



13 September 2021

Madeleine Foley
Director Committees
Regulation Committee
NSW Legislative Council, Parliament House
Macquarie Street
Sydney NSW 2000

By email to: Regulation.Committee@parliament.nsw.gov.au

Dear Ms Foley,

RE: Scrutiny of COVID-19 instruments

The NSW Council for Civil Liberties asks the Regulation Committee to focus its scrutiny more keenly on the Public Health Orders being used to manage the COVID-19 pandemic.

The *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* is made by the Health Minister under section 7 of the *Public Health Act 2010*. The Order is not disallowable because it is not a statutory rule within the meaning of the *Interpretation Act 1987*. Likewise, the Order was not subject to the regulatory impact statement or consultation obligations required of statutory rules under the *Subordinate Legislation Act 1989*. We also note that unlike under the federal *Biosecurity Act*, there are no statutory proportionality requirements under the *Public Health Act 2010* with which the Public Health Orders in NSW must comply. Safeguards such as the 90 day sunset period are ineffective.

The Orders are made and amended with considerable alacrity, sometimes incorporating wholesale changes. Given the speed at which they are drafted, the constant amendment and possibly the lack of care taken in their drafting, they have proven to be incredibly confusing; indeed, almost impossible for a lay person, let alone legal professionals, to understand. The current Delta Order is 50 pages long with 7 parts and 4 schedules, and has recently undergone a complete renumbering and reorganisation. There is new evidence of the confusion that the Orders are causing emerging every day. Is sitting on a park bench or a beach eating something considered outdoor recreation? Is light walking a good enough reason to take ones mask off? NSWCCCL asks: how can the rule of law prevail where its subjects cannot ascertain the relevant law?

Given these Orders are having a significant impact on individual rights and liberties, concern significant questions of policy, effectively introduce serious offences, and are controlling the lives of millions of NSW residents, they should be subject to intense parliamentary scrutiny. NSWCCCL submitted to this Committee last year that the Orders should in fact be placed in primary legislation. However, given this is unlikely to occur, NSWCCCL asks the Regulation Committee to meet its obligations by scrutinising the Orders much more tightly, whether that is through the

establishment of an inquiry, public or private communications with government or otherwise. This would go some way in reinforcing confidence in government and the parliamentary process.

NSWCCL understands that following the inquiry into the making of delegated legislation last year, the standing orders were changed to allow this Committee to self-refer inquiries, to examine any instruments of a legislative nature regardless of its form, including the policy or substantive content of the instrument, and to examine draft delegated legislation. These were welcome developments, but these additional powers are meaningless if not exercised in situations like the current one.

NSWCCL considers that the Committees ex post facto review of the Orders would not only improve the Orders but go some way in restoring trust and government accountability to the people of NSW. Certainly, enduring sections of the Orders, such as personal information collection and police powers, should be scrutinised and subject to ongoing refinement.

We look forward to hearing from you that the Committee has chosen to increase its scrutiny presence. It is more important than ever that Parliament do its duty to hold the executive to account.

Yours sincerely,

Michelle Falstein



New South Wales
Council for Civil Liberties

Michelle Falstein
Secretary

w. www.nswccl.org.au