosure of information is lawful under, as well as expanding list the circumstances in which the protection against self-incrimination does not apply.

10.9 Further, the Bill makes a number of amendments to the CSCRM Act. The CSCRM Act provides a framework for complaints, reviews and monitoring in relation to the provision of community services. The CSCRM Act also confers and imposes functions on the Ombudsman and the Civil and Administrative Tribunal.

10.10 Changes to the CSCRM Act under Schedule 2 of the Bill reflect changes in the Ombudsman's scope to investigate complaints relating to community services following some of those services being funded by the federal government under the National Insurance Disability Scheme. The changes also reflect the introduction of the Ageing and Disability Services Commissioner role established in 2019 under the *Ageing and Disability Commission Act 2019.*

10.11 Changes to the CSCRM Act include renaming the Community and Disability Services Commissioner as the Community Services Commissioner. The definition of Community Services Commissioner is amended under the Bill to mean a Deputy Ombudsman appointed under the Act.

10.12 Further, section 34L(1)(c)(vi) is inserted to the CSCRM Act to enable the convenor of the Child Death Review Team to provide information to the Health Care Complaints Commission in connection with the commission's functions.

10.13 The Bill also makes a number of consequential amendments to the *Public Interest Disclosures Act 2022* (PID Act). The PID Act is the primary statute which provides protection for persons who make public interest disclosures.

Issues considered by the Committee

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

Right to privacy of evidence relating to person's complaint - disclosure of confidential information

10.14 The Bill inserts or amends sections 19A(3A), 19B(4) and 34(1) of the Act and inserts section 34L(1)(c)(vi) of the CSCRM Act which amend or expand confidentiality and disclosure provisions relating to proceedings.

10.15 Section 19A(1) allows the Ombudsman to direct that any evidence, contents of a document, information or facts must not be published. Section 19A(3) creates an offence against a person who publishes evidence, contents of a document, information or facts where the Ombudsman has directed for their non-publication. The offence attracts a penalty of up to 50 penalty units or 12 months imprisonment or both. The Bill inserts section 19A(3A)(b) which allows a non-publication direction to be lawfully contravened if the material is provided to an Australian legal practitioner to obtain legal advice or representation in relation to an inquiry.

10.16 Section 19B(1) of the Acts creates an offence for the publishing of evidence that is given at an Ombudsman inquiry and can attract a penalty of up to 50 penalty units or 12 months imprisonment or both. Similarly to section 19(3A)(b), proposed section 19B(4) allows for the publication of evidence obtained at an Ombudsman inquiry if the material is provided to an Australian legal practitioner to obtain legal advice or representation in relation to an inquiry.

10.17 The Bill amends section 34 of the Act which contains a list of circumstances in which disclosure of information obtained in connection with the administration or execution of the Act does not amount to an offence. The Bill expands the list to include sections 34(l-n) which provide for the non-disclosure of information unless the disclosure is made:

(l) for information that relates or may relate to a breach of a law of the State, another State, the Commonwealth or a Territory—to a law enforcement agency,

(m) to a Commission appointed under the *Royal Commissions Act 1923*,

(n) to a special inquiry set up under the *Special Commissions of Inquiry Act 1983*.

10.18 The Bill also amends section 34L(1)(c)(vi) of the CSCRM to create an exception to the offence of disclosing confidential information created under section 34L(1). The exception allows a Team-related person to share confidential information to be with the Health Care Complaints Commission established under the *Health Care Complaints Act 1993* in connection with the Commission's functions.

10.19 Section 34B of the Act defines a Team-related person means a member of the Team, a supporting member of staff of the Ombudsman's office or any person assisting the team.

The Bill amends sections 19A(3A), 19B(4) and 34(1) of the *Ombudsman Act 1974* and inserts section 34L(1)(c)(vi) of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* which amends or expands confidentiality and disclosure provisions relating to proceedings.

Section 19A(3A)(b) creates an exception to the offence of publishing material that is subject of an Ombudsman direction not to publish. The provision allows material to be lawfully published if the material is provided to an Australian legal practitioner to obtain legal advice or representation in relation to an inquiry. Section 19B(4) similarly allows for the publication of evidence obtained

in an Ombudsman inquiry if the material is provided to an Australian legal practitioner to obtain legal advice or representation in relation to an inquiry.

The Bill amends and expands section 34 the Act which lists the circumstances in which disclosing information obtained by the Ombudsman may be lawful. The provision is expanded to include circumstances such as where the information is required for a Commission appointed under the *Royal Commissions Act 1923.*

The Bill also amends section 34L of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* to allow confidential information to be disclosed with the Health Care Complaints Commission in connection with the Commission's functions.

Where the exceptions cannot be proven, offences under both acts attract a maximum penalty of 50 penalty units or 12 months imprisonment or both.

The Committee notes these provisions allow for the publishing of material connected to Ombudsman or Community Services proceedings, which may result in the common law rights to privacy, in addition to waivers of confidence. This may result in complaint details being published, distributed, shared or used in other legal proceedings.

However, the Committee notes the statutory safeguards which may protect a person's rights to privacy. For example, sections 19B(3A) and 19B(4) only create exceptions to offences where the information is to be provided to an Australian legal practitioner to obtain legal advice or representation in relation to an inquiry. Additionally, disclosure of information in connection with Ombudsman proceedings under section 34 of the Act may only occur if that information is required for other proceedings such as for a commission under the *Royal Commissions Act 1923*. Similar protections exist under section 34L of the *Community Services (Complaints, Reviews and Monitoring) Act 1993.* In the circumstances, the Committee makes no further comment.

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

Expansion of Ombudsman's powers – ambiguity in meaning under section 11A

10.20 The Bill inserts section 11A to the Bill to provide that the Act applies to conduct occurring while a person was a public authority in the same way as it applies to a public authority.

10.21 A public authority is defined in section 5 of the Act and includes, among others, a person appointed to an office by the Governor, any statutory body representing the Crown, any Public Service agency or any person employed in a Public Service agency.

10.22 Mr Henskens stated that the provision makes clear 'that the Ombudsman's powers in relation to a public authority extend to a former public authority.'

Section 11A of the Bill provides the Act applies to conduct occurring while a person was a public authority in the same way as it applies to a public

authority. In his Second Reading Speech, the Hon. Alister Henskens SC MP stated the provision makes clear that in addition to existing public authorities, the Ombudsman's powers extend to former public authorities.

The Committee notes the provision lacks clarity. Though a public authority is defined under section 5 of the Act, the Bill is silent on the meaning of a former public authority. The wording of the provision is also unclear. In the absence of a definition of a former public authority as well as a lack of clarity in the provision's wording, this may result in ambiguity over which matters the Ombudsman has jurisdiction to handle. In the circumstances, the Committee refers this matter to Parliament for its consideration.

11. Roads Amendment (Tolling Transparency) Bill 2022*

Date introduced	22 June 2022
House introduced	Legislative Council
Member responsible	The Hon. John Graham MLC
	*Private Members Bill

Purpose and description

11.1 The object of this Bill is to amend the *Roads Act 1993* (the **Act**) to—

(a) require the prominent display of toll charges at each public entrance to a tollway, and

(b) provide a tolling agreement may only be entered into if it is in the public interest, and

(c) provide that clauses in tolling agreements, entered into after the commencement of the proposed amendments, limiting the provision of public transport services (an exclusivity clause) are of no effect, and

(d) require the Minister to make publicly available, including by tabling in Parliament, a range of information about tolling agreements, including information about exclusivity clauses in existing agreements, and

(e) require the Minister, by 1 November in specified years, to table in Parliament a report with information about the following—

(i) the tolls collected in the preceding financial year,

(ii) toll relief in the preceding financial year,

(iii) an estimate of tolls that will be collected over the duration of existing tolling agreements, and

(f) enable the Auditor-General to conduct performance audits of tolling agreements.

Background

11.2 In his second reading speech, the Hon. John Graham MLC summarised the changes proposed by the Bill as follows:

> The bill seeks to amend the Roads Act 1993 to do three things: first, to provide transparency around the agreements entered into for toll roads; secondly, to require

the Government to release certain information about tolls; and thirdly, to require the display of toll charges at the public entrance of a toll road.

11.3 Mr Graham highlighted that the Bill would make information public that is currently not disclosed for commercial-in-confidence or cabinet-in-confidence reasons.

11.4 The Bill inserts proposed Part 13A into the Act relating to transparency in tolling agreements, including:

(a) section 227A, which sets out definitions for the purposes of the new Part.

(b) section 227B, which provides that the Minister must ensure a tolling agreement is not entered or substantially amended unless the Independent Pricing and Regulatory Tribunal (the **Tribunal** or **IPART**) reports to the Minister that it is in the public interest to do so. That report must be tabled in both Houses of Parliament and published on the Transport for NSW website.

(c) sections 227C and 227D, which require the Minister to make information about tolling agreements publicly available, including by publishing the information on a Transport for NSW website and by tabling a report in both Houses of Parliament.

(d) section 227E, which requires the Minister to table in both Houses of Parliament a report on tolls paid, toll relief claimed and applications for toll relief in the preceding financial year, for financial years 2021-2022, 2022-2023 and 2023-2024.

(e) sections 227F-227I, which provides for the Auditor-General to conduct performance audits of tolling agreements and the power of the Auditor-General to request information for this purpose. A provision in a tolling agreement purporting to restrict the Auditor-General's access to information is of no effect. The Minister may require a private tolling operator to pay a contribution for the Auditor-General's cost for conducting the audit.

(f) section 227J, which requires the Minister to table in both Houses of Parliament information about exclusivity clauses in tolling agreements entered into before the commencement of the section, and provides that an exclusivity clause entered into after the section commences is of no effect.

(g) section 227K, which provides that no compensation is payable by or on behalf of the State because of the enactment or operation of the new Part, or because of a statement (including a representation of any kind whether made verbally or in writing and whether negligent, false, misleading or otherwise) or conduct relating to the enactment or operation of the new Part. The Explanatory Note accompanying the Bill provides that this limitation on compensation applies to toll operators, although the Committee notes section 227K appears to be drafted in broader terms.

11.5 The Bill also inserts proposed section 216A into the Act, requiring a toll operator to prominently display at every public entrance to a tollway a sign providing information about the tolls payable for the use of the tollway.

11.6 Finally, the Bill makes proposed consequential amendments the Dictionary of the Act and also to clause 78 of the *Roads Regulation 2018*, to allow information collected from toll service providers to be used for the purposes of the Minister's report to Parliament under the proposed section 227E.

Issues considered by the Committee

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

Strict liability offences

11.7 The Bill inserts proposed section 216A into the Act. Section 216A requires a toll operator to prominently display at every public entrance to a tollway a sign providing information about the tolls payable for the use of the tollway. Non-compliance is a strict liability offence incurring a maximum penalty of 100 penalty units ($11 000).

11.8 The Bill also inserts proposed Part 13A, including section 227B. Section 227B provides that the Minister must ensure a tolling agreement is not entered or substantially amended unless the Minister has referred the proposed agreement or amendment to IPART for investigation, and IPART has provided a report to the Minister stating that, in its opinion, it is in the public interest to enter into or ament the agreement as proposed.

11.9 Section 227B(3) states that the *Independent Pricing and Regulatory Tribunal Act 1992,* Part 3, Division 7 applies to an investigation under section 227B. This Division 7 includes strict liability offences, including (without limitation):

(a) section 21(6), for contravention of a direction by the Tribunal prohibiting or restricting the publication of evidence given before the hearing or of matters contained in documents given to the Tribunal. A maximum penalty of 100 penalty units ($11 000) or 6 months' imprisonment, or both, applies.

(b) section 22A(5), for infringement of a condition applying to a document made available to a person for inspection on request, despite the fact the document contains information the Tribunal would not be required to disclose under the *Government Information (Public Access) Act 2009*. A maximum penalty of 100 penalty units ($11 000) applies.

(c) section 23(4), for hindering, obstructing or interfering with the Chairperson or any other member of the Tribunal in the exercise of their functions. A maximum penalty of 100 penalty units ($11 000) or 6 months' imprisonment, or both, applies.

The Bill creates a new strict liability offence in the *Roads Act 1993*, and incorporates strict liability offences under other legislation into the Act. Specifically, failure by a toll operator to prominently display at every public entrance to a tollway a sign providing information about the tolls payable is a strict liability offence incurring a maximum penalty of 100 penalty units ($11

000). The Bill also incorporates strict liability offences under investigation provisions of the *Independent Pricing and Regulatory Tribunal Act 1992*, including for (without limitation) hindering, obstructing or interfering with the Chairperson or any other member of the Tribunal in the exercise of their functions. A maximum penalty of 100 penalty units ($11 000) or 6 months' imprisonment, or both, applies.

These offences do not require the mental element to be proven and are therefore considered strict liability offences. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. However, the Committee notes that strict liability offences are not uncommon in regulatory contexts or otherwise may be included to encourage compliance. In this case, to encourage compliance with signage requirements and with the Tribunal's investigation so that it may report to the Minister on whether entering into or amending a tolling agreement is in the public interest. In the circumstances, the Committee makes no further comment.

Privacy – publication of personal information

11.10 Proposed section 227B of the Bill provides that the Minister must ensure a tolling agreement is not entered or substantially amended unless:

(a) the Minister has referred the proposed agreement or amendment to IPART for investigation, and

(b) IPART provides a report to the Minister stating that, in its opinion, it is in the public interest for the Crown or the relevant public authority to enter into or amend the agreement as proposed.

11.11 A referral may require IPART to investigate and report on specific matters, such investigations conducted in accordance with the *Independent Pricing and Regulatory Tribunal Act 1992,* Part 3, Division 7.

11.12 The Minister must table this report in both Houses of Parliament within 1 month after receiving the report from IPART, and make the report publicly available by having the report published on the website of Transport for NSW within a reasonable time of its tabling in Parliament.

Where it is proposed that a tolling agreement be entered into or substantially amended, the Bill requires that the Minister refer the proposed agreement or amendment to IPART for investigation. The Bill also requires that IPART provide a report to the Minister stating that it is in the public interest to enter into or amend the tolling agreement. IPART's report must be to be tabled in Parliament and published on the website of Transport for NSW. It is unclear whether this report could include personal or sensitive information obtained by IPART in the course of its investigation, which would then be made public in accordance with the Bill. In the case that it does, this may impact upon the privacy of those individuals to which the personal or sensitive information relates. The Committee refers this issue to the Parliament for its consideration.

12. Transport Administration Amendment (Rail Trails) Bill 2022

Date introduced	21 June 2022
House introduced	Legislative Council
Minister responsible	The Hon. Sam Farraway MLC
Portfolio	Regional Transport and Roads

Purpose and description

12.1 The object of this Bill is to amend the *Transport Administration Act 1988* (the **Act**) to enable disused railway tracks outside the Greater Metropolitan Region to be used for recreation or tourism purposes and for roads or road infrastructure.

Background

12.2 The *Rail Trails for NSW Evaluation Summary* dated June 2022 states that 'Rail Trails are disused rail corridors repurposed for recreational use, predominantly for people wishing to ride bicycles or hike'.[14] In his second reading speech, the Hon. Sam Farraway said that the Bill creates:

> …more streamlined processes for the creation of rail trails and new road and road infrastructure projects that cross disused rail lines, including those that provide access to special activation precincts.

12.3 Mr Farraway highlighted that the removal of the need for authorisation of an Act of Parliament each time such projects are proposed in areas outside the Greater Metropolitan Region will make it easier 'to deliver infrastructure across disused corridors that can help to boost the regional economy'. He said that the current legislative process was a 'significant barrier to opening up disused rail lines to other uses'.

12.4 The Statement of Public Interest (**SPI**), tabled with the Bill, supported this assertion and provided that the process to achieve authorisation 'takes considerable time, and can place undue financial pressure on Councils…or cause costly delays to the development of road projects which aim to benefit regional communities'.

12.5 The Bill seeks to address this issue by inserting proposed section 99E into the Act, which applies to disused railway lines on land outside of Greater Metropolitan Sydney (the **subject land**). Under section 99E:

(a) the regulations may authorise the use of the subject land for recreation, tourism or related purposes or for roads or road infrastructure, and also

[14] Regional NSW, *Rail Trails for NSW Evaluation Study*, State of NSW, June 2022, p 4.

may authorise the removal of railway tracks and other works from the subject land.

(b) if the regulations authorise the use of the subject land for recreation, tourism and other related purposes, the regulations may authorise that the rail infrastructure owner enter into a lease of the subject land with a local council or joint organisation for those purposes (an **authorised lease**), with a maximum term of 30 years.

(c) the Minister may, subject to the regulations, terminate an authorised lease if satisfied the subject land is required to be used for transport purposes. Compensation is not payable by or on behalf of the state because the Minister terminates an authorised lease.

(d) regulations may make provision for limitations on the structures that may be erected on the subject land, the matters that must or may be included in an authorised lease and the termination of an authorised lease by the Minister.

12.6 The Bill proposes amending section 99A to provide that a railway line is not taken to be closed if, in accordance with the regulations made under section 99E, railway tracks or other works are removed from the railway line or the subject land is leased.

12.7 The Bill would also amend the name of a council forming part of the Greater Metropolitan Region.

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

Wide power to terminate lease and limitation of right to compensation

12.8 The Bill inserts section 99E into the Act. As stated above, this section provides that if the regulations authorise the use of a disused railway line on land outside of the Greater Metropolitan Region (the **subject land**) for recreation, tourism or related purposes, the regulations may also authorise the rail infrastructure owner to enter into a lease of the subject land with a local council or joint organisation for those purposes (an **authorised lease**). The total maximum term for an authorised lease is 30 years.

12.9 A regulation must not be made to authorise the use of subject land for recreation, tourism or related purposes or to require the rail infrastructure owner to enter into an authorised lease unless the Minister has consulted with those relevant stakeholders set out in subsection (4). This includes the council of the area in which the subject land is located, the Minister for Regional NSW, the National Parks and Wildlife Service, and the Local Aboriginal Land Council for the area in which the subject land is located.

12.10 Subsection (6) provides that the Minister may, subject to the regulations, terminate an authorised lease if satisfied the subject land is required to be used for transport purposes, including transport infrastructure, transport services, roads

and road infrastructure. The regulations may make provision in relation to the termination of an authorised lease by the Minister under subsection (6).

12.11 Under subsection (7), compensation is not payable by or on behalf of the State because the Minister terminates an authorised lease under the regulations made under subsection (6). In this section, compensation 'includes damages or other forms of monetary compensation'.

12.12 In his second reading speech, the Mr Farraway stated:

> It should be noted that in the instance the lease is terminated for a transport purpose, the New South Wales Government will not be liable for the payment of compensation. However, should the New South Wales Government take the land back for any other reason, it may be required to compensate businesses and/or local government for losses they suffer as a result.

The Bill allows the Minister, subject to the regulations, to terminate an authorised lease of the subject land entered into between the rail infrastructure owner and a local council or joint organisation if satisfied the subject land is required to be used for transport purposes.

While the Bill permits the regulations to allow the Minister to terminate an authorised lease in accordance with those regulations, the contents and requirements (if any) of such regulations are uncertain. Comparatively, the Bill imposes a consultation requirement on the Minister prior to entering into the lease. As this administrative power impacts on the contractual rights and obligations of the parties to the lease, the Committee refers this issue to the Parliament for its consideration.

The Bill also provides that compensation, which 'includes damages or other forms of monetary compensation', is not payable by or on behalf of the State because the Minister terminates an authorised lease for a transport purpose under the regulations. Compensation is payable for termination in other circumstances.

The definition is drafted broadly and appears to exclude compensation claims against the State in contract or equity. In general, an inclusive definition is not construed as being exhaustive, although in some cases a definition has been interpreted as being limited to those items it is said to 'include'.[15] It is therefore unclear whether the limitation of compensation following the exercise of the Minister's power to terminate excludes all types of compensation, including any compensation payable under the lease. This may impact upon the contractual rights of parties to the lease. The Committee also refers the scope of the limitation on compensation to the Parliament for its consideration.

[15] See for example *Favelle Mort Ltd v Murray* (1976) 133 CLR 580, 588-589 (Barwick CJ) cf *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395.

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

Delegation to the regulations of power to authorise use of disused railway lines

12.13 Section 99A of the Act currently requires an Act of Parliament to close a railway line. A railway line is closed if the land concerned is sold or otherwise disposed of or the railway tracks and other works concerned are removed.

12.14 The SPI highlights that this means that:

> …separate authorisation from an Act of Parliament is required for each individual rail trail brought forward, or each piece of road infrastructure proposed that will cross the non-operational corridor.

12.15 As stated above, the proposed section 99E applies to a disused railway line on land outside of Greater Metropolitan Sydney (the **subject land**). The proposed section provides that the regulations may authorise:

(a) the use of the subject land for recreation, tourism or related purposes, but only where the Minister has consulted with relevant stakeholders

(b) the use of the subject land for roads or infrastructure

(c) the removal of railway tracks and other works from the subject land for these purposes.

12.16 The SPI and Mr Farraway's second reading speech indicate that this regulation-making power will remove the need for authorisation from an Act of Parliament. Specifically, it will allow the Minister for Regional Transport and Roads to authorise the re-purposing of, and allow for the removal of track and other rail infrastructure from, a disused railway line in a non-metropolitan area without the line being closed.

12.17 In his second reading speech, Mr Farraway also said that a decision to close a rail line will still require an Act of Parliament. This requirement is preserved by the proposed amendments to section 99A of the Act, which provide that a railway line is not closed if, in accordance with the regulations made under section 99E, the railway tracks or other works are removed from the railway line or the subject land is leased.

12.18 The SPI states that 'the benefit of regulation making powers will support a quicker approval process, while allowing Parliament to retain oversight of all temporary uses of rail lines'. It also provides that the amendment will reduce red tape and financial pressure on councils, which will in turn help regional communities realise the economic and social benefits of the rail trials sooner.

12.19 The SPI also notes that the legislative framework is supported by the *NSW Rail Trails Evaluation and Strategic Framework* which requires, before any request for Ministerial authorisation under section 99E is considered, the assessment of (without limitation) the proposed rail trial's business model and local buy in and consultation.

The Bill inserts a regulation making power which allows the Minister to authorise the use of disused railway lines for certain purposes and the removal of railway tracks and other work for these purposes. This circumvents the need for an Act of Parliament to close the railway line in order to use it for these purposes.

By delegating this authorisation to the regulations, the amendment decreases the level of parliamentary oversight applying to the creation of rail trails. However, the Committee notes that the regulations are still subject to disallowance, whereby a member of Parliament may move to disallow a regulation within 15 sitting days of it being tabled in either House. Consultation is also required where the Minister authorises the land be used for recreation, tourism or related purposes. The Committee further notes that the amendment intends to support quicker approval processes and reduce financial pressure on councils. In the circumstances, the Committee makes no further comment.

Part Two – Regulations

1. Liquor Amendment (Online Age Verification Requirements) Regulation 2022

Date tabled	LA: 7 June 2022 LC: 7 June 2022
Disallowance date	LA: 11 October 2022 LC: 11 October 2022
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Hospitality and Racing

Purpose and description

1.1 The objects of this Regulation are to—

(a) prescribe the minimum standards for a temporary process that a same day delivery provider may use to verify the age of a person entering into an agreement for same day liquor delivery for the first time, and

(b) prescribe the form of authentication the person is required to provide for a second and subsequent agreement.

1.2 This Regulation is made under the *Liquor Act 2007* (the **Act**), including sections 114HA(1)(b) and (2) and 159 (the general regulation-making power).

Issues considered by the Committee

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

Privacy

1.3 Section 114HA(1)(b) and (2) of the Act requires a same day delivery provider to verify the age of a person when entering an agreement for a same day liquor delivery. Contravention of this provision incurs a maximum penalty of 50 penalty units ($5 500) under each subsection.

1.4 The Regulation inserts a new clause 107I into the *Liquor Regulation 2018* which prescribes the minimum standard for the process to verify a person's age and the form of authentication a person must undergo for a second or subsequent agreement.

1.5 The minimum standard requires the person entering into the agreement (the **purchaser**) to give the same day delivery provider their name and date of birth. The same day delivery provider must then either:

(a) use a process provided by an accredited identity service provider or provisionally accepted provider that uses an artificial intelligence system to authenticate the purchaser's age, or

(b) require the purchaser to state they are able and willing to produce, at the time of the delivery, an evidence of age document verifying their identity and age.

1.6 The form of authentication a person must undergo for a second or subsequent agreement requires the use a of system that relies on credentials to verify that a person is a least 18 years of age. Alternatively, the purchaser must give their name and date of birth to the same day delivery provider, or state they are able and willing to produce, at the time of the delivery, an evidence of age document verifying their identity and age.

1.7 Clause 107CA of the *Liquor Regulation 2018* provides that an 'accredited identity service provider' means an identity service provider who has been accredited under the Trusted Digital Identity Framework (**TDIF**).[16] It also provides that a 'provisionally accepted provider' of identity verification services means an identity service provider who has applied to become an accredited identity service provider before 1 October 2022, and is undergoing the process for accreditation as an accredited service provider.

1.8 The TDIF requires applicants to comply with applicable laws related to the protection of privacy and personal information. 'Applicants' are organisations that undergo the TDIF Accreditation Process in the role of Attribute Service Provider, Credential Service Provider, Identity Service Provider, Identity Exchange or a combination of these. An 'Identity Service Provider' is an entity that has been accredited in accordance with the TDIF as an identity service provider and provides a service that generates, manages, maintains or verifies information relating to the identity of individuals.[17]

The Regulation requires a person entering into an agreement for the same day delivery of alcohol from a same day delivery provider, or entering into such agreement on a second or subsequent occasion, to provide certain personal details in order to verify they are over 18 years of age. Specifically, they must provide details and evidence of their name and date of birth.

---

[16] Trusted Digital Identity Framework documents are available at Digital Transformation Agency, Commonwealth of Australia, *Trusted Digital Identity Framework (TDIF)*, viewed 4 July 2022.[17] Digital Transformation Agency, Commonwealth of Australia, *Trusted Digital Identity Framework – 01 Glossary of Abbreviations and Terms*, release 4.6, March 2022, viewed 4 July 2022, pp 9, 28; Digital Transformation Agency, Commonwealth of Australia, *Trusted Digital Identity Framework – 04 Functional Requirements*, release 4.6, March 2022, viewed 4 July 2022, p 10.

[17] Digital Transformation Agency, Commonwealth of Australia, *Trusted Digital Identity Framework – 01 Glossary of Abbreviations and Terms*, release 4.6, March 2022, viewed 4 July 2022, pp 9, 28; Digital Transformation Agency, Commonwealth of Australia, *Trusted Digital Identity Framework – 04 Functional Requirements*, release 4.6, March 2022, viewed 4 July 2022, p 10.

This information appears to be provided to and/or accessible by the same day delivery service provider and the accredited identity service provider or provisionally accepted service provider. While an accredited identity service provider must comply with privacy laws regarding the protection and privacy of purchasers' personal information, it is unclear whether the same day delivery provider or provisionally accepted service provider are subject to similar obligations under this legislative framework. If not, a purchaser's right to privacy in respect of their personal information may be impacted. The Committee refers this issue to the Parliament for its consideration.

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

Incorporation of external framework not subject to disallowance

1.9 The Regulation incorporates the Trusted Digital Identity Framework (TDIF) published by the Digital Transformation Agency on behalf of the Commonwealth. This term is defined in clause 107CA of the *Liquor Regulation 2018* and is referred to elsewhere in the regulations and Act.

1.10 The Regulation incorporates the TDIF into the definition of 'credentials', included for the purposes of the form of authentication under section 114HA(2) of the Act. Specifically, it provides that this term means credentials issued to proofed individuals by the same day delivery provider, an accredited identity service provider or a provisionally accepted provider of at least credential level 1 as specified in the role requirements for the TDIF.

The Regulation incorporates the Trusted Digital Identity Framework, published by the Digital Transformation Agency on behalf of the Commonwealth, into the *Liquor Regulation 2018* for the purpose of defining the term 'credentials'. This term is relevant to the form of authentication prescribed for the purposes of section 114HA(2) of the *Liquor Act 2007*.

Unlike regulations, this Framework is not subject to disallowance under section 41 of the *Interpretation Act 1987*. The Committee generally prefers legislative requirements to be included in the legislation to ensure an appropriate level of parliamentary oversight. However, it acknowledges this specialist framework is defined in and referred to elsewhere in the legislation. In the circumstances, it makes no further comment.

2. Motor Accident Injuries Amendment Regulation 2022

Date tabled	LA: 21 June 2022 LC: 21 June 2022
Disallowance date	LA: 18 August 2022 LC: 18 August 2022
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service and Digital Government

Purpose and description

2.1 The object of this Regulation is to clarify that the jurisdiction to deal with certain disputes under the *Motor Accident Injuries Act 2017* about treatment and care provided to an injured person extends to disputes about treatment and care proposed to be provided to the person.

2.2 This Regulation is made under the *Motor Accident Injuries Act 2017* (the **Act**), including sections 7.51 and 11.12 (the general regulation-making power).

Issues considered by the Committee

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

Henry VIII clause

2.3 Schedule 2 of the Act provides matters for the purposes of Part 7, relating to dispute resolution. It sets out, among other things, merit review matters and medical assessment matters.

2.4 The Regulation amends Schedule 2 of the Act to extend:

(a) merits review matters to matters regarding whether the cost of treatment to be provided to the claimant is reasonable for the purposes of section 3.24(1) (Entitlement to statutory benefits for treatment or case).

(b) medical assessment matters to matters regarding whether any treatment or care to be provided to the injured person reasonable and necessary in the circumstances or relates to the injury caused by the motor accident for the purposes of section 3.24 (Entitlement to statutory benefits for treatment and care).

2.5 Section 7.51 of the Act states that the regulations may amend or replace Schedule 2.

The Regulation amends Schedule 2 of the *Motor Accident Injuries Act 2017*, to provide that certain disputes under the Act about treatment and care provided to an injured person extends to disputes about such treatment and care which is to be provided.

These amendments are made pursuant to a Henry VIII clause in the Act, which allows the Executive to legislate and amend an Act by way of regulation without reference to Parliament. Specifically, section 7.51 of the Act states that the regulations may amend or replace Schedule 2.

The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation, particularly where the amendments may impact personal rights and liberties. In this case, the dispute resolution provisions available to an injured person, including merits review. This is to foster a greater level of parliamentary oversight regarding the changes.

However, the Committee notes that regulations must be tabled in Parliament and are subject to disallowance under sections 40 and 41 of the *Interpretation Act 1987*. It also acknowledges the Act delegates to the regulations the power to amend Schedule 2. In the circumstances, the Committee makes no further comment.

3. Notification of South Australian Bar Association Professional Standards Scheme

Date tabled	LA: 7 June 2022 LC: 7 June 2022
Disallowance date	LA: 11 October 2022 LC: 11 October 2022
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Fair Trading

Purpose and description

3.1 Pursuant to section 13 of the *Professional Standards Act 1994* (NSW) (the **Act**), the Minister authorised the publication of the South Australian Bar Association Professional Standard Scheme (the **Scheme**). The Scheme will commence on 1 July 2022.

Issues considered by the Committee

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

Incorporation of external material not subject to disallowance

3.2 The notification provides that the Minister authorised the publication of the South Australian Bar Association Professional Standard Scheme (the **Scheme**) pursuant to section 13 of the Act. The Act (like the *Professional Standards Act 2004* (SA)) enables the creation of schemes to limit the civil liability of professionals and others.

3.3 Section 4 of the Scheme provides that it applies to, among other persons, all persons to have professional indemnity insurance that complies with the Insurance Standard. 'Insurance Standard' is defined as the Insurance Standard approved by the Law Society of South Australia on 21 June 2021 and adopted by the Bar Council of South Australian Bar Association Incorporated on 19 July 2021.

3.4 The limitation of occupational liability under section 6 of the Scheme is also subject to the person being able to satisfy the Court that they have the benefit of an insurance policy or policies in accordance with the Insurance Standard insuring the person against the occupational liability to which the cause of action relates, and the amount payable under the policy or policies is not less than the amount of the monetary ceiling (such ceiling out in the Scheme).

3.5 Section 13(2) of the Act provides that sections 40 and 41 of the *Interpretation Act 1987* apply to a scheme published in the Gazette under section 13 (as the Scheme was in this case) in the same way they apply to a statutory rule.

The Scheme includes the definition of 'Insurance Standard', being the Insurance Standard approved by the Law Society of South Australia on 21 June 2021 and adopted by the Bar Council of the South Australian Bar Association Incorporated (SABA) on 19 July 2021. The Insurance Standard informs certain persons to whom the Scheme applies under section 4, and the application of the occupational limitation of liability against causes of action under section 6.

The Scheme is tabled and subject to disallowance under sections 40 and 41 of the *Interpretation Act 1987* in accordance with section 13(2) of the *Professional Standards Act 1994*. By comparison, the Insurance Standard is not subject to these requirements. The Committee generally prefers that requirements informing the application of legislation and key legislative requirements are included in the legislation to ensure an appropriate level of parliamentary oversight. In this case, under sections 4 and 6 respectively.

However, the Committee notes that a specific version of the Insurance Standard is incorporated into the Scheme, being the version adopted by SABA on 19 July 2021. The definition of this term does not indicate that any revisions of this document are incorporated, suggesting that the version applying to Scheme members is the specific version identified. Considering that the incorporated document appears to be specifically defined, the Committee makes no further comment.

4. Public Health Amendment (COVID-19 Air and Maritime Arrivals) Regulation 2022

Date tabled	LA: 7 June 2022 LC: 7 June 2022
Disallowance date	LA: 11 October 2022 LC: 11 October 2022
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

4.1 The object of this Regulation is to update a penalty notice offence consequential on the remaking of a public health order.

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

Issues considered by the 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

4.3 The *Public Health Amendment (COVID-19 Air and Maritime Arrivals) Regulation 2022* (Regulation) amends the *Public Health Regulation 2012* (Public Health Regulation) to enable penalty notices to be issued for a breach of a direction made under the *Public Health (COVID-19 Air and Maritime Arrivals) Order (No 2) 2022* or an order that replaces that order.

4.4 The Public Health Regulation previously provided that penalty notices could be issued for a breach of a direction made under the *Public Health (COVID-19) Air and maritime Arrivals) Order (No 1) 2022*. This Regulation therefore extends the operation of the penalty notice provisions that were previously in place, and additionally provides that any orders replacing the *Public Health (COVID-19 Air and Maritime Arrivals) Order (No 2) 2022* will automatically be able to result in the issue of penalty notices under the Public Health Regulation.

4.5 The maximum penalty that can be issued for a contravention of these provisions is $5 000 for an individual, and $10 000 for a corporation.

The *Public Health Amendment (COVID-19 Air and Maritime Arrivals) Regulation 2022* (Regulation) amends the *Public Health Regulation 2012* (Public Health Regulation) to enable penalty notices to be issued for a breach of a direction made under the *Public Health (COVID-19 Air and Maritime Arrivals) Order (No 2) 2022* or an order that replaces that order. Penalty notices that can be issued

in relation to these offences are $5 000 for an individual, or $10 000 for a corporation.

The Regulation previously provided for penalty notices being issued under the *Public Health (COVID-19) Air and Maritime Arrivals) Order (No 1) 2022.* This Regulation therefore extends the operation of the penalty notice provisions that were previously in place, and additionally provides that any orders replacing the current order will automatically be able to result in the issue of penalty notices under the Public Health Regulation.

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.

Further, the Committee notes that this amendment provides that further orders made will be able to authorise the issuing of penalty notices without requiring amendment to the Public Health Regulation, which means that they would not be subject to disallowance.

The Committee also acknowledges individuals and corporations retain the right to elect to have their matter heard and decided by a Court, and the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee further acknowledges that compliance is aimed at reducing the impact of the COVID-19 pandemic.

However, the Committee notes that the value of the penalty notice that can be issued is significant. Further, because the Regulation allows for new orders to replace the current order and be automatically authorised to issue penalty notices, these penalty notices may be issued indefinitely without requiring amending Regulations to be tabled before the Parliament and therefore subject to disallowance. In the circumstances, the Committee refers the mater to Parliament for its consideration.

5. Residential Apartment Buildings (Compliance and Enforcement Powers) Amendment (Building Work Levy) Regulation 2022

Date tabled	LA: 21 June 2022 LC: 21 June 2022
Disallowance date	LA: 18 October 2022 LC: 18 October 2022
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Fair Trading

Purpose and description

5.1 The objects of this Regulation are as follows—

(a) to provide that the Secretary may impose a levy on a developer in relation to building work (a ***building work levy***) by giving the developer written notice,

(b) to require developers to pay a building work levy, by using the NSW Planning Portal, within 14 days of the written notice being given,

(c) to provide that the Secretary may only impose a building work levy on a developer at the prescribed rate, and only if the building work is not of a specified type,

(d) to prescribe the rate of a building work levy imposed in relation to each of the following types of building work to which an expected completion notice relates—

(i) building work that results in a new building, part of a new building, or the addition of storeys to an existing building,

(ii) the repair, renovation or protective treatment of a building,

(e) to provide for the annual adjustment of the rate of a building work levy,

(f) to enable interest to be charged on unpaid levies,

(g) to provide that the Secretary may waive, reduce, postpone or refund a building work levy on certain grounds, either on the Secretary's own initiative or on the application of a person,

(h) to prescribe failure to pay a building work levy as a circumstance in which the Secretary may make an order prohibiting the issue of an occupation certificate and, if relevant, the registration of a strata plan for a strata scheme in relation to a residential apartment building,

(i) to enable money in the Home Building Administration Fund to be applied for meeting the costs of administering the *Design and Building Practitioners Act 2020* and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*.

5.2 The Regulation is made under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* and the *Home Building Act 1989*.

Issues considered by the Committee

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

Retrospectivity

5.3 The Regulation inserts a new Part 2 into the *Residential Apartment Buildings (Compliance and Enforcement Powers) Regulation 2020* (the **regulations**). This Part allows the Secretary to impose a building work levy on developers by written notice, and makes related provisions regarding (among other things):

(a) which building work the levy may apply to,

(b) the rate of the levy, and

(c) the provision of information by the developer to the Secretary which indicates whether a building work levy is payable, and if so how much.

5.4 Under section 4 of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (the **Act**), a developer, in relation to building work, means any of the following persons:

(a) the person who contracted or arranged for, or facilitated or otherwise caused, (whether directly or indirectly) the building work to be carried out,

(b) if the building work is the erection or construction of a building or part of a building—the owner of the land on which the building work is carried out at the time the building work is carried out,

(c) the principal contractor for the building work within the meaning of the *Environmental Planning and Assessment Act 1979,*

(d) in relation to building work for a strata scheme—the developer of the strata scheme within the meaning of the *Strata Schemes Management Act 2015*,

(e) any other person prescribed by the regulations for the purposes of this definition.

5.5 Clause 13(1) in this new Part 2 provides that the Part extends to building work:

(a) for which the Secretary has been given an expected completion notice before the commencement of this Part, and

(b) for which an occupation certificate has not been issued in relation to the building or part of the building to which the expected completion notice relates.

5.6 Section 7 of the Act provides than an expected completion notice is given by the developer at least 6 months, but not more than 12 months, before making an application for an occupation certificate for any part of a residential apartment building for which the building work is being or was carried. If the developer expects to apply for the occupation certificate in less than 6 months, the Secretary must be given an expected completion notice within 30 days of starting the building work.

5.7 The Regulation commenced on 4 July 2022.

5.8 Clause 13(2) also provides that in clause 10 (of the new Part 2), for an exempted completion notice given before the commencement of the new Part 2, a reference to giving information at the same time as the notice is given (to the Secretary) is taken to be a reference to giving information at a time specified by the Secretary by written notice. This provision enables the Secretary to request information informing the application of the building work levy where the developer has already provided the expected completion notice to the Secretary.

The Regulation provides that the new Part 2, which allows the Secretary to impose a building work levy on developers by written notice and makes related provisions, extends to building work for which the Secretary has been given an expected completion notice prior to the commencement of the Part and for which an occupation certificate has not been issued.

The Regulation therefore has retrospective application, as it affects obligations and rights pre-dating the Regulation's commencement. The Committee generally comments on provisions with retrospective effect because this runs counter to the rule of law principle that a person is entitled to know the law to which they are subject at any given time. However, the Committee acknowledges that the retrospective application of the Part is limited specifically to certain building work. In the circumstances, the Committee refers this matter to Parliament for its consideration.

6. Road Transport (Driver Licensing) Amendment Regulation 2022

Date tabled	LA: 21 June 2022 LC: 21 June 2022
Disallowance date	LA: 18 October 2022 LC: 18 October 2022
Minister responsible	The Hon. Natalie Ward MLC
Portfolio	Metropolitan Roads

Purpose and description

6.1 This Regulation amends the *Road Transport (Driver Licensing) Regulation 2017* to allow Transport for NSW to do the following—

(a) vary, suspend or cancel a person's NSW driver licence if the person's privileges to drive in another jurisdiction have been suspended or withdrawn by the driver licensing authority in the other jurisdiction,

(b) withdraw a visiting driver's privileges to drive in NSW where the driver has elected to be of good behaviour under the Act, section 36 and incurs 2 or more demerit points during the 12 months' good behaviour period.

6.2 This Regulation is made under the *Road Transport Act 2013*, including section 23, the statutory rule-making power.

Issues considered by the Committee

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

Limitations on international and interstate driver licences

6.3 The *Road Transport (Driver Licensing) Amendment Regulation 2022* (the **Regulation**) amends the *Road Transport (Driver Licensing) Regulation 2017*, to allow demerits and restrictions placed on an individual's driver license or privileges in another jurisdiction to result in consequences for the status of that driver license in NSW.

6.4 The Regulation inserts a new clause 65(1)(ja) which provides that Transport for NSW (TfNSW) may vary, suspend or cancel a person's driver licence if it appears to TfNSW that the person's visiting driver privileges have been suspended or withdrawn by the driver licensing authority in the jurisdiction. The Regulation also inserts a new clause 65(1A) to the Regulation that states that if clause 65(1)(ja) applies, the period of variation or suspension that can be granted in NSW is the same period that was imposed by the other jurisdiction.

6.5 Clause 96 of the *Road Transport (Driver Licensing) Regulation 2017* allows interstate and international drivers with a driver licence issued in their own jurisdiction are exempt from the requirement to hold a NSW driver licence. The Regulation however inserts a new clause 96(4)(na) which provides that a visiting driver ceases to be exempt from holding a NSW driver licence if they have made an election to undertake a good behaviour period as opposed to a period of suspension, under the *Road Transport Act 2013* section 36(1) and incurs 2 or more demerit points during the 12 months' good behaviour period.

6.6 Clause 3 of the *Road Transport (Driver Licensing) Regulation 2013* sets out the object of the regulation, which is to assist in providing for the consistent administration and enforcement of a driver licensing system throughout Australia.

The Regulation applies NSW driver licensing laws to drivers that have incurred driving offences under international and interstate driver licenses. This allows TfNSW to issue demerits and restrictions on these drivers as if the offences had taken place in NSW. It also authorises TfNSW to vary, cancel or suspend a driver license in NSW if it has had that adverse action applied to it in another jurisdiction. Lastly, it provides that the demerits point election scheme operated under section 36(1) of the *Road Transport Act 2013* will apply to international and interstate drivers in NSW.

This Regulation therefore defers the charging of the offence and any relevant trial procedure to another jurisdiction, while still applying the equivalent penalty to the NSW license as if the offence had been committed in NSW. In doing so, it applies new restrictions to international and interstate driver licenses that were not previously subject to these restrictions. The Committee usually comments on Regulations that may limit the capacity of individuals to engage in otherwise lawful activities in the community, including driving, where previously they were engaged without restriction.

However, the Committee notes that the broader object of the *Road Transport (Driver Licensing) Regulation 2013* is to assist in providing for the consistent administration and enforcement of a driver licensing system throughout Australia. Therefore the application of penalties and restrictions for equivalent driving offences, particularly in interstate Australian jurisdictions, may assist in administering a consistent driver licencing system. In the circumstances, the Committee makes no further comment.

7. Sporting Venues (Invasions) Amendment (Additional Designated Sporting Venues) Regulation 2022

Date tabled	LA: 10 May 2022 LC: 10 May 2022
Disallowance date	LA: 13 September 2022 LC: 13 September 2022
Minister responsible	The Hon. Paul Toole MP
Portfolio	Police

Purpose and description

7.1 The object of this Regulation is to amend the *Sporting Venues (Invasions) Regulation 2016* to prescribe additional venues, while the venues are being used for sporting activities by certain sporting teams, to be designated sporting venues for the purposes of the *Sporting Venues (Invasions) Act 2003*.

Issues considered by the Committee

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

Strict liability offences and penalty notices

7.2 The Regulation inserts section 4A into the *Sporting Venues (Invasions) Regulation 2016*, which provides that a venue listed in Schedule 1, Column 1 is a 'designated sporting venue' under section 3 of the *Sporting Venues (Invasions) Act 2003* (Act) while it is being used for sporting activities by the team set out opposite in Schedule 1, Column 2. This section continues to apply to a prescribed venue that is renamed or known by more than one name.

7.3 Schedule 1, which the Regulation inserts into the *Sporting Venues (Invasions) Regulation 2016*, lists 18 venues.

7.4 Various strict liability offences related to invasion of a playing field in a designated sporting venue are included in Part 2 of the Act:

(a) section 4 of the Act prohibits a person from entering or remaining on the playing field of a designated sporting venue during a match unless they are a match participant or other person permitted to do so under the Act. Contravention incurs a maximum penalty of 50 penalty units ($5 500).

(b) a person removed from a venue for contravention of section 4 is banned for 12 months from entering the venue, under section 5 of the Act. Entering the

venue while the ban is in force is an offence incurring a maximum penalty of 50 penalty units ($5 500), under section 8.

7.5 Section 12 of the Act states that a police officer can issue a penalty notice to a person if it appears to the officer the person has committed an offence against a provision of Part 2, with the *Fines Act 1996* applying to such notice.

The Regulation amends the *Sporting Venues (Invasions) Regulation 2016* to provide that a 'designated sporting venue' for the purposes of the *Sporting Venues (Invasions) Act 2003* includes a prescribed venue while it is being used for sporting activities by certain teams. It prescribes additional venues and teams for this purpose.

This amendment broadens the application of strict liability offences under the Act for which a police officer can issue penalty notices for offences against Part 2 of the Act, relating to invasion of the playing field of a designated sporting venue during a match.

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 generally comments on penalty notice offences, which allow an individual to pay a specified monetary amount instead of appearing before a court to have their matter heard, as it may impact on a person's right to a fair trial. Specifically, any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that strict liability offences aim to encourage compliance and, in this case, regulate public gatherings in the sporting venues. It also notes the practical benefits of penalty notices including their cost effectiveness and ease of administration. Additionally, that the issuing of a penalty notice does not prevent a person from electing to have the matter proceed to court. In the circumstances, the Committee makes no further comment.

Strict liability offences and freedom of movement

7.6 As stated above, the Regulation inserts section 4A and Schedule 1 into the *Sporting Venues (Invasions) Regulation 2016*, which provides additional 'designated sporting venues' under section 3 of the Act while they are being used for sporting activities by the teams listed in the Schedule. Schedule 1 lists 18 venues.

7.7 Various strict liability offences related to invasion of a playing field in a designated sporting venue are included in Part 2 of the Act:

(a) section 4 of the Act prohibits a person from entering or remaining on the playing field of a designated sporting venue during a match unless they are a match participant or other person permitted to do so under the Act.

(b) a person removed from a venue for contravention of section 4 is banned for 12 months from entering the venue, under section 5 of the Act. Entering the venue while the ban is in force is an offence under section 8.

(c) Contravention of section 8, or repeated contravention of section 4, results in a life ban from entering the venue under section 6.

The Regulation amends the Sporting Venues (Invasions) Regulation 2016 to provide that a 'designated sporting venue' for the purposes of the *Sporting Venues (Invasions) Act 2003* includes a prescribed venue while it is being used for sporting activities by certain teams. It prescribes additional venues and teams for this purpose.

This amendment broadens the application of strict liability offences under the Act, pursuant to which an individual found liable for invading the playing field of a venue is banned from entering the venue for 12 months. Further invasion or entry of the sporting venue during their 12 month ban results in a life ban being imposed on the individual.

Bans on entry to sporting venues, in particular a life ban, may limit an individual's right to freedom of movement. However, this right may be limited in certain circumstances, including where the restriction is provided by law, is necessary to protect public order and is consistent with other rights.[18] The Committee acknowledges that the bans limiting individuals' movement flow from conduct which may disturb public order on one or more occasions. In the circumstances, the Committee makes no further comment.

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

Certain updates to regulation not subject to disallowance

7.8 The Regulation inserts section 4A into the *Sporting Venues (Invasions) Regulation 2016*. This section provides that:

(a) a venue listed in Schedule 1, Column 1 is a 'designated sporting venue' under section 3 of the *Act* while it is being used for sporting activities by the team set out opposite in Schedule 1, Column 2.

(b) if a venue listed in Schedule 1 is renamed or known by more than one name, the reference to the venue in the Schedule is taken to include the new or additional venue names and clause 4A continues to apply.

7.9 As set out above, strict liability offences arise for invading a playing field at a designated sporting venue, for which an individual can be issued with a penalty notice and be banned from entering the venue for a period of 12 months or life, depending on the circumstances.

The Regulation provides that where an additional designated sporting venue prescribed by the regulations is renamed or known by more than one name, the venue is taken to include the new or additional venue names. Penalty notices can be issued for contravention of strict liability offences at designated sporting venues and an individual banned from a venue for 12 months or life, depending on the circumstances.

[18] *International Covenant on Civil and Political Rights*, art 12(3).

The Committee notes that individuals may be liable for strict liability offences committed at venues not explicitly referred to in the legislation, which may run counter to the rule of law principle that a person is entitled to know the law that applies to them at any given time. To uphold this principle, it therefore prefers that legislative provisions be drafted with specificity, particularly where the law can impact an individual's rights and liberties. Additionally, that any amendments to a regulation be subject to disallowance under section 41 of the *Interpretation Act* 1987, to uphold parliamentary oversight.

The Committee notes that this provision allows for flexibility and assists with the administration of the provisions. However, taking into account that penalties apply for contravention of strict liability offences relating to invasions at designated sporting venues not explicitly named in the regulations, the Committee refers this matter to the Parliament for its consideration.

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. Coal Mine Subsidence Compensation Amendment (Contributions) Regulation 2022

This Regulation amends the *Coal Mine Subsidence Compensation Regulation 2017* to specify the contributions to the Coal Mine Subsidence Compensation Fund that the Chief Executive of Subsidence Advisory NSW may levy on proprietors of certain coal mines.

This Regulation is made under the *Coal Mine Subsidence Compensation Act 2017*, including sections 33 and 51, the general regulation-making power.

2. Dams Safety Amendment (Miscellaneous) Regulation 2022

The objects of this Regulation are—

(a) to require certain safety functions, in relation to extreme or high consequence dams, to be carried out by a competent person or a panel or team of at least 2 competent persons, and
(b) to require a dam safety management system document for a dam to identify an individual who is responsible for ensuring compliance with the dam safety management system, and
(c) to require a dam owner of a declared dam to ensure a contact person is nominated and the details of that contact person are given to Dams Safety NSW, and
(d) to make other minor amendments.

This Regulation is made under the *Dams Safety Act 2015*, including sections 14(1) and 53, the general regulation-making power.

3. Electricity Supply (General) Amendment (Before You Dig Australia Limited) Regulation 2022

This Regulation amends the *Electricity Supply (General) Regulation 2014* to prescribe Before You Dig Australia Limited as the designated information provider for the *Electricity Supply Act*, Part 5E.

4. Essential Services Regulation 2022

The object of this Regulation is to authorise the Minister for Energy to direct the Australian Energy Market Operator and other persons to take action in response to the likely interruption or reduction of the supply or distribution of natural gas.

This Regulation is excluded from requirements regarding the making of statutory rules by the *Subordinate Legislation Act 1989*, Schedule 4, item 20. It is made under the *Essential Services Act 1988*.

This instrument was in force from 30 May 2021 until it was repealed on 30 June 2022, in accordance with the *Essential Services Proclamation 2022*.

5. Essential Services Regulation (No 2) 2022

The object of this Regulation is to authorise the Minister for Energy to direct persons to take action in relation to the supply or distribution of coal to a power station in response to the declaration that the supply or distribution of coal is an essential service.

This Regulation is excluded from requirements regarding the making of statutory rules by the *Subordinate Legislation Act 1989*, Schedule 4, item 20. It is made under the *Essential Services Act 1988*.

This instrument was in force from 21 June 2022 until it was repealed on 16 July 2022, in accordance with the *Essential Services Proclamation (No 2) 2022*.

6. Gas Supply (Safety and Network Management) Amendment (Before You Dig Australia Limited) Regulation 2022

This Regulation amends the *Gas Supply (Safety and Network Management) Regulation 2013* to prescribe Before You Dig Australia Limited as the designated information provider for the *Gas Supply Act*, Part 4A.

7. Liquor Amendment (Outdoor Dining) Regulation (No 2) 2022

This Regulation—

(a) provides for RSA and RCG endorsements that expire from 1 February 2020 until 28 February 2023 to be renewable before 1 March 2023 on the completion of an RSA refresher course or an approved RCG training course, respectively, and
(b) extends, to 31 December 2023, the period within which proposed temporary boundary changes to certain licensed premises may apply, and
(c) enables certain hotels and clubs to trade during extended hours for certain special events that will be held from July to December 2022.

8. Local Government (General) Amendment Regulation 2022

The object of this Regulation is to exempt from the tendering requirements that councils must comply with under the *Local Government Act 1993* contracts valued at less than $500,000 that are entered into for the purpose of natural disaster response or recovery.

This Regulation is made under the *Local Government Act 1993*, including sections 55(3)(n)(i) and 748, the general regulation-making power, and Schedule 6, item 5.

9. Mental Health Amendment Regulation 2022

The object of this Regulation is to update the form of a report about the mental state of a detained person that must be completed after the examination of a detained person under the *Mental Health Act*, section 27 or 27A. The update to the form reflects a change to the *Mental Health Act 2007* that the examination may now be undertaken by an accredited person using an audio visual link, as well as in person, where it is not reasonably

practicable for an authorised medical officer of a mental health facility, or another medical practitioner, to personally examine the person.

This Regulation is made under the *Mental Health Act 2007*, including sections 27(2) and 196, the general regulation-making power

10. Mutual Recognition Scheme (New South Wales) Temporary Exemptions Regulation 2022

The object of this Regulation is to declare certain provisions of the *Plastic Reduction and Circular Economy Act 2021*, including the regulations made under that Act, to be exempt from the Commonwealth mutual recognition scheme for goods.

The mutual recognition scheme provides generally that goods that may lawfully be sold in another jurisdiction of Australia may also be sold in New South Wales without the necessity for compliance with certain requirements imposed on the goods in New South Wales.

The exemption—

(a) is substantially for the purpose of preventing, minimising or regulating environmental pollution, and
(b) will expire on 1 June 2023.

This Regulation comprises or relates to matters set out in the *Subordinate Legislation Act 1989*, Schedule 3, being matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth and other States.

11. Rail Safety National Law National Regulations (Reporting Requirements) Amendment Regulations 2022

The Regulations amend the *Rail Safety National Law National Regulations 2012* to:

(a) include notifiable occurrences for the purposes of the definition of 'notifiable occurrence' in a new Schedule 1A, and make related changes
(b) insert an additional category of notifiable occurrences, being Category C notifiable occurrences
(c) amend provisions relating to the reporting of notifiable occurrences
(d) specify the period in which the rail transport operator must notify the Regulator of certain information obtained in accordance with its drug and alcohol testing regime, with this obligation to notify the Regulator being a mandatory requirement of the operator's drug and alcohol management program
(e) amend provisions relating to the periodic information the rail transport operator must supply monthly to the Regulator
(f) insert provisions relating to the periodic information the rail transport operator must supply annually to the Regulator.

These Regulations are made under the Rail Safety National Law. The Rail Safety National Law is set out in the Schedule to the *Rail Safety National Law (South Australia) Act* 2012, and is applied and modified as a law of NSW by the *Rail Safety (Adoption of National Law)*

Act 2012. The *Rail Safety National Law (NSW)* is the version of the Law as it applies in NSW.

12. Referable Debt Order (2022-281)

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

(a) 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 purposes of the Northern Rivers Medium-Sized Business Grant and the Music and Overnight Camp Provider Support Payment are payable to Service NSW

(b) 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 Residential Tenancy Support Payments Program are payable to the Department of Customer Service.

13. Work Health and Safety Amendment (Licences in Digital Form) Regulation 2022

The object of this Regulation is to provide that a licence or other authorisation issued under the *Work Health and Safety Regulation 2017* in digital form is not required to contain a signature. This Regulation is made under the *Work Health and Safety Act 2011*, including section 276, the general regulation-making power, and Schedule 3, clause 7.