



## Legislation Review Committee

### LEGISLATION REVIEW DIGEST

No. 1/56 – 23 June 2015



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, 2015, 94p 30 cm

Chair: Mr Michael Johnsen MP

23 June 2015

ISSN 1448-6954

1. Legislation Review Committee – New South Wales

2. Legislation Review Digest No. 1 of 56

I Title.

II Series: New South Wales. Parliament. Legislation Review Committee Digest; No. 1 of 56

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	iii
Functions of the Committee	iv
Guide to the Digest	vi
Conclusions	vii
<b>PART ONE - BILLS</b>	<b>1</b>
1. CHILD PROTECTION LEGISLATION AMENDMENT BILL 2015	1
2. COURTS AND CRIMES LEGISLATION AMENDMENT BILL 2015	10
3. CRIMES (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2015*	14
4. CRIMES (SENTENCING PROCEDURE) AMENDMENT (FIREARMS OFFENCES) BILL 2015	17
5. CRIMES LEGISLATION AMENDMENT (CHILD SEX OFFENCES) BILL 2015	19
6. ELECTRICITY NETWORK ASSETS (AUTHORISED TRANSACTIONS) BILL 2015; ELECTRICITY RETAINED INTEREST CORPORATIONS BILL 2015	22
7. FAIR TRADING LEGISLATION (REPEAL AND AMENDMENT) BILL 2015	27
8. HEALTH SERVICES AMENDMENT (PARAMEDICS) BILL 2015	30
9. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (VALIDATION) BILL 2015	32
10. INDEPENDENT PRICING REGULATORY TRIBUNAL AMENDMENT (ACCREDITED STATE WATER REGULATOR) BILL 2015	35
11. LEGAL PROFESSION UNIFORM LAW APPLICATION LEGISLATION AMENDMENT BILL 2015	38
12. PAYROLL TAX REBATE SCHEME (JOBS ACTION) AMENDMENT (EXTENSION) BILL 2015	44
13. PESTICIDES AMENDMENT BILL 2015	46
14. PETROLEUM (ONSHORE) AMENDMENT (PROHIBIT COAL SEAM GAS) BILL 2015*	51
15. PUBLIC HEALTH (TOBACCO) AMENDMENT (E-CIGARETTES) BILL 2015	54
16. SMALL BUSINESS GRANTS (EMPLOYMENT INCENTIVE) BILL 2015	56
17. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2015	63
<b>PART TWO - REGULATIONS</b>	<b>67</b>
1. CEMETERIES AND CREMATORIA REGULATION 2014	67

2.	CHILD PROTECTION (WORKING WITH CHILDREN) AMENDMENT REGULATION 2014 _____	68
3.	CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (ACCESS TO MONEY) REGULATION 2015 _____	70
4.	LIQUOR AMENDMENT (RSA) REGULATION 2015 _____	71
5.	ROAD TRANSPORT (VEHICLE REGISTRATION) AMENDMENT (RELEASE OF INFORMATION) REGULATION 2014 _____	72
6.	SECURITY INDUSTRY AMENDMENT (MISCELLANEOUS) REGULATION 2015 _____	73
7.	WORK HEALTH AND SAFETY (MINES) REGULATION 2014 _____	74

# Membership

<b>CHAIR</b>	Mr Michael Johnsen MP, Member for Upper Hunter
<b>DEPUTY CHAIR</b>	Mr Lee Evans MP, Member for Heathcote
<b>MEMBERS</b>	Ms Melanie Gibbons MP, Member for Holsworthy Mr Alister Henskens MP, Member for Ku-ring-gai Mr David Mehan MP, Member for The Entrance Mr Shaoquett Moselmane MLC The Hon. Gregory Pearce MLC Mr David Shoebridge MLC
<b>CONTACT DETAILS</b>	Legislation Review Committee Parliament of New South Wales Macquarie Street Sydney NSW 2000
<b>TELEPHONE</b>	02 9230 3439 / 02 9230 2214
<b>FACSIMILE</b>	02 9230 3309
<b>E-MAIL</b>	<a href="mailto:legislation.review@parliament.nsw.gov.au">legislation.review@parliament.nsw.gov.au</a>
<b>URL</b>	<a href="http://www.parliament.nsw.gov.au/lrc">www.parliament.nsw.gov.au/lrc</a>

# 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*.

## 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.



# Conclusions

## PART ONE - BILLS

### 1. CHILD PROTECTION LEGISLATION AMENDMENT BILL 2015

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

#### *Presumption of innocence*

By reversing the onus of proof which traditionally requires an authority to prove the accused person is guilty of the prescribed behaviour before imposing a punishment or removing a privilege, the Bill may impact on the presumption of innocence. A person may be forced to prove they are innocent of prescribed behaviour or have their authority cancelled or suspended. However, as the paramount consideration of the legislation is the welfare of children and as this provision relates to cancellation or suspension of a carer's authorisation and not to the collection of evidence to criminally prosecute a person, the Committee makes no further comment.

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

#### *Non-reviewable Decisions*

By providing that certain decisions around the grant of carers' authorisations are not reviewable, the Bill excludes a right to independent review of such decisions. The Committee refers this matter to Parliament for further consideration.

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

#### *Commencement by proclamation*

The Committee prefers legislation of this kind, which may impact on rights to commence on a fixed day or assent, not by proclamation.

### 2. COURTS AND CRIMES LEGISLATION AMENDMENT BILL 2015

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

#### *Privacy and Retrospectivity*

The Committee notes that the authorisation of the exchange of personal information between the Commissioner of Corrective Services and the Commissioner of Fines Administration may impact on the privacy of individuals. This is because the information-sharing arrangement is to operate to the exclusion of the *Privacy and Personal Information Protection Act 1998* and is to operate retrospectively. Although the Committee notes the similar functions between the two agencies that are party to the information-sharing arrangement, the Committee refers this matter to Parliament for its further consideration.

#### *Retrospectivity*

The Committee notes that the revocation of orders by the Mental Health Review Tribunal is to operate with retrospective effect. The Committee ordinarily comments about retrospective legislation as it is contrary to the rule of law. However, given that these provisions are

intended to work to the benefit of patients, the Committee does not find the retrospectivity unreasonable in the circumstances.

3. CRIMES (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2015\*

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

*Double Jeopardy*

By potentially widening the circumstances under which a person may be retried for certain offences he or she has been acquitted of, the Bill impacts on the double jeopardy rule. This rule provides that no one who has been acquitted (or convicted) of an offence can be tried a second time on the same facts. The rule is intended to prevent the State, with its considerable power and resources, making repeated attempts to convict an individual for an alleged offence, thereby subjecting him or her to a continued state of uncertainty. The Committee notes the scheme of checks and balances under Part 8, Division 2 of the Act, that must be satisfied before a retrial can be ordered. Nonetheless, the Committee refers the matter to Parliament for consideration.

*Retrospectivity*

The Committee notes that the Bill is drafted to have limited retrospective effect. Retrospectivity is contrary to the rule of law which allows people knowledge of the laws that they are subject to at any given time. The Committee refers the matter to Parliament for consideration.

4. CRIMES (SENTENCING PROCEDURE) AMENDMENT (FIREARMS OFFENCES) BILL 2015

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

*Increase in Penalties*

The Committee notes that by increasing the standard non-parole period for two offences, it is likely that there will be an increase in the length of custodial sentences for these offences. The Committee refers this matter to Parliament for its further consideration.

5. CRIMES LEGISLATION AMENDMENT (CHILD SEX OFFENCES) BILL 2015

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

*Increase in Penalties*

The Committee notes that the Bill proposes to increase the maximum penalty for sexual intercourse with a child under 10 years from 25 years to life imprisonment. Despite these tougher penalties, the Committee also notes that this increase in the maximum penalty does not affect the ability of the courts to impose a lesser sentence. Further, given the gravity of the offence under consideration, the Committee does not regard this increase in penalty to be unreasonable in the circumstances.

6. ELECTRICITY NETWORK ASSETS (AUTHORISED TRANSACTIONS) BILL 2015;  
ELECTRICITY RETAINED INTEREST CORPORATIONS BILL 2015

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

*Denial of Compensation*

The Committee notes that the Bill excludes compensation rights that may arise out of a transfer of electricity assets under the proposed Act. This may impact on the economic rights of individuals. The Committee refers the matter to Parliament for further consideration.

#### *Employment Rights*

The Committee notes that the Bill provides the Government with the power to transfer an individual's employment contract to a third party. The Committee also notes that safeguards exist in the legislation to ensure that the individual does not suffer any loss as a result of this transfer. For these reasons the Committee does not make any adverse comments in relation to this issue.

#### *Extraterritoriality*

The Committee notes the intention of the Parliament for this Bill to apply with extraterritorial effect and, in doing so, may be going beyond its constitutional remit. In this respect, the Committee refers the matter to Parliament for further consideration.

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

#### *Non-Reviewable Decision*

The Bill provides that any dispute about the reasonableness of the Electricity Price Commissioner's requests for information from public sector agencies is to be decided by the Department of Premier and Cabinet. That is, the decision by one public sector agency to refuse to provide information is overseen by another public sector agency. It is not clear from the Bill if there is any right of appeal to an independent decision maker. Given the importance of the Price Commissioner's work to the economic rights of individuals living in NSW, the Committee refers the matter to Parliament for further consideration.

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

#### *Commencement by Proclamation*

The Committee prefers legislation such as this, which creates new offences and significant penalties including imprisonment, to commence on a fixed date or on assent, not by proclamation.

#### *Henry VIII Clause*

The Committee notes that when Henry VIII clauses are included in legislation they allow subordinate legislation (in this case, an order by the Governor) to amend and take precedence over primary legislation (in this case, the *State Owned Corporations Act 1989*). Amendments to principal legislation should be effected by Parliament. The Committee refers the matter to Parliament for further consideration.

#### *Henry VIII Clause II*

The Committee is concerned when Henry VIII clauses are included in legislation, and notes that this amendment enables the subordinate legislation (the regulation) to take precedence over the primary legislation (the *Electricity Supply Act 1995*). Amendments to principal legislation should be effected by Parliament, not by a regulation. The Committee refers the matter to Parliament for further consideration.

***Matter which should be set by Parliament***

The Committee notes that proposed section 41 grants the Treasurer discretion over whether certain State taxes and charges are required to be paid by a public sector agency, any person or body. In the Committee's view, a matter such as this, which may impact on the economic rights of individuals, should be set by Parliament. The Committee refers the matter to Parliament for further consideration.

**7. FAIR TRADING LEGISLATION (REPEAL AND AMENDMENT) BILL 2015**

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

*Commencement by proclamation*

The Committee will always note where commencement of an Act is delegated to the Executive, once passed by the Legislature. The Bill proposes to repeal four Acts and this requires administrative measures to be implemented before the specific sections can commence operation. In these circumstances, the Committee does not regard the commencement by proclamation to be an inappropriate delegation of legislative power.

**8. HEALTH SERVICES AMENDMENT (PARAMEDICS) BILL 2015**

The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.

**9. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (VALIDATION) BILL 2015**

Schedule 1 Amendment of Independent Commission Against Corruption Act 1988 No 35

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

*Retrospectivity*

The Committee notes that the Bill retrospectively validates action taken by ICAC before the High Court decision. The Bill thereby sanctions findings of 'corrupt conduct' that it appears, following the Court's decision, ICAC had no jurisdiction to make. Such retrospectivity is contrary to the rule of law. The rule of law allows citizens knowledge of what the law is at any given time so that they may order their behaviour accordingly. The Committee refers the matter to Parliament for further consideration.

*Legislative Interference in the Judicial Process*

It is a fundamental principle of the judicial process that courts decide disputes according to prescribed and previously agreed upon rules. If the legislature retrospectively changes these rules, or the effect of these rules, this constitutes interference in the judicial process. By retrospectively validating action taken by ICAC before the High Court decision (e.g. making 'corrupt conduct' findings outside its jurisdiction), the Bill partially reverses the effect of the High Court's decision thereby interfering in the judicial process. The Committee refers the matter to Parliament for further consideration.

*Illegal/Arbitrary Search and Seizure*

The Bill retrospectively validates ICAC's seizure of evidence as part of investigations even though the High Court has since held those investigations to be outside ICAC's jurisdiction. By retrospectively validating seizure of this evidence, the Bill may pay insufficient regard to citizens' right to be free from illegal and arbitrary search and seizure. Indeed, the Bill potentially allows seized evidence to be used in future criminal proceedings and allows

criminal convictions and findings of 'corrupt conduct' based on such evidence to stand. The Committee refers the matter to Parliament for further consideration.

**10. INDEPENDENT PRICING REGULATORY TRIBUNAL AMENDMENT (ACCREDITED STATE WATER REGULATOR) BILL 2015**

The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.

**11. LEGAL PROFESSION UNIFORM LAW APPLICATION LEGISLATION AMENDMENT BILL 2015**

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

*Procedural Fairness*

By providing that costs assessors and review panels are not bound by the rules of evidence, the Bill may impact on parties' rights to procedural fairness. However, as the provisions relate to civil matters (the adjudication of disputes over costs for legal services) and not to criminal matters, and as they provide assessors with flexibility to gather information to reach a suitable decision, the Committee makes no further comment.

*Administration of Justice*

The Bill provides that 'relevant persons' including the Legal Services Commissioner are compellable witnesses in proceedings under certain legislation. These witnesses could be compelled to give evidence to bodies such as ICAC about a matter they were involved in whilst administering the Uniform Law. In providing for this, the Bill may impact on the administration of justice by offending against the principle of finality. For instance, a witness could be called before ICAC to give evidence about a disciplinary matter s/he made a decision about, inviting discussion about that decision thereby impacting its finality. This concern, however, must be balanced against the policy objectives of each of the Acts that the persons are compellable under. 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**

*Insufficient criteria regarding the scope of persons to whom a power may be delegated*

The Committee notes the significant functions and powers allocated to the Legal Services Commissioner under the Uniform Law. The Bill allows the regulations to prescribe the class of persons to whom these functions and powers may be delegated. Given the significance of the functions and powers, the Committee would prefer the persons to whom they may be delegated to be clearly listed in the primary legislation, not left to regulations. This is to foster appropriate parliamentary oversight. However, regulations are subject to disallowance by Parliament under section 41 of the *Interpretation Act 1987*. Given this safeguard, the Committee makes no further comment.

**12. PAYROLL TAX REBATE SCHEME (JOBS ACTION) AMENDMENT (EXTENSION) BILL 2015**

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

**13. PESTICIDES AMENDMENT BILL 2015**

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

*Undue punishment/oppressive official powers*

The Committee notes that the Bill stipulates the above only in relation to convictions involving fraud, dishonesty or other behaviour in the previous 10 years and would not necessarily prevent an applicant from obtaining a licence. Given the responsible nature of the work being subject to applicants being licenced, the Committee makes no further comment on this issue.

*Presumption of innocence*

The Committee notes that the Bill may impact on the presumption of innocence should the Environment Protection Authority decide to revoke a licence whether or not a person has been convicted of an offence for contravention. However, given the 'fit and proper persons test' established in proposed Clause 5B, the Committee notes the reasonable approach which may be undertaken by the Authority in determining whether or not to grant a licence. For this reason the Committee makes no further comment.

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

*Commencement by Proclamation*

The Committee prefers legislation of this kind, including offence and penalty provisions, to commence on a fixed date or on assent, not by proclamation.

*Matters which should be set by Parliament*

The Committee notes that grounds concerning the cancelling of a licence and information put into the public domain should be included in primary legislation, and not set by secondary legislation, to allow for adequate parliamentary scrutiny. However, as a result of Section 41 of the Interpretation Act allowing Parliament to pass a resolution disallowing a statutory rule, the Committee makes no further comment.

14. PETROLEUM (ONSHORE) AMENDMENT (PROHIBIT COAL SEAM GAS) BILL 2015\*

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

*Right to Compensation and Retrospectivity*

The Committee is concerned that the Bill denies the right to seek compensation for loss caused as a result of the enactment of the proposed legislation. The Committee is particularly concerned that this exclusion of state liability would operate retrospectively. Retrospectivity is contrary to the rule of law which allows people to order their affairs according to what the law is. For example, it is less likely that a party would enter into a contract with the state if it knew at that time that it may not be able to sue in the event of a breach because of provisions such as these. The Committee refers the matter to Parliament for consideration.

15. PUBLIC HEALTH (TOBACCO) AMENDMENT (E-CIGARETTES) BILL 2015

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

*Commencement by Proclamation*

The Committee prefers legislation of this kind, which imposes significant monetary penalties on individuals, to commence on a fixed date or on assent, not by proclamation.

16. SMALL BUSINESS GRANTS (EMPLOYMENT INCENTIVE) BILL 2015

The Committee makes no comment on the Bill in respect of issues set out in s8A of the *Legislation Review Act 1987*.

## 17. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2015

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

### *Aboriginal Land Rights*

The Committee notes the Bill removes special requirements for the transfer or disposal of an asset by the NSW Aboriginal Land Council. This may result in less extensive consideration of such decisions by the Land Council, potentially impacting on Aboriginal land rights. However, the Committee notes the amendment is consistent with the position applying in relation to other decisions of the Land Council. In the circumstances, the Committee makes no further comment.

### *Retrospectivity*

The Committee generally comments where provisions in legislation are drafted with retrospective effect. This is because retrospectivity is contrary to the rule of law, allowing people knowledge of the laws they are subject to at any given time. In this case, the retrospective provision appears to relate to a procedural matter, and does not retrospectively create new offences or penalties. In the circumstances, the Committee makes no further comment.

### *Retrospectivity II*

The Committee generally comments where provisions in legislation are drafted with retrospective effect. This is because retrospectivity is contrary to the rule of law, allowing people knowledge of the laws they are subject to at any given time. In this case, the retrospective provisions are in the nature of statute law revision, for example, correcting minor drafting errors. In the circumstances, the Committee makes no further comment.

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

### *Henry VIII Clause*

The Committee notes that by providing that the Governor can, by proclamation, revoke the repeal of any Act by the proposed Act, the Bill allows the proposed Act, or one of the effects of the proposed Act, to be amended by proclamation. To foster appropriate Parliamentary oversight amendments to primary legislation should be affected by Parliament not by a proclamation. The Committee refers the matter to Parliament for further consideration.

## PART TWO - REGULATIONS

### 1. CEMETERIES AND CREMATORIA REGULATION 2014

Inappropriately delegates legislative powers: s 9(1)(b) of the LRA

### *Matter which should be scrutinised by Parliament*

The Committee notes that the regulation allows the Cemeteries Agency, by notice in writing, to adjust levy amounts in proportion to variations in the CPI. The Committee prefers levy amounts to be set by regulation. This is to allow for proper parliamentary scrutiny – while regulations are subject to disallowance by Parliament under section 41 of the *Interpretation*

*Act 1987*, a written notice of the Cemeteries Agency is not. As the Cemeteries Agency can only make adjustments in proportion to the CPI, the Committee makes no further comment.

2. CHILD PROTECTION (WORKING WITH CHILDREN) AMENDMENT REGULATION 2014

Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

*Parliamentary Scrutiny*

The Committee notes that the Regulation amends an Act. In the Committee's view, to facilitate appropriate Parliamentary scrutiny, amendments to primary legislation should be made by Parliament amending that legislation, not by the Executive amending a regulation. However, as the paramount consideration of the Regulation is the welfare of children, the Committee makes no further comment.

3. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (ACCESS TO MONEY) REGULATION 2015

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 9(1)(b) of the LRA

*Ill-defined and wide powers*

Under the Regulation, no money can be paid to certain inmates unless the Commissioner pays it to them, or authorises the payment. No guidance is provided about the circumstances under which the Commissioner would authorise payment. Therefore, the economic rights of the inmates may be unduly dependent upon an insufficiently defined administrative power. However, the Committee notes the need to preserve order and security in correctional facilities, and the community, and the fact that the provisions relate only to extreme, high risk, restricted inmates. In the circumstances the Committee makes no further comment.

4. LIQUOR AMENDMENT (RSA) REGULATION 2015

Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

*Procedural Fairness*

This Committee is concerned about the procedural fairness of revoking a person's RSA certification without notifying him/her particularly as a person working in licensed premises without an RSA certification is subject to a maximum penalty of \$5,500. Nonetheless, for revocation to occur, the Authority must be satisfied the certification was obtained fraudulently or by deception; must make a reasonable attempt to notify the person; and the person may have the order reviewed by the Civil and Administrative Tribunal. Given these safeguards, the Committee makes no further comment.

5. ROAD TRANSPORT (VEHICLE REGISTRATION) AMENDMENT (RELEASE OF INFORMATION) REGULATION 2014

Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

*Right to Privacy*

The Committee notes that the regulation authorises a government agency (RMS) to release a person's private information to a third party (CTP insurers). RMS must enter into a registration information disclosure agreement with the CTP insurer prior to releasing the information and



the information is restricted to ‘relevant information about a registrable vehicle in connection with the issue by that CTP insurer of a third-party policy in respect of the vehicle’. However, the Committee notes that there is no requirement for RMS to consult with the Privacy Commissioner before entering into an information disclosure agreement. This is a safeguard that the regulation *does* apply in relation to the release of similar information to toll operators. The Committee makes no further comment.

## 6. SECURITY INDUSTRY AMENDMENT (MISCELLANEOUS) REGULATION 2015

Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

### *Increase in Penalties*

The Committee notes the fivefold increase in penalties for the offence of employing an unlicensed person in the security industry. The Committee makes no further comment.

## 7. WORK HEALTH AND SAFETY (MINES) REGULATION 2014

Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

### *Right to Privacy*

The Committee notes that the regulation authorises persons conducting a business that has engaged a mine worker to disclose a health monitoring report about the worker to certain third parties, without the worker’s consent. It is not clear what obligations some of those third parties have to protect the worker’s privacy once they receive this report. The Committee would prefer these obligations to be made clear in the Regulation. However, given the health and safety objectives of these provisions, and the operation of the *Health Records and Information Privacy Act 2002*, the Committee makes no further comment.

### *Right to Privacy II*

The Committee notes there appears to be no requirement that the regulator’s decision to disclose information be reasonable. It is enough that the regulator had a genuine, subjective belief the disclosure was reasonably necessary to reduce or control the risk to the health or safety of any person. It is also unclear what duty third parties in receipt of the information have to protect the certificate holder’s privacy. However, given the safety objectives of these provisions, the Committee makes no further comment.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s 9(1)(b) of the LRA

### *Matter which should be set by Parliament*

The Committee notes that the Regulation allows the regulator a broad discretion to determine a fee for any service provided by it, in addition to any fee already payable under the Regulation. The Committee would prefer all fees to be clearly set out in the Regulation. The Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers s 9(1)(b) of the LRA

### *Ill-defined and wide powers*

By providing that the regulator may exempt a person or class of persons from any provision of the Regulation, the Regulation provides the regulator with a wide and ill-defined power. No

## LEGISLATION REVIEW COMMITTEE

guidance is provided in the Regulation about the matters to be considered in granting exemptions. Guidance should be provided in the Regulation. The Committee makes no further comment.

# Part One - Bills

## 1. Child Protection Legislation Amendment Bill 2015

Date introduced	3 June 2015
House introduced	Legislative Assembly
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Minister for Family and Community Services

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Adoption Act 2000*, the *Child Protection (Working with Children) Act 2012*, the *Children and Young Persons (Care and Protection) Act 1998*, the *Community Services (Complaints, Reviews and Monitoring) Act 1993* and the *Ombudsman Act 1974* to implement miscellaneous reforms relating to the protection of children and young persons, including amendments with respect to:
  - (a) assessing a person's suitability to be an adoptive parent, guardian or carer, including by taking into account the persons who reside with any such person, and
  - (b) applying the child protection provisions of the *Ombudsman Act 1974* and the reporting body provisions of the *Child Protection (Working with Children) Act 2012* to adult persons who reside on the same property as authorised carers, and
  - (c) ensuring that persons who carry out child-related work or who reside on certain properties or who hold key positions in certain agencies hold working with children check clearances or have current applications for clearances, and
  - (d) ensuring that employers, responsible agencies and the governing bodies of agencies verify that those persons hold a clearance or have a current application and are notified when any such person ceases to hold a clearance or have a current application, and
  - (e) requiring and permitting information to be provided and exchanged for the purposes specified in paragraphs (a)–(d), and
  - (f) permitting information about investigations into reportable allegations to be provided to the child or person with a disability who is the alleged victim of the conduct to which the allegation relates and to certain other persons who are concerned in the welfare of the child or person with a disability.

### BACKGROUND

2. This Bill aims to strengthen the legislative framework governing the safety of children. In particular, in his second reading speech, the Hon. Brad Hazzard notes that the Bill responds to the serious issues raised by the Royal Commission into Institutional

Responses to Child Sexual Abuse whilst building on the Government's Safe Home for Life reforms.

3. The amendments aim to strengthen the new Working with Children Check online system, following its first 18 months of operation. The Bill also looks at the role of the Secretary of the Department of Family and Community Services, or the principal officer of a non-government accredited adoption service provider, to improve the processes and timelines for adopting children.
4. The Bill addresses governance concerns arising from principal officers providing care without being subject to standard agency assessment and supervision arrangements, and also allows for greater sharing of information of carer and household information between agencies. Finally, it clarifies the scope of the NSW Ombudsman's oversight role in relation to investigations.

## 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 by proclamation.
7. Clause 3 repeals the Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Act 2001.

### **Schedule 1 Amendment of Adoption Act 2000 No 75**

8. Schedule 1 [1] and [9] update references to a Department and the head of a Department.
9. Schedule 1 [2] provides that anything done by or with the approval of the principal officer of an accredited adoption service provider in relation to adoption services is taken to be done by the accredited adoption service provider.
10. Schedule 1 [3] inserts definitions of *applicant* (being a person who has made an application to adopt that is still current) and *reside on a property* (which refers to the definition inserted by Schedule 2 [2]) for the purposes of Part 3 of Chapter 4 of the *Adoption Act 2000* (the *Principal Act*). Schedule 1 [6] inserts similar definitions for the purposes of Part 3A of Chapter 4 of the *Principal Act*. Schedule 1 [4] makes a consequential amendment.
11. Schedule 1 [5] inserts proposed sections 45AA and 45AB into Part 3 of Chapter 4 of the *Principal Act* and Schedule 1 [8] inserts similar sections into Part 3A of Chapter 4 of the *Principal Act*.
12. Proposed section 45AA permits any person to provide information about another person to the principal officer of an accredited adoption service provider or to the Secretary of the Department of Family and Community Services (the *Secretary*) if the person reasonably believes the other person to be an applicant or a person who resides on the same property as an applicant. The information provided may be used to determine whether the applicant is suitable to adopt a child. The person who provides

the information is protected from civil, criminal or disciplinary action in relation to the provision of the information.

13. Proposed section 45AB requires an applicant to notify the person to whom the application was made about any person who resides on the same property as the applicant for 3 weeks or more, or about any person residing on the same property as the applicant who attains the age of 18 years.
14. Schedule 1 [7] permits the Secretary or the principal officer of an accredited adoption service provider to invite an authorised carer of a child who is in out-of-home care to submit an application to adopt the child (currently this may only be done by the Secretary).
15. Schedule 1 [10] inserts savings and transitional provisions consequential on the other amendments proposed to be made by Schedule 1.
16. Schedule 1 [11] inserts a definition of *Secretary* for the purposes of the Principal Act.

**Amendment of Child Protection (Working with Children) Act 2012 No 51**

17. Schedule 2 [1] omits definitions of interim bar and working with children check number and inserts a number of definitions for the purposes of the Child Protection (Working with Children) Act 2012 (the Principal Act) including notifiable person in relation to an applicant for, or a holder of, a working with children check clearance (a clearance). Notifiable persons include any employer or proposed employer of the applicant or holder in respect of child-related work. Schedule 2 [3], [8]–[12], [22], [32], [33] and [36] make consequential amendments.
18. Schedule 2 [2] sets out what is meant by the term reside on a property as this term is to replace the concept of reside at a home throughout the Principal Act.
19. Schedule 2 [4] provides a defence to offences of engaging in child-related work by a person who does not have a clearance or a current application for a clearance or by a person who is subject to an interim bar. If the offence was consequential on the person being subject to an interim bar, having an application for a clearance refused or terminated or having a clearance cancelled and, at the time that the offence was committed, the person did not know about the interim bar, refusal, termination or cancellation.
20. Schedule 2 [5] corrects an incorrect reference.
21. Schedule 2 [6] inserts proposed sections 9A and 9B.
22. Proposed section 9A requires an employer to verify on the working with children register that each worker who will carry out child-related work for the employer holds a clearance or has a current application for such a clearance. The verification must occur before the worker commences child-related work and then again when a clearance of the worker ceases to have effect (which occurs 5 years after it is granted).
23. Proposed section 9B requires the governing body of an organisation to ensure that a person is not appointed on a permanent basis to a key position in the organisation that involves child-related work unless the person is the holder of a clearance or has a

current application for a clearance. Failure to do so is an offence with a maximum penalty of \$11,000, in the case of a corporation, and \$5,500 in any other case. Key positions in an organisation are the chief executive officer, the principal officer (in the case of a designated agency, a registered agency or an accredited adoption service provider) and any other position prescribed by the regulations under the Principal Act.

24. Schedule 2 [7] re-enacts section 10 of the Principal Act. That section made it an offence if an adult person who does not have a clearance or a current application for a clearance resides at the home of an authorised carer or at a home where a home based education and care service or family day care service is provided. The new section will take account of the change in terminology from reside at a home to reside on a property. The new section will also make it clear that a person who is subject to an interim bar is taken not to have a clearance or a current application for a clearance. Finally, the new section will provide defences if the adult person has been residing on the property for less than 3 weeks or if the accused person (which may be the adult person, the agency that authorised the authorised carer or the agency that oversees the provision of the education and care service or family day care service) did not know about certain matters that caused the adult person to no longer have a clearance or a current application for a clearance.
25. Schedule 2 [13] prescribes certain agencies as the responsible agency in respect of prospective adoptive parents, prospective guardians and adult persons who reside on the same property as any such person or adult persons who reside on the same property as an authorised carer or carer applicant or on a property where a home based education and care service or family day care service is provided. A responsible agency must verify on the working with children register that each person, for whom the agency is the responsible agency, holds a clearance or has a current application for a clearance. The verification must occur when the agency becomes aware that it is the responsible agency for the person and then again when a clearance of the person ceases to have effect (which occurs 5 years after it is granted).
26. Schedule 2 [14] requires the Children's Guardian to ensure that each applicant for a clearance is given an application number and provides that an applicant may withdraw an application only with the consent of the Children's Guardian. The Children's Guardian is not to consent if of the opinion that there would be a risk to the safety of children if the applicant were to engage in child-related work. The Children's Guardian is required to give written notice of the withdrawal to notifiable persons in respect of the applicant.
27. Schedule 2 [15] extends the embargo on a fresh application for a clearance following a refusal of an application so that a person whose clearance is cancelled under section 23 (Cancellation of clearances) of the Principal Act is also unable to make a further application for 5 years unless certain circumstances change or the Children's Guardian permits an earlier application to be made. Schedule 2 [24] makes a consequential amendment.
28. Schedule 2 [16] reduces the period within which an applicant for a clearance must provide further information to the Children's Guardian from 6 months to 3 months. The Children's Guardian may terminate an application if the applicant fails to provide the information within that time. Schedule 2 [17] requires the Children's Guardian to give written notice of the termination to notifiable persons in respect of the applicant.

29. Schedule 2 [18] provides that an interim bar is also a bar on residing on the same property as an authorised carer or on a property where a home based education and care service or family day care service is provided (currently it is only a bar on engaging in child-related work). Schedule 2 [19] makes a consequential amendment.
30. Schedule 2 [20] requires the Children's Guardian to give written notice of any interim bar to notifiable persons in respect of any applicant or holder of a clearance who is subject to the interim bar.
31. Schedule 2 [21] makes it clear that an interim bar ceases in respect of an applicant for a clearance if the application for the clearance is refused.
32. Schedule 2 [23] requires the Children's Guardian to give written notice of any refusal of an application to the applicant and to notifiable persons in respect of the applicant.
33. Schedule 2 [25] and [26] require the Children's Guardian to give written notice of any cancellation of a clearance to notifiable persons in respect of the holder of the clearance.
34. Schedule 2 [27] specifies additional matters that must be included on the working with children register. These include the name and date of birth of the applicant for, or holder of, a clearance and, in the case of an application for a clearance, any determination by the Children's Guardian to refuse the application and in respect of a clearance, whether the holder of the clearance is subject to an interim bar or has had a clearance cancelled.
35. Schedule 2 [28] requires the Children's Guardian to make information on the working with children register available to a person carrying out a verification under proposed section 9A or 11B. The amendment also permits regulations under the Principal Act to be made for or with respect to a number of matters related to the register.
36. Schedule 2 [29] requires a designated agency to notify the Children's Guardian of the name and identifying particulars of any adult person who resides for 3 weeks or more on the same property as an authorised carer authorised by the agency if the agency has made a finding that the adult person engaged in sexual misconduct committed against, with or in the presence of a child, including grooming of a child or engaged in the serious physical assault of a child. Schedule 2 [30] includes designated agencies as reporting bodies for the purposes of section 35 of the Principal Act.
37. Schedule 2 [31] extends the database functions of the Children's Guardian so as to require information to be collected and maintained about persons who verify information on clearances or applications for clearances.
38. Schedule 2 [34] permits the Children's Guardian to disclose information obtained or used under the Principal Act to the Secretary for the purposes of the Secretary exercising functions under Chapter 4 (Children and young persons in need of care and protection) of the *Children and Young Persons (Care and Protection) Act 1998*. The information that may be disclosed is information about any person who the Children's

Guardian reasonably believes is or was an authorised carer, a carer applicant, a prospective adoptive parent, a guardian or a prospective guardian, or a person who resides or has resided on the same property as any such person. Schedule 2 [35] inserts a definition of *guardian*.

39. Schedule 2 [37] removes a provision that has become redundant because of changes made to the regulations under the Principal Act.
40. Schedule 2 [38] provides that certain exemptions from the requirement to have a clearance or a current application for a clearance in the case of self-employed persons who undertake child-related work do not apply to a disqualified person or to a person who has been subject to an interim bar, had an application for a clearance refused or had a clearance cancelled.
41. Schedule 2 [39] inserts savings and transitional provisions consequential on the other amendments proposed to be made by Schedule 2.

**Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157**

42. Schedule 3 [1] updates references to the head of a Department.
43. Schedule 3 [2] omits the definition of *Director-General* and inserts a number of definitions for the purposes of the *Children and Young Persons (Care and Protection) Act 1998* (the *Principal Act*). Schedule 3 [5], [15] and [18] make consequential amendments.
44. Schedule 3 [3] specifies who is the principal officer of a designated agency or a registered agency and provides that anything done by, or with the approval of, the principal officer in relation to out-of-home care is taken to be done by the designated agency or registered agency concerned.
45. Schedule 3 [4] prevents the Children's Court from making an order allocating any aspect of parental responsibility for a child or young person to an organisation or the principal officer of a designated agency (other than the Secretary).
46. Schedule 3 [7] prevents the Secretary from making an application for a guardianship order (or consenting to a designated agency or other person making such an application) unless the Secretary is satisfied that the person to whom parental responsibility for the child or young person is to be allocated under those orders has satisfied such suitability assessments as may be prescribed by regulations under the Principal Act. Schedule 3 [6] makes a consequential amendment.
47. Schedule 3 [8] provides that a care plan prepared by an applicant for a guardianship order must include information about the arrangements for contact between the child or young person and parents, relatives, friends and other persons connected with the child or young person.
48. Schedule 3 [9] requires a prospective guardian (other than an authorised carer) to notify the Secretary if a person resides on the same property as the prospective guardian for 3 weeks or more or if a person residing on that property attains the age of 18 years.
49. Schedule 3 [10] updates a reference to a renamed Department.



50. Schedule 3 [11] permits regulations under the Principal Act to make provision with respect to the authorisation of persons as authorised carers on a provisional basis.
51. Schedule 3 [12] permits regulations under the Principal Act to make provision with respect to prescribing events the occurrence of which raise a presumption that an authorised carer's authorisation will be cancelled.
52. Schedule 3 [13] requires an authorised carer to notify the designated agency that authorised the authorised carer if a person resides on the same property as the authorised carer for 3 weeks or more or if a person residing on that property attains the age of 18 years.
53. Schedule 3 [14], [16] and [22] update terminology as a consequence of the commencement of the *Government Sector Employment Act 2013*.
54. Schedule 3 [17] makes it an offence with a maximum penalty of \$22,000 if the principal officer of a designated agency resides on the same property as a child or young person who is in out-of-home care supervised by the designated agency. However, the offence does not apply if the principal officer resides with the child or young person at a facility of the designated agency at which out-of-home care is provided.
55. Schedule 3 [19] provides that certain decisions are not reviewable by the Civil and Administrative Tribunal. These are decisions not to authorise a person as an authorised carer, a decision to cancel an authorisation granted on a provisional basis and a decision to cancel a person's authorisation if the cancellation occurs because of an event that has been prescribed by the regulation under the Principal Act as an event, the occurrence of which raises a presumption that an authorised carer's authorisation will be cancelled (see Schedule 3 [12]).
56. Schedule 3 [20] permits a person to be prescribed by the regulations under the Principal Act as a prescribed body for the purposes of Chapter 16A (Exchange of information and co-ordination of services) of the Principal Act.
57. Schedule 3 [21] permits a person (the *provider of information*) to provide information to a designated agency about another person if the provider of information reasonably believes that the other person is an authorised carer, carer applicant, guardian, prospective guardian or person who resides on the same property as any such person. The designated agency is authorised to use information so provided to determine whether a person is suitable to be, or to continue to be, an authorised carer or guardian.
58. Schedule 3 [23] provides for the exchange of information between bodies that assess the suitability of persons to be adoptive parents, guardians or authorised carers in this State and bodies that arrange or provide child protection, out-of-home care, guardianship or adoption services in other jurisdictions. An exchange may occur only if it is in accordance with protocols made by the Minister for Family and Community Services in consultation with the Privacy Commissioner.
59. Schedule 3 [24] permits regulations under the Principal Act to make provision for or with respect to officers of designated agencies and registered agencies (including principal officers) and the register established by the Children's Guardian for the purpose of the

authorisation of individuals as authorised carers.

60. Schedule 3 [25] and [26] update a savings and transitional provision to make it clear that a guardianship order that is taken to be made under that provision allocates parental responsibility to a person who is a relative or kin and not to any other person.
61. Schedule 3 [27] corrects a cross-reference.
62. Schedule 3 [28] inserts savings and transitional provisions consequential on the other amendments proposed to be made by Schedule 3.

#### **Amendment of Community Services (Complaints, Reviews and Monitoring) Act 1993 No 2**

63. Schedule 4 [1] requires an Official Community Visitor to provide the Children's Guardian with any information that the Children's Guardian determines is relevant to the accreditation or registration of a designated agency or a registered agency. Schedule 4 [3] inserts a transitional provision consequential on the amendment.
64. Schedule 4 [2] makes it clear that a person may make a complaint to the Ombudsman about the conduct of a designated agency in respect of the authorisation of a person as an authorised carer.

#### **Amendment of Ombudsman Act 1974 No 68**

65. Schedule 5 [1] inserts a definition of parent for the purposes of Part 3A (Child protection) of the Ombudsman Act 1974 (the Principal Act).
66. Schedule 5 [2] provides that Part 3A of the Principal Act applies to an adult who resides on the same property as an authorised carer for 3 weeks or more in the same way as it applies to an employee and in such a case the adult is taken to be an employee of the designated agency that authorised the carer.
67. Schedule 5 [3] permits the Ombudsman, the head of a designated government agency or the head of a designated non-government agency to disclose certain information concerning an investigation into a reportable allegation. The information may be disclosed to the child who is allegedly the subject of the reportable conduct or misconduct that forms the basis of the allegation, a parent of the child or an authorised carer of the child.
68. Schedule 5 [4] permits the Ombudsman, the Secretary or the head of a funded provider to disclose certain information concerning an investigation into a reportable allegation. The information may be disclosed to the person with a disability who is allegedly the subject of the reportable incident or behaviour that forms the basis of the allegation, a nominee of the person or if the person lacks capacity, specified persons who are concerned in the welfare of the person with a disability.
69. Schedule 5 [5] inserts savings and transitional provisions consequential on the other amendments proposed to be made by Schedule 5.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Presumption of innocence*

70. Schedule 3, item 12 of the Bill permits the making of regulations under the Principal Act that would prescribe events the occurrence of which would raise a presumption that an authorised carer's authorisation will be cancelled. Therefore proof that such prescribed events have not occurred falls on the accused person.

**By reversing the onus of proof which traditionally requires an authority to prove the accused person is guilty of the prescribed behaviour before imposing a punishment or removing a privilege, the Bill may impact on the presumption of innocence. A person may be forced to prove they are innocent of prescribed behaviour or have their authority cancelled or suspended. However, as the paramount consideration of the legislation is the welfare of children and as this provision relates to cancellation or suspension of a carer's authorisation and not to the collection of evidence to criminally prosecute a person, the Committee makes no further comment.**

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

#### *Non-reviewable Decisions*

71. Schedule 3, item 19 of the Bill provides that certain decisions are not reviewable by the Civil and Administrative Tribunal. These include decisions to refuse to authorise a person as an authorised carer and a decision to cancel an authorisation granted on a provisional basis.

**By providing that certain decisions around the grant of carers' authorisations are not reviewable, the Bill excludes a right to independent review of such decisions. The Committee refers this matter to Parliament for further consideration.**

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

#### *Commencement by proclamation*

72. The Bill provides for the Act to commence on a day or days to be appointed by proclamation.

**The Committee prefers legislation of this kind, which may impact on rights to commence on a fixed day or assent, not by proclamation.**

## 2. Courts and Crimes Legislation Amendment Bill 2015

Date introduced	6 May 2015
House introduced	Legislative Assembly
Minister responsible	The Hon. Gabrielle Upton MP
Portfolio	Attorney General

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
2. To amend the Civil and Administrative Tribunal Act 2013:
  - (i) to make further provision with respect to the powers of the Civil and Administrative Tribunal (*the Tribunal*) with respect to the representation of parties to proceedings, and
  - (ii) to rename the Health Practitioner Division List of the Occupational Division of the Tribunal as the Health Practitioner List, and
  - (iii) to enable a person who is a senior member (but not an Australian lawyer) to sit as one of the 3 members of an Appeal Panel determining an internal appeal against a decision made in the Guardianship Division of the Tribunal,
3. To amend the Guardianship Act 1987:
  - (i) to make further provision with respect to persons who are to be treated as parties to certain proceedings under that Act, and
  - (ii) to provide for alternative enduring guardians to be called substitute enduring guardians, and
  - (iii) to confer additional powers on the Tribunal in connection with the determination of proceedings under that Act, and
  - (iv) to enable a person to make an application to the Tribunal for a financial management order with respect to the person and to enable a person whose estate is subject to such an order to apply for a review of the appointment of a manager of the person's estate,
4. To amend the Children's Court Act 1987, District Court Act 1973, Drug Court Act 1998, *Dust Diseases Tribunal Act 1989* and *Local Court Act 2007* to enable the Attorney General to appoint an acting head of the Court or Tribunal during a vacancy or absence from duty of the head of the Court or Tribunal,

5. To amend the *District Court Act 1973*, *Industrial Relations Act 1996*, *Land and Environment Court Act 1979*, *Local Court Act 2007* and *Supreme Court Act 1970* to enable acting judicial officers to be appointed:
  - (i) for a period not exceeding 5 years (instead of the current 12 months), and
  - (ii) up to the age of 77 years (instead of the current 75 years),
6. To amend the *Land and Environment Court Act 1979* to enable acting commissioners to be appointed for a period not exceeding 5 years (instead of the current 12 months),
7. To amend the *Crimes (Administration of Sentences) Act 1999* to enable the Commissioner of Fines Administration and the Commissioner of Corrective Services to share certain information about inmates so as to identify any of their outstanding fines and to facilitate their participation in work and development orders to satisfy all or part of those fines,
8. To amend the *Jury Act 1977* to enable the sheriff to obtain a customer identification number allocated to a person by Roads and Maritime Services for the purpose of determining whether the person should be excluded from jury service,
9. To amend the *Land and Environment Court 1979* to extend the classes of proceedings in which judges of the Land and Environment Court of New South Wales may be assisted by commissioners to include Class 4 proceedings (Class 4 proceedings relate to environmental planning and protection and development contract civil enforcement),
  - (i) to amend the *NSW Trustee and Guardian Act 2009* to enable the Mental Health Review Tribunal to revoke financial management orders made under the Act in respect of certain current or former patients admitted to mental health facilities,
10. To amend the *Oaths Act 1900* to enable justices of the peace to witness certain interstate and Commonwealth oaths, affidavits and statutory declarations,
11. To amend the *Trees (Disputes Between Neighbours) Act 2006* to extend the application of certain provisions relating to court orders in respect of high hedges that obstruct sunlight or views to land within a zone designated "rural-residential" under an environmental planning instrument,
12. To make amendments to certain legislation in the nature of statute law revision,
13. To make consequential amendments to certain legislation.

## BACKGROUND

14. This Bill is part of the Government's regular legislative review and monitoring program, and makes a number of miscellaneous amendments to legislation affecting the operation of the courts and tribunals of New South Wales and other legislation administered by the Attorney General and Minister for Justice.
15. This Bill passed Parliament on 13 May 2015 and took effect on 15 May 2015.

## OUTLINE OF PROVISIONS

16. Clause 1 sets out the name (also called the short title) of the proposed Act.
17. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
18. Clause 3 makes it clear that the explanatory notes contained in the Schedules do not form part of the proposed Act.
19. The amendments to the legislation set out in Schedule 1 are explained in detail in the explanatory notes in the Schedule.
20. The amendments to the legislation set out in Schedule 2 are explained in detail in the explanatory notes in the Schedule.
21. The amendments to the legislation set out in Schedule 3 are explained in detail in the explanatory notes in the Schedule.
22. The amendments to the legislation set out in Schedule 4 are explained in detail in the explanatory notes in the Schedule.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Privacy and Retrospectivity*

23. New section 257A of the *Crimes (Administration of Sentences) Act 1999* enables the Commissioner of Corrective Services to enter into an arrangement with the Commissioner of Fines Administration for the purposes of sharing or exchanging any information that is held by either Commissioner. This information relates to an individual who is both an inmate and a fine defaulter.
24. Under the arrangement, information can be shared relating to any inmate's name, date of birth, address, custodial information, sentence and parole information, and any unique identifiers.
25. Under section 257A(3)(a) this scheme is to operate to the exclusion of privacy requirements under the *Privacy and Personal Information Protection Act 1998*. As such, the Committee notes that this information sharing arrangement will potentially have adverse impacts on the privacy of inmates, especially concerning information that is likely to be of a sensitive nature.
26. This issue may be compounded by the amendment to Schedule 5 of the Act which retrospectively validates exchanges of information carried out before the commencement of the new provision. The Committee is concerned where legislation is to operate retrospectively, especially when its operation is prejudicial to individual rights and liberties.
27. However, the Committee also notes the similar functions of both Corrective Services NSW and the Commissioner of Fines Administration in the enforcement of fines and penalties. In this respect, the Committee appreciates that exchanges of pertinent information in certain circumstances can be justified between two like agencies.

The Committee notes that the authorisation of the exchange of personal information between the Commissioner of Corrective Services and the Commissioner of Fines Administration may impact on the privacy of individuals. This is because the information-sharing arrangement is to operate to the exclusion of the *Privacy and Personal Information Protection Act 1998* and is to operate retrospectively. Although the Committee notes the similar functions between the two agencies that are party to the information-sharing arrangement, the Committee refers this matter to Parliament for its further consideration.

### *Retrospectivity*

28. Section 88 of the *NSW Trustee and Guardian Act 2009* has been amended to now enable the Mental Health Review Tribunal to revoke financial management orders in respect of patients who are or were admitted to a mental health facility. This is in circumstances where the Tribunal is satisfied that those patients are capable of managing their affairs, or that the revocation is in their best interests.
29. Amendments to Schedule 1 of that Act provide that the revocation of financial management orders extend to revocations made before this Bill took effect.
30. The Committee notes the retrospective operation of this provision in authorising the prior revocation of orders by the Mental Health Review Tribunal. However, the Committee also notes that the revocation of these orders is largely intended to be to the benefit to the patient who had been subject to the order.

The Committee notes that the revocation of orders by the Mental Health Review Tribunal is to operate with retrospective effect. The Committee ordinarily comments about retrospective legislation as it is contrary to the rule of law. However, given that these provisions are intended to work to the benefit of patients, the Committee does not find the retrospectivity unreasonable in the circumstances.

### 3. Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015\*

Date introduced	4 June 2015
House introduced	Legislative Council
Member responsible	Mr David Shoebridge MLC
Portfolio	Private Member's Bill*

#### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Crimes (Appeal and Review) Act 2001* to extend an exception to the rule against double jeopardy in relation to an acquitted person where previously inadmissible evidence becomes admissible.
2. The Bill provides that, when the Director of Public Prosecutions applies to the Court of Criminal Appeal for an order that an acquitted person be retried for an offence punishable by life imprisonment, evidence against the acquitted person is to be considered fresh (for the purpose of determining whether it is 'fresh and compelling' in the sense required for a retrial) if it was inadmissible in the proceedings in which the person was acquitted and, as a result of a substantive legislative change in the law of evidence since the acquittal, it would now be admissible if the acquitted person were to be retried.

#### BACKGROUND

3. Nearly 25 years ago three Aboriginal children – Colleen Walker-Craig, Clinton Speedy-Duroux and Evelyn Greenup were murdered in Bowraville.
4. In 1996, there was an attempt to prosecute two of the murders together, at the same trial, under the more restrictive common law evidence rules regarding propensity and similar fact evidence that applied at that time. This application was denied and each of the murders was tried separately with the same accused person acquitted at each trial. The Member introducing this Bill, Mr David Shoebridge MLC, told Parliament that, since that time, there have been substantial changes to the laws around tendency and coincidence evidence in NSW, and running the three trials together would now be possible. This would considerably strengthen the prosecution case.
5. In 2006, legislation was passed in NSW to create a limited exception to the double jeopardy rule, allowing the Court of Criminal Appeal to order a retrial following a murder acquittal if there is 'fresh and compelling evidence' and it is in the interests of justice.
6. Meanwhile, after an extensive homicide re-investigation by the Police, further evidence came to light in the Bowraville murder cases. Based on that, and the change to tendency and coincidence law, the families of the Bowraville victims asked the Office of the Director of Public Prosecutions to apply to the NSW Court of Criminal Appeal for a



retrial. The request was denied. It was considered that the Bowraville case could not be retried because the prosecution had tendered some evidence of one murder in the trial concerning another of the murders that was not admitted under the rules of evidence as they stood at that time. That is, as that evidence had been tendered, it could not be considered 'fresh evidence' and therefore did not meet the test for retrial under the exception to double jeopardy.

7. On 26 November 2013, the Legislative Council adopted a motion calling on the Standing Committee on Law and Justice to inquire into and report on the family response to the murders in Bowraville. The Committee delivered its report in November 2014, recommending that the NSW Government review section 102 of the *Crimes (Appeal and Review) Act 2001* which deals with the current exception to double jeopardy, one of the barriers preventing a fresh murder trial.
8. The Government has appointed Justice James Wood to conduct this review. Mr Shoebridge stated that the Government should instead have implemented immediate reform to the law of double jeopardy to remove the barrier to retrial of the Bowraville murders, as time is of the essence. Hence, Mr Shoebridge has introduced the Bill which he states 'clearly and squarely addresses [the] problem and removes it as a significant barrier to a future application under the double jeopardy provisions'.

## OUTLINE OF PROVISIONS

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

### **Schedule 1 Amendment of Crimes (Appeal and Review) Act 2001 No 120**

11. Schedule 1 [1] gives effect to the object described in the 'Purpose and Description' section above. Schedule 1 [2] makes a consequential amendment.
12. Schedule 1 [3] extends the application of the provision inserted by Schedule 1 [1] to a person acquitted before the commencement of the proposed Act.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Double Jeopardy*

13. Under section 100 of the *Crimes (Appeal and Review) Act 2001* ('the Act'), the Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a life sentence offence if satisfied that there is 'fresh and compelling evidence' against the acquitted person and it is in the interests of justice to do so. However, it is unclear whether the 'fresh evidence' requirement would be satisfied by evidence that has been tendered at a trial acquitting a person, and that has been judged to be inadmissible at that trial, that would now be admissible in a trial because of changes to the laws of evidence.

14. The Bill would clarify the law to provide that evidence is to be considered 'fresh' in the sense required for a retrial, if it was inadmissible in the proceedings in which the person was acquitted but would now be admissible if the acquitted person were to be retried.
15. Mr Shoebridge noted in his Second Reading Speech on the Bill that Part 8, Division 2 of the Act contains a rigorous system of checks and balances for retrials by prosecution application. Besides the fact that the provisions only apply to the small number of offences that could attract a life sentence, and that fresh evidence must come to the Prosecutor's attention; the Director of Public Prosecutions (DPP) must decide through its internal processes that an application for retrial would have reasonable prospects of success and be in the public interest. Similarly, the DPP must apply to the NSW Court of Criminal Appeal for retrial under section 100 of the Act and the Court must be satisfied that there is 'fresh and compelling' evidence and that it is in the interests of justice for the order to be made.

**By potentially widening the circumstances under which a person may be retried for certain offences he or she has been acquitted of, the Bill impacts on the double jeopardy rule. This rule provides that no one who has been acquitted (or convicted) of an offence can be tried a second time on the same facts. The rule is intended to prevent the State, with its considerable power and resources, making repeated attempts to convict an individual for an alleged offence, thereby subjecting him or her to a continued state of uncertainty. The Committee notes the scheme of checks and balances under Part 8, Division 2 of the Act, that must be satisfied before a retrial can be ordered. Nonetheless, the Committee refers the matter to Parliament for consideration.**

### *Retrospectivity*

16. Schedule 1 item 3 of the Bill would apply the changes to the double jeopardy laws retrospectively, that is, to cases of persons acquitted before commencement of the proposed Act.

**The Committee notes that the Bill is drafted to have limited retrospective effect. Retrospectivity is contrary to the rule of law which allows people knowledge of the laws that they are subject to at any given time. The Committee refers the matter to Parliament for consideration.**

## 4. Crimes (Sentencing Procedure) Amendment (Firearms Offences) Bill 2015

Date introduced	2 June 2015
House introduced	Legislative Assembly
Minister responsible	The Hon. Gabrielle Upton MP
Portfolio	Attorney General

### PURPOSE AND DESCRIPTION

1. The object of the Bill is to amend the *Crimes (Sentencing Procedure) Act 1999* to establish standard non-parole periods for a number of firearms offences against the *Crimes Act 1900*.
2. Further, the Bill increases the standard non-parole period for offences relating to the unauthorised possession or use of firearms and prohibited weapons under the *Firearms Act 1996* and the *Weapons Prohibition Act 1998*.

### BACKGROUND

3. In 2013, the Government asked the NSW Sentencing Council to review the operation of the standard non-parole period scheme. The Council was required to conduct community consultations, and make recommendations on what offences should be included in the scheme, what the standard non-parole periods for those offences should be, and how the scheme should be administered.
4. The Council developed a series of recommendations on how the scheme can be improved, and this Bill gives effect to the second tranche of those reforms.
5. The legislation establishes standard non-parole periods for five firearm offences that have not been previously subject to that scheme. Further, the legislation increases existing standard non-parole periods for two offences relating to the unauthorised possession or use of firearms and prohibited weapons.

### OUTLINE OF PROVISIONS

6. Clause 1 sets out the name (also called the short title) of the proposed Act.
7. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
8. The Table to Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999* (the Table) sets standard non-parole periods for a number of offences. When determining a sentence for an offence listed in the Table, a court is required to take into account the standard non-parole period for that offence.

9. Schedule 1 [1] and [2] amend the Table to introduce a standard non-parole period of 9 years for offences under section 33A (1) and (2) of the Crimes Act 1900 relating to discharging a firearm with intent to cause grievous bodily harm or to resist arrest or detention, of 5 years for an offence under section 93GA (1) of that Act of firing a firearm at a dwelling-house or other building with reckless disregard for the safety of any person and of 6 years for offences under section 93GA (1A) and (1B) of that Act of firing a firearm with reckless disregard for the safety of any person at a dwelling-house or other building during a public disorder or in the course of organised criminal activity.
10. Schedule 1 [3] and [4] amend the Table to increase the standard non-parole period for offences under section 7 of the Firearms Act 1996 relating to unauthorised possession or use of firearms from 3 to 4 years and for offences under section 7 of the Weapons Prohibition Act 1998 relating to unauthorised possession or use of prohibited weapons from 3 to 5 years.
11. Schedule 1 [5] is a savings and transitional provision.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Increase in Penalties*

12. Schedule 1[3] of the Bill increases the standard non-parole period relating to unauthorised possession or use of firearms from 3 years to 4 years. In addition, Schedule 1[4] increases the standard non-parole period relating to unauthorised possession or use of a prohibited weapon from 3 years to 5 years.
13. Under section 54A(2) of the *Crimes (Sentencing Procedure) Act 1999*, the purpose of the standard non-parole period is to establish a recommended sentence that takes into account only the objective factors affecting the relative seriousness of that offence, being in the middle of the range of seriousness.
14. By increasing the standard non-parole period for two offences, it is likely that there will be an increase in the length of custodial sentences for these offences. This means that offences committed after the legislation takes effect will likely attract a higher sentence than offences committed in substantially similar circumstances before the legislation takes effect.
15. In the absence of compelling reasons that require an increase in the standard non-parole period, the Committee is cautious about general increases as potentially unfair on affected individuals.

**The Committee notes that by increasing the standard non-parole period for two offences, it is likely that there will be an increase in the length of custodial sentences for these offences. The Committee refers this matter to Parliament for its further consideration.**

## 5. Crimes Legislation Amendment (Child Sex Offences) Bill 2015

Date introduced	12 May 2015
House introduced	Legislative Assembly
Minister responsible	The Hon. Gabrielle Upton MP
Portfolio	Attorney General

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend section 66A of the *Crimes Act 1900* to make the offence of having sexual intercourse with a child who is under the age of 10 years punishable by a maximum penalty of life imprisonment.
2. The Bill also amends the *Crimes (Sentencing Procedure) Act 1999* to establish standard non-parole periods for various child sex offences under the *Crimes Act 1900*.

### BACKGROUND

3. In 2013, a Joint Select Committee on Sentencing of Child Sexual Assault Offences was established to inquire into and report on whether the current sentencing options for perpetrators of child sexual assault remain effective. The Committee was also charged with determining whether there could be greater consistency in sentencing, and ways to improve public confidence in the judicial system through alternative sentencing options. The Committee tabled its report in October 2014 with a host of recommendations.
4. Some of the key recommendations of the report are effected through this Bill, principally the streamlining of offences and expansion of the standard non-parole period scheme.

### 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. Under section 66A of the *Crimes Act 1900* the offence of having sexual intercourse with a child under the age of 10 years currently carries a maximum penalty of 25 years imprisonment while the offence, if committed in circumstances of aggravation, carries a maximum penalty of imprisonment for life.
8. Schedule 1 [1] substitutes section 66A to remove the distinction between the basic offence and the aggravated offence and make the basic offence carry a maximum penalty of imprisonment for life.

9. Under section 21 of the Crimes (Sentencing Procedure) Act 1999 a court may nevertheless impose a sentence of imprisonment for a specified term. A standard non-parole period of 15 years is set under Division 1A of Part 4 of that Act.
10. Schedule 1 [2], [3], [4] and [5] contain consequential amendments.
11. Schedule 1 [6] is a savings and transitional provision.
12. The Table to Division 1A of Part 4 of the Crimes (Sentencing Procedure) Act 1999 (the Table) sets standard non-parole periods for a number of offences. When determining a sentence for an offence listed in the Table, a court is required to take into account the standard non-parole period for the offence.
13. Schedule 2 [2] amends the Table to introduce standard non-parole periods for certain child sex offences under the Crimes Act 1900 set out in the amendment.
14. Schedule 2 [1] makes an amendment that is consequential on the amendment made by Schedule 1 [1].
15. Schedule 2 [3] is a savings and transitional provision.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Increase in Penalties*

16. At present, section 66A of the *Crimes Act 1900* provides for two separate offences for sexual intercourse with a child under 10. Specifically, this section provides that having sexual intercourse with a child under 10 attracts a maximum penalty of 25 years imprisonment, while sexual intercourse with a child under 10 'in circumstances of aggravation' attracts a maximum penalty of lifetime imprisonment.
17. This Bill proposes to combine the two separate offences of sexual intercourse with a child under 10 into one (without distinction as to any aggravating circumstances), but which would attract a maximum penalty of lifetime imprisonment.
18. The Committee notes that this is the higher of the two penalties currently provided for in the Act. In this respect, the increase in penalties without regard as to the presence of aggravating circumstances may be regarded as unjustly harsh.
19. However, the Committee also notes that under proposed section 66A(3) this penalty is only the maximum to be applied, and does not affect the discretion of the courts to impose a lesser sentence. The Committee is also mindful that sexual intercourse with a child under 10 may – by the nature of the offence itself – be regarded as circumstances of aggravation, notwithstanding the presence of any additional aggravating factors.

**The Committee notes that the Bill proposes to increase the maximum penalty for sexual intercourse with a child under 10 years from 25 years to life imprisonment. Despite these tougher penalties, the Committee also notes that this increase in the maximum penalty does not affect the ability of the courts to impose a lesser sentence. Further, given the gravity of the offence under**

**consideration, the Committee does not regard this increase in penalty to be unreasonable in the circumstances.**

## 6. Electricity Network Assets (Authorised Transactions) Bill 2015; Electricity Retained Interest Corporations Bill 2015

Date introduced	26 May 2015
House introduced	Legislative Assembly
Minister responsible	The Hon. Gladys Berejiklian MP
Portfolio	Treasurer

### PURPOSE AND DESCRIPTION

#### **Electricity Network Assets (Authorised Transactions) Bill 2015**

1. The object of the Electricity Network Assets (Authorised Transactions) Bill 2015 is to authorise and facilitate the transfer to the private sector, or to any public sector agency, of certain electricity network assets of the State, and to make detailed provision regarding the transfer of electricity network employees and their rights and entitlements. The Bill provides for the following:
  - (a) network infrastructure assets cannot be transferred to the private sector except by lease with an initial term not exceeding 99 years,
  - (b) the private sector interest in the State's electricity network assets must not exceed 49%,
  - (c) no transfer of any assets, rights or liabilities of Essential Energy is authorised,
  - (d) the State's interest in transferred network infrastructure assets is protected by providing that a public sector agency must not transfer any interest in a network infrastructure asset lease or in the lessee of such a lease (with limited exceptions),
  - (e) the Treasurer must ensure that an authorised network operator of a transacted distribution system or transacted transmission system provides an electricity price guarantee,
  - (f) the proceeds of the transfer of electricity network assets to the private sector pursuant to an authorised transaction belong to and are payable directly to the State Electricity Retained Interest Corporations Bill 2015.

#### **Electricity Retained Interest Corporations Bill 2015**

2. The object of the Electricity Retained Interest Corporations Bill 2015 is to provide for the effective stewardship and oversight of the interest in electricity network assets of the State that the State will retain following the proposed transfer of assets authorised by the proposed Electricity Network Assets (Authorised Transactions) Act 2015. This retained interest is the interest of the State in a lease of assets comprising or including



ELECTRICITY NETWORK ASSETS (AUTHORISED TRANSACTIONS) BILL 2015; ELECTRICITY  
RETAINED INTEREST CORPORATIONS BILL 2015

network infrastructure assets (other than the interests of the State as lessor under such a lease) and the interest of the State as a lessee under such a lease.

3. The Bill provides for this by:
  - (a) constituting a separate Corporation for each separate part of the retained interest (each part being referable to the distribution system previously controlled and operated by a particular electricity network SOC), and
  - (b) providing for each of those Corporations to hold the part of the retained interest for which it is responsible on behalf of the State, and
  - (c) requiring each of those Corporations to provide effective stewardship and oversight of the relevant part of the retained interest for the purpose of protecting the value to the State of that part of the retained interest and seeking to maximise returns to the State from that part of the retained interest, and
  - (d) providing that each Corporation has power to invest in the business of a transacted distribution system or transacted transmission system, and
  - (e) making provisions for the governance of each Corporation, including the duties of members of the Board of Governors and officers, financial arrangements and obligations relating to the administration and audit of finances and to annual reporting.

## BACKGROUND

4. The Electricity Network Assets (Authorised Transactions) Bill 2015 and the Electricity Retained Interest Corporations Bill 2015 were introduced into Parliament as cognate Bills on 26 May 2015 by the Hon. Gladys Berejiklian MP, Treasurer.
5. In her Second Reading Speech, the Treasurer stated that the Electricity Network Assets (Authorised Transactions) Bill will allow the Government to proceed with its election commitment to undertake a long-term lease of 49 per cent of the State-owned electricity network, and to invest \$20 billion of revenue raised into new infrastructure. This Bill introduces private investment and management into Transgrid, Ausgrid and Endeavour Energy.
6. The Treasurer further stated that the Electricity Retained Interest Corporations Bill will facilitate effective stewardship and oversight of the State's retained interest in Ausgrid and Endeavour Energy.

## OUTLINE OF PROVISIONS

7. An outline of the provisions of the Electricity Network Assets (Authorised Transactions) Bill 2015 is contained in the Explanatory Note to the Bill.
8. An outline of the provisions of the Electricity Retained Interest Corporations Bill 2015 is contained in the Explanatory Note to the Bill.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Denial of Compensation*

9. Clause 9 of Schedule 1 to the Electricity Network Assets (Authorised Transactions) Bill provides that no compensation is payable in connection with the transfer of assets, rights or liabilities to a public sector agency under the proposed Act.

**The Committee notes that the Bill excludes compensation rights that may arise out of a transfer of electricity assets under the proposed Act. This may impact on the economic rights of individuals. The Committee refers the matter to Parliament for further consideration.**

#### *Employment Rights*

10. Clauses 18 and 19 of Part 4 of the Electricity Network Assets (Authorised Transactions) Bill provide for the transfer of employment of network employees to another public sector agency or to the employment of a private sector entity. The transfer of employment does not require the consent of the person transferred.
11. Clause 20 of the Bill provides, amongst other things, that the continuity of the employee's employment is not considered broken by the transfer of employment, and the employee retains any rights to annual leave, sick leave, extended or long service leave accrued before the transfer.

**The Committee notes that the Bill provides the Government with the power to transfer an individual's employment contract to a third party. The Committee also notes that safeguards exist in the legislation to ensure that the individual does not suffer any loss as a result of this transfer. For these reasons the Committee does not make any adverse comments in relation to this issue.**

#### *Extraterritoriality*

12. Part 8, Clause 53 of the Electricity Network Assets (Authorised Transactions) Bill provides that it is the intention of the Parliament that the Bill is to operate with extraterritorial effect. This is to apply to all things situated in or outside the territorial limits of the State, as well as all things, matters and transactions entered into or occurring in or outside the territorial limits of the State.
13. The Committee notes that that by attempting to bind activities taking place outside of the territorial limits of the State, the Parliament may be going beyond its constitutional remit. As this Bill includes a number of offence provisions, this could impose a number of individuals outside of NSW – and not ordinarily within its jurisdiction – to criminal sanction by the State.

**The Committee notes the intention of the Parliament for this Bill to apply with extraterritorial effect and, in doing so, may be going beyond its constitutional remit. In this respect, the Committee refers the matter to Parliament for further consideration.**

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

14. Part 2, clause 8 of the Electricity Network Assets (Authorised Transactions) Bill creates the position of Price Commissioner. The Price Commissioner is a person engaged by the Secretary of the Department of Premier and Cabinet as a consultant. He or she will report to Government on whether entities that have leased a percentage of the Government's electricity networks have complied with their 'electricity price guarantee', that is, that their total network charges for the year ending 30 June 2019 are lower than for the year ending 30 June 2014.
15. Clause 8 further provides that a public sector agency must comply with any reasonable request by the Price Commissioner to provide information to the Price Commissioner for the purpose of reporting. Any dispute about the reasonableness of a request is to be decided by the Secretary of the Department of Premier and Cabinet.

**The Bill provides that any dispute about the reasonableness of the Electricity Price Commissioner's requests for information from public sector agencies is to be decided by the Department of Premier and Cabinet. That is, the decision by one public sector agency to refuse to provide information is overseen by another public sector agency. It is not clear from the Bill if there is any right of appeal to an independent decision maker. Given the importance of the Price Commissioner's work to the economic rights of individuals living in NSW, the Committee refers the matter to Parliament for further consideration.**

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

16. Clause 2 of the Electricity Network Assets (Authorised Transactions) Bill provides that schedule 5 of the proposed Act is to commence by proclamation. Schedule 5 would introduce new offences and significant monetary penalties, including for individuals. Similarly, clause 2 of the Electricity Retained Interest Corporations Bill 2015 provides for commencement of the proposed Act on a day or days to be appointed by proclamation. This Bill would introduce new offences and significant penalties including imprisonment.

**The Committee prefers legislation such as this, which creates new offences and significant penalties including imprisonment, to commence on a fixed date or on assent, not by proclamation.**

*Henry VIII Clause*

17. Part 3, clause 13 of the Electricity Network Assets (Authorised Transactions) Bill states that a statutory state-owned corporation may be established by order of the Governor published in the Gazette. Further, on the day on which the order takes effect, the *State Owed Corporations Act 1989* is amended by inserting the corporation's name in it, thereby establishing the corporation as a statutory corporation under that Act. That is, the order amends the Act.

**The Committee notes that when Henry VIII clauses are included in legislation they allow subordinate legislation (in this case, an order by the Governor) to amend and take precedence over primary legislation (in this case, the *State***

***Owned Corporations Act 1989***). Amendments to principal legislation should be effected by Parliament. The Committee refers the matter to Parliament for further consideration.

*Henry VIII Clause II*

18. The Committee notes that Part 6 Clause 33 of the Electricity Network Assets (Authorised Transactions) Bill introduces a Henry VIII Clause by stating that the regulations may modify any provision of the *Electricity Supply Act 1995* conferring a function on a network operator in order to apply the adapted provision to or in respect of the owner, controller or operator of a transacted distribution system or transacted transmission system.

**The Committee is concerned when Henry VIII clauses are included in legislation, and notes that this amendment enables the subordinate legislation (the regulation) to take precedence over the primary legislation (the *Electricity Supply Act 1995*). Amendments to principal legislation should be effected by Parliament, not by a regulation. The Committee refers the matter to Parliament for further consideration.**

*Matter which should be set by Parliament*

19. Part 7, clause 41 of the Electricity Network Assets (Authorised Transactions) Bill allows the Treasurer to determine whether certain State taxes and charges are required to be paid by a public sector agency, any person or body.

**The Committee notes that proposed section 41 grants the Treasurer discretion over whether certain State taxes and charges are required to be paid by a public sector agency, any person or body. In the Committee's view, a matter such as this, which may impact on the economic rights of individuals, should be set by Parliament. The Committee refers the matter to Parliament for further consideration.**

## 7. Fair Trading Legislation (Repeal and Amendment) Bill 2015

Date introduced	27 May 2015
House introduced	Legislative Assembly
Minister responsible	The Hon Victor Dominello MP
Portfolio	Innovation and Better Regulation

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
  - (a) to repeal the *Consumer Claims Act 1998* and re-enact the substance of that Act in the *Fair Trading Act 1987*,
  - (b) to repeal the *Fitness Services (Pre-paid Fees) Act 2000* and the *HomeFund Commissioner Act 1993*,
  - (c) to provide for the repeal of the *Landlord and Tenant Act 1899* no later than 5 years after the date of assent to the proposed Act,
  - (d) to make consequential and related amendments to other Acts.

### BACKGROUND

2. This Bill repeals four Acts which are no longer required to meet current regulatory needs and amends the *Fair Trading Act 1987* to include the consumer claims jurisdiction for the NSW Civil and Administrative Tribunal.
3. The Bill follows a consultative process commenced in 2013. An issues paper was released and NSW Fair Trading from stakeholders including the Law Society of New South Wales, the Tenants Union of NSW, Fitness Australia and the Real Estate Institute of New South Wales.

### 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.
6. Clause 3 repeals the Acts referred to in the Overview, other than the *Landlord and Tenant Act 1899*. The repeal of that Act is provided for by Schedule 3.4.

### Schedule 1 Amendment of Fair Trading Act 1987 No 68

7. Schedule 1 [11] re-enacts the substance of the *Consumer Claims Act 1998*, which is repealed by section 3 of the proposed Act. Schedule 1 [6], [7], [12] and [16] make consequential amendments.

8. Schedule 1 [2] inserts a definition of banker for the purposes of the *Fair Trading Act 1987*, clarifying that wherever the term appears in that Act, it includes any authorised deposit-taking institution (including building societies and credit unions).
9. Schedule 1 [13] amends a definition of prescribed authority, replacing a reference to an abolished office (the Government Analyst) with a reference to bodies or persons prescribed by regulations under the *Fair Trading Act 1987*. The amendment will enable certificates signed by or on behalf of bodies or persons prescribed by the regulations to be used as evidence in proceedings under that Act (unless the defendant requires the person who signed the certificate to be called as a witness in the proceedings).
10. Schedule 1 [1], [3]–[5], [9], [14], [15] and [17] update terminology and expressions (including as a consequence of the enactment of the *Government Sector Employment Act 2013*).
11. Schedule 1 [8] and [10] make amendments consequent on the repeal of the *Fitness Services (Pre-paid Fees) Act 2000* by the proposed Act.
12. Schedule 1 [18] enables the making of savings and transitional regulations consequent on the enactment of the proposed Act or any other Act that amends the *Fair Trading Act 1987*.
13. Schedule 1 [19] contains savings and transitional provisions consequent on the repeal and re-enactment of the *Consumer Claims Act 1998*, and on the repeal of the *Fitness Services (Pre-paid Fees) Act 2000*, by the proposed Act.

### **Schedule 2 Amendment of Acts consequent on repeal of *Consumer Claims Act 1998***

14. Schedule 2 makes amendments to Acts specified in the Schedule consequent on the repeal of the *Consumer Claims Act 1998* by the proposed Act.

### **Schedule 3 Amendment of other Acts**

15. Schedule 3.4 inserts a new section into the Landlord and Tenant Act 1899 that provides for the repeal of that Act 5 years after the section commences or on an earlier day appointed by proclamation.
16. Schedule 3.1, 3.3 [1], [4], [7], [8], [12], [13], [15] and [20] and 3.6 make amendments to Acts specified in Schedule 3.1, 3.3 and 3.6 consequent on the repeal by the proposed Act of the *HomeFund Commissioner Act 1993*.
17. Schedule 3.2 and 3.5 make amendments to Acts specified in those subschedules consequent on the repeal by the proposed Act of the *Fitness Services (Pre-paid Fees) Act 2000*.
18. Schedule 3.3 [2], [3], [5], [6], [9]–[11], [14], [16]–[19], [21] and [22] make amendments in the nature of statute law revision.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Commencement by proclamation*

19. The Bill provides for specified sections and schedules to commence on a day or days to be appointed by proclamation.

**The Committee will always note where commencement of an Act is delegated to the Executive, once passed by the Legislature. The Bill proposes to repeal four Acts and this requires administrative measures to be implemented before the specific sections can commence operation. In these circumstances, the Committee does not regard the commencement by proclamation to be an inappropriate delegation of legislative power.**

## 8. Health Services Amendment (Paramedics) Bill 2015

Date introduced	3 June 2015
House introduced	Legislative Assembly
Minister responsible	The Hon. Jillian Skinner MP
Portfolio	Health

### PURPOSE AND DESCRIPTION

The object of this Bill is to amend the *Health Services Act 1997* to prevent a person who does not have recognised qualifications, training or experience from holding himself or herself out to be a paramedic.

A **paramedic** means:

- (a) a person who holds qualifications, or who has received training, or who has experience, prescribed by the regulations, or
- (b) a person who is authorised under the legislation of another Australian jurisdiction to hold himself or herself out to be a paramedic, or
- (c) a member of staff of the Ambulance Service of NSW, or other person, who is authorised by the Health Secretary to hold himself or herself out to be a paramedic.

### BACKGROUND

1. This Bill proposes to restrict use of the title "paramedic" and to make it an offence for any person to use the title of "paramedic" if they do not hold the required qualifications. The required qualifications are set out in regulations under the legislation.
2. Currently, any person in New South Wales can call themselves a paramedic regardless of their qualifications and training. This Bill amends the Health Services Act 1997 to make it an offence for a person who is not a paramedic to hold themselves out to be a paramedic. A paramedic is defined in the Bill to include a person who has the qualifications, training or experience prescribed by the regulations; a person authorised under the law of another jurisdiction to call themselves a paramedic; or a person authorised by the Health Secretary to hold themselves out to be a paramedic.

### OUTLINE OF PROVISIONS

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

Clause 2 provides for the commencement of the proposed Act on a day to be appointed by proclamation.

Clause 3 makes the amendment described above in the Overview.



## ISSUES CONSIDERED BY COMMITTEE

**The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.**

## 9. Independent Commission Against Corruption Amendment (Validation) Bill 2015

Date introduced	6 May 2015
House introduced	Legislative Assembly
Minister responsible	The Hon. Mike Baird MP
Portfolio	Premier

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the Independent Commission Against Corruption Act 1988 to validate certain previous actions of the Independent Commission Against Corruption (ICAC) following the decision of the High Court in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.
2. On 15 April 2015, the High Court decided in that case that ICAC's jurisdiction over corrupt conduct did not extend to specified criminal conduct that adversely affected the exercise of official functions by public officials unless there was some lack of *probity* in the exercise of those official functions. Indeed, to fall within ICAC's jurisdiction, it was not sufficient that the criminal conduct merely adversely affected the *efficacy* of the exercise of official functions, stopping public officials from exercising those functions properly.
3. The Bill validates action taken by ICAC before 15 April 2015 on the previous understanding that it had jurisdiction over relevant criminal conduct that adversely affected the exercise of official functions in *any way*. It also accordingly validates action taken by others in reliance on the action taken by ICAC. The Bill does not authorise the continuation of investigations or inquiries by ICAC that have been held by the High Court to exceed its jurisdiction. However, it does enable ICAC to refer any such matters to other investigative or prosecuting authorities and to provide them with any evidence or information obtained by ICAC before 15 April 2015.

### BACKGROUND

4. In his Second Reading Speech to Parliament, the Hon Mike Baird MP, Premier, noted the High Court's decision in *Independent Commission Against Corruption v Cunneen*. Mr Baird stated the decision would potentially affect a large number of past investigations and findings of corrupt conduct made by ICAC since 1989 when it was first established. Mr Baird further stated that the High Court's decision 'should not provide those who have done the wrong thing in the past with a loophole'. Therefore, the Bill aims to ensure that all previous findings of corruption by ICAC will stand; and that the past prosecution, conviction and sentencing of a person, where it arose following an ICAC investigation, will stand.

## 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.

### Schedule 1 Amendment of Independent Commission Against Corruption Act 1988 No 35

7. The Schedule amends Schedule 4 to the Act (Savings, transitional and other provisions) to provide for the validation referred to the 'Purpose and Description' section above.

## ISSUES CONSIDERED BY COMMITTEE

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

### *Retrospectivity*

8. The Bill retrospectively validates action taken by ICAC before the High Court handed down its decision in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 on 15 April 2015.

**The Committee notes that the Bill retrospectively validates action taken by ICAC before the High Court decision. The Bill thereby sanctions findings of 'corrupt conduct' that it appears, following the Court's decision, ICAC had no jurisdiction to make. Such retrospectivity is contrary to the rule of law. The rule of law allows citizens knowledge of what the law is at any given time so that they may order their behaviour accordingly. The Committee refers the matter to Parliament for further consideration.**

### *Legislative Interference in the Judicial Process*

9. As above, the Bill retrospectively validates action taken by ICAC before the High Court handed down its decision in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 on 15 April 2015.

**It is a fundamental principle of the judicial process that courts decide disputes according to prescribed and previously agreed upon rules. If the legislature retrospectively changes these rules, or the effect of these rules, this constitutes interference in the judicial process. By retrospectively validating action taken by ICAC before the High Court decision (e.g. making 'corrupt conduct' findings outside its jurisdiction), the Bill partially reverses the effect of the High Court's decision thereby interfering in the judicial process. The Committee refers the matter to Parliament for further consideration.**

### *Illegal/Arbitrary Search and Seizure*

10. By retrospectively validating action taken by ICAC prior to the High Court's decision, the Bill also validates ICAC's past seizure of evidence, ensuring that past criminal convictions and findings of 'corrupt conduct' that are based on this evidence, can stand.
11. In addition, the Bill authorises ICAC to refer any current investigations that the High Court has judged to be outside ICAC's jurisdiction, to other investigative or prosecuting authorities. It further authorises ICAC to provide those authorities with any evidence or

information obtained by it before the High Court decision, thereby retrospectively validating the seizure of this evidence.

**The Bill retrospectively validates ICAC's seizure of evidence as part of investigations even though the High Court has since held those investigations to be outside ICAC's jurisdiction. By retrospectively validating seizure of this evidence, the Bill may pay insufficient regard to citizens' right to be free from illegal and arbitrary search and seizure. Indeed, the Bill potentially allows seized evidence to be used in future criminal proceedings and allows criminal convictions and findings of 'corrupt conduct' based on such evidence to stand. The Committee refers the matter to Parliament for further consideration.**

# 10. Independent Pricing Regulatory Tribunal Amendment (Accredited State Water Regulator) Bill 2015

Date introduced	12 May 2015
House introduced	Legislative Council
Minister responsible	The Hon. Niall Blair MLC
Portfolio	Primary Industries

## PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend *the Independent Pricing and Regulatory Tribunal Act 1992* to enable the Independent Pricing and Regulatory Tribunal (the Tribunal) to apply under the Water Charge (Infrastructure) Rules 2010 of the Commonwealth (the Commonwealth Water Charge Rules) for the accreditation of arrangements under which the Tribunal approves or determines charges for the provision of certain water infrastructure services relating to water resources in that part of the Murray-Darling Basin that is located in New South Wales (Basin water resources). For that purpose, the Bill:
  - (a) applies certain provisions of the Commonwealth Water Charge Rules as a law of New South Wales and gives those applied provisions effect during the period of accreditation, and
  - (b) confers on the Tribunal the functions of a Regulator under those applied provisions, and
  - (c) provides that the Tribunal is not subject to the control or direction of any Minister in the exercise of those functions, and
  - (d) provides for the notification of the approval, revocation or cessation of the accreditation, and
  - (e) provides for the interpretation of the applied provisions.

## BACKGROUND

2. This Bill enables IPART to receive accreditation to exercise the price determination functions on behalf of the ACCC under the Commonwealth Water Charge (Infrastructure) Rules 2010. It will result in one agency being responsible for setting prices for Water NSW across the State. Fundamentally, this Bill is primarily an administrative change aimed at simplifying processes and reducing cost.

## OUTLINE OF PROVISIONS

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

4. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

### **Schedule 1 Amendment of Independent Pricing and Regulatory Tribunal Act 1992 No 39**

5. Schedule 1 [1] inserts Part 3B (proposed sections 24AE–24AL) into the Independent Pricing and Regulatory Tribunal Act 1992 which contains the following provisions:

#### ***Part 3B Approval or determination of Murray-Darling Basin water charges***

6. Proposed section 24AE defines expressions used in the proposed Part.
7. Proposed section 24AF applies the Acts Interpretation Act 1901 of the Commonwealth (the Commonwealth Interpretation Act) as a law of New South Wales in relation to the provisions of the Commonwealth Water Charge Rules applied by proposed section 24AG (the applied provisions). The application of that Act to the Commonwealth Water Charge Rules is limited by section 5 of the Water Act 2007 of the Commonwealth (the Commonwealth Water Act). Accordingly, the proposed section provides that the Commonwealth Interpretation Act applies to the applied provisions only to the extent to which it applies to the Commonwealth Water Charge Rules. The proposed section also provides that expressions used in the applied provisions have the same meaning as in the Commonwealth Water Act and are to be read and construed subject to that Act and so as not to exceed its rule-making power. The Interpretation Act 1987 of New South Wales does not apply in relation to the applied provisions.
8. Proposed sections 24AG, 24AH, 24AI and 24AK provide for various matters that are preconditions (as set out in Schedule 5 to the Commonwealth Water Charge Rules) to the approval of an application for accreditation of arrangements. Proposed section 24AG applies the Commonwealth provisions as a law of New South Wales. Proposed section 24AH confers on the Tribunal all the functions of a Regulator under the applied provisions, which include the power to approve or determine charges for the provision of certain water infrastructure services relating to Basin water resources. Proposed section 24AI provides that the applied provisions have effect only during the period of the accreditation of arrangements. Proposed section 24AK provides that the Tribunal is not subject to Ministerial control or direction in the exercise of its functions under the applied provisions.
9. Proposed section 24AJ enables the Tribunal to apply to the Australian Competition and Consumer Commission for the accreditation of arrangements under which the Tribunal approves or determines charges for the provision of certain water infrastructure services relating to Basin water resources.
10. Proposed section 24AL provides for public notification by the Tribunal of the approval of an application for accreditation of arrangements or the revocation or cessation of such an accreditation.
11. Schedule 1 [2] makes it clear that the Tribunal is not required under the Independent Pricing and Regulatory Tribunal Act 1992 to conduct investigations and make reports to the Minister on the determination of the pricing for, or a periodic review of pricing policies in respect of, certain water infrastructure services provided by Water NSW in relation to Basin water resources.

## ISSUES CONSIDERED BY COMMITTEE

**The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.**

# 11. Legal Profession Uniform Law Application Legislation Amendment Bill 2015

Date introduced	27 May 2015
House introduced	Legislative Assembly
Minister responsible	The Hon. Gabrielle Upton MP
Portfolio	Attorney General

## PURPOSE AND DESCRIPTION

1. The Legal Profession Uniform Law (the Uniform Law) establishes a scheme to regulate the legal profession in New South Wales and Victoria. The Legal Profession Uniform Law Application Act 2014 (the application Act) applies the text of the Uniform Law as a law of this State, enacts complementary provisions for this State and repeals the Legal Profession Act 2004 (the repealed Act). The formal and ancillary provisions of the application Act and the Uniform Law commenced on 1 July 2014. The remaining provisions of the application Act and the Uniform Law are yet to commence.
2. The object of this Bill is to amend the application Act to enable the commencement of the Uniform Law scheme.
3. The Bill also makes amendments to other legislation consequent on the commencement of the Uniform Law scheme and the repeal of the repealed Act.

## BACKGROUND

4. In her Second Reading Speech to Parliament, the Hon. Gabrielle Upton MP, Attorney General stated that the Bill is a step towards a seamless, unified national legal profession market in Australia as it establishes a uniform scheme to regulate the legal profession in New South Wales and Victoria.
5. Ms Upton told Parliament that Professor Fred Hilmer's 1993 report on Australian Competition Law sowed the seeds for this reform. Ms Upton stated the report argued for the extension of competition policy principles to the legal profession in Australia to remove barriers to development of a national market in legal services. In 1994, the Law Council of Australia's Blueprint for the Structure of the Legal Profession articulated this concept further, supporting a uniform system of regulation of the legal profession throughout Australia.
6. The reforms were progressed through the Council of Australian Governments in 2004 and 2009, and the NSW and Victorian Governments are the first states to adopt uniform legal profession reforms. Ms Upton told Parliament that while the reforms will continue to allow a significant amount of local involvement in regulation by the Law Society and the Bar, they will slash red tape by simplifying and standardising regulatory obligations, and will reduce compliance costs to enable lawyers to focus on providing legal services.



## 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, other than the Schedule containing amendments to legislation other than the application Act, which commences on a day or days to be appointed by proclamation.

### **Schedule 1 Amendment of Legal Profession Uniform Law Application Act 2014 No 16**

#### **General definitions**

9. Schedule 1 [7] inserts general definitions for terms that are used throughout Acts and instruments in NSW. Admission to the Australian legal profession, Australian practising certificate and Australian registration certificate have the same meaning as in the Uniform Law. Legal costs legislation is defined to mean Parts 6 and 7 of, and Schedules 1, 2 and 6 to, the application Act and Part 4.3 of the Uniform Law. Legal profession legislation is defined to mean:
  - (a) the application Act and regulations made under that Act (referred to as local regulations), and
  - (b) the Uniform Law, and
  - (c) the Legal Profession Uniform Regulations made under Part 9.1 of the Uniform Law (Uniform Regulations) as they apply in NSW, and
  - (d) the Legal Profession Uniform Rules made under Part 9.2 of the Uniform Law (Uniform Rules) as they apply in NSW.
10. Legal costs legislation and legal profession legislation are terms used throughout the legislation amended by Schedule 2 to the proposed Act.

#### **Legal Profession Admission Board**

11. Schedule 1 [15] enables the Legal Profession Admission Board (referred to in the application Act as the NSW Admission Board) to make rules in relation to various matters, including administrative matters, registration of students-at-law, examination of candidates for registration and committees of the Board.
12. Schedule 1 [11] enables the Board to delegate its functions under the application Act or the Uniform Law to any of its committees or officers.
13. Schedule 1 [13] requires the Board to notify the Bar Council and Law Society Council of any applications for admissions. Schedule 1 [12] and [14] are consequential amendments.

#### **Legal Services Commissioner, Bar Council and Law Society Council**

14. Schedule 1 [16] authorises the Legal Services Commissioner (the NSW Commissioner) to delegate any of his or her functions under the Uniform Law to any member of the staff of the NSW Commissioner or to a person of a class prescribed by the regulations. Schedule 1 [17] authorises the NSW Commissioner to delegate any of the

Commissioner's functions under Chapter 5 of the Uniform Law (which relates to dispute resolution and professional discipline) to the Bar Council or the Law Society Council.

15. Schedule 1 [19] and [22] authorise the Bar Council and the Law Society Council to delegate any of their functions under the Uniform Law to their committees, officers or employees.
16. Schedule 1 [20] and [23] make it clear that the Councils are also authorised to delegate functions that are delegated to them under the Uniform Law.
17. Schedule 1 [18], [21] and [24] make consequential amendments.

#### **Government and corporate lawyers**

18. The application Act currently provides that the local regulations may exempt certain government lawyers from the requirement to hold an Australian practising certificate and may exclude or modify the operation of specified provisions of the Uniform Law in relation to government lawyers. Schedule 1 [25] extends this to excluding or modifying the operation of specified provisions made under the Uniform Law. Schedule 1 [26] provides a similar regulation-making power for corporate lawyers.

#### **Legal costs—costs assessment**

19. Schedule 1 [27] substitutes Part 7 of the application Act, which supplements Part 4.3 of the Uniform Law. Rather than applying provisions of the Uniform Law relating to solicitor-client costs to the assessment of party-party costs as the existing Part did, the new Part deals with the assessment of costs ordered by a court or tribunal (ordered costs) and costs payable on a solicitor-client basis (Uniform Law costs).
20. Division 2 deals with the assessment of both types of costs. Division 3 contains additional provisions for ordered costs and Division 4 contains additional provisions for Uniform Law costs.
21. Division 5 deals with reviews of costs assessments and Division 6 deals with appeals against those reviews. Division 7 establishes the Costs Assessment Rules Committee, which may make rules (costs assessment rules). Division 8 contains miscellaneous provisions.
22. The new Part also extends the operation of the provisions of the Uniform Law that apply to solicitor-client costs to the costs of a barrister briefed directly by a client (proposed section 65 of the application Act).

#### **Approved professional indemnity insurance policies**

23. Schedule 1 [28] and [29] relate to the Attorney General's power to approve, by order in writing, professional indemnity insurance policies. Rather than providing that compliance with any conditions of an order is a prerequisite for a policy to be regarded as an approved policy, proposed section 95 (3A) of the application Act provides that, if any terms or conditions imposed by an order are not complied with by the insurer or provider of the policy, the order may be amended to prohibit or restrict the future issue of policies by that insurer or provider and that the Attorney General may take into account any such failure to comply when deciding whether to approve future policies.

24. Schedule 1 [30] omits provisions relating to evidence of approved professional indemnity insurance policies that are no longer necessary as the matter is proposed to be dealt with by the Uniform Rules.

#### **Rights of review**

25. Schedule 1 [31] provides for the rights of review to the Civil and Administrative Tribunal of New South Wales (NCAT) for matters relating to Australian practising certificates and registration certificates and certain consumer and disciplinary matters. It also restates a provision (currently section 166 (5) of the application Act) that enables local regulations to provide for further rights of review to NCAT.

#### **Registers and publicising disciplinary action**

26. Schedule 1 [32]–[35] broaden the application of Part 12 of the application Act, which currently deals with the keeping of registers and the publicising of disciplinary action in relation to Australian legal practitioners, so that it will also apply to Australian-registered foreign lawyers, Australian lawyers (who are not Australian legal practitioners) and to former Australian legal practitioners, Australian-registered foreign lawyers and Australian lawyers.

#### **Savings and transitional provisions**

27. Schedule 1 [43] inserts savings and transitional provisions consequent on the enactment of the proposed Act. In particular, proposed clause 10 of Schedule 9 to the application Act sets out transitional arrangements in relation to mortgage practices and managed investment schemes. For a period of 3 years, the prohibition on a law practice operating a managed investment scheme in section 258 of the Uniform Law will not apply. The existing prohibition in section 135 (2) of the Legal Profession Act 2004 will continue to apply to incorporated legal practices and Part 3.5 of, and Schedule 8 to, that Act, will continue to apply in respect of existing mortgages and managed investment schemes. Schedule 1 [31] and [41] omit the provisions relating to mortgages in the application Act which are no longer necessary.
28. Schedule 1 [10] provides that the savings and transitional provisions in Part 3 of Schedule 4 to the Uniform Law apply in New South Wales (proposed section 18A of the application Act).
29. Schedule 1 [42] provides that local savings and transitional regulations are to have effect despite anything to the contrary in Schedule 4 to the Uniform Law (which contains savings and transitional provisions).

#### **Miscellaneous**

30. Schedule 1 [10] provides an exception to section 468 (1) of the Uniform Law, which provides that certain persons are not compellable in legal proceedings to give evidence or produce documents in relation to their involvement in the administration of the Uniform Law. The provision will not apply to proceedings, hearings or inquiries under the Royal Commissions Act 1923, the Special Commissions of Inquiry Act 1983, the Independent Commission Against Corruption Act 1988, the Police Integrity Commission Act 1996 or the Ombudsman Act 1974. Proposed section 18B of the application Act reflects section 38A of the repealed Act.

31. Schedule 1 [8] and [9] make minor amendments to the bodies designated as local regulatory authorities and the courts and tribunals designated as tribunals for the purposes of the Uniform Law.
32. Schedule 1 [36] provides for the manner in which certain offences under the application Act and the Uniform Law are to be dealt with. It also inserts a provision providing that a contravention of the local regulations or the costs assessment rules may constitute unsatisfactory professional conduct or professional misconduct, whether or not the lawyer has been convicted of an offence in relation to the contravention.
33. Schedule 1 [37] makes it clear that local regulations may be made in relation to matters arising under the Uniform Law.
34. Schedule 1 [39] provides that local regulations may be made in relation to a barrister receiving or holding money for legal costs in advance of the barrister providing legal services.
35. Schedule 1 [40] restates a regulation-making power in relation to costs assessments.
36. Schedule 1 [44] omits amendments to the Interpretation Act 1987 that are now located in Schedule 2 to the proposed Act.
37. Schedule 1 [1]–[3] make minor amendments to definitions used in the application Act.
38. Schedule 1 [4], [5], [6] and [38] are statute law revision amendments.

#### **Schedule 2 Amendment of other legislation**

39. Schedule 2 amends the various Acts, Regulations and Rules set out in that Schedule as a consequence of the repeal of the Legal Profession Act 2004 and the commencement of the uncommenced provisions of the application Act and Uniform Law. References to the repealed Act and its provisions are replaced with references to the application Act or the Uniform Law as appropriate.

## **ISSUES CONSIDERED BY COMMITTEE**

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

#### *Procedural Fairness*

40. Schedule 1, item 27, proposed section 69 of the Bill provides that, in considering an application for a costs assessment, a costs assessor is not bound by the rules of evidence and may inform himself/herself on any matter in the manner he or she thinks fit. Similarly, proposed section 85 of the Bill provides that a panel reviewing the decision of a costs assessor is not bound by the rules of evidence.

**By providing that costs assessors and review panels are not bound by the rules of evidence, the Bill may impact on parties' rights to procedural fairness. However, as the provisions relate to civil matters (the adjudication of disputes over costs for legal services) and not to criminal matters, and as they provide assessors with flexibility to gather information to reach a suitable decision, the Committee makes no further comment.**

*Administration of Justice*

41. Section 468(1) of the Uniform Law provides certain 'relevant persons' (including the Legal Services Commissioner, Bar Council and Law Society Council) are not compellable to give evidence or produce documents in respect of any matter in which the person was involved in the course of the administration of the Legal Profession Uniform Law. However, schedule 1, item 10 of the Bill provides an exception to this rule – that such persons *will* be compellable in proceedings under certain Acts including the *Royal Commission Act 1923* and the *Independent Commission Against Corruption Act 1988*.

**The Bill provides that 'relevant persons' including the Legal Services Commissioner are compellable witnesses in proceedings under certain legislation. These witnesses could be compelled to give evidence to bodies such as ICAC about a matter they were involved in whilst administering the Uniform Law. In providing for this, the Bill may impact on the administration of justice by offending against the principle of finality. For instance, a witness could be called before ICAC to give evidence about a disciplinary matter s/he made a decision about, inviting discussion about that decision thereby impacting its finality. This concern, however, must be balanced against the policy objectives of each of the Acts that the persons are compellable under. 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**

*Insufficient criteria regarding the scope of persons to whom a power may be delegated*

42. Schedule 1, item 16 of the Bill provides the Legal Services Commissioner may delegate any of his or her functions under the Legal Profession Uniform Law to a person of a class prescribed by the regulations. The Uniform Law allocates important functions to the Legal Services Commissioner including professional discipline and complaint investigations. To carry out these functions, significant powers are also allocated to the Legal Services Commissioner including the power to search premises and seize evidence in certain circumstances.

**The Committee notes the significant functions and powers allocated to the Legal Services Commissioner under the Uniform Law. The Bill allows the regulations to prescribe the class of persons to whom these functions and powers may be delegated. Given the significance of the functions and powers, the Committee would prefer the persons to whom they may be delegated to be clearly listed in the primary legislation, not left to regulations. This is to foster appropriate parliamentary oversight. However, regulations are subject to disallowance by Parliament under section 41 of the *Interpretation Act 1987*. Given this safeguard, the Committee makes no further comment.**

# 12. Payroll Tax Rebate Scheme (Jobs Action) Amendment (Extension) Bill 2015

Date introduced	7 May 2015
House introduced	Legislative Assembly
Minister responsible	The Hon. Gladys Berejiklian MP
Portfolio	Treasurer and Industrial Relations

## PURPOSE AND DESCRIPTION

1. The *Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011* established a payroll tax rebate scheme intended to assist in the creation of new jobs by providing employers with an incentive to increase the number of their full time equivalent employees.
2. As is currently provided for under the Act, that scheme may be closed by order of the Minister for Finance, Service and Property or, if no such date is appointed, the scheme is automatically closed on 30 June 2015.
3. The object of this Bill is to extend the date on which the scheme is automatically closed to 30 June 2019.

## BACKGROUND

4. Under the scheme, payroll tax liable employers can apply for a \$5,000 payroll tax rebate for each additional full-time employee, with the rebate prorated for part-time employees based on the number of hours worked compared to the standard working hours of full-time employees.
5. The rebate will continue to be into instalments, with \$2,000 paid on the first anniversary of the hire of the additional staff member and \$3,000 paid on the second anniversary of the hire of the additional staff.
6. Rebates paid to date total around \$93 million. The scheme will now be extended until 30 June 2019.

## 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 gives effect to the object set out in the Overview and provides for the *Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011* to be repealed on 1 July 2023.

## ISSUES CONSIDERED BY COMMITTEE

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

## 13. Pesticides Amendment Bill 2015

Date introduced	6 May 2015
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman MP
Portfolio	Minister for the Environment

### PURPOSE AND DESCRIPTION

1. The object of this Bill are:
  - (a) to amend the Pesticides Act 1999:
    - (i) to provide for a new licensing regime for pesticide work, and
    - (ii) to rename certificates of competency under the Act as restricted pesticide authorisations, and
    - (iii) to align the provisions of the Act with recent changes made to the Agvet Code, and
    - (iv) to enact provisions to improve the administration and enforcement of the Act, and
    - (v) to make amendments in the nature of statute law revision, and
    - (vi) to enact savings and transitional provisions consequent on the enactment of the proposed Act, and
  - (b) to make consequential amendments to the Land and Environment Court Act 1979 and Work Health and Safety Regulation 2011.

### BACKGROUND

2. In his Second Reading Speech to Parliament, the Hon. Mark Speakman MP, Minister for the Environment, stated that currently in New South Wales aerial pesticides applicators are licensed by the Environment Protection Authority (EPA) and that urban pest management technicians and fumigators are licensed by WorkCover NSW. The bill makes a number of amendments which consolidates the administration of these licenses such that all pesticide licensing will be administered by the EPA.
3. The Hon. Mark Speakman MP also advised that such administrative changes are in accordance with national reforms which New South Wales agreed to in May 2013 when all jurisdictions signed an updated Intergovernmental Agreement on Agricultural and Veterinary Chemicals.
4. Currently, details of newly issued aerial licenses are published in the New South Wales *Government Gazette*, while the bill will require the EPA to keep a register of all licensees. This register will be available to the public. For pest management technicians and



fumigators, the currently used term “certificate of competency” will be replaced by the term “licence”.

5. At present, the Commonwealth Government regulates pesticides up until and including the point of sale. This bill provides amendments to coexist with the Commonwealth’s agricultural and veterinary chemicals legislation regarding definitions and notices issued by the Australian Pesticides and Veterinary Medicines Authority.
6. Additional amendments concern the current issues regarding a person’s misuse of pesticides which is either wilful, negligent or as a result of a lack of due diligence, as well as amendments to the existing framework for the prevention of pesticide residue in produce. The bill also allows the Minister to convene committees to advise on matters relating to the Act.

## 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.

## Schedule of Amendment of Pesticides Act 1999 No 80

### *Licensing and restricted pesticide authorisations*

9. Currently, Division 1 of Part 6 of the Pesticides Act 1999 (the principal Act) provides for the licensing of pilots who apply pesticides using aircraft and persons who run businesses that do so.
10. Certain other work involving the application of pesticides and the use of fumigants is regulated under the Work Health and Safety Regulation 2011, which continues in operation Part 9.1 of the repealed Occupational Health and Safety Regulation 2001 in relation to such work (the continued OHS provisions). The continued OHS provisions require (with some exceptions) certificates of competency in order to do that work.
11. The proposed Act provides for the cessation of the continued OHS provisions and the transfer of licensing of the application of pesticides and use of fumigants to new provisions to be inserted in the principal Act.
12. Schedule 1.1 amends the principal Act:
  - (a) to enable the regulations to prescribe certain kinds of activities involving pesticides as kinds of prescribed pesticide work, and
  - (b) to make it an offence for a person to carry out prescribed pesticide work (or employ a person to carry out prescribed pesticide work) unless the person carrying out the work holds the kind of licence prescribed by the regulations for that work, and
  - (c) to provide for the granting of such licences, licence conditions, duration of licences and the suspension and revocation of licences, and
  - (d) to require the Environment Protection Authority to keep a Register of Licences and to enable it to make information in the Register available to members of the public, and

- (e) to rename certificates of competency under the principal Act as restricted pesticide authorisations to avoid confusion with certificates of competency issued under the continued OHS provisions (which will become licences under the Act).

*Harmonisation with Agvet Code*

- 13. Schedule 1.2 amends the principal Act to align its provisions with those of the Agvet Code following recent amendments to the Code. In particular, Schedule 1.2:
  - (a) updates notes and definitions in the principal Act to reflect changes in the Agvet Code, and
  - (b) includes certain deemed permits under the Agvet Code in the definition of permit for the principal Act, and
  - (c) includes certain pesticides the approvals of which have been suspended or cancelled under the Agvet Code in the definition of unregistered pesticide for the principal Act, and
  - (d) makes changes to the Act consequent on the introduction of the concept of reserved chemical products in the Agvet Code.

*Administration and enforcement*

- 14. Schedule 1.3 amends the principal Act:
  - (a) to make it clear that offences under the principal Act involving damage to property resulting from pesticide use extend to situations where pesticide use prevents, or is likely to prevent, any part of premises used for agricultural operations from being used for such operations or reduces, or is likely to reduce, the capacity of a part of premises to be used for such operations, and
  - (b) to make it an offence for a person to use a pesticide in a manner that harms a companion animal that is in or on premises with the consent of the owner or occupier of the premises, and
  - (c) to enable the Minister to delegate the Minister's functions with respect to the making of pesticide control orders to the Chairperson of the Environment Protection Authority, and
  - (d) to enable a prohibited residue notice or order to extend to persons involved in growing or supplying produce to which the notice or order relates, and
  - (e) to enable a prohibited residue notice or order to require a person to whom it applies to report on and monitor prohibited residue in produce and to arrange for analysis to be undertaken of prohibited residue and the findings of the analysis to be reported to the Environment Protection Authority, and
  - (f) to enable the Environment Protection Authority to enforce written undertakings given to it in connection with a matter in relation to which the Authority has a function under the principal Act, and

(g) to enable regulations to be made for or with respect to the analysis, reporting and monitoring of pesticide residues by growers and suppliers of produce.

*Statute law revision*

15. Schedule 1.4 makes certain amendments in the nature of statute law revision, including providing for the abolition of the now defunct Pesticides Implementation Committee.

*Savings and transitional provisions*

16. Schedule 1.5 amends the principal Act:
- (a) to update provisions concerning the making of savings and transitional regulations, and
  - (b) to include savings and transitional provisions consequent on the enactment of the proposed Act.

**Schedule 2 Consequential amendment of other legislation**

17. Schedule 2.1 makes an amendment to the Land and Environment Court Act 1979 to ensure that proceedings to enforce undertakings by the Environment Protection Authority under its new powers are allocated to Class 4 of the Court's jurisdiction.
18. Schedule 2.2 amends the Work Health and Safety Regulation 2011 to provide for the continued OHS provisions to cease to have effect on a day declared by regulations under the principal Act.

**ISSUES CONSIDERED BY COMMITTEE**

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

*Undue punishment/oppressive official powers*

19. The Committee notes that proposed Clause 5B establishes the 'fit and proper persons test' and allows the Authority to take into account dishonesty, previous fraud convictions, and other behaviour in determining whether a person is suitable to hold a licence.

**The Committee notes that the Bill stipulates the above only in relation to convictions involving fraud, dishonesty or other behaviour in the previous 10 years and would not necessarily prevent an applicant from obtaining a licence. Given the responsible nature of the work being subject to applicants being licenced, the Committee makes no further comment on this issue.**

*Presumption of innocence*

20. The Committee notes that Clause 6, proposed sections 52 (2) (d) establishes that the Authority may revoke a licence where someone has contravened any section of relevant legislation whether or not they have been convicted of an offence for contravention.

**The Committee notes that the Bill may impact on the presumption of innocence should the Environment Protection Authority decide to revoke a licence whether or not a person has been convicted of an offence for contravention. However, given the 'fit and proper persons test' established in proposed Clause 5B, the Committee notes the reasonable approach which may be undertaken by**

**the Authority in determining whether or not to grant a licence. For this reason the Committee makes no further comment.**

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

#### *Commencement by Proclamation*

21. Clause 2 of the Bill provides that the proposed Act is to commence on a day or days to be appointed by proclamation.

**The Committee prefers legislation of this kind, including offence and penalty provisions, to commence on a fixed date or on assent, not by proclamation.**

#### *Matters which should be set by Parliament*

22. The Committee notes that Clause 6 proposed sections 52 (2) (i) provides for the Authority to revoke a licence on any ground as may be prescribed by the regulations. The Committee also notes that Clause 6 proposed section 53 states that regulations may prescribe information to be included on a public register. To promote adequate parliamentary scrutiny, this information should be prescribed in primary not secondary legislation. This is particularly the case as proposed sections 53 (3) (6) and (7) provides for the information to be publicised thereby impacting on privacy rights.

**The Committee notes that grounds concerning the cancelling of a licence and information put into the public domain should be included in primary legislation, and not set by secondary legislation, to allow for adequate parliamentary scrutiny. However, as a result of Section 41 of the Interpretation Act allowing Parliament to pass a resolution disallowing a statutory rule, the Committee makes no further comment.**

# 14. Petroleum (Onshore) Amendment (Prohibit Coal Seam Gas) Bill 2015\*

Date introduced	28 May 2015
House introduced	Legislative Council
Member responsible	The Hon. Jeremy Buckingham MLC
Portfolio	Private Member's Bill*I

## PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the Petroleum (Onshore) Act 1991:
  - (a) to prohibit prospecting for, or the mining of, coal seam gas in New South Wales, and
  - (b) to reintroduce the public interest as a ground for certain decisions relating to petroleum titles.

## BACKGROUND

2. In his Second Reading Speech to Parliament, the Hon. Jeremy Buckingham stated that 'Now is the time to ban coal seam gas. The industry is unwanted, unnecessary and unsafe'. Mr Buckingham further stated that in 2011, the Legislative Council's General Purpose Standing Committee conducted an inquiry into coal seam gas that 'uncovered the extent, scale and momentum behind the coal seam gas industry in 2011'. Mr Buckingham indicated the inquiry found that there was no consent for coal seam gas from the community.
3. Mr Buckingham went *on* to outline the potential environmental and economic risks of coal seam gas and stated:

We [the Greens] do not accept we need another fossil fuel. We do not accept that this industry is safe. We do not believe the lies of big oil and big gas. It is all about an export industry. It is all about selling gas into Asia. It is not about creating jobs and wealth here in the long term.
4. Mr Buckingham told Parliament that the Bill will prohibit prospecting for new production areas of coal seam gas or other unconventional gas in NSW, and will ensure that existing coal seam gas production areas at Camden and Narrabri are not expanding and that existing petroleum licenses can be cancelled without compensation.

## 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 day that is 14 days after the date of assent to the proposed Act. This day is also the prohibition commencement day for the purposes of the provisions to be inserted by the proposed Act.

**Schedule 1 Amendment of Petroleum (Onshore) Act 1991 No 84**

7. Schedule 1 [1] inserts a new Part in the Act dealing with prospecting or mining coal seam gas. On and from the prohibition commencement day, the new Part:
  - (a) prohibits prospecting for or mining coal seam gas in all areas of New South Wales except in accordance with an existing production lease, and
  - (b) provides for any petroleum title (other than an existing production lease) relating to coal seam gas that is in force immediately before that day to cease to have effect to the extent to which it authorises prospecting for or mining coal seam gas in any area of New South Wales, and
  - (c) prevents the Minister from granting new, or renewing existing, petroleum titles relating to coal seam gas, and
  - (d) prevents the holder of an existing production lease from conducting petroleum mining operations involving drilling or hydraulic fracturing for the purpose of increasing or extending the holder's capacity to produce coal seam gas, and
  - (e) enables the Minister to cancel a petroleum title that has entirely ceased to have effect because of the operation of the new Part, and
  - (f) provides that the State is not required to pay compensation in connection with the enactment or operation of the new Part, but may nevertheless voluntarily choose to do so.
8. Schedule 1 [2] reintroduces the public interest as a ground for certain decisions relating to petroleum titles. The ground was first introduced by the Mining and Petroleum Legislation Amendment (Public Interest) Act 2013, but was replaced by a fit and proper person ground by the Mining and Petroleum Legislation Amendment Act 2014.

**ISSUES CONSIDERED BY COMMITTEE****Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA*****Right to Compensation and Retrospectivity***

9. Clause 7D of the Bill provides that compensation is not payable by or on behalf of the state in connection with the enactment or operation of the proposed Act, including for conduct that is unconscionable, negligent, false, misleading, deceptive, tortious, a breach of contract, or a breach of statute. This exclusion of liability extends retrospectively, that is, to conduct and matters that occurred before the exclusion was enacted.

**The Committee is concerned that the Bill denies the right to seek compensation for loss caused as a result of the enactment of the proposed legislation. The Committee is particularly concerned that this exclusion of state liability would operate retrospectively. Retrospectivity is contrary to the rule of law which allows people to order their affairs according to what the law is. For example, it is less likely that a party would enter into a contract with the state if it knew at that time that it may not be able to sue in the event of a breach because of**

**provisions such as these. The Committee refers the matter to Parliament for consideration.**

# 15. Public Health (Tobacco) Amendment (E-Cigarettes) Bill 2015

Date introduced	6 May 2015
House introduced	Legislative Assembly
Minister responsible	The Hon. Jillian Skinner MP
Portfolio	Minister for Health

## PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the Public Health (Tobacco) Act 2008 to prohibit the sale of e-cigarettes and e-cigarette accessories to persons who are under the age of 18 years.

## BACKGROUND

2. In her Second Reading Speech to Parliament, the Hon. Jillian Skinner MP, Minister for Health, stated that the popularity and use of e-cigarettes is growing across the world. Mrs Skinner further stated that there is no conclusive evidence to say whether e-cigarettes help people to quit smoking but that, in any case, they are not suitable for minors. Mrs Skinner indicated that the Bill aims to protect young people from the potential risks that e-cigarettes pose by making sure that they cannot be purchased by minors.

## OUTLINE OF PROVISIONS

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

### *Schedule 1 Amendment of Public Health (Tobacco) Act 2008 No 94*

5. Schedule 1 [3] makes it an offence for a person to sell an e-cigarette or e-cigarette accessory to a person who is under the age of 18 years unless it is an authorised product. Schedule 1 [1], [4] and [6] make consequential amendments. Schedule 1 [2] and [5] define the terms authorised product, e-cigarette and e-cigarette accessory.
6. An e-cigarette is defined to mean a device (other than a device of a kind excluded by the regulations) that is designed to generate or release an aerosol or vapour (whether or not containing nicotine) by electronic means for inhalation by its user in a manner that replicates, or produces an experience similar to, the inhalation of smoke from an ignited tobacco product or ignited non-tobacco smoking product. It is also defined to include certain other kinds of devices if they have been prescribed by the regulations.
7. An e-cigarette accessory is defined to include such things as a cartridge, capsule or other container designed to contain a liquid, aerosol, gas, vapour or other substance for use in an e-cigarette and a heating element designed for use in e-cigarettes.



8. An authorised product is defined to mean certain therapeutic goods that are registered (or the subject of an approval or authority) under the Therapeutic Goods Act 1989 of the Commonwealth or supplied under a licence or authority in force under the Poisons and Therapeutic Goods Act 1966 or the regulations under that Act.
9. The maximum penalty for the offence will be:
  - (a) in the case of an individual, 100 penalty units (currently \$11,000) for a first offence or 500 penalty units (currently \$55,000) for a second or subsequent offence, or
  - (b) in the case of a corporation, 500 penalty units (currently \$55,000) for a first offence or 1,000 penalty units (currently \$110,000) for a second or subsequent offence.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Commencement by Proclamation*

10. Clause 2 of the Bill provides that the proposed Act is to commence on a day or days to be appointed by proclamation.

**The Committee prefers legislation of this kind, which imposes significant monetary penalties on individuals, to commence on a fixed date or on assent, not by proclamation.**

## 16. Small Business Grants (Employment Incentive) Bill 2015

Date introduced	4 June 2015
House introduced	Legislative Assembly
Minister responsible	The Hon Gladys Berjikian
Portfolio	Treasury

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to assist in the creation of new jobs by establishing a grant scheme that gives small business employers an incentive to increase the number of their full time equivalent employees for a period of at least a year.

### BACKGROUND

2. This Bill establishes the Small Business Employment Incentive Scheme aimed at assisting the government deliver its target of 150,000 new jobs in New South Wales over the next four years. The Scheme will provide a grant to eligible employers of up to \$2,000 per full-time employee.
3. The Scheme is similar to the existing Jobs Action Plan. There are some differences which include:
  - new employees are not limited to one new position but can be moved within their company
  - employers of apprentices and trainees may receive the grant
  - the registration period has been extended.

### OUTLINE OF PROVISIONS

#### Part 1 Preliminary

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 the date of assent to the proposed Act.
6. Clause 3 provides for the object of the proposed Act, as set out in the Overview.
7. Clause 4 defines certain words and expressions used in the proposed Act.

#### Part 2 Grant scheme

8. Clause 5 establishes a grant scheme for small business employers who employ people in new jobs on or after 1 July 2015.

9. Clause 6 provides that an employer is entitled to a grant under the grant scheme (subject to the other provisions of the proposed Act) in respect of the employment of a person if the employment is eligible employment.
10. Clause 7 provides that employment is eligible employment if:
  - (a) the employer is an eligible small business, and
  - (b) a person is employed (as a full time or part time employee) in a position that is a new job, and
  - (c) the employment commences on or after 1 July 2015 and before 1 July 2019, and
  - (d) the employment is maintained for the minimum employment period, and
  - (e) the services of the employee are performed wholly or mainly in New South Wales, and
  - (f) the employment satisfies any further eligibility criteria set out in the grant criteria, and
  - (g) the employment is not excluded from the grant scheme.
11. Clause 8 defines what is meant by an eligible small business. An employer is an eligible small business if the employer has an ABN, carries on a business for the whole of the grant period and is not liable to pay payroll tax.
12. Clause 9 defines what is meant by a new job. A position is a new job if the employment of a person in that position results in a sustained increase in the number of the employer's full time equivalent employees (that is, an increase that is sustained for 1 year).
13. Clause 10 provides for the calculation of the number of full time equivalent employees of an employer.
14. Clause 11 provides for the minimum employment period in respect of a new job. The minimum employment period is 1 year starting on the date eligible employment is claimed to commence. A person must be employed in the position for which the grant is claimed for the whole of the minimum employment period (disregarding short vacancies).
15. Clause 12 permits a grant to be paid in circumstances where all the criteria for eligible employment have not been met. This is to occur subject to a condition that those criteria are met. However, the Chief Commissioner of State Revenue (the Chief Commissioner) may pay a grant without the criteria being met if satisfied that the failure to meet the criteria was due to circumstances beyond the control of the employer.
16. Clause 13 authorises the Minister for Finance, Services and Property (the Minister), by order published on the NSW legislation website, to determine further criteria for the payment of grants under the proposed Act. This order constitutes the grant criteria.
17. Clause 14 sets out the types of employment that are excluded from the grant scheme.

18. Clause 15 permits a grant to be claimed in respect of the employment of an internally transferred employee in a new job. A person is an internally transferred employee if the person's employment is transferred from one employer (the former employer) to another employer (the new employer) and either or both of the following applies:
  - (a) the former and new employers are members of the same group for payroll tax purposes,
  - (b) the transfer occurs because the business or undertaking of the former employer is merged with, or taken over or otherwise acquired by, the new employer.
19. Clause 16 provides for the closure of the grant scheme on a date appointed by the grant criteria (or on 30 June 2019, if no date is appointed).

### **Part 3 Calculation of grant**

20. Clause 17 provides that a grant can be claimed for the grant period only. The grant period is the period commencing on the date the eligible employment is claimed to commence and ending on the first anniversary of that date.
21. Clause 18 provides that the grant payable is \$2,000 for each full time employee and a proportional amount for a part time employee.
22. Clause 19 enables the Chief Commissioner to determine the number of full time equivalent employees of an employer, and the amount of the grant, by agreement with the claimant in certain cases.

### **Part 4 Payment of grant**

#### *Division 1 Registration and claim for grant*

23. Clause 20 provides that an employer must be registered as a claimant to claim a grant under the grant scheme.
24. Clause 21 enables the Chief Commissioner to register an employer as a claimant in respect of the employment of a person in a specified position.
25. Clause 22 sets out the procedure for applying to be registered as a claimant.
26. Clause 23 provides that a person cannot be registered as a claimant for a grant in respect of the employment of a person if the application for registration is made more than 3 months after the scheme closure date.
27. Clause 24 sets out the procedure for making a claim for a grant.

#### *Division 2 Decision with respect to claim*

28. Clause 25 provides that the Chief Commissioner is to decide whether a grant is payable in respect of a claim and the amount of the grant payable.
29. Clause 26 gives the Chief Commissioner power to refuse a claim if the Chief Commissioner is of the opinion that a claimed increase in the number of full time equivalent employees of an employer is contrived for the purpose of claiming a grant under the grant scheme.

30. Clause 27 gives the Chief Commissioner power to refuse a claim if the Chief Commissioner is of the opinion that an employer has failed to disclose material information.
31. Clause 28 sets out how the grant is to be paid.
32. Clause 29 enables the Chief Commissioner to correct a decision relating to a claim.
33. Clause 30 requires the Chief Commissioner to notify a claimant of a decision to grant or refuse a claim or vary or reverse an earlier decision on a claim and to include reasons for the decision.

## **Part 5 Repayment of grant**

34. Clause 31 authorises the Chief Commissioner to require a claimant to repay a grant in certain circumstances. The provision also authorises the Chief Commissioner to charge interest on an overdue payment and to charge a penalty for a dishonest claim.
35. Clause 32 authorises the Chief Commissioner to require a person (other than the claimant) to whom a grant is paid in error to repay the grant. The provision also authorises the Chief Commissioner to charge interest on an overdue payment.
36. Clause 33 authorises the Chief Commissioner to recover from a relevant third party any amount that is payable by a grant recipient but remains unpaid.
37. Clause 34 authorises the Chief Commissioner to enter into an arrangement for the payment of a liability under the proposed Act by instalments.
38. Clause 35 authorises the Chief Commissioner to write off liabilities under the proposed Act.
39. Clause 36 authorises the Chief Commissioner to remit, in whole or in part, an amount a person is required to pay under the proposed Act.

## **Part 6 Objections and reviews**

### *Division 1 Objections*

40. Clause 37 enables an objection to be made to decisions made by the Chief Commissioner under the proposed Act.
41. Clause 38 sets a time limit for the lodging of an objection.
42. Clause 39 requires the grounds for an objection to be stated in the notice of objection.
43. Clause 40 provides that an objector has the onus of proving an objector's case.
44. Clause 41 provides that the Chief Commissioner may allow or disallow an objection and reverse, vary or confirm the original decision.
45. Clause 42 requires the Chief Commissioner to give an objector notice of the determination of an objection.

*Division 2 Reviews*

46. Clause 43 enables an objector who is dissatisfied with the Chief Commissioner's determination of an objection to apply to the Civil and Administrative Tribunal for an administrative review of the Chief Commissioner's original decision.
47. Clause 44 provides that the Civil and Administrative Tribunal may confirm, vary or reverse the original decision and make further orders as to costs or otherwise.

**Part 7 Administration**

*Division 1 Administration generally*

48. Clause 45 provides that the Chief Commissioner is responsible to the Minister for the administration of the grant scheme.
49. Clause 46 authorises the Chief Commissioner to delegate functions related to the administration of the grant scheme.
50. Clause 47 authorises the Chief Commissioner to appoint persons as authorised officers. A person who is an authorised officer for the purposes of a taxation law (as referred to in section 68 of the *Taxation Administration Act 1996*) is taken to be an authorised officer for the purposes of the proposed Act.

*Division 2 Powers of investigation*

51. Clause 48 authorises the Chief Commissioner to carry out an authorised investigation for the purposes of the proposed Act, including in relation to whether an application or a claim has been properly made, whether a claimant who has received a grant was eligible for the grant and any other matter reasonably related to the administration of the proposed Act.
52. Clause 49 authorises the Chief Commissioner to exercise certain powers in connection with authorised investigations.
53. Clause 50 gives the Chief Commissioner access to public documents without the payment of fees.
54. Clause 51 authorises the Chief Commissioner to enter premises if the Chief Commissioner has reason to believe or suspect that there are documents at the premises that are relevant to the administration of the proposed Act. Entry cannot be made to residential premises without either consent or a search warrant.
55. Clause 52 provides that an officer who has entered premises under the proposed Part may require records to be produced, ask questions and require reasonable assistance and facilities to be provided.
56. Clause 53 authorises the Chief Commissioner or an authorised officer to take possession of a document and to take copies, extracts or notes of it.
57. Clause 54 deals with applications for search warrants.
58. Clause 55 makes it an offence to prevent the Chief Commissioner or an authorised officer from exercising a function under the proposed Part, to hinder or obstruct the

Chief Commissioner or an authorised officer in the exercise of such a function, or to refuse or fail to comply with a requirement made by the Chief Commissioner or an authorised officer. The maximum penalty is 100 penalty units (currently, \$11,000).

59. Clause 56 provides a defence to a prosecution for an offence under the proposed Part if the court is satisfied that the defendant could not, by the exercise of reasonable diligence, have complied with the requirement concerned or that the defendant complied with the requirement to the extent of his or her ability to do so.
60. Clause 57 makes it clear that the powers conferred on the Chief Commissioner and authorised officers by the proposed Act can be exercised in conjunction with powers conferred by taxation legislation.

### **Part 8 Miscellaneous**

61. Clause 58 makes it an offence to knowingly give false or misleading information to an authorised officer or in relation to an application or claim under the proposed Act. The maximum penalty is 100 penalty units (currently, \$11,000).
62. Clause 59 protects the confidentiality of certain information obtained in the course of work related to the administration of the proposed Act.
63. Clause 60 enables evidence relating to grants or the imposition of penalties to be given by a certificate signed by the Chief Commissioner.
64. Clause 61 provides that offences under the proposed Act are to be dealt with summarily and proceedings for an offence may be commenced within 3 years of the date on which it is alleged an offence was committed.
65. Clause 62 provides for the appropriation of funds from the Consolidated Fund for the payment of grants under the proposed Act.
66. Clause 63 protects persons involved in the administration of the proposed Act from personal liability.
67. Clause 64 confers power to make regulations under the proposed Act.
68. Clause 65 provides for the repeal of the proposed Act on 1 July 2023.

### **Schedule 1 Savings, transitional and other provisions**

69. Schedule 1 contains savings, transitional and other provisions.
70. Schedule 2 Amendment of Acts
71. Schedule 2.1 amends the Law Enforcement (Powers and Responsibilities) Act 2002 to provide for the issue of search warrants under the proposed Act.
72. Schedule 2.2 amends the Taxation Administration Act 1996 to permit a tax officer to disclose information obtained under or in relation to the administration of a taxation law in connection with the administration or execution of the proposed Act or the *Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011*.

## ISSUES CONSIDERED BY COMMITTEE

**The Committee makes no comment on the Bill in respect of issues set out in s8A of the *Legislation Review Act 1987*.**



# 17. Statute Law (Miscellaneous Provisions) Bill 2015

Date introduced	27 May 2015
House introduced	Legislative Assembly
Minister responsible	The Hon. Gabrielle Upton MP
Portfolio	Attorney General

## PURPOSE AND DESCRIPTION

The objects of the Bill are:

- (a) to make minor amendments to various Acts and regulations (Schedule 1), and
- (b) to amend certain other Acts and instruments for the purpose of effecting statute law revision (Schedule 2), and
- (c) to make minor amendments to various Acts and instruments consequent on the enactment of the Government Sector Employment Act 2013 (Schedule 3), and
- (d) to amend certain Acts to enable the repeal of regulations by Schedule 6 (by transferring into those Acts provisions of the regulations to be repealed that are of possible ongoing effect) (Schedule 5), and
- (e) to repeal various Acts and instruments and provisions of Acts and instruments (Schedule 6), and
- (f) to make other provisions of a consequential or ancillary nature (Schedules 4 and 7).

## BACKGROUND

1. In her Second Reading Speech to Parliament, the Hon. Gabrielle Upton MP, Attorney General, stated that the Bill continues the statute law revision program that has been in place for more than 30 years. Ms Upton indicated that Bills of this kind have featured in most sessions of Parliament since 1984 and are an effective way of making minor policy changes by amending various Acts, repealing redundant legislation and correcting drafting errors.

## OUTLINE OF PROVISIONS

2. Clause 1 sets out the name (also called the short title) of the proposed Act.
3. Clause 2 provides for the commencement of the proposed Act.
4. Clause 3 makes it clear that the explanatory notes contained in the Schedules do not form part of the proposed Act.

### Schedule 1 Minor amendments

5. Schedule 1 makes amendments to the following Acts and regulations:

Aboriginal Land Rights Act 1983 No 42

Biological Control Act 1985 No 199

Classification (Publications, Films and Computer Games) Enforcement Act 1995 No 63

Conveyancers Licensing Act 2003 No 3

Co-operative Housing and Starr-Bowkett Societies Act 1998 No 11

Co-operative Housing and Starr-Bowkett Societies Regulation 2005

Crime Commission Act 2012 No 66

Environmental Planning and Assessment Act 1979 No 203

Environmental Planning and Assessment Amendment Act 2014 No 79

Environmental Planning and Assessment Regulation 2000

Gambling (Two-up) Act 1998 No 115

Gaming Machines Act 2001 No 127

Health Care Complaints Act 1993 No 105

Holiday Parks (Long-term Casual Occupation) Act 2002 No 88

Holiday Parks (Long-term Casual Occupation) Regulation 2009

Home Building Act 1989 No 147

Liquor Act 2007 No 90

Mental Health Amendment (Statutory Review) Act 2014 No 85

Passenger Transport Act 2014 No 46

Prevention of Cruelty to Animals Act 1979 No 200

Public Health Act 2010 No 127

Registered Clubs Act 1976 No 31

Residential (Land Lease) Communities Act 2013 No 97

Saint John's College Act 1857

State Emergency and Rescue Management Act 1989 No 165

Subordinate Legislation Act 1989 No 146

University of Technology, Sydney, Act 1989 No 69

University of Western Sydney Act 1997 No 116

Veterinary Practice Act 2003 No 87

6. The amendments to each Act and regulation are explained in detail in the explanatory note relating to the Act or regulation concerned set out in Schedule 1.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Aboriginal Land Rights*

7. Schedule 1, clause 1.1, item 2 of the Bill removes special requirements for the transfer or disposal of an asset, or the termination of certain arrangements by the NSW Aboriginal Land Council to be approved by a resolution passed by not less than 80 per cent of the voting members present at a meeting that has been notified at least 14 days before the date of the meeting. The proposed amendment will result in an ordinary notice and resolution being sufficient.

**The Committee notes the Bill removes special requirements for the transfer or disposal of an asset by the NSW Aboriginal Land Council. This may result in less extensive consideration of such decisions by the Land Council, potentially impacting on Aboriginal land rights. However, the Committee notes the amendment is consistent with the position applying in relation to other decisions of the Land Council. In the circumstances, the Committee makes no further comment.**

#### *Retrospectivity*

8. Schedule 1, clause 1.13, item 1 of the Bill provides that the Health Care Complaints Commission is required to notify the Health Secretary of the details of complaints that have been assessed by the Commission and appear to it to involve a possible breach of the *Assisted Reproductive Technology Act 2007*. Item 2 extends the proposed amendment to complaints that the Commission has received before the amendment commences and is still dealing with on that commencement.

**The Committee generally comments where provisions in legislation are drafted with retrospective effect. This is because retrospectivity is contrary to the rule of law, allowing people knowledge of the laws they are subject to at any given time. In this case, the retrospective provision appears to relate to a procedural matter, and does not retrospectively create new offences or penalties. In the circumstances, the Committee makes no further comment.**

#### *Retrospectivity II*

9. Schedule 7, clause 1 of the Bill provides that certain amendments, including amendments correcting errors in technical provisions (for example, headings indicating the section to be amended or directions as to where a new section is to be inserted) and rectifying minor drafting errors (for example, corrections in numbering of provisions, correction or insertion of cross references, omission of unnecessary matter, or insertion

of omitted matter), will be taken to have commenced on the date the amendments to which they relate commenced.

**The Committee generally comments where provisions in legislation are drafted with retrospective effect. This is because retrospectivity is contrary to the rule of law, allowing people knowledge of the laws they are subject to at any given time. In this case, the retrospective provisions are in the nature of statute law revision, for example, correcting minor drafting errors. In the circumstances, the Committee makes no further comment.**

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

#### *Henry VIII Clause*

10. Schedule 7, clause 4 of the Bill enables the Governor, by proclamation, to revoke the repeal of any Act, or any provision of any Act, by the proposed Act.

**The Committee notes that by providing that the Governor can, by proclamation, revoke the repeal of any Act by the proposed Act, the Bill allows the proposed Act, or one of the effects of the proposed Act, to be amended by proclamation. To foster appropriate Parliamentary oversight amendments to primary legislation should be affected by Parliament not by a proclamation. The Committee refers the matter to Parliament for further consideration.**

## Part Two - Regulations

# 1. Cemeteries and Crematoria Regulation 2014

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide for the imposition of general levies on cemetery and crematorium operators prescribed by the Regulation and to prescribe the interment services in respect of which general levies are to be payable, the method of calculating the amount payable, the period in respect of which payment is to be made and to enable the Cemeteries Agency to waive, reduce, postpone or refund such levies. The general levies are to be paid into the Cemeteries Agency Fund established under section 22 of the Cemeteries and Crematoria Act 2013 and are contributions towards the cost of administration of that Act to the extent that it relates to cemeteries. Section 24 (2) (e) of that Act requires general levies to be paid within the time and in the manner specified by the Cemeteries Agency.

### ISSUES CONSIDERED BY COMMITTEE

**Inappropriately delegates legislative powers: s 9(1)(b) of the LRA**

*Matter which should be scrutinised by Parliament*

2. Subclause 4(6) of the Regulation provides that the Cemeteries Agency may, by notice in writing, adjust the amount of interment service levies in respect of a certain period in proportion to variations in the CPI.

**The Committee notes that the regulation allows the Cemeteries Agency, by notice in writing, to adjust levy amounts in proportion to variations in the CPI. The Committee prefers levy amounts to be set by regulation. This is to allow for proper parliamentary scrutiny – while regulations are subject to disallowance by Parliament under section 41 of the *Interpretation Act 1987*, a written notice of the Cemeteries Agency is not. As the Cemeteries Agency can only make adjustments in proportion to the CPI, the Committee makes no further comment.**

## 2. Child Protection (Working with Children) Amendment Regulation 2014

### PURPOSE AND DESCRIPTION

1. The objects of this Regulation are as follows:
  - (a) to make murder of any person a disqualifying offence for the purposes of the Child Protection (Working with Children) Act 2012 (the Act),
  - (b) to define certain agencies that provide voluntary out-of-home care as registered agencies and to provide that the role of the person having the overall supervision of the agency's arrangements for the provision of that care (the principal officer of the agency) is a child-related role,
  - (c) to provide that the role of a member of a governing body of a designated agency, accredited adoption service provider or registered agency is a child-related role,
  - (d) to provide a 48 hour exemption from offences in section 10 of the Act if an adult person who resides at the home of an authorised carer ceases to have a clearance or current application,
  - (e) to provide an exemption from offences in section 10 of the Act in the case of an adult person who resides at the home of an authorised carer whose authorisation is suspended,
  - (f) to provide a one-year exemption (unless the Children's Guardian directs otherwise) from the requirement that a reporting agency notify the Children's Guardian of any finding it has made before 3 July 1995 that a worker has engaged in misconduct involving children,
  - (g) to require the principal officer and each member of the governing body of a designated agency, registered agency or accredited adoption service provider to comply with Division 2 (Mandatory requirements for child-related work) of Part 2 of the Act by 31 March 2015,
  - (h) to provide that the Children's Guardian may require certain self-employed persons who are exempt from Division 2 of Part 2 of the Act to comply with that Division,
  - (i) to provide that certain exemptions do not apply to persons who are disqualified persons or persons who have been subject to an interim bar or who have had a working with children check clearance cancelled or an application for a clearance refused,
  - (j) to make other minor amendments.

## ISSUES CONSIDERED BY COMMITTEE

### Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

#### *Parliamentary Scrutiny*

2. Clause 3 of the Regulation amends the Child Protection (Working with Children) Act 2012 (the Act) to make murder of *any person* a disqualifying offence for the purposes of the Act. Prior to this amendment, a person was only disqualified from working with children under this provision if he or she had been found guilty of murdering a *child*.

**The Committee notes that the Regulation amends an Act. In the Committee's view, to facilitate appropriate Parliamentary scrutiny, amendments to primary legislation should be made by Parliament amending that legislation, not by the Executive amending a regulation. However, as the paramount consideration of the Regulation is the welfare of children, the Committee makes no further comment.**

### 3. Crimes (Administration of Sentences) Amendment (Access to Money) Regulation 2015

#### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow money to be paid into an extreme high risk restricted inmate's account if the Commissioner of Corrective Services authorises that payment. Currently, such inmates cannot receive any money, and it cannot be deposited in their accounts (except money the Commissioner pays to inmates). Such money must be returned to the sender or confiscated.
2. This Regulation is made under the Crimes (Administration of Sentences) Act 1999, including sections 79 and 271 (the general regulation-making power).

#### ISSUES CONSIDERED BY COMMITTEE

**Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 9(1)(b) of the LRA**

##### *Ill-defined and wide powers*

3. The regulation allows money to be paid into the account of an extreme high risk restricted inmate if the Commissioner of Corrective Services authorises the payment. Currently, such inmates cannot receive any money nor have it paid into their accounts unless it is paid to them by the Commissioner.

**Under the Regulation, no money can be paid to certain inmates unless the Commissioner pays it to them, or authorises the payment. No guidance is provided about the circumstances under which the Commissioner would authorise payment. Therefore, the economic rights of the inmates may be unduly dependent upon an insufficiently defined administrative power. However, the Committee notes the need to preserve order and security in correctional facilities, and the community, and the fact that the provisions relate only to extreme, high risk, restricted inmates. In the circumstances the Committee makes no further comment.**



## 4. Liquor Amendment (RSA) Regulation 2015

### PURPOSE AND DESCRIPTION

1. The objects of this Regulation are as follows:
  - (a) to allow approved training providers who are the TAFE Commission, an industry association or a provider nominated by an industry association to provide responsible service of alcohol (RSA) training courses online,
  - (b) to enable the Independent Liquor and Gaming Authority to revoke a person's RSA certification, and disqualify that person from holding RSA certification for up to 12 months, if it is found that the person obtained RSA certification fraudulently or by deception,
  - (c) to create certain penalty notice offences in relation to obtaining RSA certification fraudulently or by deception.
2. This Regulation is made under the Liquor Act 2007, including sections 99, 150 and 159 (the general regulation-making power).

### ISSUES CONSIDERED BY COMMITTEE

#### Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

##### *Procedural Fairness*

3. Under proposed subclause 49C of the Regulation, the Authority may, on application by the Secretary or Commissioner of Police make an order revoking any recognised RSA certification held by a person if the Authority is satisfied the certification was obtained fraudulently or by deception. Notice of the making of the order is to be given to the person the subject of the order, but failure to give notice does not affect operation of the order if a reasonable attempt has been made to notify the person.

**This Committee is concerned about the procedural fairness of revoking a person's RSA certification without notifying him/her particularly as a person working in licensed premises without an RSA certification is subject to a maximum penalty of \$5,500. Nonetheless, for revocation to occur, the Authority must be satisfied the certification was obtained fraudulently or by deception; must make a reasonable attempt to notify the person; and the person may have the order reviewed by the Civil and Administrative Tribunal. Given these safeguards, the Committee makes no further comment.**

## 5. Road Transport (Vehicle Registration) Amendment (Release of Information) Regulation 2014

### PURPOSE AND DESCRIPTION

1. The objects of this Regulation are as follows:
  - (a) to extend the release of vehicle registration information to Compulsory Third Party (CTP) insurers to include the release of information before the point-of-sale of third-party insurance,
  - (b) to confirm that Roads and Maritime Services is authorised to release vehicle registration information through its services known as the “Free registration check report”, the “NSW Rego App” and the “Vehicle history report”,
  - (c) to confirm that Roads and Maritime Services may verify concession entitlement claims with Centrelink,
  - (d) to permit the automatic renewal of registration of vehicles where the registered operator is an eligible pensioner and there is a zero renewal payment.

### ISSUES CONSIDERED BY COMMITTEE

#### Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

##### *Right to Privacy*

2. Clause 14D permits Roads and Maritime Services (RMS) to provide vehicle registration information to Compulsory Third Party (CTP) insurers including the name, address and date of birth of any registered operator.

**The Committee notes that the regulation authorises a government agency (RMS) to release a person’s private information to a third party (CTP insurers). RMS must enter into a registration information disclosure agreement with the CTP insurer prior to releasing the information and the information is restricted to ‘relevant information about a registrable vehicle in connection with the issue by that CTP insurer of a third-party policy in respect of the vehicle’. However, the Committee notes that there is no requirement for RMS to consult with the Privacy Commissioner before entering into an information disclosure agreement. This is a safeguard that the regulation *does* apply in relation to the release of similar information to toll operators. The Committee makes no further comment.**

## 6. Security Industry Amendment (Miscellaneous) Regulation 2015

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Security Industry Regulation 2007* as follows:
  - (a) to revise the Schedule of penalty notice offences:
    - (i) to update a reference to an offence provision and to remove references to repealed or relocated offence provisions, and
    - (ii) to increase the prescribed penalties for a penalty notice offence that prohibits a master licensee from employing unlicensed persons (from \$2,200 to \$11,000 if the offence is committed by a corporation and from \$1,100 to \$5,500 if committed by an individual), and
    - (iii) to prescribe certain offences as penalty notice offences (being offences relating to contravening visitor permit conditions, failing to produce visitor permits on demand, obstructing an enforcement officer and unauthorised subcontracting),
  - (b) to omit a redundant prescription of a security activity for the purposes of the *Security Industry Act 1997*,
  - (c) to omit reference to certain contraventions as offences the commission of which is a discretionary ground for Refusing the grant of an application for a licence,
  - (d) to modify an exemption from the application of the *Security Industry Act 1997* relating to apprentices and trainees and to omit a redundant exemption,
  - (e) to require certain records to be kept in a manner and form approved by the Commissioner of Police.

### ISSUES CONSIDERED BY COMMITTEE

#### Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

##### *Increase in Penalties*

2. This Regulation increases the prescribed penalties for individuals employing unlicensed persons from \$1,100 to \$5,500.

**The Committee notes the fivefold increase in penalties for the offence of employing an unlicensed person in the security industry. The Committee makes no further comment.**

## 7. Work Health and Safety (Mines) Regulation 2014

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to protect the health and safety of workers at mines and other persons whose health and safety may be affected by mining operations. In particular, this Regulation makes provision with respect to the following matters:
  - (a) the role of the mine operator,
  - (b) managing risks to health and safety associated with mining operations, including by the preparation of a safety management system, principal mining hazard management plans and principal control plans,
  - (c) the health monitoring of workers,
  - (d) consultation with workers at a mine and the safety role of workers at the mine,
  - (e) the preparation of mine survey plans and mine plans,
  - (f) requiring mine operators to provide certain information to the regulator,
  - (g) the keeping of a mine record,
  - (h) the exercise of statutory functions at mines by suitably qualified individuals,
  - (i) the licensing of certain activities at underground coal mines,
  - (j) the membership and functions of the Mine Safety Advisory Council and the Mining Competence Board,
  - (k) safety and health representatives at coal mines,
  - (l) other miscellaneous matters.

### ISSUES CONSIDERED BY COMMITTEE

#### **Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA**

##### *Right to Privacy*

2. Clause 109 of the Regulation provides that a mine operator must monitor the health of a worker in certain circumstances. Subclause 119(1) further provides that a person conducting a business that has engaged a mine worker must ensure that any health monitoring report about that worker is kept as a confidential record.
3. However, subclause 119(4) of the Regulation provides that the person conducting the business may disclose a health monitoring report to certain third parties without the relevant worker's consent and the Regulation does not make clear what responsibility some of those third parties have, if any, to keep this information confidential.

The Committee notes that the regulation authorises persons conducting a business that has engaged a mine worker to disclose a health monitoring report about the worker to certain third parties, without the worker's consent. It is not clear what obligations some of those third parties have to protect the worker's privacy once they receive this report. The Committee would prefer these obligations to be made clear in the Regulation. However, given the health and safety objectives of these provisions, and the operation of the *Health Records and Information Privacy Act 2002*, the Committee makes no further comment.

### *Right to Privacy II*

4. Clause 145 of the Regulation provides that the regulator is to maintain a register of practising certificates held by people qualified to exercise certain statutory functions. The register is to provide certification agencies, mine operators and industry health and safety representatives with relevant information about the certificate holders e.g. name, contact details, qualifications, place of employment etc.
5. Subclause 145(4) further provides that the regulator may disclose any information on the register to any person or agency if the regulator considers that it is reasonably necessary to do so to reduce or control the risk to the health or safety of any person.

The Committee notes there appears to be no requirement that the regulator's decision to disclose information be reasonable. It is enough that the regulator had a genuine, subjective belief the disclosure was reasonably necessary to reduce or control the risk to the health or safety of any person. It is also unclear what duty third parties in receipt of the information have to protect the certificate holder's privacy. However, given the safety objectives of these provisions, the Committee makes no further comment.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s 9(1)(b) of the LRA

### *Matter which should be set by Parliament*

6. Subclause 182(1) of the Regulation provides that, in addition to any other fee payable to the regulator under the Regulation, the regulator may determine a fee for any service provided by it.

The Committee notes that the Regulation allows the regulator a broad discretion to determine a fee for any service provided by it, in addition to any fee already payable under the Regulation. The Committee would prefer all fees to be clearly set out in the Regulation. The Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers s 9(1)(b) of the LRA

### *Ill-defined and wide powers*

7. Subclause 185(1) of the Regulation provides that the regulator may exempt a person, or class of persons, from any provision of the Regulation either unconditionally or subject to conditions.

**By providing that the regulator may exempt a person or class of persons from any provision of the Regulation, the Regulation provides the regulator with a wide and ill-defined power. No guidance is provided in the Regulation about the matters to be considered in granting exemptions. Guidance should be provided in the Regulation. The Committee makes no further comment.**