



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No. 62/55 – 14 October 2014



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

New South Wales. Parliament. Legislative Assembly.

Legislation Review Committee Legislation Review Digest, Legislation Review Committee, Parliament NSW [Sydney, NSW]: The Committee, 2014, 23p 30 cm

Chair: Mr Stephen Bromhead MP

14 October 2014

ISSN 1448-6954

1. Legislation Review Committee – New South Wales

2. Legislation Review Digest No. 62 of 55

I Title.

II Series: New South Wales. Parliament. Legislation Review Committee Digest; No. 62 of 55

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

Contents

Membership	ii
Functions of the Committee	iii
Guide to the Digest	v
Conclusions	vii
PART ONE - BILLS	1
1. CRIMINAL RECORDS AMENDMENT (HISTORICAL HOMOSEXUAL OFFENCES) BILL 2014	1
2. FERNLEIGH TRACK CONSERVATION AREA PROTECTION BILL 2014	6
3. RURAL FIRES AMENDMENT BILL 2014	7
PART TWO – REGULATIONS	11
APPENDIX ONE – INDEX OF MINISTERIAL CORRESPONDENCE ON BILLS	12
APPENDIX TWO – INDEX OF CORRESPONDENCE ON REGULATIONS ON WHICH THE COMMITTEE HAS REPORTED	13

Membership

CHAIR	Mr Stephen Bromhead MP, Member for Myall Lakes
DEPUTY CHAIR	Dr Geoff Lee MP, Member for Parramatta
MEMBERS	Mr Glenn Brookes MP, Member for East Hills Mr John Flowers MP, Member for Rockdale Ms Tania Mihailuk MP, Member for Bankstown The Hon. Shaoquett Moselmane MLC The Hon. Dr Peter Phelps MLC Mr David Shoebridge MLC
CONTACT DETAILS	Legislation Review Committee Parliament of New South Wales Macquarie Street Sydney NSW 2000
TELEPHONE	02 9230 2096 / 02 9230 2631
FACSIMILE	02 9230 3052
E-MAIL	legislation.review@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au/lrc

Functions of the Committee

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

8A Functions with respect to Bills

- 1 The functions of the Committee with respect to Bills are:
 - (a) to consider any Bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - i trespasses unduly on personal rights and liberties, or
 - ii makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - iii makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - iv inappropriately delegates legislative powers, or
 - v insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- 2 A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations

- 1 The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - i that the regulation trespasses unduly on personal rights and liberties,
 - ii that the regulation may have an adverse impact on the business community,
 - iii that the regulation may not have been within the general objects of the legislation under which it was made,
 - iv that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

- v that the objective of the regulation could have been achieved by alternative and more effective means,
 - vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - vii that the form or intention of the regulation calls for elucidation, or
 - viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- 2 Further functions of the Committee are:
- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
 - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

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

Guide to the Digest

COMMENT ON BILLS

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

Ministerial Correspondence – Bills previously considered

This section contains the Committee's reports on correspondence it has received relating to Bills and copies of that correspondence. The Committee may write to the Minister responsible for a Bill, or a Private Member of Parliament in relation to his or her Bill, to seek advice on any matter concerning that Bill that relates to the Committee's scrutiny criteria.

COMMENT ON REGULATIONS

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the Digest. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the Digest drawing the regulation to the Parliament's "special attention". The criteria for the Committee's consideration of regulations are set out in s 9 of the *Legislation Review Act 1987*.

Regulations for the special attention of Parliament

When required, this section contains any reports on regulations subject to disallowance to which the Committee wishes to draw the special attention of Parliament.

Regulations about which the Committee is seeking further information

This table lists the Regulations about which the Committee is seeking further information from the Minister responsible for the instrument, when that request was made and when any reply was received.

Copies of Correspondence on Regulations

This part of the Digest contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought information. The Committee's letter to the Minister is published together with the Minister's reply.

APPENDIX 1: INDEX OF MINISTERIAL CORRESPONDENCE ON BILLS

This table lists the recipient and date on which the Committee sent correspondence to a Minister or Private Member of Parliament in relation to Bills reported on in the calendar year. The table also lists the date a reply was received and the Digests in which reports on the Bill and correspondence appear.

APPENDIX 2: INDEX OF CORRESPONDENCE ON REGULATIONS REPORTED ON

This table lists the recipient and date on which the Committee sent correspondence to a Minister in relation to Regulations reported on in the calendar year. The table also lists the date a reply was received and the Digests in which reports on the Regulation and correspondence appear.

Conclusions

PART ONE - BILLS

1. CRIMINAL RECORDS AMENDMENT (HISTORICAL HOMOSEXUAL OFFENCES) BILL 2014

Schedule 1 Amendment of Criminal Records Act 1991 No 8

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

Retrospectivity

The Committee generally comments where provisions are drafted to have retrospective effect. This is because such provisions are contrary to the rule of law which allows a person knowledge of what the law is at any given time. In this case, however, the retrospective provision does not retrospectively create new offences or penalties or remove rights. Instead it retrospectively extinguishes convictions for historical offences. In the circumstances, the Committee makes no further comment.

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

Lack of Clarity

In the Committee's view, the Bill lacks clarity about the persons to whom the Secretary of the Department of Justice may delegate his or her power to extinguish convictions. In the Committee's view, the persons or class of persons to whom this power may be delegated should be listed in the Bill. The Committee makes no further comment.

2. FERNLEIGH TRACK CONSERVATION AREA PROTECTION BILL 2014

The Committee has not identified any issues arising under section 8A(1) of the Legislation Review Act 1987.

3. RURAL FIRES AMENDMENT BILL 2014

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

Strict Liability and Removal of the Presumption of Innocence

The Committee notes that the provisions introduces a strict liability offence for the owner or driver of a vehicle involved in the discarding of a fire risk object, even if the owner or driver is not the individual responsible for the offence. The Committee expresses its concern at legislation that removes the presumption of innocence and deems individuals guilty of offences for which they are not responsible. However, the Committee also appreciates the difficulty at times of investigating such offences, and the reality that often the owner of the vehicle will likely know who is driving it, and the driver of a vehicle will likely know which passenger discarded a fire risk object. In these circumstances, the Committee makes no further comment.

Excessive Punishment

LEGISLATION REVIEW COMMITTEE

The Committee notes the significant increase in penalties proposed under the amendments may be deemed an excessive punishment, disproportionate to the offence committed. However, the Committee also notes the policy reasons for increasing these penalties, particularly for offences committed when there is a total fire ban, where there is a risk of endangering other property or people when setting fire to land. For this reason, the Committee makes no further comment.

PART TWO – REGULATIONS

The Committee does not report on any Regulations in this Digest.

Part One - Bills

1. Criminal Records Amendment (Historical Homosexual Offences) Bill 2014

Date introduced	18 September 2014
House introduced	Legislative Assembly
Member responsible	Mr Bruce Notley-Smith MP
Portfolio	N/A

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the Criminal Records Act 1991 (the principal Act) to enable certain convictions for a number of decriminalised homosexual sexual conduct offences to become extinguished.

BACKGROUND

2. In his Second Reading speech to Parliament, Mr Bruce Notley-Smith MP stated that until 1984, the *Crimes Act 1900* contained a number of offences prohibiting male homosexual activity. These offences applied to consensual and non-consensual conduct. Mr Notley-Smith further stated that some people engaging in homosexual activity were convicted of other offences such as indecent or offensive behaviour. He continued:

In 1984 the *Crimes (Amendment) Act 1984* decriminalised consensual male homosexual activity for people aged over the age of 18 years. Further legislative reform occurred in 2003, when the *Crimes Amendment (Sexual Offences) Act* lowered the age of consent for male homosexual activity from 18 to 16 years. These amendments to the criminal law demonstrated a well-founded desire on the part of this Parliament to reflect the expectations of the wider community. No longer were homosexual acts between consenting adults seen as requiring the intervention of the criminal law. No longer did the community see homosexual men, or more broadly, members of the gay, lesbian, bisexual, transgender and intersex [GLBTI] community as lesser members of the Australian community.

3. Mr Notley-Smith further told Parliament that while consensual homosexual activity between people over the age of consent is no longer a criminal offence, men who were previously convicted of these offences still deal with the stigma of a criminal conviction for a sex offence which can constrain employment opportunities, volunteering options, and overseas travel options. Mr Notley-Smith stated that the existence of convictions for these historical offences thereby perpetuates the discrimination suffered by these men despite the discriminatory laws having been repealed.

OUTLINE OF PROVISIONS

4. Clause 1 sets out the name (also called the short title) of the proposed Act.
5. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Criminal Records Act 1991 No 8

6. Schedule 1 [1] provides for an additional object of the principal Act, being to provide for a scheme to enable certain convictions for a number of decriminalised homosexual sexual conduct offences to become extinguished.
7. Schedule 1 [2] makes a consequential amendment.
8. Schedule 1 [3] provides that notes included in the principal Act do not form part of that Act.
9. Schedule 1 [4] inserts proposed Part 4A (Extinguishing convictions for historical homosexual offences) into the principal Act to give effect to the object of this Bill.
10. Proposed section 19A contains definitions for the purposes of the proposed Part including a definition of eligible homosexual offence, being any of the following offences:
 - (a) the former offences under sections 78K, 78L, 78Q, 81, 81A and 81B of the Crimes Act 1900,
 - (b) the former offences under sections 79 and 80 of the Crimes Act 1900 (before those offences were amended by the Crimes (Amendment) Act 1984), but not any offence relating to bestiality,
 - (c) the former offences under section 12 of the Police Offences Act 1901 (now called the Police (Special Provisions) Act 1901) and under section 7 of the Summary Offences Act 1970, but only if the former offence was constituted by:
 - i a person engaging in sexual intercourse or another form of sexual activity with another person of the same sex, or
 - ii a person procuring another person of the same sex to engage in sexual intercourse or another sexual activity with a person of the same sex,
 - (d) an offence prescribed by the regulations for the purposes of this definition,
 - (e) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a), (b), (c) or (d).
11. Proposed section 19B enables a person who has been convicted of an eligible homosexual offence to apply to the Secretary of the Department of Justice (the Secretary) for the conviction to become extinguished. If the convicted person has died, an application under the proposed section may be made on behalf of the person by the convicted person's legal personal representative or a spouse, de facto partner, parent or

child of the convicted person, or a person who was in a close personal relationship with the convicted person immediately before the convicted person's death.

12. Proposed section 19C provides that a conviction for an eligible homosexual offence becomes an extinguished conviction when the Secretary decides that he or she is satisfied that the other person involved in the sexual activity constituting the offence:
 - (a) consented to the sexual activity, and
 - (b) was above:
 - i the age of 16 years, or
 - ii if the other person was under the special care of the convicted person (within the meaning of section 73 (3) of the Crimes Act 1900)—the age of 18 years.
13. Section 73 (3) of the Crimes Act 1900 provides that a person (the victim) is under the special care of another person (the offender) if, and only if:
 - (a) the offender is the step-parent, guardian or foster parent of the victim or the de facto partner of a parent, guardian or foster parent of the victim, or
 - (b) the offender is a school teacher and the victim is a pupil of the offender, or
 - (c) the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim, or
 - (d) the offender is a custodial officer of an institution of which the victim is an inmate, or
 - (e) the offender is a health professional and the victim is a patient of the health professional.
14. The proposed section includes other provisions dealing with these applications including providing that the Secretary is not to hold an oral hearing for the purpose of making a decision under the proposed section and that the Secretary may delegate the exercise of his or her functions under the proposed section.
15. Proposed section 19D provides that the Secretary may require certain persons or bodies (such as the NSW Police Force, a court or the Director of Public Prosecutions) to provide the Secretary with information for the purposes of making a decision under proposed section 19C.
16. Proposed section 19E provides that a person who has made an application under the proposed Part may apply to the Civil and Administrative Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of a decision made by the Secretary under proposed section 19C.
17. Proposed section 19F sets out the consequences of a conviction becoming an extinguished conviction (being consequences similar to a conviction becoming a spent conviction). If a conviction of a person is an extinguished conviction:
 - (a) the person is not required to disclose to any other person for any purpose information concerning the extinguished conviction, and

- (b) a question concerning the person's criminal history is taken not to refer to any convictions of the person which are extinguished convictions, and
 - (c) in the application to the person of a provision of an Act or statutory instrument:
 - i a reference in the provision to a conviction is taken not to be a reference to any convictions of the person which are extinguished convictions, and
 - ii a reference in the provision to the person's character or fitness is not to be interpreted as permitting or requiring account to be taken of extinguished convictions.
18. Proposed section 19G provides that it is an offence for a person who has access to records of convictions kept by or on behalf of a public authority to, without lawful authority, disclose to any other person any information concerning an extinguished conviction. The offence carries a maximum penalty of 50 penalty units or imprisonment for 6 months, or both. Unlike the corresponding offence relating to spent convictions, there is no exemption from this offence for the following:
- (a) the Criminal Records Section of the NSW Police Force making information relating to an extinguished conviction available to law enforcement agencies or other prescribed office holders,
 - (b) law enforcement agencies (or authorised officers of law enforcement agencies) making information relating to an extinguished conviction available to another law enforcement agency or to a court in compliance with an order of the court,
 - (c) persons making information relating to an extinguished conviction available in accordance with section 33, 34 or 40A of the Child Protection (Working with Children) Act 2012.
19. Proposed section 19H makes it an offence for a person to, fraudulently or dishonestly, obtain or attempt to obtain information concerning an extinguished conviction from records of convictions kept by or on behalf of a public authority. The offence carries a maximum penalty of 50 penalty units or imprisonment for 6 months, or both.
20. Proposed section 19I provides that if the Secretary is satisfied that a conviction became an extinguished conviction by reason of an application that included false or misleading information, or documents that are false or misleading, the Secretary may determine that the conviction is no longer an extinguished conviction. The conviction ceases to be an extinguished conviction on and from the date of that determination.
21. A person whose conviction is the subject of a determination by the Secretary under the proposed section may apply to the Civil and Administrative Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of the determination.
22. Schedule 1 [5] and [6] make consequential amendments.

ISSUES CONSIDERED BY COMMITTEE

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

Retrospectivity

23. Proposed section 19C of the Bill enables the Secretary of the Department of Justice to retrospectively extinguish a conviction for an eligible historical homosexual offence. Unlike a spent conviction, an extinguished conviction operates as if the offence had never occurred. Indeed, in his Second Reading Speech to Parliament, Mr Bruce Notley-Smith MP indicated the *existence* of convictions for these historical offences (and not just the necessity to disclose them) perpetuates the discrimination suffered by the convicted people because the laws under which they were convicted are considered discriminatory by today's standards. This contrasts with spent convictions legislation which prevents people having to *disclose* relatively minor historical offences without retrospectively extinguishing those convictions.

The Committee generally comments where provisions are drafted to have retrospective effect. This is because such provisions are contrary to the rule of law which allows a person knowledge of what the law is at any given time. In this case, however, the retrospective provision does not retrospectively create new offences or penalties or remove rights. Instead it retrospectively extinguishes convictions for historical offences. In the circumstances, the Committee makes no further comment.

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

Lack of Clarity

24. Proposed section 19C of the Bill provides that the Secretary of the Department of Justice may delegate the exercise of his or her power to extinguish a conviction for eligible homosexual offences to any person or any class of persons authorised by the regulations.

In the Committee's view, the Bill lacks clarity about the persons to whom the Secretary of the Department of Justice may delegate his or her power to extinguish convictions. In the Committee's view, the persons or class of persons to whom this power may be delegated should be listed in the Bill. The Committee makes no further comment.

2. Fernleigh Track Conservation Area Protection Bill 2014

Date introduced	18 September 2014
House introduced	Legislative Council
Member responsible	The Hon. Lynda Voltz MLC
Portfolio	N/A

PURPOSE AND DESCRIPTION

1. The object of this Bill is to prevent the sale, lease or other disposal of certain land set aside for the Charlestown East Bypass, a project that is not being proceeded with. The land is in the vicinity of the Fernleigh Track Conservation Area, in the local government area of Lake Macquarie, and is presently owned by Roads and Maritime Services.

BACKGROUND

2. This Bill seeks to ensure that State government-owned land zoned for conservation around the Fernleigh Track cannot be sold, leased or otherwise disposed of without the approval of both Houses of Parliament.
3. Fernleigh Track is a walking and cycling track that forms part of a wildlife corridor that connects various conservation areas and nature reserves.
4. According to the Member responsible for this Bill, the Hon. Lynda Voltz MLC:

The genesis of this Bill lies in the Government's attempts to sell this land for development purposes... [T]his was done with no consultation or consideration of local community concerns.

OUTLINE OF PROVISIONS

5. Clause 1 sets out the name (also called the short title) of the proposed Act.
6. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
7. Clause 3 prohibits the sale, lease or other disposal of the relevant land except with the approval of both Houses of Parliament.

ISSUES CONSIDERED BY COMMITTEE

The Committee has not identified any issues arising under section 8A(1) of the Legislation Review Act 1987.

3. Rural Fires Amendment Bill 2014

Date introduced	16 September 2014
House introduced	Legislative Assembly
Minister responsible	The Hon. Stuart Ayres MP
Portfolio	Minister for Police and Emergency Services

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Rural Fires Act 1997 (the Act)* and related legislation as follows:
 - (a) to provide that if a person commits the offence of discarding a lighted tobacco product or match from a motor vehicle under section 99A of the Act:
 - (i) the owner of the vehicle is taken to be guilty of the offence unless the owner gives notice of the name and address of the person in charge of the vehicle at the relevant time, and
 - (ii) the driver of the vehicle is taken to be guilty of the offence unless the driver gives notice of the name and address of the passenger who discarded the lighted tobacco product or match,
 - (b) to make the offence under section 100 (1) of the Act of setting fire to another person's land or property, or permitting fire to escape from land, an offence for which a penalty notice may be served,
 - (c) to provide that if a person sets fire to another person's land or property, or permits fire to escape from land, where a total fire ban is in force a court must take the total fire ban into account as an aggravating factor in deciding the penalty to be imposed for the offence,
 - (d) to create an aggravated offence of setting fire to another person's land or property, or permitting fire to escape from land, knowing that a total fire ban is in force,
 - (e) to make minor amendments relating to the issue of fire permits.

BACKGROUND

2. In his second reading speech to Parliament, the Hon. Stuart Ayres MP advised Parliament that during the 2013-14 bushfire season, the NSW Rural Fire Service responded to more than 6,950 bush and grass fires across the State. In that period, the NSW Rural Fire Service formally investigated more than 1,900 suspicious bush and grass fires, in addition to the bushfire incidents that were reported to and investigated by police through Strike Force Toronto. The 2013-14 bushfires in NSW had devastating consequences on a number of community groups.

3. This legislation has been introduced in response to some of the issues that had emerged following the 2013-14 bushfire season.

OUTLINE OF PROVISIONS

4. Clause 1 sets out the name (also called the short title) of the proposed Act proposed Act.
5. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
6. Section 99A of the Act makes it an offence to discard a lighted tobacco product or match or any incandescent material on any land. Schedule 1 [4] deems the owner and driver of a motor vehicle from which such an object is discarded to be guilty of the offence unless:
 - (a) the owner was not in the vehicle and either gives notice of the name and address of the person in charge of the vehicle at the relevant time or shows that the owner did not know (and could not with reasonable diligence have ascertained) those details, and
 - (b) the driver gives notice of the name and address of the passenger who discarded the lighted tobacco product or match and shows that the driver did not know (and could not with reasonable diligence have ascertained) those details.
7. Notice of the details of the person in charge of the vehicle, or of the passenger, must be verified by statutory declaration. The proposed amendment also creates further exceptions to the deeming provision where the vehicle is a passenger vehicle or stolen. Schedule 1[3] is a consequential amendment.
8. Schedule 1 [5] provides that if a person sets fire to another person's land or property, or permits fire to escape from land, where a total fire ban is in force a court must take the total fire ban into account as an aggravating factor in deciding the penalty to be imposed for the offence. It also creates an aggravated offence of setting fire to another person's land or property, or permitting fire to escape from land, knowing that a total fire ban is in force. The aggravated offence will require the prosecution to prove, in addition to the elements of the offence in existing section 100 (1), that a total fire ban was in force where the accused set fire to land or property, or permitted fire to escape from land, and that the accused knew the total fire ban was in force. The aggravated offence carries a maximum penalty of 1,200 penalty units or imprisonment for 7 years or both. If the accused is charged with the aggravated offence but the prosecution is unable to prove the aggravating elements (that a total fire ban was in force and that the accused knew of the total fire ban), the accused may still be found guilty of the offence under existing section 100 (1).
9. Schedule 1 [6] makes the aggravated offence an indictable offence.
10. Schedule 1 [7] inserts transitional provisions.
11. Schedule 1 [2] expands the circumstances in which the Commissioner of the NSW Rural Fire Service or the Commissioner of Fire and Rescue NSW may issue a fire permit authorising a person to light a fire during a bush fire danger period for a specified purpose to include circumstances in which lighting a fire for that purpose does not

contravene any other Act or law. At present, such a permit may only be issued if a bush fire hazard reduction certificate has been issued in respect of the purpose or an approval, consent or authority required for the purpose has been given.

12. Schedule 1 [1] makes a minor related amendment.
13. Schedule 2.1 [2] amends the *Rural Fires Regulation 2013* to make the offence under section 100 (1) of the Act of setting fire to another person's land or property, or permitting fire to escape from land, an offence that may be dealt with by a penalty notice of \$2,200.
14. Schedule 2.1 [1] makes an amendment consequential on the amendment made by Schedule 1 [4].
15. Schedule 2.2 [2] amends the *Criminal Procedure Act 1986* to provide that the aggravated offence of setting fire to another person's land or property, or permitting fire to escape from land, knowing that a total fire ban is in force, is to be tried summarily in the Local Court unless the prosecutor elects to have the offence dealt with on indictment.
16. Schedule 2.2 [1] provides that, if the offence is dealt with summarily, the maximum monetary penalty that may be imposed is 100 penalty units.

ISSUES CONSIDERED BY COMMITTEE

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

Strict Liability and Removal of the Presumption of Innocence

17. Schedule 1 clause 4 amends section 99A (2) of the *Rural Fires Act 1997* by introducing strict liability offences for the driver or owner of a motor vehicle or a trailer attached to a motor vehicle. The driver or owner of a motor vehicle or a trailer attached to a motor vehicle is deemed guilty if a fire risk object is discarded from that motor vehicle or from a trailer attached to that motor vehicle.
18. However, the Committee also notes that exceptions will be provided for the owner when they are not the driver, and for the driver when they are not the offender, under proposed sections 99(7) and 99(8). These exceptions are triggered if the owner provides the name and address of the person who was in charge of the motor vehicle at the relevant time, and if the driver provides the name and address of the passenger who discarded the fire risk object. In both cases, there is also an exception if the owner or driver satisfies the relevant authorities dealing with the offence that they did not know the individuals responsible and could not, with reasonable diligence, ascertain the name and address of the individuals responsible.

The Committee notes that the provisions introduces a strict liability offence for the owner or driver of a vehicle involved in the discarding of a fire risk object, even if the owner or driver is not the individual responsible for the offence. The Committee expresses its concern at legislation that removes the presumption of innocence and deems individuals guilty of offences for which they are not responsible. However, the Committee also appreciates the difficulty at times of investigating such offences, and the reality that often the owner of the vehicle will likely know who is driving it, and the driver of a

vehicle will likely know which passenger discarded a fire risk object. In these circumstances, the Committee makes no further comment.

Excessive Punishment

19. Clause 5 of the Bill amends section 100 to provide for new penalties for an offence committed under a total fire ban under Division 6 of the Act. Proposed section 100 (1B) allows for a penalty of 1,200 penalty units or imprisonment for 7 years, or both, should a person, without lawful authority set fire or cause fire to be set to the land or property of another person, the Crown or any public authority, or being the owner or occupier of any land, permits a fire to escape from that land as to cause or be likely to cause injure or damage. Currently, the maximum penalty is 50 penalty units or imprisonment for 12 months, or both.

The Committee notes the significant increase in penalties proposed under the amendments may be deemed an excessive punishment, disproportionate to the offence committed. However, the Committee also notes the policy reasons for increasing these penalties, particularly for offences committed when there is a total fire ban, where there is a risk of endangering other property or people when setting fire to land. For this reason, the Committee makes no further comment.

Part Two – Regulations

The Committee does not report on any Regulations in this Digest.

Appendix One – Index of Ministerial Correspondence on Bills

The Committee does not report on any Ministerial Correspondence on Bills in this Digest.

Appendix Two – Index of Correspondence on Regulations on which the Committee has reported

1. In Digest 9/55, the Committee reported on the Work Health and Safety (Savings and Transitional) Regulation 2011, and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 17 April 2012 which addresses to the Committee's satisfaction the issues raised.
2. In Digest 12/55, the Committee reported on the Water Management (General) Amendment (Water Sharing Plans) Regulation (No 2) 2011 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 29 May 2012 which addresses to the Committee's satisfaction the issues raised.
3. In Digest 16/55, the Committee reported on the Home Building Amendment (Threshold for Home Warrant Insurance) Regulation 2012 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 29 May 2012 which addresses to the Committee's satisfaction the issues raised.
4. In Digest 12/55, the Committee reported on the Local Government (General) Amendment (Election Procedures) Regulation 2012 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister received 21 June 2012 which addresses to the Committee's satisfaction the issues raised.
5. In Digest 15/55, the Committee reported on the Police Amendment (Death and Disability) Regulation 2011 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister received 9 July 2012 which addresses to the Committee's satisfaction the issues raised.
6. On 8 May 2012 the Committee wrote to the Attorney General in relation to James Hardie Former Subsidiaries (Winding up and Administration) Amendment (Statutory Recovery Claims) Regulation 2012. The Committee was in receipt of a response from the Attorney General dated 10 August 2012 which addressed to the Committee's satisfaction the issues raised. Further information in relation to this can be found in Digest 23/55.