



Legislation Review Committee

LEGISLATION REVIEW DIGEST

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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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Membership

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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. CRIMES AMENDMENT (TERRORISM) BILL 2013

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

Freedom of Association

The Committee notes that the Bill extends by 3 years the date until which membership of a terrorist organisation is an offence, punishable by a maximum of 10 years imprisonment. In the Committee's view, relevant safeguards exist under the scheme the Bill extends, to ensure organisations are only proscribed as 'terrorist organisations' on an impartial, apolitical basis. The Committee makes no further comment.

Right to Privacy

The Committee notes that the Bill ensures covert search warrants can continue to be granted for a further 3 years to allow eligible persons to covertly enter and search premises, to obtain evidence of the offence and 'terrorist act' of membership of a terrorist organisation thereby impacting on the right to privacy. However, the Committee notes a judge must consider the nature and gravity of the 'terrorist act' in determining whether there are reasonable grounds to issue a covert search warrant. Hence, safeguards exist to balance national security and public safety concerns with the right to privacy. For this reason, the Committee makes no further comment.

Presumption of Innocence

The Committee notes that the Bill extends for 3 years the application of section 310J(2) of the *Crimes Act 1900*. Section 310J(2) requires an accused person to disprove a presumption that they are guilty of the offence of being a member of a terrorist organisation. Therefore, in the Committee's view the Bill may violate the right of an accused person to the presumption of innocence. The Committee refers this matter to Parliament for further consideration.

2. CRIMES AMENDMENT (ZOE'S LAW) BILL 2013 (NO 2)*

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

Right to Choose

The Committee refers to Parliament for its consideration matters relating to offences against an unborn child, with particular respect to establishing a separate offence of grievous bodily harm that causes harm to, or the destruction of, that unborn child.

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

Commencement by Proclamation

The Committee prefers that legislation of this kind, especially where it may affect the rights and responsibilities of an individual, should commence on a fixed date, or on assent.

3. FIREARMS AMENDMENT (PROHIBITION ORDERS) BILL 2013*

Trespasses on personal rights and liberties: s8A(1)(b)(i) of the LRA

Reversed onus of proof

In the Committee's view, by requiring an accused person to disprove a presumption that they are guilty of a criminal offence, subsections (3), (5), (7) and (13) of proposed section 74 of the Bill may violate a person's right to the presumption of innocence. Further, if an accused person is unable to disprove the presumption that they are guilty of the subject offences, the consequences are potentially very serious. The person could be sentenced to a maximum penalty of 5-10 years gaol. Therefore, the Committee refers this issue to Parliament for further consideration.

Freedom of Movement

In placing restrictions on where individuals subject to a firearms prohibition order may be present, proposed section 74 of the Bill may impact on the person's right to freedom of movement.

However, as a firearms prohibition order is made where the Commissioner of Police is of the opinion that the relevant person is not fit, in the public interest, to be permitted to have possession of a firearm (and the person can apply to the Administrative Decisions Tribunal for a review of this decision), and as section 74 only prohibits such people attending places where firearms and firearms parts are available, the Committee makes no further comment.

Freedom of Association

By limiting that individual subject to a firearms prohibition order from associating with certain persons, residing at certain premises, or joining particular groups, these provisions may impact the person's right to freedom of association.

However, a firearms prohibition order is made where the Commissioner of Police is of the opinion that the relevant person is not fit, to be permitted to have possession of a firearm, and the restrictions on associating are themselves limited to strictly defined situations. Further, the affected person can apply to the Administrative Decisions Tribunal for a review of this decision. Therefore, the Committee makes no further comment.

Search Without Warrant and Without Requirement for Reasonable Suspicion

Proposed section 74A of the Bill provides that police can detain and search a person subject to a firearms prohibition order and search his or her premises and/or vehicle to determine whether the person has contravened a firearms prohibition order. There is no requirement for the police officer to have a reasonable suspicion a contravention has occurred, or to obtain a warrant, before exercising these powers. In the Committee's view, this may impact on a person's right to be free from unreasonable search. The Committee refers the matter to Parliament for further consideration.

4. HEAVY VEHICLE (ADOPTION OF NATIONAL LAW) AMENDMENT BILL 2013

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

Limited Defence

Although this provision makes a mistake of fact unavailable for certain offences, the Committee has previously noted in Digest 39/55 the overall safety objectives of this Bill. The Committee reiterates its previous view and makes no further comment.

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

Reference to an Interstate Jurisdiction

The Committee reiterates its previous view that this Bill will remove the ability of the NSW Parliament from scrutinising amendment bills to the Heavy Vehicle National Law. However, it also recognises that the nature of cooperative federalism and design of model legislation will often require that one jurisdiction take the lead on model legislation, with other jurisdictions providing reference to the model legislation. The Committee makes no further comment on this issue.

PART TWO – REGULATIONS

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

Part One - Bills

1. Crimes Amendment (Terrorism) Bill 2013

Date introduced	29 August 2013
House introduced	Legislative Assembly
Minister responsible	The Hon. Greg Smith MP
Portfolio	Attorney General and Minister for Justice

PURPOSE AND DESCRIPTION

1. The object of the Bill is to amend the *Crimes Act 1900* to extend the date until which membership of a terrorist organisation is an offence under the Act from 13 September 2013 to 13 September 2016.

BACKGROUND

2. The Bill seeks to extend the sunset date for the offence of being a member of a terrorist organisation, which is punishable by a maximum sentence of 10 years imprisonment.
3. The offence was originally inserted into the *Crimes Act 1900* by Schedule 4 to the *Terrorism Legislation Amendment (Warrants) Act 2005*. This Amendment Act amended the *Terrorism (Police Powers) Act 2002* to enable specially authorised police officers or staff of the NSW Crime Commission to covertly enter and search premises under the authority of a covert search warrant, to respond to or prevent terrorist acts, *including obtaining evidence of this new offence of being a member of a terrorist organisation*.
4. In providing for the issue of covert search warrants under NSW law relating to membership of a terrorist organisation, the *Terrorism Legislation Amendment (Warrants) Act 2005* anticipated the Commonwealth Parliament enacting a national covert search warrant scheme.
5. However, a national covert search warrant scheme has not yet been enacted. Accordingly, the Bill seeks an additional 3 years before the repeal of the offence of being a member of a terrorist organisation to ensure that covert search warrants relating to the offence can continue to be granted until a national scheme is adopted.
6. The Attorney General informed Parliament in his Second Reading Speech that following the Federal Election, the NSW Government intends to raise the issue of implementing a national covert warrant regime with the Commonwealth Government.

OUTLINE OF PROVISIONS

7. Clause 1 sets out the name (also called the short title) of the proposed Act.

8. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
9. Clause 3 amends the *Crimes Act 1900* to extend the sunset date for the offence of being a member of a terrorist organisation from 13 September 2013 to 13 September 2016.

ISSUES CONSIDERED BY COMMITTEE

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

Freedom of Association

10. The Bill extends the date until which membership of a terrorist organisation is an offence under the *Crimes Act 1900* for 3 more years. Section 310I of the *Crimes Act 1900* provides that the meaning of 'terrorist organisation' for the purposes of the offence is to be taken from section 102.1 of the Commonwealth Criminal Code (the Code). Under the Code a 'terrorist organisation' includes an organisation specified in regulations by the Governor General.
11. The Committee notes that section 102.1 the Code contains various safeguards to ensure the Governor General's proscription of an organisation as a 'terrorist organisation' is done on an impartial basis, and not on the basis of a political assessment of the organisation. For example, the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in preparing, planning, assisting or fostering the doing of a terrorist act, or advocates the doing of a terrorist act, and must brief the leader of the Opposition regarding the proposed proscription. In this way, the interests of national security and public safety are appropriately balanced against the right to freedom of association.

The Committee notes that the Bill extends by 3 years the date until which membership of a terrorist organisation is an offence, punishable by a maximum of 10 years imprisonment. In the Committee's view, relevant safeguards exist under the scheme the Bill extends, to ensure organisations are only proscribed as 'terrorist organisations' on an impartial, apolitical basis. The Committee makes no further comment.

Right to Privacy

12. The Committee notes that the Bill ensures covert search warrants can continue to be granted for a further 3 years to allow covert entry and search of premises by specially authorised police officers or staff of the NSW Crime Commission to respond to or prevent 'terrorist acts' – or, more specifically, to obtain evidence of the offence of membership of a terrorist organisation (which is the 'terrorist act' in this instance).
13. The powers conferred by a covert search warrant, under section 270 of the *Terrorism (Police Powers) Act 2002* are extensive, impacting on the right to privacy. They include the power to enter, without the occupier's knowledge the premises the subject of the warrant; use such force as is reasonably necessary to enter the premises; search the premises for any kind of thing described in the warrant; and if the warrant authorises the seizure of a kind of thing, to seize and detain a thing of that kind and any relevant thing that the person finds in the course of executing the warrant.

14. However, the Committee further notes section 27K of the *Terrorism (Police Powers) Act 2002* contains certain safeguards around the granting of a covert search warrant to respond to or prevent a 'terrorist act'. These include that an eligible judge must consider the nature and gravity of the 'terrorist act' in determining whether there are reasonable grounds to issue a covert search warrant.

The Committee notes that the Bill ensures covert search warrants can continue to be granted for a further 3 years to allow eligible persons to covertly enter and search premises, to obtain evidence of the offence and 'terrorist act' of membership of a terrorist organisation thereby impacting on the right to privacy. However, the Committee notes a judge must consider the nature and gravity of the 'terrorist act' in determining whether there are reasonable grounds to issue a covert search warrant. Hence, safeguards exist to balance national security and public safety concerns with the right to privacy. For this reason, the Committee makes no further comment.

Presumption of Innocence

15. The Committee notes that by extending by 3 years the date until which membership of a terrorist organisation is an offence under the *Crimes Act 1900*, the Bill also extends the application of section 310J(2) of the *Crimes Act 1900*.
16. Section 310J(2) provides that a person is not guilty of the offence of membership of a terrorist organisation if the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation. In this way, section 310J(2) requires an accused person to disprove a presumption that they are guilty of an offence that attracts a maximum penalty of 10 years imprisonment.

The Committee notes that the Bill extends for 3 years the application of section 310J(2) of the *Crimes Act 1900*. Section 310J(2) requires an accused person to disprove a presumption that they are guilty of the offence of being a member of a terrorist organisation. Therefore, in the Committee's view the Bill may violate the right of an accused person to the presumption of innocence. The Committee refers this matter to Parliament for further consideration.

2. Crimes Amendment (Zoe's Law) Bill 2013 (No 2)*

Date introduced	29 August 2013
House introduced	Legislative Assembly
Member responsible	Chris Spence MP
	Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Crimes Act 1900* to recognise the separate existence of the foetus of a pregnant woman that is of at least 20 weeks' gestation (as a living person) so that proceedings for certain offences relating to grievous bodily harm may be brought against an offender who causes the unlawful destruction of or harm to any such foetus rather than proceedings for grievous bodily harm to the woman.
2. In the case of the unlawful destruction of a foetus of less than 20 weeks' gestation, the Bill retains the existing provision that enables proceedings to be brought for grievous bodily harm to the woman.
3. The Bill does not apply to anything done in the course of a medical procedure or to anything done by or with the consent of the pregnant woman that causes the destruction of harm to a foetus.

BACKGROUND

4. This Bill has been introduced in response to a case in 2009 where a pregnant woman was hit by a driver under the influence of drugs, and subsequently lost her child after a stillbirth. The case was the subject of significant media attention.
5. According to the Second Reading Speech, the driver was charged only with grievous bodily harm to the mother of the child ('Zoe'), and the subsequent stillbirth of Zoe was listed as one of the injuries sustained by the mother.
6. This Bill seeks to create a developmental threshold at which point offences of grievous bodily harm can be brought against a foetus if at least 20 weeks gestation or with a body mass of at least 400 grams.
7. These provisions were the subject of a review in October 2010 by the Attorney-General's Department entitled *Review of Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child* in which a change to the provision concerning grievous bodily harm on an unborn child was expressly not recommended.

OUTLINE OF PROVISIONS

8. Clause 1 sets out the name (also called the short title) of the proposed Act.

9. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
10. Schedule 1 [2] inserts proposed section 8A into the Act to give effect to the object set out in the above Overview.
11. For the purposes of the proposed section, an unborn child (that is taken to be a living person for the purposes of applicable offences) is defined as a foetus of at least 20 weeks' gestation or, if that cannot be reliably established, a foetus that weighs at least 400 grams (proposed section 8A (1) and (2)). Accordingly, separate proceedings may be brought for causing grievous bodily harm to an unborn child (including in a case where the harm results in the destruction of the unborn child). In the case of any other foetus, the proposed section continues to treat the destruction of the foetus as grievous bodily harm to the pregnant woman for the purposes of applicable offences (proposed section 8A (3)).
12. Proposed section 8A (1) defines applicable offences for the purposes of the proposed section. The offences are as follows:
 - (a) section 33 (1) (Intentionally causing grievous bodily harm),
 - (b) section 33A (1) (Discharging firearm etc with intent to cause grievous bodily harm),
 - (c) section 35 (Recklessly causing grievous bodily harm),
 - (d) section 46 (Intentionally or recklessly causing grievous bodily harm by gunpowder etc),
 - (e) section 51A (Predatory driving),
 - (f) section 52A (3) or (4) (Dangerous driving causing grievous bodily harm),
 - (g) section 52B (3) or (4) (Dangerous navigation causing grievous bodily harm),
 - (h) section 54 (Causing grievous bodily harm unlawfully or negligently),
 - (i) section 95 (Robbery or stealing from the person in circumstances of aggravation),
 - (j) section 110 (Breaking and entering dwelling and infliction of grievous bodily harm therein).
13. Proposed section 8A (4) excludes from the proposed section anything done in the course of a medical procedure or anything done by or with the consent of the pregnant woman that causes the destruction of or harm to a foetus.
14. Schedule 1 [1] makes a consequential amendment to the definition of grievous bodily harm for the purpose of the Act.

ISSUES CONSIDERED BY COMMITTEE

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

Right to Choose

15. At present, proceedings can be brought against an offender who causes the unlawful destruction of or harm to a foetus as proceedings for grievous bodily harm to a pregnant woman. The Bill would instead allow proceedings to be brought against such an offender as proceedings for grievous bodily harm against the foetus itself where the unborn child is more than 20 weeks' gestation, or 400 grams in mass. This provision would be in addition to any grievous bodily harm to the pregnant woman.
16. The Committee recognises that this Bill specifically excludes anything done in the course of a medical procedure, or anything done by, or with the consent of, the pregnant woman concerned.
17. The Committee appreciates the significant sensitivities that exist when seeking to amend legislation of this nature.

The Committee refers to Parliament for its consideration matters relating to offences against an unborn child, with particular respect to establishing a separate offence of grievous bodily harm that causes harm to, or the destruction of, that unborn child.

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

Commencement by Proclamation

18. This Bill is to commence on a day or days to be determined by proclamation.

The Committee prefers that legislation of this kind, especially where it may affect the rights and responsibilities of an individual, should commence on a fixed date, or on assent.

3. Firearms Amendment (Prohibition Orders) Bill 2013*

Date introduced	29 August 2013
House introduced	Legislative Assembly
Member responsible	Mr John Robertson MP
	Leader of the Opposition

PURPOSE AND DESCRIPTION

1. The Bill seeks to amend the *Firearms Act 1996* to make further provision with respect to the effect of firearms prohibition orders and to authorise police officers to conduct searches for the purposes of ensuring compliance with such orders. Such orders are made by the Commissioner of Police if the Commissioner is of the opinion that the relevant person is not fit, in the public interest, to be permitted to have possession of a firearm.

BACKGROUND

2. In his Second Reading speech to Parliament, Mr Robertson indicated he was introducing the Bill against a background of significant gun violence in Sydney, particularly in the city's west and south-west.
3. Mr Robertson stated that the Bill is intended to give Police tough new powers to remove firearms from the street, and enable Police to gather evidence to enable the Government to declare and shut down criminal gangs.
4. Under the current law, Police must obtain a warrant before searching individuals who are subject to a firearm prohibition order. Mr Robertson stated such individuals include criminal gang members and their associates, anyone charged with a prohibited firearms offence, violent offenders and repeat offenders.
5. The Bill seeks to allow Police to: (a) detain a person subject to a firearm prohibition order, (b) enter any premises occupied by or under the control or management of a person subject to a firearm prohibition order and (c) stop, detain and search any vehicle occupied or under the control of such a person, without the need to first obtain a warrant. The Bill provides that these powers could only be exercised to determine whether the firearms prohibition order has been contravened (e.g. despite the order, the person still possesses a firearm).
6. The Bill also extends the restrictions placed on a person subject to a firearms prohibition order. While such a person is currently prohibited from possessing or using a firearm, and is disqualified from being the holder of a firearms licence or permit, under the Bill he or she would be prohibited from engaging in a wider range of activity e.g. acquiring or possessing firearms parts or ammunition, or being in the company of persons in possession of firearms.

OUTLINE OF PROVISIONS

7. Clause 1 sets out the name (also called the short title) of the proposed Act.
8. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Firearms Act 1996 No 46

9. Schedule 1 makes the amendments to the *Firearms Act 1996* to prohibit persons subject to firearms prohibition orders from:
 - a. acquiring or possessing firearm parts or ammunition, and
 - b. being in the company of persons in possession of firearms, and
 - c. residing at premises where there are firearms, firearm parts or ammunition, and
 - d. being present at places where firearms, firearm parts or ammunition are made, sold and dealt with as part of a business, and
 - e. being members of, or being present at the premises of, firearms clubs or shooting ranges, and
 - f. participating in firearms training courses (or being present at premises where such courses are conducted).
10. Schedule 1 also prohibits other persons from supplying firearm parts or ammunition to persons who are subject to firearms prohibition orders. This prohibition is in addition to the current prohibition on selling or giving possession of a firearm to another person, knowing that the other person is prohibited from possessing firearms by a firearms prohibition order.
11. In addition, Schedule 1 provides that the Commissioner of Police cannot delegate his or her functions in relation to firearms prohibition orders and provides for the Commissioner to exempt persons from any of the offences relating to such an order.
12. Schedule 1 also empowers police officers, without a warrant, to detain persons, enter premises and stop and detain vehicles and conduct searches for the purposes of ensuring compliance with firearms prohibition orders.

Schedule 2 Amendment of Criminal Procedure Act 1986

13. Schedule 2 makes consequential amendments to provisions of the *Criminal Procedure Act 1986* that deal with the procedure for prosecuting indictable offences.

ISSUES CONSIDERED BY COMMITTEE

Trespasses on personal rights and liberties: s8A(1)(b)(i) of the LRA

Reversed onus of proof

14. Proposed section 74, Bill requires an accused person to disprove a presumption that they are guilty of a criminal offence.
15. Subsection (3) provides that if a firearm, firearm part, or ammunition is found in or on any premises occupied by a person subject to a firearms prohibition order, in the absence of proof to the contrary, it will be taken to be possessed by that person.

16. Subsection (5) provides that if a person subject to a firearms prohibition order is prosecuted for being in the company of another person who has a firearm; it is a defence if the person can prove that he or she did not know that the other person had that firearm.
17. Subsection (7) provides that if a person subject to a firearms prohibition order is prosecuted for residing at premises on which there is a firearm, firearm part, or ammunition, it is a defence for the person to prove that he or she did not know that the item was on the premises.
18. Subsection (13) provides that if a person is prosecuted for supplying a firearm to a person who is subject to a firearms prohibition order, it is a defence if the person can prove that he or she did not know the other person was subject to the order.
19. If an accused person cannot disprove the presumption that he or she is guilty of the offences under these subsections the person could be sentenced to a maximum penalty of 5-10 years gaol.

In the Committee's view, by requiring an accused person to disprove a presumption that they are guilty of a criminal offence, subsections (3), (5), (7) and (13) of proposed section 74 of the Bill may violate a person's right to the presumption of innocence. Further, if an accused person is unable to disprove the presumption that they are guilty of the subject offences, the consequences are potentially very serious. The person could be sentenced to a maximum penalty of 5-10 years gaol. Therefore, the Committee refers this issue to Parliament for further consideration.

Freedom of Movement

20. Proposed section 74 also provides that individuals who are subject to a firearms prohibition order are restricted from being present at places related to the manufacture or sale of firearms, or at gun clubs or shooting ranges.

In placing restrictions on where individuals subject to a firearms prohibition order may be present, proposed section 74 of the Bill may impact on the person's right to freedom of movement.

However, as a firearms prohibition order is made where the Commissioner of Police is of the opinion that the relevant person is not fit, in the public interest, to be permitted to have possession of a firearm (and the person can apply to the Administrative Decisions Tribunal for a review of this decision), and as section 74 only prohibits such people attending places where firearms and firearms parts are available, the Committee makes no further comment.

Freedom of Association

21. Proposed section 74 further provides that a person subject to a firearms prohibition order must not be in the company of a person with a firearm, or reside at premises where there are firearms. The maximum penalty for these offences is 5 years imprisonment.

22. In addition, proposed section 74 prohibits a person subject to a firearms prohibition order from being or seeking to become a member of a gun club or shooting range. The maximum penalty for contravening this provision is a \$5,500 fine.

By limiting that individual subject to a firearms prohibition order from associating with certain persons, residing at certain premises, or joining particular groups, these provisions may impact the person's right to freedom of association.

However, a firearms prohibition order is made where the Commissioner of Police is of the opinion that the relevant person is not fit, to be permitted to have possession of a firearm, and the restrictions on associating are themselves limited to strictly defined situations. Further, the affected person can apply to the Administrative Decisions Tribunal for a review of this decision. Therefore, the Committee makes no further comment.

Search Without Warrant and Without Requirement for Reasonable Suspicion

23. Proposed section 74A of the Bill provides that a police officer may detain and search a person subject to a firearms prohibition order and search his or her premises and/or vehicle to determine whether the person has contravened a firearms prohibition order. There is no requirement for a police officer to have a reasonable suspicion that a contravention has occurred or to obtain a warrant, before exercising these powers.

Proposed section 74A of the Bill provides that police can detain and search a person subject to a firearms prohibition order and search his or her premises and/or vehicle to determine whether the person has contravened a firearms prohibition order. There is no requirement for the police officer to have a reasonable suspicion a contravention has occurred, or to obtain a warrant, before exercising these powers. In the Committee's view, this may impact on a person's right to be free from unreasonable search. The Committee refers the matter to Parliament for further consideration.

4. Heavy Vehicle (Adoption of National Law) Amendment Bill 2013

Date introduced	28 August 2013
House introduced	Legislative Assembly
Minister responsible	The Hon. Gladys Berejiklian MP
Portfolio	Transport

PURPOSE AND DESCRIPTION

1. The objects of the Bill are to amend the *Heavy Vehicle (Adoption of National Law) Act 2013* to make further provision to facilitate the adoption of the Heavy Vehicle Law set out in the Schedule to the *Heavy Vehicle National Law Act 2012* of Queensland as a law of New South Wales and its enforcement (including by making provision for savings and transitional matters).
2. The Bill also makes modifications to the National Law in its application to New South Wales to preserve existing registration laws for heavy vehicles pending the anticipated commencement of national registration under the National Law in 2015
3. The Bill also makes modifications to fatigue management and vehicle standards to preserve the operation of certain existing local productivity initiatives and enforcement provisions.

BACKGROUND

4. In June 2009, the Council of Australian Governments voted to establish a single national regulator for heavy vehicles, rail safety and marine safety, as well as a national rail safety investigator. New South Wales has already passed applying law for rail safety and domestic commercial vessels, thus leaving only heavy vehicles to attend to. The Heavy Vehicle National Law received Royal Assent in Queensland on 26 February 2013, paving the way for other jurisdictions to follow suit. The Bill implements the NSW Government's commitment to the national reforms and to the establishment of the National Heavy Vehicle Regulator in New South Wales.
5. In May 2013, the Government introduced the *Heavy Vehicle (Adoption of National Law) Bill 2013*. This Bill is the second tranche of reform to give effect to the Heavy Vehicle National Law in New South Wales.
6. This Bill sets out the terms of the *Heavy Vehicle (Adoption of National Law) Regulation 2013* and makes the necessary repeals and changes to existing legislation.

OUTLINE OF PROVISIONS

7. Clause 1 sets out the name (also called the short title) of the proposed Act.
8. Clause 2 provides for the commencement of the proposed Act. Schedules 1, 2.2 [29], 2.4 [10] and 2.6 will commence on the date of assent to the proposed Act. The other

provisions of the proposed Act will commence when section 4 (Application of Heavy Vehicle National Law) of the Heavy Vehicle (Adoption of National Law) Act 2013 commences.

9. Clause 3 recognises that clause 10 of Schedule 3 (Savings, transitional and other provisions) to the Heavy Vehicle (Adoption of National Law) Act 2013 (as inserted by the proposed Act) provides for the proposed Heavy Vehicle (Adoption of National Law) Regulation 2013 set out in Schedule 4 to the proposed Act to be taken to be a Regulation made under the Heavy Vehicle (Adoption of National Law) Act 2013.
10. Clause 4 provides for:
 - (a) the repeal of the Road Transport (Vehicle and Driver Management) Act 2005 and the Road Transport (Vehicle and Driver Management) Regulation 2005, and
 - (b) recognises that clause 47 of Schedule 4 to the Road Transport Act 2013 (as inserted by the proposed Act) provides for the Road Transport (Mass, Loading and Access) Regulation 2005, as amended by the proposed Act, to have effect as a Regulation under the Road Transport Act 2013.
11. Clause 5 provides for the automatic repeal of the proposed Act by section 30C of the Interpretation Act 1987 once all of its provisions have commenced.
12. Schedule 1 amends the Heavy Vehicle (Adoption of National Law) Act 2013 (the principal Act):
 - (a) to provide for definitions of terms to be used in provisions to be inserted by the proposed Act (see Schedule 1 [1] and [2]), and
 - (b) to provide for the National Law and the regulations under that Law (the national regulations) to apply in New South Wales subject to certain modifications (See Schedule 1 [4] and [5]), and
 - (c) to make certain declarations and provide for certain authorisations in connection with the application of the National Law in New South Wales (see Schedule 1 [7], [16], [17] and [19]–[21]), and
 - (d) to provide for the regulations under the principal Act (the local regulations) to prescribe offences for which an infringement notice (also called a penalty notice) may be issued under the National Law (see Schedule 1 [11] and [27]), and
 - (e) to make amendments in the nature of statute law revision or that are consequential on other amendments (see Schedule 1 [3], [6], [8]–[10], [12]–[15], [18], [23]–[25] and [29]–[31]).
13.
 - (a) to enable an authorised officer under the National Law to require the driver of a heavy motor vehicle to produce the driver's Australian driver licence for compliance purposes within the meaning of that Law, and
 - (b) to enable Roads and Maritime Services to exercise the powers of an authorised officer under the National Law,

(c) to enable an authorised officer to exercise powers under both certain law enforcement legislation and the proposed Act and National Law where appropriate in relation to the same occasion, and

(d) to provide for who may commence proceedings for offences, and

(e) to preclude double jeopardy in respect of an act, omission or circumstances that give rise to both an offence under the road transport legislation and the National Law, and (f) to provide for what it means when the National Law provides that the defence of mistake of fact is unavailable for an offence, and

(g) to recognise that evidence of speed collected in accordance with Part 5.3 (Traffic control and monitoring) of the Road Transport Act 2013 can be used in proving offences against the National Law where the speed of a heavy vehicle is relevant to establishing whether the offence has been committed, and

(h) to provide for section 10 of the Crimes (Sentencing Procedure) Act 1999 not to apply in relation to certain heavy vehicle offences under the National Law in a manner consistent with existing provisions in the Road Transport Act 2013.

14. Schedule 1 [32] inserts a new Schedule 1 in the principal Act containing modifications to the National Law in its application to New South Wales. The new Schedule makes provision as follows:

(a) Schedule 1.1 makes modifications to the National Law to preserve existing registration laws for heavy vehicles pending the anticipated commencement of national registration under the National Law in 2015,

(b) Schedule 1.2 makes modifications to the National Law to preserve certain exemptions and other modifications currently applicable in relation to:

(i) the driver fatigue and heavy vehicle speeding compliance provisions of the Road Transport (Vehicle and Driver Management) Regulation 2005 (see clauses 58A, 58B, 60 (5), 72, 115, 115A, 115B, 167A, 167B of that Regulation and the Ministerial Exemption (Bus Operator Fatigue Management Accreditation Requirements) Order 2009), and

(ii) the enforcement of the Road Transport (Vehicle and Driver Management) Act 2005.

15. Schedule 1 [32] also inserts a new Schedule 2 in the principal Act containing:

(a) modifications to the Heavy Vehicle (Fatigue Management) National Regulation under the National Law to preserve the operation of existing risk category for contraventions of AFM hours for the driver fatigue provisions of the Road Transport (Vehicle and Driver Management) Regulation 2005 (see proposed Schedule 2.1), and

(b) modifications to the Heavy Vehicle (Vehicle Standards) National Regulation under the National Law to preserve the operation of existing provisions in New South Wales concerning the use of warning lights and signs on school buses and the use of lights and reflectors on vehicles (see proposed Schedule 2.2).

16. Schedule 1 [26] and [28] confer a general power for the local regulations to amend each of these new Schedules so as to insert, vary or omit modifications to the National Law and national regulations in their application to New South Wales.
17. Schedule 1 [32] inserts a new Schedule 3 in the principal Act in substitution for the current Schedule 1 to that Act. The new Schedule includes provisions of a savings and transitional nature consequent on the enactment of the principal Act and the proposed Act and the National Law coming into force.
18. Schedule 2:
 - (a) provides for the Road Transport (Mass, Loading and Access) Regulation 2005 (which is currently a Regulation under the Road Transport (Vehicle and Driver Management) Act 2005) to have effect as a Regulation under the Road Transport Act 2013 and makes amendments to the Regulation generally to confine its operation to light vehicles, and
 - (b) makes other amendments to the road transport legislation that are consequential on, or related to, the National Law coming into force in New South Wales.
19. Schedule 3 makes amendments to certain other Acts and statutory rules that are consequential on, or related to, the National Law coming into force in New South Wales.
20. Schedule 4 sets out the terms of the proposed Heavy Vehicle (Adoption of National Law) Regulation 2013, which will be taken to be a Regulation made under the Heavy Vehicle (Adoption of National Law) Act 2013. The proposed Regulation will prescribe offences against the National Law and the Heavy Vehicle (Mass, Dimension and Loading) Regulation in their application to New South Wales for which an infringement notice (also called a penalty notice) may be issued under the National Law.

ISSUES CONSIDERED BY COMMITTEE

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

Limited Defence

21. Proposed section 27D clarifies that the defence of mistake of fact is unavailable for certain offences. These offences include a driver driving while fatigued, a driver who drives more than the maximum work time, rests less than the minimum rest time, or who fails to keep appropriate records.
22. The effect of this would be to enable an offender to be convicted of an offence, even if they had the honest and reasonable belief about the facts, which, had they existed, would have meant that the driver's actions or omissions would not have constitute that offence.
23. The Committee commented on similar provisions when considering the *Heavy Vehicle (Adoption of National Law) Bill 2013*, the principal legislation of this Bill, in its Digest 39/55 in June 2013. Then, the Committee considered the overall safety objectives of the Bill and made no further comment.

Although this provision makes a mistake of fact unavailable for certain offences, the Committee has previously noted in Digest 39/55 the overall safety

objectives of this Bill. The Committee reiterates its previous view and makes no further comment.

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

Reference to an Interstate Jurisdiction

24. Schedule 3[1] provides that the local regulations may contain provisions of a savings or transitional nature consequent on the enactment of any Act of Queensland that amends the Heavy Vehicle National Law set out in the Schedule to the Queensland Act.
25. The Committee commented on similar provisions when considering the *Heavy Vehicle (Adoption of National Law) Bill 2013*, the principal legislation of this Bill, in its Digest 39/55 in June 2013. Then, the Committee noted that the effect of provisions like this will be to subject NSW law to the laws established by an interstate jurisdiction, removing legislation that affects NSW from the scrutiny of the NSW Parliament.
26. However, the Committee also noted that the nature of cooperative federalism will at times require one jurisdiction to establish model legislation, with other jurisdictions applying that law by reference to the model legislation.

The Committee reiterates its previous view that this Bill will remove the ability of the NSW Parliament from scrutinising amendment bills to the Heavy Vehicle National Law. However, it also recognises that the nature of cooperative federalism and design of model legislation will often require that one jurisdiction take the lead on model legislation, with other jurisdictions providing reference to the model legislation. The Committee makes no further comment on this issue.

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.