Legislation Review Committee

PARLIAMENT OF NEW SOUTH WALES

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

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Guide to the Digest

Comment on Bills

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

Comment on Regulations

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

Summary of Conclusions

PART ONE – BILLS

1. CHILDCARE AND ECONOMIC OPPORTUNITY FUND BILL 2022

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

Repeal by proclamation

The Bill is repealed on a day appointed by proclamation and published on the NSW legislation website. The proclamation may include related savings and transitional provisions.

The Committee notes that Acts of Parliament are generally repealed by another Act or expiry, rather than by proclamation. It considers that this process facilitates an appropriate level of parliamentary scrutiny and transparency. The Committee therefore refers the repeal clause to the Parliament for its consideration of whether it inappropriately delegates legislative power.

Statutory rule expressed to commence before publication on NSW legislation website

The Bill provides that a savings and transitional provision, which may be contained in the regulations, taking effect before publication on the NSW legislation website does not affect a person's existing rights prejudicially or impose liability on them for anything done or omitted to be done beforehand.

The Bill asserts that a provision contained in a regulation may apply before its publication on the NSW legislation website. This conflicts with section 39(2A) of the *Interpretation Act 1987*. The section provides that where a statutory rule is published on the NSW legislation website after the day on which one or more of its provisions is or are expressed to commence, that those provisions commence on the day the statutory rule is published on the NSW legislation website (rather than the earlier day). The Committee refers this matter to the Parliament for its consideration.

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

Significant matters not subject to parliamentary scrutiny

The Bill delegates various matters to the regulations. Such matters include persons who may be subject to the power of a commissioned person to require information, and provisions about the use or disclosure of information obtained by the commissioned person. The Bill therefore delegates provisions regarding the use or disclosure of information, which may be obtained by an investigatory power, to the regulations. Depending on the circumstances, this may impact on an individual's right to privacy or privilege against self-incrimination. Although, the Committee notes that no civil penalty applies for non-compliance.

Other matters referred by the Bill to the regulations include other functions of the NSW Childcare and Economic Opportunity Fund Board and other persons to whom a function of the Minister, Board or Chairperson may be delegated. The regulations may also contain savings and transitional provisions.

The Committee generally prefers such significant matters to be included in the primary legislation, particularly where they may impact on personal rights. The Committee therefore refers this issue to the Parliament for its consideration.

2. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (NO BODY, NO PAROLE) BILL 2022

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

Discretion in respect to parole matters

The Bill amends the *Crimes (Administration of Sentences) Act 1999* to insert a mandatory requirement for release on parole of an offender who has been convicted of and imprisoned for a homicide offence, where the victim's body or remains have not been located. Specifically, it requires the State Parole Authority not make a parole release order unless the offender has 'cooperated satisfactorily' to identify the victim's location. This requirement applies even where the Authority is satisfied under section 160 that release is necessary in exceptional extenuating circumstances or where the offender is dying.

The Committee notes that under the Act, the State Parole Authority ordinarily assesses whether it is in the interests of community safety to grant a parole order allowing offenders to continue serving the rest of their sentence in the community. Additionally, this legislative process is triggered when an offender approaches their parole eligibility date. That date is determined by the sentencing judge who has the discretion to impose and determine the length of a non-parole period when imposing a sentence of imprisonment.

By prohibiting offenders from being considered for release on parole under the process set out in the Act, the Bill may extend the non-parole period beyond that imposed by the sentencing judge, in effect limiting the discretion of the sentencing judge and the State Parole Authority. Additionally, it may impact on a prisoner's right to freedom from arbitrary detention if they are required to serve longer imprisonment periods because they are prohibited from the ordinary parole consideration process, even in typically exceptional circumstances.

The Committee acknowledges that release on parole is discretionary and requires balancing the rights of offenders who can demonstrate reformed behaviour with the interests of the community's safety. However, the Committee notes that the impact on victims and their families and the offender's cooperation with investigators are existing considerations for a sentencing judge in imposing an imprisonment sentence with a non-parole period. Given that there are no exceptions to the mandatory requirement, the Committee refers the matter to Parliament for its consideration.

Retrospectivity

The Bill amends the *Crimes (Administration of Sentences) Act 1999* to provide that the mandatory requirement for release on parole introduced applies to offenders convicted or sentenced and applications for parole made before the commencement of the relevant provisions. This allows the provisions to operate retrospectively. The Committee generally comments where provisions apply retrospectively as it runs counter to the rule of law principle that a person is entitled to know the law that applies to them at any given time.

The Committee acknowledges that the retrospective application of the provision is to ensure the Bill's policy objectives are achieved. However, it notes that the retrospective application could have negative implications for imprisoned offenders making parole applications prior to the commencement of the Bill as an Act. For this reason, the Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

3. CRIMES AMENDMENT (MONEY LAUNDERING) BILL 2022; DEDICATED ENCRYPTED CRIMINAL COMMUNICATION DEVICE PROHIBITION ORDERS BILL 2022; LAW

ENFORCEMENT (POWERS AND RESPONSIBILITIES) AMENDMENT (DIGITAL EVIDENCE ACCESS ORDERS) BILL 2022

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

Reversal of onus of proof – defence to dealing with proceeds of general crime offence

The *Crimes Amendment (Money Laundering) Bill 2022* inserts section 193BA the *Crimes Act 1900*. This establishes offences for a person who deals with proceeds of general crime valued at $100 000 or more, while being reckless as to whether it is proceeds of general crime. Subsection (4) provides a defence to an offence under this section, if the defendant can satisfy the court that they dealt with the property to assist the enforcement of a law.

This defence is substantially identical to defences for money laundering offences in Part 4AB of the Act, under sections 193B and 193D. The Committee previously reported on the defences under sections 193B and 193D when they were first introduced, in its Digest No. 11 of 2005. Consistent with those comments, the defence under section 193BA(4) may reverse the onus of proof by requiring that the defendant prove any matter of their innocence.

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

The Committee notes that the prosecution still bears the onus of proving the elements of the offence. It also acknowledges that the presumption of innocence is not absolute and defences where the burden of proof shifts to the defendant are not uncommon in criminal law. However, the Committee notes that these offences carry a maximum penalty of 10 and 15 years' imprisonment. It also notes that no defences are otherwise available to accused persons in the prosecution of these offences. For these reasons, the Committee refers this matter to Parliament for its consideration.

Procedural fairness – proof of offences in relation to property

The *Crimes Amendment (Money Laundering) Bill 2022* creates offences in the *Crimes Act 1900* for a person who deals with proceeds of general crime valued at $100 000 or more. It defines 'proceeds of general crime' to mean property which entirely or partly comes, directly or indirectly, from 'the commission of an offence against a law'. It also inserts subsection (3) into section 193F which clarifies that, in criminal proceedings for this offence, the prosecution is not required to establish 'an offence or a type of offence' was committed in relation to property, in order to prove that it is 'proceeds of general crime'.

This means a person may be convicted for dealing with property of a certain value without needing to prove it was connected to any offence or type of offence, if the prosecution can establish the mental element. This is despite 'proceeds of general crime' being defined by its connection to the commission of an offence. As it is not clear what must be proved to establish the physical element of the offence, the Bill may therefore impact the accused person's right to procedural fairness.

The Committee notes that the provisions are intended to strengthen criminal prosecution of organised crimes to better protect the community. It also acknowledges that the prosecution is still required to prove the mental element of recklessness to whether property is proceeds of general crime beyond a reasonable doubt. However, the Committee considers that 'proceeds of general crime' is widely defined and could capture any property on inference. It also notes that these offences carry a maximum penalty of 10 or 15 years' imprisonment. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Wide powers of enforcement – entry, search and seizure without warrant

The *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* gives a number of powers which police officers can exercise without a warrant, at any time while a dedicated encrypted criminal communication device (DECCD) prohibition order is in force. This includes exercising powers under section 5 to stop, detain and search the person subject of the prohibition order and a vehicle connected to them, as well as enter and search premises connected to them, for the purpose of determining whether they possess a DECCD.

Section 7 also empowers a police officer to seize and detain in the course of these searches any 'thing' which they suspect on reasonable grounds may provide evidence of the commission of a relevant offence, was unlawfully obtained or is a dangerous article. There appears to be no provisions in the Bill which define or narrow the scope of the ordinary meaning of 'thing' to limit what may be seized and detained by officers in the course of conducting a search under an in-force DECCD prohibition order.

The Committee notes that the Bill thereby provides wide powers of enforcement. The exercise of these enforcement powers may interfere with individual rights including, for example, their real property rights in respect to the power to enter and search premises and vehicles without warrants and to seize 'things', or their right to security of the person in respect to the power to stop, search and detain a person against whom the prohibition order is made.

The Committee recognises that the overarching aim of the provisions is to strengthen law enforcement in their investigation and prevention of organised criminal activity using encrypted devices. It also acknowledges that the Bill provides a number of safeguards in respect to the conduct and notice of these search powers, as well as requiring service of the order on the subject person before exercising any powers and reporting back to independent scrutineers once the order ceases to be in force.

However, the Committee notes that Bill provides that a prohibition order is in force for a specified period that is between six months to two years. The person subject of an order can be subject to the exercise of these powers at any time during that period, without the need for a warrant. This is in circumstances where the person has been convicted of a past serious criminal offence but is not currently charged with any further offences. For these reasons, the Committee refers this matter to Parliament for its consideration.

Reversed onus of proof – defence to possession of DECCD offence

The *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* inserts section 192P into the *Crimes Act 1900*. This section establishes an offence for a person possesses a dedicated encrypted criminal communication device (DECCD) which is reasonably suspected of being used to commit or facilitate serious criminal activity. Subsection (3) provides a defence to an offence under these provisions if the defendant can satisfy the court that they possessed the property in the ordinary course of their duties working for a government agency or public authority, or to supply to or in partnership/agreement with a government agency.

This defence reverses the onus of proof by requiring that the defendant prove any matter of their innocence. In regards to criminal actions, a reverse onus may undermine a person's right to the presumption of innocence as contained in Article 14 of the ICCPR. The right to the presumption of innocence protects an accused person's privilege to be presumed innocent until proved guilty according to law.

However, the Committee notes that the prosecution still bears the onus of proving the elements of the offence. It also acknowledges that the presumption of innocence is not absolute and

defences where the burden of proof shifts to the defendant are not uncommon in criminal law. In the circumstances, the Committee makes no further comment.

Right to silence – exclusion of privilege against self-incrimination

Section 6 of the *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* enables a police officer to direct a person against whom a dedicated encrypted criminal communication device (DECCD) prohibition order is in force to give the officer information or assistance. That information or assistance must be deemed reasonably necessary to enable police to view or access data from a computer identified during a search or seized on reasonable suspicions it is a DECCD.

The Bill also inserts section 80O into the *Law Enforcement (Powers and Responsibilities) Act 2002* which empowers a police officer executing a DECCD access order to require a relevant person to give information or assistance to the officer. That information or assistance must be deemed reasonable and necessary to enable access to the data in or from a device permitted under the order, to determine whether the device is a DECCD.

Non-compliance with any direction under section 6 of the Bill or section 80O in the Act without reasonable excuse is an offence, carrying a maximum penalty of 3 years' imprisonment, or $11 000 and/or 5 years' imprisonment respectively. Both provisions clarify that non-compliance because it would 'tend to' incriminate or expose the person to a penalty is not a reasonable excuse. The Bill may thereby impact a person's right to silence by excluding their privilege against self-incrimination in the exercise of state enforcement powers.

The Committee acknowledges that the powers to direct the provision of information or assistance require service of the order on the subject person before any powers are exercised. It also notes the Bill is intended to strengthen law enforcement in their investigation and prevention of organised criminal activity using encrypted devices.

However, the Committee notes that the offences of non-compliance may require a person to provide information or assistance that could incriminate them on pain of penalty, in this case potential imprisonment. It further notes that there are no provisions limiting the use of data accessed by information or assistance compelled from the person, as evidence against them in criminal prosecutions. For these reasons, the Committee refers the matter to Parliament for its consideration.

Application of DECCD access order to minors

The *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* inserts Part 5A into the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide for the issuance of dedicated encrypted criminal communication device (DECCD) access orders. Section 80F requires an application by a police officer for an access order must include details of the person to whom the access order is proposed to be issued. It clarifies that, where that person is under 18 years of age, an officer of at least Inspector rank must authorise the making of the application.

By allowing the issue of DECCD access orders to persons aged under 18 years, the Bill may thereby authorise the exercise of enforcement powers by police under the order towards minors. These powers include the ability to direct persons to give information or assistance to police in order to access the data in a device suspected of being a DECCD. Non-compliance with such a direction without reasonable excuse is an offence carrying a maximum penalty of $11 000 and/or 5 years' imprisonment.

The Committee acknowledges that there are safeguard provisions requiring the authorisation of an officer at Inspector rank or above to make an application for an access order in respect to a

minor. However, it notes that this oversight measure only applies to the making of the application and there are no additional measures in respect to the exercise of powers under the access orders towards minors. It also notes that young people under the age of 18 years may lack the capacity to understand the consequences of the access order and non-compliance with a direction given under the order. 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

Wide regulation-making power

The *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* provides a general regulation-making power under section 26. Specifically, it allows regulations to prescribe a matter that is 'necessary or convenient' for carrying out or effecting the Bill.

There appears to be no provisions which define or narrow the scope of the ordinary meaning of 'convenient'. The Bill may therefore include a wide 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 the overarching aim of the provisions is to strengthen law enforcement in their investigation and prevention of organised criminal activity using encrypted devices. However, the Committee notes that the provisions may effectively allow regulations to prescribe matters with little limit. For these reasons, the Committee refers this 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

Restriction on avenues for review - Applications for revocation of prohibition order

The *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* establishes the legislative framework for the issue of dedicated encrypted criminal communication device (DECCD) prohibition orders. This includes provisions allowing an application for a prohibition order to be decided by an authorised magistrate outside of a courtroom. It also excludes the person who would be or is subject of a prohibition order from being told about or making submissions to the application, knowing the reasons for the making of an order against them or accessing documents forming part of the application.

While the Bill provides avenues for the subjected person to apply to the Local Court for revocation of the order under Part 5, section 19(8) prohibits them from applying within six months of being served the order. Section 19(6) also prohibits the court from being provided any document forming part of the application for the order, or the reasons recorded by the magistrate for making the order.

The Bill may effectively prevent the person subject of a DECCD prohibition order and the Local Court reviewing an application for revocation of that order from knowing the reasons for the making of that order. This may limit the ability of affected persons to seek a review of judicial decisions in a higher court.

The Committee appreciates that these provisions are intended to enable law enforcement in respect to DECCD and providing notice to 'subject persons' may frustrate that purpose if an individual had the opportunity to dispose of the device. It also acknowledges that the Commissioner of Police may provide the court with whatever information they consider relevant to the revocation application, which may include the reasons for the making of the order.

However, the Committee notes that the prohibition orders subject the person to search, detain and seizure powers without warrant at any time the order is in force. By preventing a subject person from applying for revocation within 6 months, they are potentially subject to these powers during this period without an avenue for review. In these circumstances, it is important that affected persons can access independent review of decisions to issue these orders. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Matter deferred to regulations – dedicated encrypted criminal communication device

The *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* inserts Part 4ABA into the *Crimes Act 1900* to establish an offence for possessing a dedicated encrypted criminal communication device (DECCD). Section 192O defines what mobile electronic devices are and are not a DECCD for the purpose of the offence. It also allows regulations to prescribe other devices that are and are not DECCDs under Part 4ABA.

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 determine what conduct constitutes an offence carrying a maximum penalty of 3 years' imprisonment.

However, the Committee acknowledges that these provisions are intended to build more flexibility into the regulatory framework and allow law enforcement to better respond to the changing nature of electronic criminal activity. It 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*. In the circumstances, the Committee makes no further comment.

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

Right to silence – exclusion of privilege against self-incrimination

The *Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2022* inserts section 76AM into the *Law Enforcement (Powers and Responsibilities) Act 2002* which empowers an officer executing a digital evidence access order to require a relevant person to give information or assistance to the officer. That information or assistance must be deemed reasonable and necessary to enable access to or copying/conversion of the data held in a computer covered by the order.

Non-compliance with a direction under section 76AM without reasonable excuse is an offence, carrying a maximum penalty of $11 000 and/or 5 years' imprisonment. Section 76AO provides that it is not a reasonable excuse that compliance would 'tend to' incriminate or expose the person to a penalty. The Bill may thereby impact a person's right to silence by excluding their privilege against self-incrimination in the exercise of state enforcement powers.

As previously noted, the Committee recognises that stopping individuals from preventing law enforcement accessing devices with incriminating materials may facilitate law enforcement of organised crime through digital means. It also notes that there are safeguard provisions limiting the use of that information by police to only accessing the data in the relevant computer.

However, the Committee notes that the offences of non-compliance may require a person provide information or assistance that could incriminate them on pain of penalty, in this case potential imprisonment. It further notes that there are no provisions limiting the use of data accessed by information or assistance compelled from the person, as evidence against them in criminal prosecutions. For these reasons, the Committee refers the matter to Parliament for its consideration.

Application of digital evidence access order to minors

The *Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2022* inserts Division 4A into Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide for the issuance of digital evidence access orders. Section 76AF requires an application for an access order must include details of the person to whom the access order is proposed to be issued. It clarifies that, where that person is under 18 years of age, an officer of at least Inspector rank must authorise the making of the application.

By allowing the issue of digital evidence access orders to persons aged under 18 years, the Bill may thereby authorise the exercise of enforcement powers by police under the order towards minors. These powers include the ability to direct persons to give information or assistance to police in order to access the data in a computer device covered by the order. Non-compliance with such a direction without reasonable excuse is an offence carrying a maximum penalty of $11 000 and/or 5 years' imprisonment.

The Committee acknowledges that there are safeguard provisions requiring the authorisation of an officer at Inspector rank or above to make an application for an access order in respect to a minor. However, it notes that this oversight measure only applies to the making of the application and there are no additional measures in respect to the exercise of powers under the access orders towards minors. It also notes that young people under the age of 18 years may lack the capacity to understand the consequences of the access order and non-compliance with a direction given under the order. For these reasons, the Committee refers this matter to Parliament for its consideration.

4. CRIMINAL PROCEDURE LEGISLATION AMENDMENT (PROSECUTION OF INDICTABLE OFFENCES) BILL 2022

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

Administration of criminal justice

The Bill amends the Criminal Procedure Act by introducing new duties of disclosure at section 36B. These obligations closely mirror the amendments introduced by the *Director of Public Prosecutions Amendment (Disclosures) Act 2012*, which the Committee considered in Digest 27/55. In that report, the Committee commented that the amendments may affect a defendant's ability to access information which could assist their defence. However, it was also noted that this access needs to be balanced between an investigatory body's need to protect the safety of its witnesses and its investigatory processes, with the prosecution's duty of disclosure and the need to ensure a fair trial for the accused.

Consistent with the Committee's previous comments, it is noted that enabling officers to determine what constitutes protected material and only requiring disclosure upon request, could affect a defendant's ability to access information that could assist their defence. However, the Committee notes that there is a public interest argument for the preservation of protected material, and that the amendment is effectively trying to balance procedural fairness for the accused, and the protection of an investigative body's witnesses and investigatory processes. In the circumstances, the Committee makes no further comment.

Privacy – Disclosure of protected information

The Bill amends the Criminal Procedure Act by introducing new duties of disclosure at section 36B. Section 36B(9) requires law enforcement or investigating officers to disclose protected material to the prosecutor where the prosecutor requests the material.

The Committee notes that the requirement for an officer to first notify the prosecutor of the existence of the information, and the nature of the material and the claim or publication restriction that relates to it, appears to establish a safeguard. However, the Bill ultimately leaves it to the prosecutor's discretion to request the information, and thus require the disclosure of protected material. Accordingly, despite the safeguard, the obligation to disclose protected material may still interfere with a person's privacy or confidential information.

Despite this, the Committee acknowledges that the disclosure of protected material in this circumstance will likely be necessary to ensure a fair trial for the accused. Given the public interest in ensuring procedural fairness, and noting that a limited safeguard is in place, the Committee makes no further comment.

The Committee notes that the Bill proposes to enable its amendments to the Criminal Procedure Act and *Criminal Procedure Regulation 2017,* to be extended to proceedings commenced, but not yet committed for trial or sentence, before the commencement day for the amendment. This may create provisions with retrospective effect that apply to offences that were committed before this provision has been enacted and thereby impact the key principle of the rule of law, being that a person should be able to know the law and penalties that they are subject to at any one time.

Although the Committee often comments on retrospective provisions in legislation, the Committee notes that the Bill seeks to clarify that criminal procedures for indictable matters apply to offences investigated by regulatory agencies, rather than change the obligations under criminal laws that a person may be subject to. Additionally, these amendments seek to apply to proceedings that have not yet been committed for trial or sentence before the amendments commence. This may offer satisfactory safeguards to protect from adverse impact upon individual persons. In the circumstances it makes no further comment.

Matters deferred to the regulations

The Bill inserts section 36B(5) into the Criminal Procedure Act. This section would defer the making of provisions about the duties of disclosure of law enforcement and investigating officers to the regulations.

The Committee generally prefers substantive clauses to be set out in the Act where they can be the subject of a greater level of parliamentary scrutiny. However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.

5. PREVENTION OF CRUELTY TO ANIMALS AMENDMENT (PROHIBITIONS FOR CONVICTED PERSONS) BILL 2022*

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

Extraterritorial application of criminal laws – serious interstate animal offence

The Bill amends section 4 of the *Prevention of Cruelty to Animals Act 1979* to define a 'serious interstate animal offence' to mean an offence under various interstate animal cruelty legislation in another State or Territory equivalent to serious cruelty or bestiality offence under the *Crimes Act.*

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

attaches prohibition from certain activities and carries maximum penalties that include imprisonment.

However, the Committee recognises that criminal laws often recognise crimes in other jurisdictions where it is the equivalent of criminal provisions in NSW for the broader aim of ensuring public safety and consistency in the application of the criminal law. In these circumstances, the Committee makes no further comment.

Enforcement powers – power to seize animals

The Bill inserts section 24CB into the *Prevention of Cruelty to Animals Act 1979* which grants officers under the Act a general power to seize animals kept or being bred in contravention of a disqualification order or by a person convicted of an animal cruelty offence under criminal laws in Australia. The Committee notes that the exercise of these enforcement powers may impact a person's real property rights.

However, the Committee recognises that these powers are intended to strengthen compliance with provisions of the Act intended to protect animal welfare, by enabling officers to seize animals being kept in breach of disqualification orders or the general prohibition under section 31AB. In these circumstances, the Committee makes no further comment.

Judicial discretion in respect to orders following criminal convictions

The Bill amends section 31 of the *Prevention of Cruelty to Animals Act 1979* to require a court which has convicted a person of an animal cruelty offence to make a disqualification order, unless it is satisfied special circumstances justify not making the order. By establishing a presumption for the making of a disqualification order, the Bill may in effect limit the discretion of the trial judge using an Act of Parliament.

However, the Committee acknowledges that the court retains the discretion to determine whether special circumstances exist to rebut the presumption. In these circumstances, the Committee makes no further comment.

Strict liability - Restrictions on ownership, employment, and business

The Bill inserts sections 31AC and 31AD into the *Prevention of Cruelty to Animals Act 1979*, which contain certain prohibitions on persons convicted of an animal cruelty offence. Specifically, a person convicted of an interstate animal offence must not purchase or own an animal, or engage in work, whether paid or unpaid, involving direct contact with, or care of, an animal. It also prohibits a person convicted of an animal cruelty offence from breeding animals or being involved in a business relating to breeding animals. The maximum penalty that can be applied to an individual for offences under these sections is 400 penalty units ($44 000) or imprisonment for 1 year, or both.

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. Additionally, in this case, the provisions place restrictions on a person's ability for certain ownership, employment or conducting a business.

The Committee notes that strict liability offences are not uncommon in regulatory contexts and may be included to encourage compliance. However the Committee notes that the nature of this strict liability offence prohibits certain activities ordinarily permitted that now would attach penalties of imprisonment and are not merely monetary. In these circumstances, the Committee refers this matter to Parliament for its consideration.

Freedom of contract – prohibition on employment of convicted persons

The Bill amends the *Exhibited Animals Protection Act 1986* to prohibit the holder of an authority from knowingly causing or permitting a prescribed person to work with, or care for, an animal exhibited under the authority. The maximum penalty for this offence for an individual is 400 penalty units ($44 000) or imprisonment for 1 year, or both, and 2000 penalty units ($220 000) in any other case.

This places a restriction on authority holders over the employment of certain individuals and attaches a significant penalty, including imprisonment, for individuals who hold an authority to exhibit animals. These amendments may therefore impact upon the freedom of contract of employers by restricting who is eligible for employment.

The Committee recognises that this provision is intended to protect exhibited animals from possible harm and animal cruelty. However, the Committee notes that the *Prevention of Cruelty to Animals Act 1979* sets out a general prohibition for convicted persons from engaging in such work. It also notes that individuals who employ such persons may be sentenced to a term of imprisonment. 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

Matters deferred to the regulations – offences attaching penalty of imprisonment

As noted, the Bill amends the *Exhibited Animals Protection Act 1986* to prohibit the holder of an authority from knowingly causing or permitting a prescribed person to work with, or care for, an animal exhibited under the authority. This offence carries a maximum penalty of 400 penalty units ($44 000) or imprisonment for 1 year, or both for an individual, or 2000 penalty units ($220 000) in any other case.

Subsection 31A(2) provides that a relevant offence means an offence under the Act, the *Crimes Act 1900*, the *Prevention of Cruelty to Animals Act 1979* or its regulations. This effectively defers further offences to which this prohibition applies to the regulations under the *Prevention of Cruelty to Animals Act 1979*.

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 strict prohibitions.

The Committee acknowledges 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 contravention of the prohibition may incur penalties including imprisonment. In these circumstances, the Committee refers this matter to Parliament for its consideration.

6. ROYAL BOTANIC GARDENS AND DOMAIN TRUST AMENDMENT (FACILITATION OF SYDNEY METRO WEST) BILL 2022

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

7. SECURITY INDUSTRY AMENDMENT BILL 2022

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

Strict liability offences – increased penalties

The Bill amends the Security Industry Act and Security Industry Regulation to vary the penalties for offences, including some strict liability offences. These variations include the introduction of custodial sentences for some offences and the increase in some maximum monetary penalties.

For example, the Bill increases the maximum monetary penalty for the strict liability offence of obstructing a law enforcement officer, from 100 penalty units to 500 penalty units, and attaches a two-year custodial sentence. Previously the maximum penalty for this offence was 100 penalty units.

The Bill also introduces a new tiered penalty system for contraventions of licence conditions. Under the tiered system, an individual who contravenes a Tier 3 condition faces a maximum monetary penalty of 250 penalty units, imprisonment for 12 months, or both. The previous maximum penalty for an individual's contravention of a licence condition was 100 penalty units, imprisonment for six months, or both. Section 30 of the Security Industry Act, does not require the establishment of a mental element to prove that the contravention of a condition has occurred, accordingly, depending on the specific condition, the provision may amount to a strict liability offence.

The Committee acknowledges that in speaking to the Bill, Minister Toole indicated that the increase to penalties under the Act or regulation are necessary because the existing provisions for some offences are no longer sufficient to deter criminal activity. However, given the increased penalties apply to strict liability offences and may include imprisonment, the Committee refers this issue to the Parliament for its consideration.

Privacy – Publication of information

Part 3D of the Bill enables the Commissioner to publish information about the revocation of a licence, or an offence committed by a licensee under the Act or the regulations.

Under this Part, the Commissioner may publish the name of a person who committed an offence, information about an offence, including the date, and any other information prescribed by the regulation. The Commissioner may also publish the name of a person whose licence has been revoked, the reason for the revocation, the date on which the licence was revoked, and any other information prescribed by the regulations.

The Committee notes that the publication of the names of persons who have committed an offence or have had their licence revoked may interfere with a person's privacy or confidential information. The Committee also notes that the Bill defers certain items to the regulations, such as the power to prescribe additional information that may be published.

The Committee acknowledges that the bill provides a safeguard through the requirement not to make information publicly available unless the proceedings for the offence or the steps to revoke the licence are finalised. However, the Committee also notes that the regulations may prescribe additional circumstances for the publication of information, which would not be subject to the same level of Parliamentary scrutiny as a Bill. In the circumstances, the Committee refers the matter to parliament for consideration.

Commencement by proclamation

The Bill is intended to 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 right or obligations. However, the Committee notes that a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments. This may be particularly the case where amendments are being made to the licensing schemes across industries and multiple pieces of legislation. In the circumstances, the Committee makes no further comment.

Matters deferred to the regulations

The Bill amends the Security Industry Act to enable the regulations to prescribe activities that do not constitute "security activities", and places that do not constitute "relevant places", for the purposes of the Act. This enables the regulations to determine specific situations that will not be subject to key provisions of the Act.

The Bill also enables the regulations to prescribe grounds or other requirements for the granting of an exemption by the Commissioner, and the prescription of a fee to be paid to the Commissioner on application for an exemption. As discussed earlier, the Bill also defers, to the regulations, the power to prescribe additional information that may be published by the Commissioner in relation to an offence or a revocation of licence.

The Committee acknowledges that, in his second reading speech to the Bill, the Hon. Paul Toole MP, stated that the exemption provisions were included to ensure that there is an available pathway for the Commissioner to exempt persons from the need to obtain a security license where it is in the public interest and in unforeseen situations, such as the COVID-19 pandemic.

However, the Committee generally prefers substantive clauses to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected such as the procedure for applications for an exemption, or the prescribed information that may be published by the Commissioner. In the circumstances, the Committee refers this matter to parliament for consideration.

PART TWO – REGULATIONS

1. CHARITABLE FUNDRAISING AMENDMENT REGULATION 2022

Penalty Notice Offences

The *Charitable Fundraising Amendment Regulation 2022* prescribes 26 offences under the *Charitable Fundraising Act 1991*, and two offences under the *Charitable Fundraising Regulation 2021* as penalty notice offences. Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a court to have their matter heard. This may impact on a person's right to a fair trial. That is, to have the matter heard by an impartial decision maker in public and to put forward their side of the case.

However, the Committee acknowledges that the amendment does not remove a person's right to have their matter heard and determined by a Court. Additionally, there are practical benefits in allowing matters to be dealt with by way of a penalty notice, including cost effectiveness and ease of administration. The amount payable under a penalty notice is also lower than the maximum penalty payable if the matter were determined by a Court. In the circumstances, the Committee makes no further comment.

2. LOCAL COURT OF NEW SOUTH WALES PRACTICE NOTE CIV 1

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

Right to a fair trial

The Practice Note requires a party to attend certain stages of civil proceedings in the Local Court remotely, including interlocutory steps. Parties must also attend final trials in the small claims division remotely. However, a party may still seek and obtain leave of the Court to appear in person. A Court can also direct that any step of proceedings be held in person if it advances the dictates of justice. Otherwise, where the Practice Note requires remote attendance, a party can apply for a matter to be heard in person.

To grant an application, the Court must be satisfied that the dictates of justice are advanced by the applicant appearing in person. The Practice Note does not specify the circumstances where the dictates of justice would be advanced by the applicant appearing in person. However it does state that that 'there will be few instances where parties will be disadvantaged by the requirement to appear remotely'.

Requiring remote, rather than in person, attendance may impact the extent to which individuals are able to meaningfully participate in proceedings, particularly self-representing litigants who may struggle with accessing or using the internet or remote mode of attendance. It also imposes a burden on the party wishing to appear in person to apply to the Court to do so. Further, it is unclear whether a person with a disability or impairment is able to give arguments or obtain reasons from the decision-maker, as the matter is heard in chambers and not at a hearing. Self-represented litigants may again be disadvantaged as they must navigate complex procedural requirements in order to appear in person. In the circumstances, the requirement may impact their right to a fair trial.

The Committee notes that the Practice Note provides avenues for in-person attendance. It also notes that remote attendance increases administrative efficiency and helps to expedite proceedings, in accordance with the purpose of the Practice Note. Noting however the potential impact on personal rights, the Committee refers this matter to the Parliament for its consideration.

3. ROAD AMENDMENT (ELECTRIC SCOOTER TRIAL) RULE 2022

Strict liability offence

The *Road Amendment (Electric Scooter Trial) Rule 2022* amends the *Road Rules 2014* by creating a number of strict liability offences for non-compliance with rules relating to the use of electric scooters. For example, Rule 262-11 makes it an offence to ride an electric scooter while carrying a person or animal. Rule 262-10 makes it an offence for a person under the age of 16 to ride an electric scooter. The maximum penalty for any of these new strict liability offences is $2,200 (20 penalty units).

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance and are commonly used in the context of road safety regulation. It also notes that the penalties are monetary only and do not contemplate a custodial sentence. In the circumstances, the Committee makes no further comment.

Penalty notice offences

The Road Amendment (Electric Scooter Trial) Rule 2022 amends *the Road Transport (General) Regulation 2021* by expanding the list of offences for which a penalty notice may be issued. Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a court to have their matter heard. This may impact on a person's right to a fair trial. That is, to have the matter heard by an impartial decision maker in public and to put forward their side of the case.

However, the Committee acknowledges that the amendment does not remove a person's right to have their matter heard and determined by a Court. Additionally, there are practical benefits in allowing matters to be dealt with by way of a penalty notice, including cost effectiveness and ease of administration. The amount payable under a penalty notice is also lower than the maximum penalty payable if the matter was determined by a Court. In the circumstances, the Committee makes no further comment.

Part One – Bills

1. Childcare and Economic Opportunity Fund Bill 2022

Date introduced	21 September 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Portfolio	Treasurer and Energy

Purpose and description

1.1 The object of the Bill is to improve access to affordable childcare and facilitate the participation of parents and carers in work by the provision of financial assistance particularly in areas where—

(a) there are childcare supply shortages, or

(b) there are higher barriers to parents and carers participating in work because of the affordability or accessibility, or both, of childcare.

Background

1.2 The Bill sets out a new legislative framework for the provision of childcare and financial assistance in NSW through the establishment of Childcare and Economic Opportunity Fund (the **Fund**).

1.3 In his second reading speech, the Hon. Matt Kean MP stated that this Bill 'addresses the number one recommendation of the NSW Government's Women's Economic Opportunities Review to make childcare more accessible and affordable and empower women to participate in the workforce'.

1.4 Part 1 of the Bill provides that its principal objective is to 'increase participation in the State's workforce, particularly for women, by making quality childcare more affordable and accessible'. It also provides that, to achieve this object, the Bill aims to 'reduce barriers to parents and carers participating in work' and 'improve affordability and accessibility of childcare'.

1.5 Part 2 of the Bill allows the Minister to commission independent persons to undertake a review into, and prepare a report for the Minister on, the childcare sector. In his second reading speech, the Hon. Matt Kean MP provided:

> These independent reports will provide the primary evidence base in the development of the fund's strategic direction and key strategic documents. The reports will provide

> independent advice to the Minister on areas where there are childcare supply shortages and oversupply, and areas in which parents face higher disincentives due to cost and accessibility barriers to childcare. As set out in part 2, clause 6, from 2026-27 onwards the reports will include an estimate of the annual amount required to be invested into the fund to support the delivery of the fund's objectives, up to a cap of $650 million per year indexed to the consumer price index [CPI].

1.6 Under section 7, the commissioned person may require another person to give information and answer questions in order to prepare the report after reasonable efforts to obtain information by other means have been unsuccessful.

1.7 Part 3 of the Bill establishes and makes provisions regarding the NSW Childcare and Economic Opportunity Fund Board, a statutory body representing the Crown. The functions of the Board are set out at section 12 and include to:

(a) develop strategic investment plans for its activities, including types of programs for which financial assistance will be provided to help achieve the Bill's objective

(b) develop and administer programs

(c) provide advice on request of the Minister or Treasurer.

1.8 Part 4 of the Bill establishes and makes provisions regarding the Fund, which must be established in the Special Deposits Account. In his second reading speech, the Minister said:

> Establishing the fund in the Special Deposits Account will ensure the Government's landmark investment to boost the supply of childcare is sufficiently safeguarded, enduring and gives certainty of funding for the sector. It will also create opportunities to support long-term public-private partnerships and innovative solutions from the sector to boost supply in target areas.

1.9 Part 5 includes miscellaneous provisions. Section 22 requires a person exercising functions under the Bill to 'consider the disincentives posed by childcare costs on persons deciding to participate, or increase participation, in work'. The Hon. Matt Kean MP explained that this relates to the ability for parents 'to work or work more hours if they want to'.

Issues considered by the Committee

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

Repeal by proclamation

1.10 Section 27 provides that the Bill is repealed on a day appointed by proclamation and published on the NSW legislation website, not before 30 June 2032. The proclamation may include related savings and transitional provisions.

> **The Bill is repealed on a day appointed by proclamation and published on the NSW legislation website. The proclamation may include related savings and transitional provisions.**

The Committee notes that Acts of Parliament are generally repealed by another Act or expiry, rather than by proclamation. It considers that this process facilitates an appropriate level of parliamentary scrutiny and transparency. The Committee therefore refers the repeal clause to the Parliament for its consideration of whether it inappropriately delegates legislative power.

Statutory rule expressed to commence before publication on NSW legislation website

1.11 Clause 1 of Schedule 2 provides that the regulations may contain provisions of a savings or transitional nature consequent on the commencement of the Bill or a provision amending the Bill.

1.12 Subsection (5) states that a savings or transitional provision taking effect before its publication on the NSW legislation website does not:

(a) affect the rights of a person existing before that publication in a way prejudicial to the person, or

(b) impose liabilities on a person for anything done or omitted to be done before publication.

1.13 In this section, 'person' does not include the State or an authority of the State.

1.14 Section 39(2A) of the *Interpretation Act 1987* provides:

> Neither the whole nor any part of a statutory rule is invalid merely because (without statutory authority) the statutory rule is published on the NSW legislation website after the day on which one or more of its provisions is or are expressed to commence. In that case, that or those provisions commence on the day the statutory rule is published on the NSW legislation website, instead of on the earlier day.

The Bill provides that a savings and transitional provision, which may be contained in the regulations, taking effect before publication on the NSW legislation website does not affect a person's existing rights prejudicially or impose liability on them for anything done or omitted to be done beforehand.

The Bill asserts that a provision contained in a regulation may apply before its publication on the NSW legislation website. This conflicts with section 39(2A) of the *Interpretation Act 1987*. The section provides that where a statutory rule is published on the NSW legislation website after the day on which one or more of its provisions is or are expressed to commence, that those provisions commence on the day the statutory rule is published on the NSW legislation website (rather than the earlier day). The Committee refers this matter to the Parliament for its consideration.

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

Significant matters not subject to parliamentary scrutiny

1.15 The Bill refers various matters to the regulations, including the following provisions:

(a) section 7(6), outlining other persons who may be required to give information to, or answer the questions of, a person commissioned by the Minister to

undertake a review into the childcare sector market (**commissioned person**) are prescribed by the regulations.

(b) section 8(3), allowing that the regulations may make provision about the use or disclosure of information obtained for the purposes of the market monitoring report. This may include information or answers a person is required to give to the commissioned person under section 7.

(c) section 12, whereby other functions of the NSW Childcare and Economic Opportunity Fund Board are prescribed by the regulations.

(d) section 24(c), whereby other persons authorised to exercise a function of the Minister, Board or Chairperson of the Board are prescribed by the regulations.

(e) clause 1(1) of Schedule 2, outlining that regulations may contain provisions of a savings or transitional nature consequent on the commencement of the Bill or a provision amending it.

The Bill delegates various matters to the regulations. Such matters include persons who may be subject to the power of a commissioned person to require information, and provisions about the use or disclosure of information obtained by the commissioned person. The Bill therefore delegates provisions regarding the use or disclosure of information, which may be obtained by an investigatory power, to the regulations. Depending on the circumstances, this may impact on an individual's right to privacy or privilege against self-incrimination. Although, the Committee notes that no civil penalty applies for non-compliance.

Other matters referred by the Bill to the regulations include other functions of the NSW Childcare and Economic Opportunity Fund Board and other persons to whom a function of the Minister, Board or Chairperson may be delegated. The regulations may also contain savings and transitional provisions.

The Committee generally prefers such significant matters to be included in the primary legislation, particularly where they may impact on personal rights. The Committee therefore refers this issue to the Parliament for its consideration.

2. Crimes (Administration of Sentences) Amendment (No Body, No Parole) Bill 2022

Date introduced	21 September 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Dr Geoff Lee MP
Portfolio	Corrections

Purpose and description

2.1 The object of the Bill is to amend the *Crimes (Administration of Sentences) Act 1999* to provide that a parole order must not be made for an offender serving a term of imprisonment for a homicide offence where the victim's body or remains have not been located, unless the Parole Authority is satisfied the offender has satisfactorily cooperated in locating the victim's body or remains.

Background

2.2 The Bill proposes amendments to the *Crimes (Administration of Sentences) Act 1999* (the **Act**) which would not allow a parole order be made for an inmate serving an imprisonment sentence for a homicide conviction. This is in circumstances where the victim's body or remains have not been located and the offender is deemed not to have satisfactorily cooperated with authorities to locate the body or remains.

2.3 In his second reading speech, the Hon. Dr Geoff Lee MP, Minister for Corrections, stated that the amendments would introduce stronger 'no body, no parole' laws that reflect similar laws in other Australian jurisdictions. He further commented that the amendments would reflect public sentiment and meet community expectations.

2.4 The Minister noted that the amendments try to balance the rights of offenders 'to parole' with the rights of victims' families 'to recover the remains of their loved ones'. He highlighted that the Bill:

> … recognises the pain and ongoing suffering experienced by victims' families and friends who have not only lost a loved one but are unable to locate their remains and put them to rest. The uncertainty of not knowing the location of a loved one's body is extremely distressing and creates ongoing trauma for victims' families and friends.

Issues considered by the Committee

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

Discretion in respect to parole matters

2.5 The Bill inserts section 135A into Division 2 of the Act, which applies to an offender serving an imprisonment term for a homicide offence in circumstances where the

victim's body or remains have not been located or where part of the victim's body or remains have not been located because of the offender or another's act or omission.

2.6 A homicide offence is defined as an offence of murder, manslaughter, infanticide, assault causing death, conspiracy to murder or accessory after the fact to murder. The Minister confirmed in his second reading speech that this definition seeks to 'capture serious offences which may involve missing remains'.

2.7 Specifically, section 135A(2) provides that the Authority must not make a parole release order unless it is satisfied that the offender has 'cooperated satisfactorily' to identify the victim's location. It also requires the Commissioner of Police (**Commissioner**) to provide a written report about the offender's cooperation in that respect, which the Authority must consider when deciding whether an offender has satisfactorily cooperated.

2.8 Existing section 135(1) of the Act provides that the paramount general duty of the State Parole Authority (the **Authority**) is to only make a parole order for the release of an offender where it is satisfied that is in the interests of the community's safety. Subsections (2) to (4) sets out a number of matters that the Authority must consider when determining whether it is in the interests of the community's safety. The Bill amends section 135(3) to remove whether an offender has 'failed to disclose the location of the remains of a victim' from this list of matters.

2.9 Existing section 135(5) also provides that the Authority must not make a parole release order for a 'serious offender' unless the Council advises that it is appropriate to do so. Subdivision 3 of Part 6, Division 2 makes further provisions when considering parole matters for serious offenders. Sections 143 to 143B require the Authority to begin considering whether a serious offender should be released on parole:

(a) at least 60 days before the offenders' parole eligibility date,

(b) at least 90 days before any subsequent anniversary of that eligibility date, or

(c) otherwise, at any time after that eligibility date in circumstances prescribed by the regulations as constituting manifest injustice.

2.10 An offender becomes eligible for release on parole at the end of the non-parole period of their sentence. Under the *Crimes (Sentencing Procedure) Act 1999*, a court sentencing an offender to an imprisonment term must set a non-parole period, unless reasons exist for declining to do so. The sentencing court is also required to record reasons for setting a non-parole period which does not align with the standard periods or length requirements set out in the Act.

2.11 In his second reading speech, the Minister described the intention of proposed section 135A is to incentivise offenders imprisoned for a homicide offence to cooperate in locating the victim's body. He stated that this:

> … aims to increase the likelihood of finding remains in the hope that this may offer some degree of finality or closure to those close to the victim. The bill will help the families and friends of victims get the closure that they deserve.

2.12 Finally, the Bill also inserts subsection (3A) into section 160 to clarify that section 135A applies to parole orders for exceptional circumstances under section 160. This would mean the Authority cannot make a parole release order in exceptional circumstances for offenders convicted of a homicide offence where the victim's body or remains have not been located.

2.13 The Minister stated in his second reading speech that the reforms made by the Bill ' will strengthen our current legislative framework in relation to parole and send a clear message to offenders that, in order to be released into the community on parole, they must cooperate in assisting to locate their victims' remains.'

The Bill amends the *Crimes (Administration of Sentences) Act 1999* to insert a mandatory requirement for release on parole of an offender who has been convicted of and imprisoned for a homicide offence, where the victim's body or remains have not been located. Specifically, it requires the State Parole Authority not make a parole release order unless the offender has 'cooperated satisfactorily' to identify the victim's location. This requirement applies even where the Authority is satisfied under section 160 that release is necessary in exceptional extenuating circumstances or where the offender is dying.

The Committee notes that under the Act, the State Parole Authority ordinarily assesses whether it is in the interests of community safety to grant a parole order allowing offenders to continue serving the rest of their sentence in the community. Additionally, this legislative process is triggered when an offender approaches their parole eligibility date. That date is determined by the sentencing judge who has the discretion to impose and determine the length of a non-parole period when imposing a sentence of imprisonment.

By prohibiting offenders from being considered for release on parole under the process set out in the Act, the Bill may extend the non-parole period beyond that imposed by the sentencing judge, in effect limiting the discretion of the sentencing judge and the State Parole Authority. Additionally, it may impact on a prisoner's right to freedom from arbitrary detention if they are required to serve longer imprisonment periods because they are prohibited from the ordinary parole consideration process, even in typically exceptional circumstances.

The Committee acknowledges that release on parole is discretionary and requires balancing the rights of offenders who can demonstrate reformed behaviour with the interests of the community's safety. However, the Committee notes that the impact on victims and their families and the offender's cooperation with investigators are existing considerations for a sentencing judge in imposing an imprisonment sentence with a non-parole period. Given that there are no exceptions to the mandatory requirement, the Committee refers the matter to Parliament for its consideration.

Retrospectivity

2.14 The Bill inserts clause 139 as a savings and transitional provision into Schedule 5, Part 28 of the Act. This clause clarifies that section 135A applies:

(a) whether the offender was convicted or sentenced before or after the commencement of the section, and

(b) whether or not an application for the parole order has been made before the commencement of the section.

2.15 Speaking to these savings and transitional provisions in his second reading speech, the Minister stated that the application of section 135A to offenders convicted or sentenced and applications for parole made before the Bill commences as an Act:

> … is to ensure that offenders in prison who may soon be eligible for parole but have refused to cooperate in locating their victim's remains are captured by the new provision.

The Bill amends the *Crimes (Administration of Sentences) Act 1999* to provide that the mandatory requirement for release on parole introduced applies to offenders convicted or sentenced and applications for parole made before the commencement of the relevant provisions. This allows the provisions to operate retrospectively. The Committee generally comments where provisions apply retrospectively as it runs counter to the rule of law principle that a person is entitled to know the law that applies to them at any given time.

The Committee acknowledges that the retrospective application of the provision is to ensure the Bill's policy objectives are achieved. However, it notes that the retrospective application could have negative implications for imprisoned offenders making parole applications prior to the commencement of the Bill as an Act. For this reason, the Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

3. Crimes Amendment (Money Laundering) Bill 2022; Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022; Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2022

Date introduced	21 September 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Toole MP
Portfolio	Police

Purpose and description

Crimes Amendment (Money Laundering) Bill 2022

3.1 The object of the Bill is to prevent and disrupt organised and other serious crime by making amendments to the *Crimes Act 1900* and the *Criminal Procedure Act 1986* to—

(a) create new offences relating to money laundering, and

(b) set out the circumstances in which there are reasonable grounds to suspect property is the proceeds of crime, and

(c) provide for circumstances where there are reasonable grounds for suspecting property is the proceeds of crime, including circumstances where representations about property being the proceeds of crime or proceeds of general crime are obtained in the course of a controlled operation, and

(d) enable alternative verdicts to be reached for an offence of money laundering relating to the proceeds of general crime, and

(e) provide that there is no requirement to prove an offence was committed in relation to property that is the proceeds of general crime to prove an offence under the *Crimes Act 1900*, Part 4AC, and

(f) provide that an offence under the *Crimes Act 1900*, section 193BA(3) is a summary offence.

Device Prohibition Orders Bill 2022

3.2 The object of the Bill is to prevent and disrupt organised and other serious crime by—

(a) giving police an investigative tool by establishing a scheme for dedicated encrypted criminal communication device prohibition orders that provide for investigations of criminal activity involving dedicated encrypted criminal communication devices, and

(b) making possession of a dedicated encrypted criminal communication device for the purpose of committing or facilitating serious criminal activity an offence, and

(c) setting out powers given by a dedicated encrypted criminal communication device prohibition order, and

(d) setting out the requirements and processes for an application for a dedicated encrypted criminal communication device prohibition order, and

(e) providing that a dedicated encrypted criminal communication device prohibition order may only be made by an authorised magistrate and the obligations on and requirements of the magistrate making the order, and

(f) providing for the revocation of a dedicated encrypted criminal communication device prohibition order, and

(g) providing for the reporting requirements of the Commissioner of Police about a dedicated encrypted criminal communication device prohibition order, and

(h) establishing the role of oversight commissioner and providing for the declaration of authorised magistrates.

Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2022

3.3 The object of the Bill is to prevent and disrupt organised and other serious crime by making amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* and the *Criminal Procedure Act 1986* to—

(a) provide for digital evidence access orders, and

(b) require a specified person to provide reasonable and necessary information or assistance to enable access to data held in a relevant computer, and

(c) prevent an application for review of a crime scene warrant causing a stay on the operation of a digital evidence access order in connection with the warrant, and

(d) require the Minister to conduct a review of the proposed provisions set out in the proposed *Law Enforcement (Powers and Responsibilities) Act 2002*, and

(e) provide that the offence of giving false or misleading information in applications for a digital evidence access order is a summary offence.

Background

3.4 The *Crimes Amendment (Money Laundering) Bill 2022* (**Money Laundering Bill**), *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* (**DECCD Bill**) and the *Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2022* (**Digital Evidence Access Bill**) (collectively, the **Bills**) seek to reform the broader legislative framework for the New South Wales criminal justice system and enforcement agencies.

3.5 In his second reading speech to the Cognate Bills, the Hon. Paul Toole MP, Deputy Premier and Minister for Police, described that the package of reforms are intended to:

> … ensure that our law enforcement agencies, the NSW Police Force and the NSW Crime Commission, have the necessary tools to respond to serious and organised crime in New South Wales. These reforms… will ensure that New South Wales has some of the toughest and most comprehensive laws to tackle organised crime in the country.

3.6 The Minister further stated that the Bills 'target essential enablers of organised crime', including targeting money laundering operations and empowering law enforcement agencies in respect to digital devices and dedicated encrypted criminal communication devices (**DECCDs**) connected with crime. In line with this intent, the Money Laundering Bill proposes amendments to the *Crimes Act 1900* (the **Crimes Act**) and the *Criminal Procedure Act 1986* (the **CPA**) to introduce additional offences for laundering money and other proceeds connected to 'general crime'.

3.7 Separately, the DECCD Bill would, if enacted, allow authorised magistrates to issue DECCD prohibition orders and amend a number of Acts to provide for enforcement powers and new offences flowing from the issue of these prohibition orders. Additionally, the Digital Evidence Access Bill proposes to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* (the **LEPRA**) and CPA to enable relevant law enforcement agencies to access digital evidence in connection to serious crimes from computers.

3.8 In the closing remarks of his second reading speech, the Minister highlighted that 'criminals are constantly adapting and they go to great lengths to hide their crimes. As they adapt, so too must our response'. He stated that the reforms proposed by the Bills are important measures as they would give the state's law enforcement agencies the tools needed to combat evolving criminal activity.

3.9 Although these Bills are separate Acts when operative, the Money Laundering Bill, DECCD Bill and Digital Evidence Access Bill are cognate and were introduced together. Therefore, in accordance with the Committee's usual practice, the Bills have been considered in the one report.

Issues considered by the Committee

Crimes Amendment (Money Laundering) Bill 2022

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

Reversal of onus of proof – defence to dealing with proceeds of general crime offence

3.10 The Money Laundering Bill inserts section 193BA into Part 4AB of the Crimes Act. This section establishes offences for dealing with 'proceeds of general crime' valued at $100 000 or more while 'being reckless as to whether it is proceeds of general crime' (**laundering proceeds of general crime**).

3.11 Section 193BA(3) establishes the general offence for laundering proceeds of general crime and subsection (1) establishes a greater offence for a person who launders proceeds of general crime with the intention to conceal or disguise features of the property. These offences carry a maximum penalty of 10 and 15 years' imprisonment respectively.

3.12 Section 193BA(4) provides a defence in criminal prosecution for an offence of laundering proceeds of general crime. This defence requires the defendant to satisfy the court that they dealt with the proceeds of crime 'to assist the enforcement of a law of the Commonwealth, a State or a Territory'.

The *Crimes Amendment (Money Laundering) Bill 2022* inserts section 193BA the *Crimes Act 1900*. This establishes offences for a person who deals with proceeds of general crime valued at $100 000 or more, while being reckless as to whether it is proceeds of general crime. Subsection (4) provides a defence to an offence under this section, if the defendant can satisfy the court that they dealt with the property to assist the enforcement of a law.

This defence is substantially identical to defences for money laundering offences in Part 4AB of the Act, under sections 193B and 193D. The Committee previously reported on the defences under sections 193B and 193D when they were first introduced, in its Digest No. 11 of 2005.[1] Consistent with those comments, the defence under section 193BA(4) may reverse the onus of proof by requiring that the defendant prove any matter of their innocence.

In regards to criminal actions, a reverse onus may undermine a person's right to the presumption of innocence as contained in Article 14 of the ICCPR.[2] The right to the presumption of innocence protects an accused person's privilege to be presumed innocent until proved guilty according to law.

The Committee notes that the prosecution still bears the onus of proving the elements of the offence. It also acknowledges that the presumption of innocence is not absolute and defences where the burden of proof shifts to the defendant are not uncommon in criminal law. However, the Committee notes that these offences carry a maximum penalty of 10 and 15 years' imprisonment. It also

[1] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 11 of 2005*, 10 October 2005.

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

notes that no defences are otherwise available to accused persons in the prosecution of these offences. For these reasons, the Committee refers this matter to Parliament for its consideration.

Procedural fairness – proof of offences in relation to property

3.13 As noted, the Money Laundering Bill inserts offences for laundering proceeds of general crime under section193BA in Part 4AC of the Crimes Act. It amends section 193A to define 'proceeds of general crime' as:

> … money or other property that is wholly or partly derived or realised, directly or indirectly, by a person from the commission of an offence against a law of—
>
> (a) the State, or
>
> (b) the Commonwealth, another State or a Territory, or
>
> (c) another country.

3.14 Section 193F sets out matters which do not need to be established to prove elements of offences under Part 4AC of the Crimes Act. Relevantly, subsection (1) clarifies that proving property is the proceeds of crime does not require establishing a particular offence was committed or a particular person committed an offence concerning that property. The Bill also inserts subsection (3) which clarifies that, in order to prove that property is proceeds of general crime, the prosecution does not need to establish that:

(a) 'an offence or a type of offence' was committed concerning the property, or

(b) a particular person committed an offence or type of offence concerning the property.

3.15 Regarding new section 193F(3), the Minister stated in his second reading speech that:

> The intention is that property will be considered to be proceeds of general crime if evidence about the property gives rise to the clear inference that it is derived wholly or partly by any person, directly or indirectly, from crime generally. This, coupled with the mental element of recklessness in the new proceeds of general crime offences, is intended to overcome the difficulties with prosecuting an offence against section 193B of the Crimes Act, arising from the decisions in [*Chen v Director of Public Prosecutions (Cth)* [2011] NSWCCA 205] and [*R v McKellar (No 3)* [2014] NSWSC 106].

3.16 He described the impact of those judgments which clarified that section 193F(1) only relieves the prosecution from having to prove that the property alleged to be proceeds of crime came from 'a particular criminal event'.

The *Crimes Amendment (Money Laundering) Bill 2022* creates offences in the *Crimes Act 1900* for a person who deals with proceeds of general crime valued at $100 000 or more. It defines 'proceeds of general crime' to mean property which entirely or partly comes, directly or indirectly, from 'the commission of an offence against a law'. It also inserts subsection (3) into section 193F which clarifies that, in criminal proceedings for this offence, the prosecution is not

required to establish 'an offence or a type of offence' was committed in relation to property, in order to prove that it is 'proceeds of general crime'.

This means a person may be convicted for dealing with property of a certain value without needing to prove it was connected to any offence or type of offence, if the prosecution can establish the mental element. This is despite 'proceeds of general crime' being defined by its connection to the commission of an offence. As it is not clear what must be proved to establish the physical element of the offence, the Bill may therefore impact the accused person's right to procedural fairness.

The Committee notes that the provisions are intended to strengthen criminal prosecution of organised crimes to better protect the community. It also acknowledges that the prosecution is still required to prove the mental element of recklessness to whether property is proceeds of general crime beyond a reasonable doubt. However, the Committee considers that 'proceeds of general crime' is widely defined and could capture any property on inference. It also notes that these offences carry a maximum penalty of 10 or 15 years' imprisonment. For these reasons, the Committee refers this matter to Parliament for its consideration.

Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022

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

Wide powers of enforcement – entry, search and seizure without warrant

3.17 The DECCD Bill establishes a scheme for the issue of DECCD prohibition orders. Schedule 1 provides that a DECCD prohibition order may be against a person who has been convicted of a 'serious criminal offence' and is at least 18 years of age at the time of application. Under section 17, an authorised magistrate can issue a DECCD prohibition order which remains in force for a period between 6 month to 2 years.

3.18 Part 2 sets out the powers which may be exercised at any time while a DECCD prohibition order is in force. Section 5(1) provides that the police officer may do any of the following without a warrant, for the purpose of determinating whether a person possesses a DECCD:

(a) Stop, detain and search them,

(b) Enter and search premises where they reside, the officer reasonably suspects they own or control/manage directly, or the officer reasonably suspects they are using it for an unlawful purpose,

(c) Stop, detain and search a vehicle they are driving, control/manage or occupy,

(d) Detain and search a vehicle parked on an area that is part of or provided for the use of premises that can be searched that is not shared with another dwelling/premises,

(e) Detain and search a vehicle parked on an area that is shared with another dwelling/premises where the officer reasonably suspects the vehicle is being used by them for an unlawful purpose, and

(f) Use electronic equipment to inspect or search a computer identified during a search.

3.19 Subsections (2) and (3) clarify that the provisions of the LEPRA, including relevant legislative limitations to the exercise of search and particularly strip search powers, apply to searches conducted under this section.

3.20 Additionally, section 7 provides for seizure powers that a police officer may exercise in the course of a search conducted under section 5. Specifically, it empowers an officer to seize and detain 'all or part of a thing' they suspect on reasonable grounds either:

(a) May provide evidence that an offence was committed involving a DECCD or an offence for non-compliance or prohibited disclosure of a production order under the *Criminal Assets Recovery Act 1990*,

(b) Was unlawfully obtained, or

(c) Is a 'dangerous article' as defined under the LEPRA.

3.21 However, section 17(2) of the DECCD Bill prohibits exercising any power under a DECCD prohibition order until a copy of the order has been served on the subject of the order. Section 8 also requires the Commissioner of Police (the **Commissioner**) to ensure written notice about a search of premises or a vehicle is given to a person subject of a DECCD prohibition order who was not present during the search as soon as practicable afterwards.

3.22 Additionally, section 21 requires the Commissioner to give a report about the number of searches conducted under a prohibition order, what was done and seized, and evidence uncovered while exercising those powers. That report is to be given to the authorised magistrate who issued the order and the 'oversight commissioner' as soon as practicable and no later than 60 days after the order ceases to be in force. Section 22 establishes the office of the oversight commissioner who must be an experienced Australian legal practitioner and not a member of the NSW Police Force.

The *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* gives a number of powers which police officers can exercise without a warrant, at any time while a dedicated encrypted criminal communication device (DECCD) prohibition order is in force. This includes exercising powers under section 5 to stop, detain and search the person subject of the prohibition order and a vehicle connected to them, as well as enter and search premises connected to them, for the purpose of determining whether they possess a DECCD.

Section 7 also empowers a police officer to seize and detain in the course of these searches any 'thing' which they suspect on reasonable grounds may provide evidence of the commission of a relevant offence, was unlawfully obtained or is a dangerous article. There appears to be no provisions in the Bill which define or

narrow the scope of the ordinary meaning of 'thing' to limit what may be seized and detained by officers in the course of conducting a search under an in-force DECCD prohibition order.

The Committee notes that the Bill thereby provides wide powers of enforcement. The exercise of these enforcement powers may interfere with individual rights including, for example, their real property rights in respect to the power to enter and search premises and vehicles without warrants and to seize 'things', or their right to security of the person in respect to the power to stop, search and detain a person against whom the prohibition order is made.

The Committee recognises that the overarching aim of the provisions is to strengthen law enforcement in their investigation and prevention of organised criminal activity using encrypted devices. It also acknowledges that the Bill provides a number of safeguards in respect to the conduct and notice of these search powers, as well as requiring service of the order on the subject person before exercising any powers and reporting back to independent scrutineers once the order ceases to be in force.

However, the Committee notes that Bill provides that a prohibition order is in force for a specified period that is between six months to two years. The person subject of an order can be subject to the exercise of these powers at any time during that period, without the need for a warrant. This is in circumstances where the person has been convicted of a past serious criminal offence but is not currently charged with any further offences. For these reasons, the Committee refers this matter to Parliament for its consideration.

Reversed onus of proof – defence to possession of DECCD offence

3.23 The DECCD Bill amends the Crimes Act to insert Part 4ABA, which establishes an offence under section 192P(1) for possessing a DECCD where there are 'reasonable grounds to suspect' possession of the device was to commit or facilitate serious criminal activity. This offence carries a maximum penalty of 3 years' imprisonment.

3.24 A defence to this offence is provided under section 192P(3), which requires the defendant in a criminal prosecution to satisfy the court that they possessed the DECCD either:

(a) In the ordinary course of their duties as an officer, employee or agent of a government agency or public authority in Australia, or

(b) To supply to or in partnership/agreement with a government agency in Australia.

The *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* inserts section 192P into the *Crimes Act 1900*. This section establishes an offence for a person possesses a dedicated encrypted criminal communication device (DECCD) which is reasonably suspected of being used to commit or facilitate serious criminal activity. Subsection (3) provides a defence to an offence under these provisions if the defendant can satisfy the court that they possessed the property in the ordinary course of their duties working for a

> **government agency or public authority, or to supply to or in partnership/agreement with a government agency.**
>
> **This defence reverses the onus of proof by requiring that the defendant prove any matter of their innocence. In regards to criminal actions, a reverse onus may undermine a person's right to the presumption of innocence as contained in Article 14 of the ICCPR. The right to the presumption of innocence protects an accused person's privilege to be presumed innocent until proved guilty according to law.**
>
> **However, the Committee notes that the prosecution still bears the onus of proving the elements of the offence. It also acknowledges that the presumption of innocence is not absolute and defences where the burden of proof shifts to the defendant are not uncommon in criminal law. In the circumstances, the Committee makes no further comment.**

Right to silence – exclusion of privilege against self-incrimination

3.25 As earlier discussed, Part 2 of the DECCD Bill provides a number of powers which may be exercised at any time while a DECCD prohibition order is in force. Proposed sections 5(1)(d) and 6(1) provides that a police officer may direct a person against whom a DECCD prohibition order is in force (the **subject person**) to give them information or assistance. This information or assistance must be 'reasonably necessary' to view or access data from a computer that was identified during a search under section 5, or seized under the prohibition order which the officer reasonably suspects is a DECCD.

3.26 It is an offence under section 6(2) for a person not to comply with this direction without reasonable excuse. The maximum penalty for this offence is 3 years' imprisonment. Subsection (3) clarifies that a reasonable excuse does not include that compliance with a direction or requirement of a police officer 'would tend to' incriminate them or expose them to penalty.

3.27 Separately, the DECCD Bill also inserts Part 5A into the LEPRA which establishes a scheme for the issue of DECCD access orders. Section 80B enables a police officer to apply to a relevant magistrate for an access order if they have reasonable grounds to suspect a specified person is committing an offence of possessing a DECCD, and considers the order will assist law enforcement to determine whether the identified device is a DECCD.

3.28 Division 4 of the Bill sets out the powers and requirements on the issue of a DECCD access order. Relevantly, section 80M provides that a DECCD access order authorises a police officer to examine the specified device and any data accessible from it to determine whether it is a DECCD. It also authorises an officer to direct a 'relevant person for the order' to provide information/assistance to the officer which is reasonable and necessary to enable access to the data held in or from a device specified or within scope of the order.

3.29 The Minister clarified in his second reading speech that these powers are:

> … not intended to provide for broader powers of search of content on the device beyond confirming its status as a DECCD. Should access to the device for other

purposes be required by the police officer, the police officer will need to rely on another lawful authority.

3.30 The DECCD Bill also inserts section 80O into LEPRA, which establishes an offence for non-compliance with that direction without reasonable excuse. It also makes it an offence to give the officer purported compliance information that is false or misleading in a 'material particular' without reasonable excuse, unless they inform the officer it is false or misleading. This offence carries a maximum penalty of $11 000 and/or 5 years' imprisonment.

3.31 Section 80O(2) clarifies that it is not a reasonable excuse that compliance with a direction or requirement of a police officer 'would tend to' incriminate them or expose them to penalty. However, section 80M(3)(a) explicitly limits the use of the information provided only for the purpose of accessing data held in or from a device.

3.32 However, as earlier noted, section 17(2) prohibits exercising any power under a DECCD prohibition order until a copy of the order has been served on the subject person. Section 80N inserted into the LEPRA also requires a person executing a DECCD access order to produce the order for inspection by the relevant person for the order if they request it.

Section 6 of the *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* enables a police officer to direct a person against whom a dedicated encrypted criminal communication device (DECCD) prohibition order is in force to give the officer information or assistance. That information or assistance must be deemed reasonably necessary to enable police to view or access data from a computer identified during a search or seized on reasonable suspicions it is a DECCD.

The Bill also inserts section 80O into the *Law Enforcement (Powers and Responsibilities) Act 2002* which empowers a police officer executing a DECCD access order to require a relevant person to give information or assistance to the officer. That information or assistance must be deemed reasonable and necessary to enable access to the data in or from a device permitted under the order, to determine whether the device is a DECCD.

Non-compliance with any direction under section 6 of the Bill or section 80O in the Act without reasonable excuse is an offence, carrying a maximum penalty of 3 years' imprisonment, or $11 000 and/or 5 years' imprisonment respectively. Both provisions clarify that non-compliance because it would 'tend to' incriminate or expose the person to a penalty is not a reasonable excuse. The Bill may thereby impact a person's right to silence by excluding their privilege against self-incrimination in the exercise of state enforcement powers.

The Committee acknowledges that the powers to direct the provision of information or assistance require service of the order on the subject person before any powers are exercised. It also notes the Bill is intended to strengthen law enforcement in their investigation and prevention of organised criminal activity using encrypted devices.

However, the Committee notes that the offences of non-compliance may require a person to provide information or assistance that could incriminate them on

pain of penalty, in this case potential imprisonment. It further notes that there are no provisions limiting the use of data accessed by information or assistance compelled from the person, as evidence against them in criminal prosecutions. For these reasons, the Committee refers the matter to Parliament for its consideration.

Application of DECCD access order to minors

3.33 As noted earlier, the DECCD Bill inserts Part 5A into the LEPRA to establish a scheme for the issue of DECCD access orders. Division 2 provides for matters relevant to applications for access orders, including section 80B which allows a police officer to apply to a magistrate for an access order. Section 80F(1) sets out the information which must be included in an application for a DECCD access order. This information includes ' details of the person in relation to whom it is proposed the DECCD access order will be issued'.

3.34 However, section 80F(2) provides that, if this person is under 18 years of age, the application must be accompanied by 'a document signed by a police officer of the rank of Inspector or above authorising the applicant to make the application'. Speaking to similar access orders under the Digital Evidence Access Bill, the Minister acknowledged there is no age restriction on the issuance of an order but noted this provision is 'an appropriate safeguard to ensure additional oversight when dealing with young people'.

The *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* inserts Part 5A into the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide for the issuance of dedicated encrypted criminal communication device (DECCD) access orders. Section 80F requires an application by a police officer for an access order must include details of the person to whom the access order is proposed to be issued. It clarifies that, where that person is under 18 years of age, an officer of at least Inspector rank must authorise the making of the application.

By allowing the issue of DECCD access orders to persons aged under 18 years, the Bill may thereby authorise the exercise of enforcement powers by police under the order towards minors. These powers include the ability to direct persons to give information or assistance to police in order to access the data in a device suspected of being a DECCD. Non-compliance with such a direction without reasonable excuse is an offence carrying a maximum penalty of $11 000 and/or 5 years' imprisonment.

The Committee acknowledges that there are safeguard provisions requiring the authorisation of an officer at Inspector rank or above to make an application for an access order in respect to a minor. However, it notes that this oversight measure only applies to the making of the application and there are no additional measures in respect to the exercise of powers under the access orders towards minors. It also notes that young people under the age of 18 years may lack the capacity to understand the consequences of the access order and non-compliance with a direction given under the order. 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

Wide regulation-making power

3.35 Section 26 of the DECCD provides a general regulation-making power in respect to a matter that:

(a) By the Bill, is required or permitted to be prescribed, and

(b) Is 'necessary or convenient to be prescribed for carrying out or giving effect to' the Bill.

The *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* provides a general regulation-making power under section 26. Specifically, it allows regulations to prescribe a matter that is 'necessary or convenient' for carrying out or effecting the Bill.

There appears to be no provisions which define or narrow the scope of the ordinary meaning of 'convenient'. The Bill may therefore include a wide 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 the overarching aim of the provisions is to strengthen law enforcement in their investigation and prevention of organised criminal activity using encrypted devices. However, the Committee notes that the provisions may effectively allow regulations to prescribe matters with little limit. For these reasons, the Committee refers this 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

Restriction on avenues for review - Applications for revocation of prohibition order

3.36 An application for a DECCD prohibition order is not required to be decided 'in a courtroom' under section 14(2) of the DECCD Bill. The Bill further provides that the person who would be or is subject of a prohibition order is not:

(a) Entitled to be told about the application – section 14(1)(a).

(b) Permitted to make a submission to the application – section 14(1)(b).

(c) Entitled to know the reasons for the decision making the prohibition order – section 15(2)(a).

(d) Allowed access to or to be provided with a copy or the original of any document forming part of the application – section 15(2)(b).

3.37 Part 5 of the Bill provides avenues through the Local Court for the revocation of a DECCD prohibition order. Section 19 sets out the process for the subject person of a DECCD prohibition order (the **subject person**) to apply to have it revoked, and section 20 sets out the process where the Commissioner or the oversight

commissioner is the applicant. For the subject person, section 19(8) prohibits them from applying for revocation within six months of being served the order or refused a revocation application by the court.

3.38 Under sections 19 and 20, after receiving an application, the Local Court may require the applicant to provide the court with a copy of the DECCD prohibition order, and can affirm, vary the terms of or revoke the DECCD prohibition order. The court may only revoke the order if it is satisfied either:

(a) The order is unreasonably onerous in the circumstances,

(b) The subject person is not likely to use a DECCD to avoid law enforcement detecting criminal activity, or

(c) The risk of the subject person using a DECCD to avoid law enforcement detecting criminal activity could be mitigated another way.

3.39 Subsection (6) of both sections 19 and 20 prohibits the Local Court from being provided either:

(a) A document forming part of the application for the relevant DECCD prohibition order, or

(b) The reasons for making the order recorded by the authorised magistrate.

3.40 However, both sections explicitly provide that the subsection (6) prohibition does not prevent the Commissioner from providing information to the Local Court when hearing an application for revocation, if the Commissioner 'considers it to be relevant to the application'.

The *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* establishes the legislative framework for the issue of dedicated encrypted criminal communication device (DECCD) prohibition orders. This includes provisions allowing an application for a prohibition order to be decided by an authorised magistrate outside of a courtroom. It also excludes the person who would be or is subject of a prohibition order from being told about or making submissions to the application, knowing the reasons for the making of an order against them or accessing documents forming part of the application.

While the Bill provides avenues for the subjected person to apply to the Local Court for revocation of the order under Part 5, section 19(8) prohibits them from applying within six months of being served the order. Section 19(6) also prohibits the court from being provided any document forming part of the application for the order, or the reasons recorded by the magistrate for making the order.

The Bill may effectively prevent the person subject of a DECCD prohibition order and the Local Court reviewing an application for revocation of that order from knowing the reasons for the making of that order. This may limit the ability of affected persons to seek a review of judicial decisions in a higher court.

The Committee appreciates that these provisions are intended to enable law enforcement in respect to DECCD and providing notice to 'subject persons' may

frustrate that purpose if an individual had the opportunity to dispose of the device. It also acknowledges that the Commissioner of Police may provide the court with whatever information they consider relevant to the revocation application, which may include the reasons for the making of the order.

However, the Committee notes that the prohibition orders subject the person to search, detain and seizure powers without warrant at any time the order is in force. By preventing a subject person from applying for revocation within 6 months, they are potentially subject to these powers during this period without an avenue for review. In these circumstances, it is important that affected persons can access independent review of decisions to issue these orders. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Matter deferred to regulations – dedicated encrypted criminal communication device

3.41 As earlier noted, the DECCD Bill inserts Part 4ABA into the Crimes Act which establishes an offence under section 192P for possessing a DECCD. Section 192O defines a DECCD under this Part as a mobile electronic device that:

> (a) is specifically designed or equipped for use to facilitate communication, between persons reasonably suspected of being involved in serious criminal activity, to defeat law enforcement detection, and
>
> (b) uses hardware modifications or software deployed on the device that—
>
> (i) modifies the device's factory operating system, whether temporarily or permanently to block or replace key features usually available on the device's operating system, including, for example, voice call, web browsers or geolocation services, and
>
> (ii) enables encryption of communication between users, and
>
> (c) is configured in a way that specifically impedes law enforcement access to information on the device.

3.42 However, a DECCD does not include a device that has been designed, modified or equipped with software or security features which a reasonable person would consider were applied for a primary purpose other than 'facilitating communication between persons involved in criminal activity to defeat law enforcement detection'. Section 192O also provides regulation-making powers to prescribe devices as being and not being a DECCD.

The *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022* inserts Part 4ABA into the *Crimes Act 1900* to establish an offence for possessing a dedicated encrypted criminal communication device (DECCD). Section 192O defines what mobile electronic devices are and are not a DECCD for the purpose of the offence. It also allows regulations to prescribe other devices that are and are not DECCDs under Part 4ABA.

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 determine what conduct constitutes an offence carrying a maximum penalty of 3 years' imprisonment.

However, the Committee acknowledges that these provisions are intended to build more flexibility into the regulatory framework and allow law enforcement to better respond to the changing nature of electronic criminal activity. It 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*. In the circumstances, the Committee makes no further comment.

Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2022

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

Right to silence – exclusion of privilege against self-incrimination

3.43 The Digital Evidence Access Bill inserts Division 4A into Part 5 of the LEPRA, to enable the issue of digital evidence access orders.

3.44 Similar to a DECCD access order, a digital evidence access order would allow an executing officer under section 76AM to give directions to the person specified to give information or assistance that is reasonable and necessary to enable access to or allow copying/conversion of data from a computer seized under a search warrant or crime scene warrant.

3.45 It also establishes an offence for non-compliance with that direction under section 76AO, identical to the offence for non-compliance in respect to a DECCD access order earlier noted, including the exclusion of self-incrimination as a reasonable excuse for non-compliance. The use of this information is also limited to only for the purpose of accessing the data in a relevant computer.

3.46 Speaking to these provisions, the Minister noted that this offence and exclusion:

> … makes clear that criminals who know they have incriminating material on their device are not given a potential legal avenue to refuse to comply with a direction. We do not abrogate this privilege lightly and it is essential to ensure these orders operate as intended. The bill does not abrogate legal professional privilege.

The *Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2022* inserts section 76AM into the *Law Enforcement (Powers and Responsibilities) Act 2002* which empowers an officer executing a digital evidence access order to require a relevant person to give information or assistance to the officer. That information or assistance must be deemed reasonable and necessary to enable access to or copying/conversion of the data held in a computer covered by the order.

Non-compliance with a direction under section 76AM without reasonable excuse is an offence, carrying a maximum penalty of $11 000 and/or 5 years' imprisonment. Section 76AO provides that it is not a reasonable excuse that compliance would 'tend to' incriminate or expose the person to a penalty. The

Bill may thereby impact a person's right to silence by excluding their privilege against self-incrimination in the exercise of state enforcement powers.

As previously noted, the Committee recognises that stopping individuals from preventing law enforcement accessing devices with incriminating materials may facilitate law enforcement of organised crime through digital means. It also notes that there are safeguard provisions limiting the use of that information by police to only accessing the data in the relevant computer.

However, the Committee notes that the offences of non-compliance may require a person provide information or assistance that could incriminate them on pain of penalty, in this case potential imprisonment. It further notes that there are no provisions limiting the use of data accessed by information or assistance compelled from the person, as evidence against them in criminal prosecutions. For these reasons, the Committee refers the matter to Parliament for its consideration.

Application of digital evidence access order to minors

3.47 The Digital Evidence Access Bill inserts section 76AF into the LEPRA, setting out the information that must be included in an application for a digital evidence access order. Similar to section 80F for a DECCD access order discussed earlier, section 76AF allows an application for a digital evidence access order issued to a person under the age of 18 years, provided there is documentation that the application was authorised by a police officer of Inspector rank or above.

The *Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2022* inserts Division 4A into Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide for the issuance of digital evidence access orders. Section 76AF requires an application for an access order must include details of the person to whom the access order is proposed to be issued. It clarifies that, where that person is under 18 years of age, an officer of at least Inspector rank must authorise the making of the application.

By allowing the issue of digital evidence access orders to persons aged under 18 years, the Bill may thereby authorise the exercise of enforcement powers by police under the order towards minors. These powers include the ability to direct persons to give information or assistance to police in order to access the data in a computer device covered by the order. Non-compliance with such a direction without reasonable excuse is an offence carrying a maximum penalty of $11 000 and/or 5 years' imprisonment.

The Committee acknowledges that there are safeguard provisions requiring the authorisation of an officer at Inspector rank or above to make an application for an access order in respect to a minor. However, it notes that this oversight measure only applies to the making of the application and there are no additional measures in respect to the exercise of powers under the access orders towards minors. It also notes that young people under the age of 18 years may lack the capacity to understand the consequences of the access order and non-compliance with a direction given under the order. For these reasons, the Committee refers this matter to Parliament for its consideration.

4. Criminal Procedure Legislation Amendment (Prosecution of Indictable Offences) Bill 2022

Date introduced	21 September 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service and Digital, Small Business, and Fair Trading[3]

Purpose and description

4.1 The objects of this Bill are—

(a) to amend the *Criminal Procedure Act 1986*—

(i) to require certain law enforcement or investigating officers to make disclosures concerning alleged offences to prosecutors other than the Director of Public Prosecutions, and

(ii) to clarify what prosecutors must certify in a charge certificate about compliance with duties of disclosure about alleged offences being prosecuted, and

(iii) to require certain trial papers about a person committed for trial or sentence in the court to be given to prosecutors as soon as practicable after the papers are received by the registrar of the court, and

(b) to amend the *Director of Public Prosecutions Act 1986* to include additional persons involved in investigating certain alleged offences among the persons with duties to make disclosures to the Director of Public Prosecutions concerning the alleged offences, and

(c) to make other minor or consequential amendments to the *Criminal Procedure Regulation 2017* and the *Director of Public Prosecutions Regulation 2020*.

Background

4.2 The Bill amends the *Criminal Procedure Act 1986* (the **Criminal Procedure Act**), the *Director of Public Prosecutions Act 1986* (the **DPP Act**), and their associated regulations. The purpose of the Bill is to ensure that there is an appropriate

[3] This Bill was introduced in the Legislative Assembly by Minister Dominello, Minister for Customer Service and Digital, Small Business, and Fair Trading. However, the primary Act that it amends – the *Criminal Procedure Act 1986* – is under the joint administration of the Premier and Attorney General.

framework in place for the prosecution of indictable offences under regulatory legislation.

4.3 In the second reading speech to the Bill, the Hon. Victor Dominello MP, Minister for Customer Service and Digital, Minister for Small Business, and Minister for Fair Trading, stated that:

> At present the criminal procedure law does not provide an adequate framework for the prosecution of indictable offences by regulatory bodies. The bill clarifies the process by which regulators or the Director of Public Prosecutions prosecute offences under regulatory legislation on indictment.

4.4 Minister Dominello also advised that:

> These amendments will enable regulators to undertake key prosecutorial functions. They will also make clear that equivalent disclosure obligations exist for investigators and prosecutors, whether an offence is investigated by a regulatory investigator or a law enforcement officer, and whether it is prosecuted by a regulator or the Director of Public Prosecutions.

4.5 Schedule 1.1[1] of the Bill amends the Criminal Procedure Act by introducing the definition of a "Law enforcement or investigating officer" to clarify that criminal procedure for indictable matters apply to offences investigated by regulatory agencies. Schedule 1.1[2] amends the Act by introducing section 36B, which imposes duties of disclosure on law enforcement and investigating officers. The disclosure obligations closely mirror those currently set out in section 15A of the DPP Act.

4.6 The Committee previously commented on the introduction of the disclosure obligations under the DPP Act in Legislation Review Digest No. 27/55 – 23 October 2012.

4.7 Schedule 1.1[3] of the Bill amends section 66 of the Criminal Procedure Act to require all prosecutors to certify in a charge certificate that they have received and considered verification of the law enforcement or investigating officers' compliance with duties of disclosure. Schedule 1.1 [6] amends section 113 of the Act to require certain trial papers about a person committed for trial or sentence to be given to prosecutors as soon as practicable after the papers are received by the registrar of a court.

4.8 The Bill also amends the DPP Act by extending the duties of disclosure under section 15A from just law enforcement officers, to an officer or staff member of any agency created by or under an Act, who is responsible for an investigation into an alleged offence.

4.9 The Bill amends the *Criminal Procedure Regulation 2017* by imposing on prosecutors certain obligations currently imposed on the Director of Public Prosecutions regarding the listing of criminal proceedings. The Bill also proposes consequential amendments to this regulation and the *Director of Public Prosecutions Regulation 2020.*

Issues considered by the Committee

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

Administration of criminal justice

4.10 The Bill inserts section 36B into the Criminal Procedure Act, which sets out obligations in respect of disclosures by law enforcement or investigating officers. Pursuant to section 36B(1), law enforcement or investigating officers of alleged offences will be required to:

> …disclose to prosecutors of the alleged offences all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person.

4.11 Under section 36B(7), protected material is any information, document or other thing that is subject to a claim of privilege, public interest immunity or statutory immunity, or which was obtained during an investigation that is the subject of a statutory publication restriction.

4.12 Under section 36B, law enforcement and investigating officers will be required to inform the prosecutor of the existence of protected material, as well as the nature of the material and the claim or publication restriction that relates to it. However, officers are not required to provide the material to the prosecutor unless the prosecutor requests that the material be provided. The initial assessment of whether something constitutes protected material is left to the law enforcement or investigating officer.

4.13 In his second reading speech, the minister stated that:

> The disclosure obligations set out in new section 36B reflect those contained under section 15A of the Director of Public Prosecutions Act, which currently applies to law enforcement officers in cases where the offence is being prosecuted by the Director of Public Prosecutions

4.14 The Committee previously considered the disclosure obligations established by the *Director of Public Prosecutions Amendment (Disclosures) Act 2012* in Digest 27/55 and noted that whilst the:

> …effect of the amendment will fetter a defendant's ability to access information which could assist in their defence, the Committee also recognises that the purpose of the amendment is to strike a balance between an investigatory body's need to protect the safety of its witnesses and its investigatory processes, and the prosecution's duty of disclosure and the need to ensure a fair trial for the accused.[4]

The Bill amends the Criminal Procedure Act by introducing new duties of disclosure at section 36B. These obligations closely mirror the amendments introduced by the *Director of Public Prosecutions Amendment (Disclosures) Act 2012*, which the Committee considered in Digest 27/55. In that report, the Committee commented that the amendments may affect a defendant's ability to

[4] See page 24 of Digest No. 27/55 – 23 October 2012 [*Director of Public Prosecutions Amendment (Disclosures) Bill 2012*] https://www.parliament.nsw.gov.au/ladocs/digests/563/Digest%2027%20-%2023%20October%202012.pdf

access information which could assist their defence. However, it was also noted that this access needs to be balanced between an investigatory body's need to protect the safety of its witnesses and its investigatory processes, with the prosecution's duty of disclosure and the need to ensure a fair trial for the accused.

Consistent with the Committee's previous comments, it is noted that enabling officers to determine what constitutes protected material and only requiring disclosure upon request, could affect a defendant's ability to access information that could assist their defence. However, the Committee notes that there is a public interest argument for the preservation of protected material, and that the amendment is effectively trying to balance procedural fairness for the accused, and the protection of an investigative body's witnesses and investigatory processes. In the circumstances, the Committee makes no further comment.

Privacy – Disclosure of protected information

4.15 The Bill inserts section 36B into the Criminal Procedure Act, which sets out obligations in respect of disclosures by law enforcement or investigating officers. Under section 36B(9), law enforcement or investigating officers must disclose protected material to the prosecutor where requested by the prosecutor to do so.

The Bill amends the Criminal Procedure Act by introducing new duties of disclosure at section 36B. Section 36B(9) requires law enforcement or investigating officers to disclose protected material to the prosecutor where the prosecutor requests the material.

The Committee notes that the requirement for an officer to first notify the prosecutor of the existence of the information, and the nature of the material and the claim or publication restriction that relates to it, appears to establish a safeguard. However, the Bill ultimately leaves it to the prosecutor's discretion to request the information, and thus require the disclosure of protected material. Accordingly, despite the safeguard, the obligation to disclose protected material may still interfere with a person's privacy or confidential information.

Despite this, the Committee acknowledges that the disclosure of protected material in this circumstance will likely be necessary to ensure a fair trial for the accused. Given the public interest in ensuring procedural fairness, and noting that a limited safeguard is in place, the Committee makes no further comment.

Retrospectivity

4.16 The Bill proposes to amend Schedule 2 of the Criminal Procedure Act to specify that amendments made by the Bill to the Act or its corresponding regulation, will extend to proceedings that have commenced, but have not yet been committed for trial or sentence, before the commencement day for the amendment.

The Committee notes that the Bill proposes to enable its amendments to the Criminal Procedure Act and *Criminal Procedure Regulation 2017,* to be extended to proceedings commenced, but not yet committed for trial or sentence, before the commencement day for the amendment. This may create provisions with retrospective effect that apply to offences that were committed before this

provision has been enacted and thereby impact the key principle of the rule of law, being that a person should be able to know the law and penalties that they are subject to at any one time.

Although the Committee often comments on retrospective provisions in legislation, the Committee notes that the Bill seeks to clarify that criminal procedures for indictable matters apply to offences investigated by regulatory agencies, rather than change the obligations under criminal laws that a person may be subject to. Additionally, these amendments seek to apply to proceedings that have not yet been committed for trial or sentence before the amendments commence. This may offer satisfactory safeguards to protect from adverse impact upon individual persons. In the circumstances it makes no further comment.

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

Matters deferred to the regulations

4.17 The Bill inserts subsection 36B(5) into the Criminal Procedure Act. This provision enables the regulations to set out provisions about the duties of disclosure of law enforcement or investigating officers. Specifically, section 36B(5) contemplates that the regulations would make provisions about matters including the recording of information, documents or other things, as well as the verification of compliance with a duty imposed by the section.

The Bill inserts section 36B(5) into the Criminal Procedure Act. This section would defer the making of provisions about the duties of disclosure of law enforcement and investigating officers to the regulations.

The Committee generally prefers substantive clauses to be set out in the Act where they can be the subject of a greater level of parliamentary scrutiny. However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.

5. Prevention of Cruelty to Animals Amendment (Prohibitions for Convicted Persons) Bill 2022*

Date introduced	21 September 2022
House introduced	Legislative Council
Member responsible	The Hon. Emma Hurst MLC
	*Private Members Bill

Purpose and description

5.1 The object of this Bill is to amend the *Prevention of Cruelty to Animals Act 1979* and the *Exhibited Animals Protection Act 1986* to prohibit persons convicted of certain offences in relation to animals from caring for or working with animals.

Background

5.2 The Bill amends two key Acts that set out the legislative framework relating to the treatment of animals in NSW.

5.3 First, it amends the *Prevention of Cruelty to Animals Act 1979* (the **POCTA Act**), which sets out provisions to prevent cruelty to animals and promote their welfare by requiring a person in charge of an animal to provide care and treat animals in a humane manner.

5.4 Second, it amends the *Exhibited Animals Protection Act 1986* (the **EAP Act**), which sets out the legislative framework for the protection of exhibited animals such as those displayed or kept for educational, cultural, scientific, or entertainment. Its provisions do not apply to animals on display solely for the sale of the animal, animal research, or other circumstances as prescribed by the regulations.

5.5 In the second reading speech to the Bill, the Hon. Emma Hurst MLC stated she considered that the current animal cruelty laws in New South Wales were out of date.

5.6 Ms Hurst further stated that the amendments in the bill were intended to increase protections for animals following a successful conviction of a person for an animal cruelty offence:

> The amendments in the bill will increase protections and safeguards for animals after someone is convicted of animal cruelty. I am sure everyone in this place and in the community would agree that, if someone has committed an act of cruelty against an animal, whether that act occurred in New South Wales or interstate, that person is a threat to other animals and should not have animals in their care. Yet this is currently not happening, and animals are being put at risk as a result. The bill will make several

> key amendments to both the Prevention of Cruelty to Animals Act [POCTA] and the Exhibited Animals Protection Act to protect animals from abusers.

5.7 Primarily, the bill amends the POCTA Act to define a 'serious interstate animal offence' to mean an offence under various interstate animal cruelty legislation in another State or Territory, equivalent to a serious cruelty or bestiality offence under the *Crimes Act 1900* (NSW) (the **Crimes Act**).

5.8 The Bill then makes several amendments to allow officers to seize animals kept by a person in contravention of certain animal cruelty offences under the Crimes Act, to require that courts make further orders following a conviction of an animal cruelty offence, prohibitions applicable to persons convicted of serious interstate animal offences and employers under the Exhibition Act.

Issues considered by the Committee

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

Extraterritorial application of criminal laws – serious interstate animal offence

5.9 The Bill amends the definitions under section 4 of the POCTA to include a *serious interstate animal offence,* which means certain bestiality and serious animal cruelty offences under legislation of other States and the Territories. Specifically:

(a) the *Crimes Act 1900* (ACT), section 63A,

(b) the *Criminal Code Act 1983* (NT), section 138,

(c) the *Criminal Code Act 1899* (Qld), Schedule 1, section 211 or 242,

(d) the *Criminal Law Consolidation Act 1935* (SA), section 69,

(e) the *Criminal Code Act 1924* (Tas), section 122,

(f) the *Crimes Act 1958* (Vic), section 54A,

(g) the *Criminal Code Act Compilation Act 1913* (WA), section 181

5.10 In her second reading speech, Ms Hurst noted this was intended so that the offences that were the equivalent of a serious cruelty or bestiality offence under the Crimes Act in another State or Territory would also be subject to a mandatory lifetime animal ban in New South Wales.

The Bill amends section 4 of the *Prevention of Cruelty to Animals Act 1979* to define a 'serious interstate animal offence' to mean an offence under various interstate animal cruelty legislation in another State or Territory equivalent to serious cruelty or bestiality offence under the *Crimes Act.*

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

prohibition from certain activities and carries maximum penalties that include imprisonment.

However, the Committee recognises that criminal laws often recognise crimes in other jurisdictions where it is the equivalent of criminal provisions in NSW for the broader aim of ensuring public safety and consistency in the application of the criminal law. In these circumstances, the Committee makes no further comment.

Enforcement powers – power to seize animals

5.11 The POCTA Act, Part 2A sets out the powers which may be exercised by officers under the Act. Division 1 provides for general powers that may be exercised by officers under the Act.

5.12 Additionally, section 31AB of the POCTA Act prohibits a person who has been convicted of an animal cruelty offence under sections 79, 80, 530 and 531 of the Crimes Act from purchasing or owning an animal, or engaging in work involving direct contact with or care of an animal. This offence carries a maximum penalty of 44 penalty units ($44 000) and/or 1 year's imprisonment.

5.13 The Bill inserts section 24CB into the POCTA Act, which empowers an officer to seize an animal:

(a) Kept in contravention of an interim or final disqualification order or an interstate prohibition order, which prohibits a person from purchasing, acquiring or taking possession/custody of any animal.

(b) Kept by a person who has been convicted of an animal cruelty offence under sections 79, 80, 530 and 531 of the Crimes Act or a serious interstate animal offence.

(c) Being bred or is involved in a business of breeding an animal by a person convicted of an animal cruelty offence under the POCTA Act or Crimes Act.

5.14 Ms Hurst described that these amendments would ensure that animals kept in contravention of court orders 'can be seized immediately'. Speaking on the urgent need for these amendments, she further stated that:

> Right now, if someone has animals in breach of a disqualification order, it can be very difficult for the RSPCA and Animal Welfare League to seize an animal, unless the animal is severely injured or in need of veterinary treatment. This is despite the fact that the animal is being kept in breach of a disqualification order and is clearly at risk of harm as long as they remain with the convicted abuser.

The Bill inserts section 24CB into the *Prevention of Cruelty to Animals Act 1979* which grants officers under the Act a general power to seize animals kept or being bred in contravention of a disqualification order or by a person convicted of an animal cruelty offence under criminal laws in Australia. The Committee notes that the exercise of these enforcement powers may impact a person's real property rights.

However, the Committee recognises that these powers are intended to strengthen compliance with provisions of the Act intended to protect animal welfare, by enabling officers to seize animals being kept in breach of disqualification orders or the general prohibition under section 31AB. In these circumstances, the Committee makes no further comment.

Judicial discretion in respect to orders following criminal convictions

5.15 Section 31 of the POCTA Act provides for further orders which a court may make following the conviction of a person for an animal cruelty offence.

5.16 The Bill amends section 31(1)-(1B) of the POCTA Act. Specifically, it maintains the discretion of the court to make a disposal order following conviction but requires the making of a disqualification order 'unless the court is satisfied special circumstances justify not making the order'.

5.17 Speaking to the intended operation of these amendments, Ms Hurst noted that it creates a presumption that a disqualification order should be made. She further stated that this would address the existing gap where 'horrific animal cruelty cases go through the courts only to end up without any ban on the person having animals'.

The Bill amends section 31 of the *Prevention of Cruelty to Animals Act 1979* to require a court which has convicted a person of an animal cruelty offence to make a disqualification order, unless it is satisfied special circumstances justify not making the order. By establishing a presumption for the making of a disqualification order, the Bill may in effect limit the discretion of the trial judge using an Act of Parliament.

However, the Committee acknowledges that the court retains the discretion to determine whether special circumstances exist to rebut the presumption. In these circumstances, the Committee makes no further comment.

Strict liability - Restrictions on ownership, employment, and business

5.18 The Bill amends the POCTA Act to insert sections 31AC and 31AD.

5.19 Section 31AC provides for a prohibition upon a person that is convicted of a serious interstate animal offence so that they must not purchase or own an animal, or engage in work, whether paid or unpaid, involving direct contact with, or care of, an animal. The maximum penalty for this offence is 400 penalty units or imprisonment for 1 year, or both.

5.20 Section 31AD provides that if a person is convicted of an animal cruelty offence, the person must not breed animals, or be involved in a business relating to breeding animals. The maximum penalty for an individual is 400 penalty units ($44 000) or imprisonment for 1 year, or both. A maximum penalty of 2000 penalty units ($220 000) may apply in any other case.

The Bill inserts sections 31AC and 31AD into the *Prevention of Cruelty to Animals Act 1979*, which contain certain prohibitions on persons convicted of an animal cruelty offence. Specifically, a person convicted of an interstate animal offence must not purchase or own an animal, or engage in work, whether paid or unpaid, involving direct contact with, or care of, an animal. It also prohibits a person

convicted of an animal cruelty offence from breeding animals or being involved in a business relating to breeding animals. The maximum penalty that can be applied to an individual for offences under these sections is 400 penalty units ($44 000) or imprisonment for 1 year, or both.

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. Additionally, in this case, the provisions place restrictions on a person's ability for certain ownership, employment or conducting a business.

The Committee notes that strict liability offences are not uncommon in regulatory contexts and may be included to encourage compliance. However the Committee notes that the nature of this strict liability offence prohibits certain activities ordinarily permitted that now would attach penalties of imprisonment and are not merely monetary. In these circumstances, the Committee refers this matter to Parliament for its consideration.

Freedom of contract – prohibition on employment of convicted persons

5.21 The Bill inserts section 31A to the Exhibition Act, which provides that the holder of an authority must not knowingly cause or permit a prescribed person to work with, or care for, an animal exhibited under the authority.

5.22 The maximum penalty carried by this offence for an individual is 400 penalty units ($44 000) or imprisonment for 1 year, or both. The maximum penalty for this offence for anyone other than an individual is 2 000 penalty units ($220 000).

5.23 In this section, a prescribed person means a person who has been convicted of a relevant offence, or a person who is charged with a relevant offence until either the charge is heard and determined by a court, the charge is withdrawn, or a decision is made not to take or continue proceedings against the person. A relevant offence is taken to mean an offence under the Exhibition Act, the Crimes Act, sections 79, 80, 530 or 531, or the POCTA Act and its regulations.

5.24 As noted earlier, section 31AB of the POCTA Act establishes an offence for a person who has been convicted of an animal cruelty offence under sections 79, 80, 530 and 531 of the Crimes Act from engaging in work involving direct contact with or care of an animal.

5.25 In her second reading speech, Ms Hurst described the lack of a prohibition in the Exhibition Act to prevent businesses exhibiting animals from employing a person who has been convicted of an animal cruelty as 'a major oversight'. She highlighted that these amendments will resolve the issue that 'the hands of the Department of Primary Industry, as the regulator, are tied because the Act does not make this an offence'.

The Bill amends the *Exhibited Animals Protection Act 1986* to prohibit the holder of an authority from knowingly causing or permitting a prescribed person to work with, or care for, an animal exhibited under the authority. The maximum penalty for this offence for an individual is 400 penalty units ($44 000) or

imprisonment for 1 year, or both, and 2000 penalty units ($220 000) in any other case.

This places a restriction on authority holders over the employment of certain individuals and attaches a significant penalty, including imprisonment, for individuals who hold an authority to exhibit animals. These amendments may therefore impact upon the freedom of contract of employers by restricting who is eligible for employment.

The Committee recognises that this provision is intended to protect exhibited animals from possible harm and animal cruelty. However, the Committee notes that the *Prevention of Cruelty to Animals Act 1979* sets out a general prohibition for convicted persons from engaging in such work. It also notes that individuals who employ such persons may be sentenced to a term of imprisonment. 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

Matters deferred to the regulations – offences attaching penalty of imprisonment

5.26 Proposed subsection 31A(1) provides that the holder of an authority must not knowingly cause or permit a prescribed person to work with, or care for, an animal exhibited under the authority. The maximum penalty for an individual is 400 penalty units ($44 000) or imprisonment for 1 year, or both. The maximum penalty for this offence for other than an individual is 2000 penalty units ($220 000).

5.27 Subsection 31A(2) provides that, for the purposes of the prohibition contained in 31A(1), a *relevant offence* means:

(a) an offence under this Act or the regulations in relation to an animal, or

(b) an offence under the *Crimes Act 1900*, section 79, 80, 530 or 531, or

(c) an offence under the *Prevention of Cruelty to Animals Act 1979*, or regulations made under that Act, in relation to an animal.

As noted, the Bill amends the *Exhibited Animals Protection Act 1986* to prohibit the holder of an authority from knowingly causing or permitting a prescribed person to work with, or care for, an animal exhibited under the authority. This offence carries a maximum penalty of 400 penalty units ($44 000) or imprisonment for 1 year, or both for an individual, or 2000 penalty units ($220 000) in any other case.

Subsection 31A(2) provides that a relevant offence means an offence under the Act, the *Crimes Act 1900*, the *Prevention of Cruelty to Animals Act 1979* or its regulations. This effectively defers further offences to which this prohibition applies to the regulations under the *Prevention of Cruelty to Animals Act 1979*.

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 strict prohibitions.

The Committee acknowledges 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 contravention of the prohibition may incur penalties including imprisonment. In these circumstances, the Committee refers this matter to Parliament for its consideration.

6. Royal Botanic Gardens and Domain Trust Amendment (Facilitation of Sydney Metro West) Bill 2022

Date introduced	21 September 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. David Elliot MP
Portfolio	Transport

Purpose and description

6.1 The object of the Bill is to amend the *Royal Botanic Gardens and Domain Trust Act 1980* to provide power for the acquisition by Sydney Metro of the substratum, or a part of the substratum, of the Royal Botanic Gardens and Domain for underground rail facilities in relation to the Sydney Metro West.

Background

6.2 The *Royal Botanic Gardens and Domain Trust Act 1980* (the **Act**) sets out the legislative framework for the establishment, constitution and powers of the Royal Botanic Gardens and Domain Trust.

6.3 In his second reading speech Mr Mark Taylor MP, on behalf of the Hon. David Elliot MP, explained:

> The bill amends the Royal Botanic Gardens and Domain Trust Act 1980 to allow for the acquisition of substratum, which is the underlying land beneath the surface of the ground, under The Domain along the alignment of Sydney Metro West by Sydney Metro for the construction of the Sydney Metro West project.

6.4 He provided that the Bill 'prioritises necessary amendments' to the Act to ensure timely delivery of the Sydney Metro West project.

6.5 The Bill inserts a new section 19A into the Act, which provides that the substratum of Trust lands, or a part of it, may be acquired by Sydney Metro for underground rail facilities in relation to Sydney Metro West.

Issues considered by the Committee

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

7. Security Industry Amendment Bill 2022

Date introduced	21 September 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Toole MP
Portfolio	Police

Purpose and description

7.1 The objects of this Bill are to:

(a) Make miscellaneous amendments to:

(i) The *Security Industry Act 1997;* and

(ii) The *Security Industry Regulation 2016,* and

(b) To insert new offences into the *Tattoo Parlours Act 2012*

Background

7.2 The *Security Industry Amendment Bill 2022* amends the *Security Industry Act 1997* (the **Security Industry Act**) and the *Security Industry Regulations 2016* (the **Security Industry Regulation**). These legislative instruments set out the regulatory framework for the licensing and regulation of persons in the security industry.

7.3 The Bill also amends the *Tattoo Parlours Act 2012* (the **Tattoo Parlours Act**)*,* which sets out the legislative framework for the licensing and regulation of body art tattooing businesses and body art tattooists.

7.4 The Bill is intended to strengthen the licensing regime for the security industry, modernise the Acts to bring them in line with current security activities, and make clarifications to remove ambiguity.

7.5 Schedule 1 amends the Security Industry Act. In his second reading speech to the Bill, the Hon. Paul Toole MP, Minister for Police, stated that the Bill would make seven significant amendments to the security industry licensing scheme in New South Wales. These amendments have been summarised below:

(a) Clarificatory amendments to streamline processes and make the Security Industry Act future proof and fit for purpose.

(b) Amendments to introduce a tiered penalty system for contraventions of licence conditions.

(c) Amendments to update the definition of "crowd controller" to expand the places at which crowd controller functions are exercised and clarify that

controlling or monitoring the behaviour of persons is only a function of a crowd controller if it is done to maintain order.

(d) Amendments to combine the current class 1A, unarmed guard, and class 1C, crowd control, licences into a new security officer class 1A licence. These amendments will also introduce a new class of licence for the security activity of patrol, protect or guard cash-in-transit.

(e) Amendments to empower the Commissioner to prohibit a person from reapplying for a security licence for two years if the commissioner refuses their initial application on specific grounds.

(f) Amendments that move the offences of obstruction or failing to comply with requirements of enforcement officers into a new Part 3C of the Act, and increase the penalty for the offences.

(g) Amendments that enable the Commissioner to make information publicly available about offences committed under the Act.

7.6 Schedule 2 amends the Security Industry Regulation to specify that the conduct of health screening is not a security activity, to update penalties for various offences, and to exempt a person employed as a medical practitioner at a hospital from the operation of the Security Industry Act.

7.7 Schedule 2 also enables the Commissioner to exempt a person who is not an Australian citizen or a permanent Australian resident from the requirement to hold a class 2A security licence if the Commissioner is satisfied the person has specialised skills or experience not readily available in Australia.

7.8 Schedule 3 amends the Tattoo Parlours Act to introduce the new offences of altering, damaging or destroying records, providing false or misleading information, conspiracy and inducing the commission of certain offences

Issues considered by the Committee

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

Strict liability offences – increased penalties

7.9 The Bill increases the maximum monetary penalties for numerous offences, including some strict liability offences, set out in the Security Industry Act and Security Industry Regulations. The Bill also introduces a custodial sentence for some existing offences which did not previously attract a custodial sentence.

7.10 For example, under section 39S of the Security Industry Act, the strict liability offence of obstructing an enforcement officer now attracts a maximum penalty of 500 penalty units, imprisonment for 2 years, or both. Previously it attracted a maximum penalty of 100 penalty units.

7.11 The Bill also introduces a new tiered penalty system for the contravention of licence conditions. The contravention of a Tier 3 penalty by an individual now attracts a maximum penalty of 250 penalty units, imprisonment for 12 months, or both.

Previously, the maximum penalty for an individual's contravention of a licence condition was 100 penalty units, imprisonment for six months, or both.

The Bill amends the Security Industry Act and Security Industry Regulation to vary the penalties for offences, including some strict liability offences. These variations include the introduction of custodial sentences for some offences and the increase in some maximum monetary penalties.

For example, the Bill increases the maximum monetary penalty for the strict liability offence of obstructing a law enforcement officer, from 100 penalty units to 500 penalty units, and attaches a two-year custodial sentence. Previously the maximum penalty for this offence was 100 penalty units.

The Bill also introduces a new tiered penalty system for contraventions of licence conditions. Under the tiered system, an individual who contravenes a Tier 3 condition faces a maximum monetary penalty of 250 penalty units, imprisonment for 12 months, or both. The previous maximum penalty for an individual's contravention of a licence condition was 100 penalty units, imprisonment for six months, or both. Section 30 of the Security Industry Act, does not require the establishment of a mental element to prove that the contravention of a condition has occurred, accordingly, depending on the specific condition, the provision may amount to a strict liability offence.

The Committee acknowledges that in speaking to the Bill, Minister Toole indicated that the increase to penalties under the Act or regulation are necessary because the existing provisions for some offences are no longer sufficient to deter criminal activity. However, given the increased penalties apply to strict liability offences and may include imprisonment, the Committee refers this issue to the Parliament for its consideration.

Privacy – Publication of information

7.12 The Bill inserts new Part 3D to the Security Industry Act, which enables the Commissioner to publish information about certain offences. Under this Part, section 39Y permits the Commissioner to publish information about the revocation of a licence, or an offence committed under the Act or the regulations by a licensee.

7.13 Section 39Z enables the Commissioner to publish the name of a person who committed an offence, information about the offence such as the date and any other information prescribed by the regulation. It would also permit the Commissioner to publish the name of a person whose licence has been revoked, the reason for the revocation, the date when the licence was revoked, and any other information prescribed by the regulations.

7.14 Where an offence is dealt with by way of a penalty notice, information about the penalty notice may not be published unless the amount of the notice exceeded $5 000.

7.15 Section 39ZA provides that the Commissioner must not make the information publicly available unless the proceedings for the offence or the steps to revoke the licence are finalised.

7.16 Where an appeal is made against a decision to revoke a licence after the 28-day period, the Commissioner must remove information made publicly available about the revocation as soon as practicable. The Commissioner may subsequently make the information available if the decision to revoke is upheld or the appeal dismissed.

Part 3D of the Bill enables the Commissioner to publish information about the revocation of a licence, or an offence committed by a licensee under the Act or the regulations.

Under this Part, the Commissioner may publish the name of a person who committed an offence, information about an offence, including the date, and any other information prescribed by the regulation. The Commissioner may also publish the name of a person whose licence has been revoked, the reason for the revocation, the date on which the licence was revoked, and any other information prescribed by the regulations.

The Committee notes that the publication of the names of persons who have committed an offence or have had their licence revoked may interfere with a person's privacy or confidential information. The Committee also notes that the Bill defers certain items to the regulations, such as the power to prescribe additional information that may be published.

The Committee acknowledges that the bill provides a safeguard through the requirement not to make information publicly available unless the proceedings for the offence or the steps to revoke the licence are finalised. However, the Committee also notes that the regulations may prescribe additional circumstances for the publication of information, which would not be subject to the same level of Parliamentary scrutiny as a Bill. In the circumstances, 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

Commencement by proclamation

7.17 Section 2 of the Bill provides that it is to commence by proclamation.

The Bill is intended to 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 right or obligations. However, the Committee notes that a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments. This may be particularly the case where amendments are being made to the licensing schemes across industries and multiple pieces of legislation. In the circumstances, the Committee makes no further comment.

Matters deferred to the regulations

7.18 Schedule 1 of the Bill amends the Security Industry Act to enable the regulations to prescribe what activities do not constitute "security activities", and what places do not constitute "relevant places, for the purposes of the Act.

7.19 The Bill also enables the regulations to prescribe grounds or other requirements for the granting of an exemption by the Commissioner, and the prescription of a fee to be paid to the Commissioner on application for an exemption.

7.20 As discussed earlier, the Bill also enables the regulations to prescribe information about an offence or revocation of licence that may be published by the Commissioner.

The Bill amends the Security Industry Act to enable the regulations to prescribe activities that do not constitute "security activities", and places that do not constitute "relevant places", for the purposes of the Act. This enables the regulations to determine specific situations that will not be subject to key provisions of the Act.

The Bill also enables the regulations to prescribe grounds or other requirements for the granting of an exemption by the Commissioner, and the prescription of a fee to be paid to the Commissioner on application for an exemption. As discussed earlier, the Bill also defers, to the regulations, the power to prescribe additional information that may be published by the Commissioner in relation to an offence or a revocation of licence.

The Committee acknowledges that, in his second reading speech to the Bill, the Hon. Paul Toole MP, stated that the exemption provisions were included to ensure that there is an available pathway for the Commissioner to exempt persons from the need to obtain a security license where it is in the public interest and in unforeseen situations, such as the COVID-19 pandemic.

However, the Committee generally prefers substantive clauses to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected such as the procedure for applications for an exemption, or the prescribed information that may be published by the Commissioner. In the circumstances, the Committee refers this matter to parliament for consideration.

Part Two – Regulations

1. Charitable Fundraising Amendment Regulation 2022

Date tabled	LA: 9 August 2022 LC: 9 August 2022
Disallowance date	LA: 15 November 2022 LC: 15 November 2022
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Fair Trading

Purpose and description

1.1 The objects of the *Charitable Fundraising Amendment Regulation 2022* are:

(a) to prescribe offences under the *Charitable Fundraising Act 1991* and the *Charitable Fundraising Regulation 2021* that may be dealt with by penalty notice, and

(b) to prescribe the penalty amounts payable, and to update the name of an exempt religious organisation

1.2 This Regulation is made under the *Charitable Fundraising Act 1991*.

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

Penalty Notice Offences

1.3 The Regulation inserts Schedule 2 into the *Charitable Fundraising Regulation 2021* which prescribes 26 offences under the *Charitable Fundraising Act 1991*, and two offences under the *Charitable Fundraising Regulation 2021* as penalty notice offences. The amounts payable in response to a penalty notice issued in accordance with Schedule 2 range from $110 to $2,200.

The *Charitable Fundraising Amendment Regulation 2022* prescribes 26 offences under the *Charitable Fundraising Act 1991*, and two offences under the *Charitable Fundraising Regulation 2021* as penalty notice offences. Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a court to have their matter heard. This may impact on a person's right to a fair trial. That is, to have the matter heard by an impartial decision maker in public and to put forward their side of the case.

However, the Committee acknowledges that the amendment does not remove a person's right to have their matter heard and determined by a Court. Additionally, there are practical benefits in allowing matters to be dealt with by way of a penalty notice, including cost effectiveness and ease of administration. The amount payable under a penalty notice is also lower than the maximum penalty payable if the matter were determined by a Court. In the circumstances, the Committee makes no further comment.

2. Local Court of New South Wales Practice Note Civ 1

Date tabled	LA: 9 August 2022 LC: 9 August 2022
Disallowance date	LA: 15 November 2022 LC: 15 November 2022
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

2.1 The purpose of this Practice Note is to update Practice Note Civ 1 dealing with matters relevant to the management of civil proceedings (clause 3.1).

2.2 This Practice Note:

(a) describes the practice of the Local Court in managing civil proceedings to achieve the just, quick and cheap resolution of the real issues in the proceedings: s 56(1) *Civil Procedure Act 2005* (**CPA**) (clause 3.3).

(b) seeks to give effect to the overriding purpose of the CPA and to the finalisation of all civil proceedings within the Court's time standards (clause 3.5).

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

Right to a fair trial

2.3 The Practice Note requires a party to attend proceedings remotely at certain stages of civil proceedings in the Local Court. For example:

(a) clause 12.1 provides that, in the general division, all interlocutory steps will be undertaken remotely (and/or via the Online Court) in order to advance the dictates of justice. 'Interlocutory steps' means all steps in the case management process except the final trial date, and includes any motion to set aside a judgement.

(b) clause 17.3 provides that, in the general division, it is the Court's expectation that Notices of Motion will be heard remotely.

(c) clause 21.4 provides that, in the small claims division, all interlocutory steps before an assessor will be undertaken remotely.

(d) clause 21.6 provides that, in the small claims division, final trials will be conducted by remote means. Although, a party may seek the leave of the

Court to appear in person if it advances the dictates of justice to do so and the Court may direct, regardless of whether an application is made, that any step be held in person if it advances the dictates of justice (clauses 21.6-21.8).

(e) under clause 23.4, in the small claims division, the pre-trial review will be held remotely (or via the Online Court, as directed).

2.4 Clause 3.2 defines 'remote appearance' (or 'remotely' or 'remote means') as appearances either by audio visual link, telephone or other remote means.

2.5 Clause 11 sets out the process for a party to apply for the matter to be heard in person. An applicant must email the registry to request that an in-person appearance be granted by the Court no later than five days before the interlocutory hearing or trial date. To grant an application, the Court must be satisfied that the dictates of justice are advanced by an in-person appearance order being made.

2.6 Clause 11 further states:

(a) leave to appear in person will not be granted on grounds of convenience

(b) it is the expectation of the Court that the majority of matters will be heard remotely

(c) there will be few instances where parties will be disadvantaged by the requirement to appear remotely.

2.7 Clause 11.6 also provides that where any disability or impairment cannot be accommodated remotely, proceedings should be conducted in person. The magistrate or assessor will make a decision in chambers about whether the application will be granted, and the parties will be notified of the decision by the registry.

The Practice Note requires a party to attend certain stages of civil proceedings in the Local Court remotely, including interlocutory steps. Parties must also attend final trials in the small claims division remotely. However, a party may still seek and obtain leave of the Court to appear in person. A Court can also direct that any step of proceedings be held in person if it advances the dictates of justice. Otherwise, where the Practice Note requires remote attendance, a party can apply for a matter to be heard in person.

To grant an application, the Court must be satisfied that the dictates of justice are advanced by the applicant appearing in person. The Practice Note does not specify the circumstances where the dictates of justice would be advanced by the applicant appearing in person. However it does state that that 'there will be few instances where parties will be disadvantaged by the requirement to appear remotely'.

Requiring remote, rather than in person, attendance may impact the extent to which individuals are able to meaningfully participate in proceedings, particularly self-representing litigants who may struggle with accessing or using the internet or remote mode of attendance. It also imposes a burden on the party wishing to appear in person to apply to the Court to do so. Further, it is unclear

whether a person with a disability or impairment is able to give arguments or obtain reasons from the decision-maker, as the matter is heard in chambers and not at a hearing. Self-represented litigants may again be disadvantaged as they must navigate complex procedural requirements in order to appear in person. In the circumstances, the requirement may impact their right to a fair trial.

The Committee notes that the Practice Note provides avenues for in-person attendance. It also notes that remote attendance increases administrative efficiency and helps to expedite proceedings, in accordance with the purpose of the Practice Note. Noting however the potential impact on personal rights, the Committee refers this matter to the Parliament for its consideration.

3. Road Amendment (Electric Scooter Trial) Rule 2022

Date tabled	LA: 9 August 2022 LC: 9 August 2022
Disallowance date	LA: 15 November 2022 LC: 15 November 2022
Minister responsible	The Hon. Natalie Ward MLC
Portfolio	Metropolitan Roads

Purpose and description

3.1 The object of this Rule is to establish an 18-month trial for the use, on roads and road related areas, of electric scooters borrowed or hired through share schemes agreed to by public authorities. In particular, this Rule does the following:

(a) provides that the *Road Rules 2014* apply, with some modifications, to electric scooters and electric scooter riders in the same way they apply to bicycles and bicycle riders,

(b) creates new rules, including offences, applicable specifically to electric scooters and electric scooter riders,

(c) enables the issue of penalty notices for alleged offences against the new rules,

(d) prohibits the use of electric scooters on roads outside areas specified by Transport for NSW,

(e) exempts electric scooters from vehicle registration requirements,

(f) exempts electric scooter riders from driver licensing requirements.

3.2 The Committee notes that the regulation expands the number of offences via subordinate legislation under the *Road Rules 2014.*

Issues considered by committee

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

Strict liability offence

3.3 The Rule amends Schedule 1 of the *Road Rules 2014* by inserting *Part 15-1 Additional road rules for electric scooter riders.* This amendment includes the creation of 13 new strict liability offences.

3.4 The new strict liability offences relate to road safety obligations. The following are some examples of the new offences created by the Rule:

(a) Riding an electric scooter on a road on which the ordinary speed limit is greater than 50 kilometres per hour (Rule 262-5(1))

(b) Riding an electric scooter without wearing an approved bicycle helmet that has been securely fitted and fastened (Rule 262-9)

(c) Riding an electric scooter while under the age of 16 (Rule 262-10)

(d) Riding an electric scooter while carrying a person or animal (Rule 262-11)

(e) Riding an electric scooter that does not have a bell, horn, or similar warning device, in working order (Rule 262-12)

3.5 The maximum penalty for all of the new strict liability offences is a monetary penalty of $2 200 (20 penalty units).

3.6 The new offences are of a strict liability nature which derogates from the common law principle that mens rea, or the mental element, is a necessary part of liability for an offence.

The *Road Amendment (Electric Scooter Trial) Rule 2022* amends the *Road Rules 2014* by creating a number of strict liability offences for non-compliance with rules relating to the use of electric scooters. For example, Rule 262-11 makes it an offence to ride an electric scooter while carrying a person or animal. Rule 262-10 makes it an offence for a person under the age of 16 to ride an electric scooter. The maximum penalty for any of these new strict liability offences is $2,200 (20 penalty units).

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance and are commonly used in the context of road safety regulation. It also notes that the penalties are monetary only and do not contemplate a custodial sentence. In the circumstances, the Committee makes no further comment.

Penalty notice offences

3.7 The Rule amends Schedule 5 of the *Road Transport (General) Regulation 2021* by expanding the list of offences for which a penalty notice may be issued. The amendment prescribes that these new offences will be *Level 2* offences, meaning that the maximum penalty payable in response to the penalty notice will be $120.

***The Road Amendment (Electric Scooter Trial) Rule 2022* amends *the Road Transport (General) Regulation 2021* by expanding the list of offences for which a penalty notice may be issued. Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a court to have their matter heard. This may impact on a person's right to a fair trial. That is, to have**

the matter heard by an impartial decision maker in public and to put forward their side of the case.

However, the Committee acknowledges that the amendment does not remove a person's right to have their matter heard and determined by a Court. Additionally, there are practical benefits in allowing matters to be dealt with by way of a penalty notice, including cost effectiveness and ease of administration. The amount payable under a penalty notice is also lower than the maximum penalty payable if the matter was determined by a Court. In the circumstances, the Committee makes no further comment.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

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

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

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

(i) trespasses unduly on personal rights and liberties, or

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

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

(iv) inappropriately delegates legislative powers, or

(v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

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

9 Functions with respect to regulations

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

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

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

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

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

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

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

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

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

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

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

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

(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.

Functions Regarding Bills

The Legislation Review Committee has two broad functions set out in sections 8A and 9 of the *Legislation Review Act 1987*. Section 8A requires the Committee to scrutinise all Bills introduced into Parliament while section 9 requires the scrutiny of all regulations. The Committee can only comment on the specific issues set out under these two sections.

The Committee's purpose is to assist all members of Parliament to be aware of, and make considered decisions on, the rights implications of legislation. The Committee does not make specific recommendations on Bills and does not generally comment on government policy.

The Committee's functions with respect to Bills as established under section 8A of the Act are as follows:

(i) To consider any Bill introduced into Parliament, and

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

(1) trespass unduly on personal rights and liberties, or

(2) makes rights, liberties and obligations unduly dependent upon insufficiently defined administrative powers, or

(3) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or

(4) inappropriately delegates legislative powers, or

(5) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

The terms of section 8A are not defined. However, the types of issues the Committee typically addresses in its Digests include, but are not limited to:

Trespass unduly on personal rights and liberties:

- retrospectivity
- self-incrimination and the right to silence
- reversal of the onus of proof
- strict liability
- search and seizure without warrant
- confidential communications and privilege
- oppressive official powers
- right to vote
- equal application of laws
- non-discrimination

- freedom of speech
- freedom of religion
- privacy and protection of personal information
- rights to personal physical integrity
- excessive and disproportionate punishment
- legislative interference in standing judicial matters

Insufficiently defined administrative powers:

- ill-defined and wide powers
- vagueness or uncertainty

Non-reviewable decisions:

- excludes merits review
- excludes judicial review
- no requirement to provide reasons for an a decisions
- decisions made in private

Inappropriate delegation of legislative powers:

- provides the executive with unilateral authority to commence an Act;
- Henry VIII clauses (clauses that allow amendment of Acts by regulation)
- provide that a levy, tax or penalty be set by regulation
- allow for offences to be set by regulation
- extraterritoriality
- matters which should be set by Parliament (for example definitions)

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny

- subordinate legislation not tabled in Parliament and not subject to disallowance
- insufficient disallowance period
- providing that regulations may incorporate rules or standards of other bodies in force not subject to disallowance

Past practice of the Committee has been to highlight issues of concern it identifies in a Bill and its provisions. The Committee also evaluates the potential reasons and safeguards regarding issues of concern and determines if the provisions may be reasonable in the circumstances or should be referred to Parliament for further consideration.

Under section 8A(2) of the Act, Parliament may pass a Bill whether or not the Committee has reported on the Bill. However, this does not prevent the Committee from reporting on any passed or enacted Bill.

Functions Regarding Regulations – Review of All Regulations

Functions with respect to regulations are established under section 9 of the Act as follows:

(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, or

  (vii) that the form or intention of the regulation calls for elucidation.

(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.

Unlike Bill reports, the Committee only reports on those regulations with identified issues under section 9, rather than reporting on every regulation made.

The Committee may write to the relevant Minister for further information or, as with Bills, refer particular matters to the Parliament for further consideration. As above, the Committee may also recommend that Parliament disallow a regulation that has been made.

A summary of the regulations that the Committee considers do not warrant comment are published as an appendix to the Digest.

Appendix Two – Regulations without papers

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

1. Bail Amendment Regulation 2022

This Regulation amends the *Bail Regulation 2021* to prescribe minimum standards for electronic monitoring required by bail conditions. The minimum standards concern electronic monitoring devices, stationary beacons or home units, batteries and charging and monitoring and notifications.

This Regulation also includes a transitional provision, consequent on the commencement of the *Bail Amendment Act 2022* (the ***Amendment Act***), that for clarity restates the principle that the amendments made by the Amendment Act apply to any bail decision made after the commencement of that Act, even if the relevant offence was committed or charges were laid, or relevant conviction or plea of guilt occurred, before the commencement.

This Regulation is made under the *Bail Act 2013*, including sections 30A and 98 (the general regulation-making power) and Schedule 3, clause 1.

2. Building and Development Certifiers Amendment Regulation 2022

The object of this Regulation is to amend the Building and Development Certifiers Regulation 2020 to—

(a) prescribe a ground to suspend registration if the Secretary is satisfied that a person is not adequately insured, and
(b) extend by 1 year the exclusion period for a professional indemnity policy for certain claims made in relation to cladding, and
(c) make miscellaneous updates to the qualifications referred to in Schedule 2 of the Regulation.

This Regulation is made under the *Building and Development Certifiers Act 2018*, including sections 16(g), 26, 47 and 120, the general regulation-making power.

3. Cemeteries and Crematoria Regulation 2022

The object of this Regulation is to repeal and remake, without any significant amendments, the provisions of the *Cemeteries and Crematoria Regulation 2014*, which would otherwise be repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2).

The objects of this Regulation are as follows—

(a) to provide for conditions related to general levies imposed on prescribed cemetery and crematorium operators,
(b) to specify the steps a cemetery operator must take to ascertain cultural or religious practices applying to the remains of a deceased person,
(c) to provide for conditions related to renewable interment rights,

(d) to prescribe certain events about which a cemetery operator must cause a register to be kept and the particulars that must be included in the register,
(e) to provide for matters of a savings or transitional nature.

4. Children's Guardian (Amendment) Regulation (No 2) 2022

The objects of this Regulation are—

(a) consequential on the commencement of the *Children's Guardian Amendment Act 2022*, to update and transfer the following matters from the *Children and Young Persons (Care and Protection) Regulation 2012* and the *Adoption Regulation 2015*—
  (i) information to be recorded on the carers register and access to the carers register,
  (ii) the accreditation of designated agencies,
  (iii) the accreditation of adoption service providers,
  (iv) information to be recorded on the specialised substitute residential care register, previously the voluntary out-of-home care register,
  (v) access to information on the specialised substitute residential care register, and
(b) consequential on the commencement of the *Children's Guardian Amendment Act 2022*, to provide for a code of conduct for agencies providing specialised substitute residential care, and
(c) to update and transfer the regulation of child employment from the *Children and Young Persons (Care and Protection) (Child Employment) Regulation 2015*

In regards to objects (a)(iv) and (v) above, the provisions relating to the recording and access of information contain substantial safeguards and limitations regarding the collection, use and purpose of the information. For this reason, the Committee has made no further comment on this regulation.

5. Children's Guardian Amendment Regulation 2022

The object of this Regulation is to amend the *Children's Guardian Regulation 2022* consequential on the passage of the *Children's Guardian Amendment Act 2022*, and the inclusion in the *Children's Guardian Act 2019* of a definition of residential care worker.

6. Criminal Assets Recovery Amendment (ACT Unexplained Wealth Orders) Regulation 2022

The object of this Regulation is, for the Criminal Assets Recovery Act 1990, to declare—

(a) an order in force under the *Confiscation of Criminal Assets Act 2003* of the Australian Capital Territory, Part 7A to be an interstate proceeds assessment or unexplained wealth order, and
(b) an order in force under the *Confiscation of Criminal Assets Act 2003* of the Australian Capital Territory, section 32A to be an interstate restraining order.

7. Design and Building Practitioners Amendment Regulation 2022

The objects of this Regulation are as follows—

(a) to add the following new classes of practitioner—

(i) building practitioner—body corporate nominee (low rise),
(ii) building practitioner—body corporate nominee (medium rise),
(iii) building practitioner—general (low rise),
(iv) building practitioner—general (medium rise),
(v) design practitioner—architectural (low rise),
(vi) design practitioner—architectural (medium rise),

(b) to make amendments as a consequence of the commencement of the *Better Regulation Legislation Amendment (Miscellaneous) Act 2021*, Schedule 1.6 on 1 July 2022,

(c) to make other minor and consequential amendments.

Regarding paragraph (b), the Better Regulation Legislation Amendment (Miscellaneous) Act 2021 made a number of amendments to the Design and Building Practitioners Act 2020. Certain provisions previously included in the Design and Building Practitioners Regulation 2021 are therefore now included in the Act.

This Regulation is made under the Design and Building Practitioners Act 2020.

8. Electricity Infrastructure Investment Amendment (Miscellaneous) Regulation 2022

The object of this Regulation is to provide for the following—

(a) the carrying out of network infrastructure projects,
(a) long-term energy service agreements between the scheme financial vehicle and infrastructure operators,
(b) contributions by distribution network service providers to the electricity infrastructure fund,
(c) other minor matters.

Regarding paragraph (d), minor amendments include renumbering of provisions and related changes.

9. Electricity Infrastructure Investment Amendment (Revenue Determinations) Regulation 2022

The object of this Regulation is to provide for the following—

(a) long-term energy service agreements that show outstanding merit,
(b) matters the infrastructure planner must take into account when exercising certain functions,
(c) the functions of the regulator,
(d) assessments and recommendations by the infrastructure planner,
(e) revenue determinations made by the regulator,
(f) other minor and consequential amendments.

10. Environmental Planning and Assessment Amendment (Avoided Land) Regulation 2022

The objects of this Regulation are as follows—

(a) to require a development application for development relating to certain infrastructure on avoided land to be accompanied by a statement setting out

whether the activity is consistent with the *Cumberland Plain Conservation Plan Guidelines*,

(b) to require a determining authority to notify the Secretary of the Department of Planning and Environment of a decision to carry out or modify, or to grant an approval to carry out, an activity relating to certain infrastructure on avoided land, including a statement setting out whether the determining authority considers the activity is consistent with the *Cumberland Plain Conservation Plan Guidelines*,

(c) to update the reference to the *Mamre Road Precinct Structure Plan*.

This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including section 10.13 (the general regulation-making power).

11. Environmental Planning and Assessment Amendment (Housing Supply) Regulation 2022

The object of this Regulation is to amend the Environmental Planning and Assessment Regulation 2021 to—

(a) require the name of the registered community housing provider who will manage dwellings used for affordable housing to be specified in a development application for certain development for the purposes of residential flat buildings carried out by or on behalf of a public authority or social housing provider or by certain joint ventures (relevant development), and

(b) extend the period during which a development consent for relevant development is subject to certain conditions, in line with the affordable housing requirements for the development under *State Environmental Planning Policy (Housing) 2021*, section 40.

This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including sections 4.12, 4.17(11) and 4.64

12. Environmental Planning and Assessment Amendment (Parramatta City Centre Development Levy) Regulation 2022

The object of this Regulation is to increase the maximum percentage of development levy a consent authority may require an applicant to pay as a condition of development consent for development on land in parts of Parramatta City Centre.

13. Environmental Planning and Assessment Amendment (Sustainable Buildings) Regulation 2022

The object of this Regulation is to amend the following Regulations in relation to the proposed *State Environmental Planning Policy (Sustainable Buildings) 2022*—

(a) *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*,

(b) *Environmental Planning and Assessment Regulation 2021*.

14. Fisheries Management Legislation Amendment Regulation 2022

The objects of this Regulation are to—

(a) amend the *Fisheries Management (Aquaculture) Regulation 2017* as follows—
  (i) to provide for the annual contribution of certain aquaculture permit holders,
  (ii) to set out the Minister for Agriculture's duties in relation to endorsing aquaculture lease documents, including when the endorsement may be made using an online system,
  (iii) to allow certain applications, transmissions and documents to be provided using an online system, and
(b) amend the *Fisheries Management (Supporting Plan) Regulation 2006* to provide for the management charge payable by shareholders in certain share management fisheries.

This Regulation is made under the *Fisheries Management Act 1994*, including sections 57(1), 57A, 60(1), 76(3), 142, definition of aquaculture, paragraph (e), 163(4) and (8), 167(7), 191(h), (k) and (m1) and 289, the general regulation-making power.

15. Fluoridation of Public Water Supplies Regulation 2022

The object of this Regulation is to repeal and remake, without substantial amendments, the *Fluoridation of Public Water Supplies Regulation 2017*, which would otherwise be repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2).

16. Government Sector Finance Amendment (Departments) Regulation 2022

The object of this Regulation is to update the list of statutory bodies and departments subject to annual reporting arrangements under the *Annual Reports (Departments) Act 1985* and the *Annual Reports (Statutory Bodies) Act 1984*. This is to reflect changes made to agencies by the *Administrative Arrangements (Administrative Changes—Miscellaneous) Order (No 5) 2022* and the *Administrative Arrangements (Administrative Changes—Miscellaneous) Order (No 6) 2022*.

This Regulation is made under the *Government Sector Finance Act 2018*, including Schedule 1, clause 1 and section 10.4, the general regulation-making power.

17. Health Legislation Amendment (Fees) Regulation 2022

The object of this Regulation is to update fees charged under various Acts in the Ministry of Health portfolio in accordance with the Consumer Price Index.

This Regulation is made under the following provisions—

(a) *Assisted Reproductive Technology Act 2007*, section 7(2) and (8),
(b) *Mental Health Act 2007*, sections 115(2)(b) and 118(b),
(c) *Poisons and Therapeutic Goods Act 1966*, sections 17(1)(a1), 24(1)(f) and 45C(1A)(f),
(d) *Private Health Facilities Act 2007*, sections 6(2)(f), 8(4), 14(1), 15(3)(b), 16(2)(b), 17(2)(e) and 24(2)(b).

18. Heavy Vehicle (Adoption of National Law) Regulation 2022

The object of this Regulation is to repeal and remake, without substantial changes, the provisions of the *Heavy Vehicle (Adoption of National Law) Regulation 2013*, which would

otherwise be repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation prescribes—

(a) the offences under the *Heavy Vehicle National Law (NSW)* for which an infringement notice may be issued, and
(b) the amounts payable for infringement notices, which are increased from the amounts payable under the *Heavy Vehicle (Adoption of National Law) Regulation 2013* in accordance with the Consumer Price Index and to ensure the amounts are consistent nationally.

This Regulation comprises or relates to matters set out in the *Subordinate Legislation Act 1989*, Schedule 3, namely matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or another State or Territory

19. Independent Pricing and Regulatory Tribunal Regulation 2022

The object of this Regulation is to repeal and remake, without significant amendments, the *Independent Pricing and Regulatory Tribunal Regulation 2017*, which would otherwise be repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation modifies the application of the *Commercial Arbitration Act 2010* to the arbitration of disputes relating to public infrastructure access regimes under the *Independent Pricing and Regulatory Tribunal Act 1992*, Part 4A.

The modifications relate to the following matters—

(a) the right to legal representation,
(b) the private hearing of disputes,
(c) the recovery of the costs of arbitration,
(d) appeals to the Supreme Court on questions of law.

The provisions of this Regulation also apply to the arbitration of disputes under the *Water Industry Competition Act 2006*, section 40 and the *Water Industry Competition (Access to Infrastructure Services) Regulation 2021*, section 11.

20. Industrial Relations (General) Amendment (Fees) Regulation 2022

This Regulation amends the *Industrial Relations (General) Regulation 2020* to increase certain fees charged for proceedings in the Industrial Relations Commission in alignment with fees charged for similar matters in the Supreme Court, Land and Environment Court, District Court and Local Court.

21. Local Government Amendment Regulation 2022

The object of this Regulation is to postpone the repeal of the following regulations to 1 September 2025—

(a) Local Government (General) Regulation 2021,
(b) *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021*.

22. Mandatory Disease Testing Regulation 2022

The object of this Regulation is to provide for the following matters relating to mandatory disease testing—

(a) the content of a mandatory testing order,
(b) submissions to a senior officer in relation to the determination of an application for a mandatory testing order,
(c) the disclosure of blood test results,
(d) delegation of the functions of senior officers and the Chief Health Officer,
(e) prescribed classes of workers.

This Regulation comprises or relates to matters set out in the *Subordinate Legislation Act 1989*, Schedule 3, namely matters of a machinery nature and matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

Regarding paragraph (a), the form of the mandatory testing order is set out at Schedule 1 and includes a notice to a detained third party that reasonable force may be used to ensure that the third party complies with the order. The inclusion of this notice aligns with section 18 of the *Mandatory Disease Testing Act 2021*, which provides the information an order must contain. Section 21 provides that a law enforcement officer may use reasonable force against a detained third party in the exercise of their functions under that section.

23. Protection of the Environment Operations (Clean Air) Amendment Regulation 2022

The object of this Regulation is to postpone the repeal of the *Protection of the Environment Operations (Clean Air) Regulation 2021* from 1 September 2022 to 16 December 2022.

This Regulation is made under the *Protection of the Environment Operations Act 1997*, including section 323, the general regulation-making power.

24. Protection of the Environment Operations (General) Amendment (Thermal Energy from Waste) Regulation 2022

The object of this Regulation is to amend the Protection of the Environment Operations (General) Regulation 2021 to—

(a) impose a prohibition on—
  (i) the thermal treatment of waste that involves or results in energy recovery, and
  (ii) work carried out to enable the activity to be carried out, and
(b) provide for exceptions to the prohibition, including if—
  (i) the activity or work is carried out at certain precincts or premises, or
  (ii) the activity is an established and operating activity at the premises immediately before the prohibition comes into force, or
  (iii) the activity is carried out to replace a less environmentally sound fuel in certain circumstances.

25. Road Transport (Vehicle Registration) Amendment (Written-off Vehicles) Regulation 2022

The object of this Regulation is to amend the *Road Transport (Vehicle Registration) Regulation 2017* to—

(a) clarify the requirements in relation to written-off light vehicles, in particular for the following—
  (i) light truck self-insurers,
  (ii) write-off assessment criteria for light trucks,
  (iii) light trucks as notifiable light vehicles,
  (iv) the qualifications of assessors conducting total loss assessments of light vehicles,
  (v) light vehicle compliance certificates, and
(b) clarify the extent to which industry-recognised standards and methods of repair may be taken to be the relevant technical specifications in relation to—
  (i) light vehicles under the Regulation, Part 7, and
  (ii) heavy vehicles under the Regulation, Part 7A, and
(c) remove redundant clauses—
  (i) relating to records required to be kept by insurers about light vehicles and heavy vehicles assessed as not being total losses where the subject matter is already covered by *the Road Transport Act 2013* or the Regulation, and
  (ii) as a consequence of amendments made to the Act by the *Road Transport Amendment (Miscellaneous) Act 2019.*

26. Roman Catholic Church Communities' Lands Regulation 2022

The object of this Regulation is to repeal and remake, with minor amendments, the *Roman Catholic Church Communities' Lands Regulation 2017*, which would otherwise be repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2).

27. Surveillance Devices Regulation 2022

The object of this Regulation is to remake, with minor amendments, the *Surveillance Devices Regulation 2014*, which is repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation provides for the following—

(a) the declaration of laws of other jurisdictions to be corresponding laws under the *Surveillance Devices Act 2007*,
(b) the additional purposes for which the information obtained from the use of body-worn videos by police officers may be used, published or communicated,
(c) the exemption of ambulance officers from the prohibition against the use of certain body-worn recording devices to permit the officers to use those devices for a trial period,
(d) savings and formal matters

28. Transport Administration (Staff) Regulation 2022

The object of this Regulation is to remake, without substantive changes, the provisions of the *Transport Administration (Staff) Regulation 2012*, which is repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation makes provision about—

(a) the employment of the staff of the following transport corporations—
  (i) Sydney Ferries,
  (ii) Sydney Trains,
  (iii) NSW Trains, and
(b) the employment of persons in the Transport Service, including the employment of persons to enable the State Transit Authority to exercise its functions.

29. Workplace Surveillance Regulation 2022

The object of this Regulation is to repeal and remake, with minor amendments, the provisions of the *Workplace Surveillance Regulation 2017*, which would otherwise be repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2). This Regulation—

(a) prescribes the form of applications for covert surveillance authorities, and
(b) prescribes the form of covert surveillance authorities, and
(c) prescribes the form of reports on the use of covert surveillance authorities, and
(d) requires a Magistrate or eligible Supreme Court Judge who receives an application for, or issues, a covert surveillance authority to advise the Minister of the receipt of the application for, or issue of, the authority, and
(e) provides for the repeal of the Workplace Surveillance Regulation 2017 and savings consequent on that repeal.