



Legislation Review Committee

LEGISLATION REVIEW DIGEST

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

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Membership

CHAIR	Mr Michael Johnsen MP, Member for Upper Hunter
DEPUTY CHAIR	Mr Lee Evans MP, Member for Heathcote
MEMBERS	Ms Melanie Gibbons MP, Member for Holsworthy Mr Alister Henskens SC MP, Member for Ku-ring-gai Mr David Mehan MP, Member for The Entrance The Hon Shaoquett Moselmane MLC The Hon Gregory Pearce MLC Mr David Shoebridge MLC
CONTACT DETAILS	Legislation Review Committee Parliament of New South Wales Macquarie Street Sydney NSW 2000
TELEPHONE	02 9230 2096 / 02 9230 3382
FACSIMILE	02 9230 3309
E-MAIL	legislation.review@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au/lrc

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. COASTAL MANAGEMENT BILL 2016

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

Commencement by proclamation

The Committee generally prefers legislation to commence on a fixed date or on assent, rather than by proclamation. However, the Committee notes that this Bill does not impact on rights and liberties and that it may take some time to establish the processes to transition from the current coastal management framework to the new system proposed in the Bill. The Committee makes no further comments.

2. CRIMES (DOMESTIC AND PERSONAL VIOLENCE) AMENDMENT (REVIEW) BILL 2016

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

Commencement by proclamation

The Committee generally prefers legislation to commence on a fixed date or on assent, rather than by proclamation. However, as the Bill does not unduly impact on personal rights and liberties, the Committee makes no further comments.

3. CRIMES (HIGH RISK OFFENDERS) AMENDMENT BILL 2016

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

Deprivation of Liberty

The Committee notes that in considering the primary legislation, the then Legislation Review Committee raised a number of concerns that could trespass on individual rights and liberties. This included the Bill's potential impacts on the deprivation of liberty through arbitrary detention; the departure from the criminal burden of proof in determining whether to apply continue detention; and the possibility that continued detention would constitute a de facto double jeopardy on a convicted individual. Although the current Bill before the Committee is largely technical in nature, it remains incumbent upon this Committee to flag issues first raised by its predecessor Committee with respect to the operation of the entire legislation. The Committee makes no further comment.

Retrospectivity

The Committee notes that the retrospective application of this Bill will extend the provisions of the *Crimes (High Risk Offenders) Act 2016* to offenders who may not have been captured before commencement of the Act. The Committee notes that the regime under the *Crimes (High Risk Offenders) Act* is infrequently used and reserved for the most serious of offenders. However, the Committee considers the application of the Bill retrospectively may impact upon personal rights and liberties and refers this matter to Parliament for further consideration.

4. EMERGENCY SERVICES LEVY INSURANCE MONITOR BILL 2016

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

Right against self-incrimination

Clause 67 of the Bill impacts on the right against self-incrimination by requiring individuals to provide records, information or answers even though it might incriminate them or make them liable to a penalty. It also interferes with this right by providing that certain self-incriminating information may be admissible in evidence against the person in criminal proceedings. The provision includes some safeguards, such as limiting the kinds of proceedings in which evidence of this nature can be admissible and warning individuals that they can object to providing self-incriminating information.

The Committee notes that similar provisions which abrogate the privilege against self-incrimination occur frequently in legislation. Despite the frequent occurrence of similar provisions, the Committee refers clause 67 of the Bill to Parliament for further consideration in relation to whether the interference with the right against self-incrimination is justified in the circumstances.

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

Ministerial direction to Emergency Services Levy Insurance Monitor

Clause 7 of the Bill states that the Emergency Services Levy Insurance Monitor is independent and not subject to the control or direction of a Minister in respect of the exercise of its functions. However, the Bill authorises the relevant Minister to publish a 'general direction' in the Gazette in respect of the exercise of the Monitor's functions. The scope of such guidance is not defined in the Bill, although it cannot relate to a specific matter or complaint. The Committee notes that the Monitor has various functions including to deal with complaints and investigate and institute proceedings in respect of prohibited conduct. These functions may be affected by a 'general direction' from the Minister. The Committee refers clause 7 of the Bill to Parliament for further consideration as to whether guidance with respect to the Monitor's functions should instead be included in a Regulation. Such guidance would then be subject to parliamentary scrutiny through the disallowance process in section 41 of the *Interpretation Act 1987*.

5. NATIONAL PARKS AND WILDLIFE AMENDMENT (ADJUSTMENT OF AREAS) BILL 2016

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

6. NORFOLK ISLAND ADMINISTRATION BILL 2016

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

7. ROADS AMENDMENT (TRANSPARENT TOLLING) BILL 2016*

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

8. SUPERANNUATION ADMINISTRATION CORPORATION (PILLAR) (AUTHORISED TRANSACTION) BILL 2016

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

Commencement by proclamation

The Committee will always note where an Act, or provisions within an Act, commence by proclamation. In this instance the Committee does not regard the commencement by proclamation to be an inappropriate delegation of legislative power.

9. TERRORISM (POLICE POWERS) AMENDMENT (INVESTIGATIVE DETENTION) BILL 2016

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

Arrest and detention without charge or warrant; broad definition of 'terrorism suspect'; retrospectivity; rights of minors; right to legal representation; and other rights potentially affected

The Committee notes that the Bill is concerned with assisting the police to improve public safety and that it contains various safeguards for terrorism suspect who may be subject to investigative detention. However, the Committee highlights that the Bill may impact on various rights and liberties. In particular, the Committee is concerned that individuals may be arrested, questioned and detained without charge for up to 14 days with court approval, and that this can apply to individuals between 14 and 18 years of age. In addition, the definition of a 'terrorism suspect' is broad; suspects who are arrested do not have to be taken before the court as soon as practicable; and the court can prohibit a suspect from contacting certain persons including a specified legal representative. For these reasons, the Committee refers this Bill to Parliament for further consideration in relation to whether the impacts on rights and liberties are proportionate to the circumstances.

10. WATER NSW AMENDMENT (STAFF TRANSFERS) BILL 2016

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

PART TWO – REGULATIONS

1. WORKERS COMPENSATION AMENDMENT (RETURN TO WORK ASSISTANCE) REGULATION 2016

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

Right to fair workers compensation

The Regulation prescribes certain circumstances in which an employer responsible for a work injury is not liable to pay compensation to the relevant employee. However, the Committee recognises that the exclusions strike a fair balance between workers and employers by ensuring workers gather appropriate evidence for their claim and carry out training and education from registered providers which is relevant to their future. Employers will also not be liable for work assistance which only leads to very short term re-employment. The Committee makes no further comments.

Part One – Bills

1. Coastal Management Bill 2016

Date introduced	4 May 2016
House introduced	Legislative Council
Minister responsible	The Hon. John Ajaka MLC
Portfolio	Ageing, Disability Services, Multiculturalism

PURPOSE AND DESCRIPTION

1. The object of this Bill is to provide for the integrated management of the coastal environment of New South Wales consistent with the principles of ecologically sustainable development for the social, cultural and economic well-being of the people of the State.
2. The Bill consequently repeals the *Coastal Protection Act 1979* and the *Coastal Protection Regulation 2011*.

BACKGROUND

3. The Minister advised in his Second Reading Speech that the Bill is the first part of a coastal reform package to better allow coastal communities to deal with challenges and opportunities:

The reasons for this reform are to make the system simpler by replacing and improving the outdated and complex web of laws managing our coast; to enable us to resolve the issues arising from past settlement patterns and to manage the unique environmental, social and economic values of the coast in a planned and strategic way; and to provide better support for local councils as the custodians of our coast.

4. The State Government consulted with Local Government, coastal experts and coastal communities in developing the Bill.
5. In November 2015, the Minister for Planning released a draft Bill for public consultation along with the main aspects of a draft coastal manual. The Government received 450 submissions in response to the draft Bill. Suggestions from these submissions and consultations have been incorporated into the Bill introduced into Parliament.

ISSUES CONSIDERED BY COMMITTEE

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

Commencement by proclamation

6. Clause 2 of the Bill provides that the Act commences on a day or days to be appointed by proclamation.

The Committee generally prefers legislation to commence on a fixed date or on assent, rather than by proclamation. However, the Committee notes that this

Bill does not impact on rights and liberties and that it may take some time to establish the processes to transition from the current coastal management framework to the new system proposed in the Bill. The Committee makes no further comments.

2. Crimes (Domestic and Personal Violence) Amendment (Review) Bill 2016

Date introduced	5 May 2016
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 give effect to the recommendations contained in the 'Statutory review of the Crimes (Domestic and Personal Violence) Act 2007 (NSW)' and the 'Statutory review of chapter 9A of the Coroners Act 2009: the Domestic Violence Death Review Team' prepared by the Department of Justice and to make other minor amendments.

BACKGROUND

2. As stated above, the Bill implements recommendations from two statutory reviews relating to domestic and personal violence. The government supported all of the recommendation in those reviews.
3. A number of government and non-government stakeholders provided input into the reviews. The statutory reviews also considered other relevant reports including the report by the Australian and NSW Law Reform Commissions, 'Family violence – a national legal response,' from 2010 and the Legislative Council Standing Committee on Social Issues' report, 'Domestic violence trends and issues in NSW' from 2012.

ISSUES CONSIDERED BY COMMITTEE

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

Commencement by proclamation

4. Clause 2 of the Bill provides that the Act commences on a day or days to be appointed by proclamation.

The Committee generally prefers legislation to commence on a fixed date or on assent, rather than by proclamation. However, as the Bill does not unduly impact on personal rights and liberties, the Committee makes no further comments.

3. Crimes (High Risk Offenders) Amendment Bill 2016

Date introduced	Wednesday 4 May 2016
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 ensure that the class of violent offenders in relation to whom the State can apply to the Supreme Court for orders requiring their continuing detention or extended supervision following the expiry of an existing sentence of imprisonment or period of supervision extends to offenders convicted of any of the following serious indictable offences:
 - (a) murder that occurs in the course of the commission of another serious crime (known as “constructive murder”),
 - (b) manslaughter by unlawful and dangerous act,
 - (c) wounding with intent to cause death or grievous bodily harm.

BACKGROUND

2. This Bill amends the *Crimes (High Risk Offenders) Act 2006* to clarify that the Act will apply to offenders who have been imprisoned for the serious indictable offences listed above. In the Second Reading Speech, the Attorney General, the Hon Gabrielle Upton MP, commented that the amendments are required to address a recently identified limitation in the drafting of the Act. The Attorney General stated:

The bill addresses limitations where some very violent crimes, such as shootings and stabbings, are potentially not covered by the Act due to the technical elements of the offence the person was charged with. The Act was intended to cover these types of offending, however a technical limitation in the drafting of the Act has recently been identified.

ISSUES CONSIDERED BY COMMITTEE

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

3. In its 2006 consideration of the primary bill, the then Legislation Review Committee raised concerns about the deprivation of liberty for certain individuals that was core to the operation of the legislation.
4. In particular, the Committee noted that in seeking to extend continuing detention or extended supervision orders following the expiry of a sentence, the State risks arbitrarily

detaining an individual in violation of one of the basic principles of the rule of law. The Committee noted:

One of the principles of fairness which has traditionally guided the criminal justice system is that a person should be deprived of liberty only in relation to criminal conduct in which they have engaged in the past – not criminal conduct which they may engage in the future.

5. The then Committee also noted that the threshold required to continue a period of detention or community supervision is a departure from the traditional burden of proof used to determine criminal conduct, which would ordinarily be ‘proven beyond reasonable doubt’. This was also identified as a possible trespass on individual rights and liberties.
6. Lastly, the Committee also commented on the possibility that the legislation may constitute a de facto double jeopardy as an individual could be seen as being effectively repunished for an offence already committed and sentence served.
7. While the then Committee gave careful weight to the reasons for the Bill, it nonetheless referred the Bill to Parliament for its further consideration on the issues raised.
8. While this amendment Bill appears to only rectify a limitation in the original drafting without altering the substance of the legislation, it remains incumbent upon this Committee to reflag some of the concerns raised by the then Committee while the current Bill is subject to review.

The Committee notes that in considering the primary legislation, the then Legislation Review Committee raised a number of concerns that could trespass on individual rights and liberties. This included the Bill’s potential impacts on the deprivation of liberty through arbitrary detention; the departure from the criminal burden of proof in determining whether to apply continue detention; and the possibility that continued detention would constitute a de facto double jeopardy on a convicted individual. Although the current Bill before the Committee is largely technical in nature, it remains incumbent upon this Committee to flag issues first raised by its predecessor Committee with respect to the operation of the entire legislation. The Committee makes no further comment.

Retrospectivity

9. Schedule 2 [2] of the Bill extends the amendments proposed by this Bill to offences committed before the date of commencement and to persons serving a sentence of imprisonment that commenced before the date of commencement.

The Committee notes that the retrospective application of this Bill will extend the provisions of the *Crimes (High Risk Offenders) Act 2016* to offenders who may not have been captured before commencement of the Act. The Committee notes that the regime under the *Crimes (High Risk Offenders) Act* is infrequently used and reserved for the most serious of offenders. However, the Committee considers the application of the Bill retrospectively may impact upon personal rights and liberties and refers this matter to Parliament for further consideration.

4. Emergency Services Levy Insurance Monitor Bill 2016

Date introduced	3 May 2016
House introduced	Legislative Assembly
Member responsible	The Hon. Gladys Berejiklian MP
Portfolio	Treasury

PURPOSE AND DESCRIPTION

1. On 10 December 2015, the Treasurer announced a proposal to reform the current scheme for funding State fire and emergency services expenditure (the emergency services levy reform).
2. Under the current scheme, the expenditure is funded through contributions required to be paid by insurance companies (under the *Fire Brigades Act 1989*, the *Rural Fires Act 1997* and the *State Emergency Service Act 1989*). This scheme is proposed to be abolished and replaced by a scheme through which contributions are to be paid by property owners.
3. The objects of this Bill are to provide for the following matters in connection with the emergency services levy reform:
 - (a) the establishment and functions of an Emergency Services Levy Insurance Monitor (the Monitor),
 - (b) remedies in relation to the following conduct:
 - i exploitative pricing of insurance contracts as a consequence of the emergency services levy reform,
 - ii conduct that falsely represents, or misleads or deceives a person about, the effect of the emergency services levy reform.
4. The functions of the Monitor will include various advisory, monitoring, investigation and enforcement functions in connection with the emergency services levy reform.
5. The proposed Act will be repealed, and the functions of the Monitor will cease, on 1 January 2019.

BACKGROUND

6. The Minister advised in her Second Reading Speech that the Government intends to abolish the Emergency Services Levy from 1 July 2017 and replace it with an Emergency Services Property Levy as the Government considers the current system of funding fire and emergency services is unfair. The Minister further advised that:

Fire and Rescue NSW, the NSW Rural Fire Service and the NSW State Emergency Service have operating costs of more than \$1 billion per year, and 73.7 per cent of this cost is paid through a levy on insurance policies. Only people and businesses who buy insurance are currently contributing to the funding of these vital services.

7. Under the proposed new system, which the Minister says the Government will introduce into Parliament later in the year, all property owners will contribute to the cost of fire and emergency services. This approach is also adopted in other Australian jurisdictions including Victoria.
8. The Minister says these reforms will improve the affordability of insurance and will help to address the issue of underinsurance in NSW, where 36 per cent of households do not have contents insurance.

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

Right against self-incrimination

9. If a person is required to provide records or information or answer a question in accordance with the Bill, they are not excused from this requirement on the basis that the record, information or answer might incriminate them or make them liable to a penalty.
10. Information or answers given will be admissible against that person in proceedings for an offence under Part 5 of the Bill. However, information or answers given will not be admissible in any other criminal proceedings if the person objected at the time to giving the information or answer on the ground that it might incriminate them, or they were not warned that they could object.
11. If a person provides records in compliance with a requirement under Part 5 of the Bill, and those records might incriminate that person, the records may be admissible in evidence against the person in criminal proceedings.
12. If a person provides a record or information or gives an answer in compliance with Part 5 of the Bill, any further information obtained is not inadmissible on the ground that:
 - (a) the record, information or answer had to be provided, or
 - (b) the record, information or answer given might incriminate the person (clause 67).

Clause 67 of the Bill impacts on the right against self-incrimination by requiring individuals to provide records, information or answers even though it might incriminate them or make them liable to a penalty. It also interferes with this right by providing that certain self-incriminating information may be admissible in evidence against the person in criminal proceedings. The provision includes some safeguards, such as limiting the kinds of proceedings in which evidence of this nature can be admissible and warning individuals that they can object to providing self-incriminating information.

The Committee notes that similar provisions which abrogate the privilege against self-incrimination occur frequently in legislation. Despite the frequent occurrence of similar provisions, the Committee refers clause 67 of the Bill to

Parliament for further consideration in relation to whether the interference with the right against self-incrimination is justified in the circumstances.

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

Ministerial direction to Emergency Services Levy Insurance Monitor

13. The Bill provides that the Emergency Services Levy Insurance Monitor is not subject to the control or direction of any Minister in respect of the exercise of the Monitor's functions, including in respect of a specific matter or complaint.
14. However, the Minister administering the Act may issue a 'general direction' in writing to the Monitor in respect of the exercise of the Monitor's functions, which must be published in the Gazette. The Monitor is required to comply with a general direction from the Minister (clause 7 of the Bill).

Clause 7 of the Bill states that the Emergency Services Levy Insurance Monitor is independent and not subject to the control or direction of a Minister in respect of the exercise of its functions. However, the Bill authorises the relevant Minister to publish a 'general direction' in the Gazette in respect of the exercise of the Monitor's functions. The scope of such guidance is not defined in the Bill, although it cannot relate to a specific matter or complaint. The Committee notes that the Monitor has various functions including to deal with complaints and investigate and institute proceedings in respect of prohibited conduct. These functions may be affected by a 'general direction' from the Minister. The Committee refers clause 7 of the Bill to Parliament for further consideration as to whether guidance with respect to the Monitor's functions should instead be included in a Regulation. Such guidance would then be subject to parliamentary scrutiny through the disallowance process in section 41 of the *Interpretation Act 1987*.

5. National Parks and Wildlife Amendment (Adjustment of Areas) Bill 2016

Date introduced	Wednesday 4 May 2016
House introduced	Legislative Council
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Environment

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *National Parks and Wildlife Act 1974*:
 - (a) to change the reservation of Ben Halls Gap National Park (which consists of about 3,018 hectares) to a nature reserve to be known as Ben Halls Gap Nature Reserve, and
 - (b) to change the reservation of about 2,020 hectares of Khappinghat Nature Reserve to a national park to be known as Khappinghat National Park, and
 - (c) to revoke the reservation of about 88.42 hectares of Gwydir Wetlands State Conservation Area, and
 - (d) to revoke the reservation of the following land and to vest the land in the Minister for the purposes of Part 11 of that Act, which enables the Minister to sell, grant leases of, dispose of or otherwise deal with the land:
 - i about 0.1 hectare of Jervis Bay National Park,
 - ii about 140.94 hectares of Kosciuszko National Park,
 - iii about 2.018 hectares of Ku-ring-gai Chase National Park,
 - iv about 0.04 hectare beneath the surface of Lane Cove National Park,
 - v about 0.34 hectare of Middle Brother National Park,
 - vi about 18.5 hectares of Morton National Park,
 - vii Penrith Lakes Regional Park (which consists of about 6,656 square metres),
 - viii about 13.4 hectares of Royal National Park,
 - ix about 1.6 hectares of Wollemi National Park,
 - x about 0.11 hectare of Yaegl Nature Reserve, and

- (e) to provide that the Minister must not transfer the parts of that land currently forming part of Ku-ring-gai Chase National Park and Middle Brother National Park, unless satisfied that appropriate compensation has been provided, and
- (f) to revoke the reservation of about 86.31 hectares of land in Macquarie Pass State Conservation Area that has been transferred to the Illawarra Local Aboriginal Land Council, following a claim under the *Aboriginal Land Rights Act 1983*.

BACKGROUND

2. This Bill makes a number of amendments to the *National Parks and Wildlife Act 1974* to adjust boundaries, alter the management of certain areas and allow upgrades to roads and sporting facilities. Overall, approximately 178 hectares will be revoked from the national parks system. Some of the amendments include:
 - Less than one hectare will be revoked from the Ku-ring-gai Chase National Park to facilitate the upgrade of Mona Vale Road.
 - Nearly two hectares of land will be added to the Garigal National Park which includes land surrounding Whale Rock and a proposed fauna bridge between Ku-ring-gai Chase and Garigal National Parks.
 - 18.5 hectares will be revoked from the Morton National Park to facilitate access to private properties.
 - Three sporting ovals that fall within the boundary of the Royal National Park, covering 13.3 hectares, will be revoked and transferred to Sutherland Shire Council.
 - The Khappinghat Nature Reserve, which comprises 2,020 hectares, will be re-categorised as Khappinghat National Park.
 - 86 hectares of the Macquarie Pass State Conservation Area will be revoked to recognise the Illawarra Local Aboriginal Land Council's title to the land and 88 hectares of the Gwydir Wetlands will also be revoked as a result of a yet to be determined Aboriginal land claim.

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.

6. Norfolk Island Administration Bill 2016

Date introduced	Wednesday 4 May 2016
House introduced	Legislative Council
Minister responsible	The Hon. Duncan Gay MLC
Portfolio	

PURPOSE AND DESCRIPTION

1. The object of this Bill is to authorise the State of New South Wales to enter into arrangements with the Commonwealth for the provision of services and for the exercise of functions in Norfolk Island by New South Wales.

BACKGROUND

2. In March 2015 the Commonwealth Government announced a number of reforms for Norfolk Island. In May 2015 the *Norfolk Island Legislation Amendment Act 2015* (Cth) and related Acts came into effect. They provide for the Australian Government to assume responsibility for funding and delivering national and state level services to Norfolk Island. Included in the reforms is the intent to establish the Norfolk Island Regional Council.
3. In 2016, the NSW Government agreed to assist the Commonwealth Government in delivering services to Norfolk Island. In the Second Reading Speech, the Hon. Sarah Mitchell MLC stated:

In March 2016 this Government committed to providing service delivery support in school education, local government and health for the people of Norfolk Island commencing 1 July 2016. The involvement of the New South Wales Government in Norfolk Island is contingent on responsibility for Norfolk Island and its citizens remaining with the Commonwealth Government and any activity undertaken by the New South Wales Government being completely funded by the Commonwealth and resulting in no net cost for New South Wales.

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*.

7. Roads Amendment (Transparent Tolling) Bill 2016*

Date introduced	5 May 2016
House introduced	Legislative Assembly
Minister responsible	Mr Ryan Park MP
Portfolio	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Roads Act 1993* to impose requirements relating to the scrutiny and transparency of the following arrangements about tolling:
 - (a) tolling agreements (that is, agreements between a private sector entity and the government under which the private sector entity agrees to design, finance, construct (or re-build) and operate a tollway, bridge or tunnel, or to pay money, in exchange for the right to set and collect private tolls and charges),
 - (b) tolling orders (that is, orders made by Roads and Maritime Services (RMS) or roads authorities fixing the amount of tolls and charges for traffic using tollways, bridges, tunnels and road-ferries).
2. The requirements imposed by this Bill, which apply only to future tolling agreements and tolling orders, are as follows:
 - (a) the Minister will be required to ensure that tolling agreements are not entered into or amended, and tolling orders are not made, unless they have been investigated by the Independent Pricing and Regulatory Tribunal (IPART) and found to be in the public interest,
 - (b) the Auditor-General will be required to conduct performance audits of tolling agreements and tolling orders after they have been made or amended,
 - (c) tolls and charges will not be permitted to increase by more than the Consumer Price Index,
 - (d) reports of IPART and the Auditor-General will be tabled in Parliament and information about tolling agreements and tolling orders will be published in the Gazette or otherwise made publicly available.

BACKGROUND

3. Mr Ryan Park MP, in his Second Reading Speech, says the Bill attempts to introduce more transparency into the processes by which tolling agreements and orders are made in New South Wales.

4. Mr Park says the Bill has been developed through consultation with motoring groups and road transport industries.

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.

8. Superannuation Administration Corporation (Pillar) (Authorised Transaction) Bill 2016

Date introduced	Tuesday 3 May 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. Gladys Berejiklian MP
Portfolio	Treasurer

PURPOSE AND DESCRIPTION

1. The object of this Bill is to authorise and facilitate the transfer to the private sector of the assets, rights and liabilities of the Superannuation Administration Corporation, which is a statutory State owned corporation that operates the business of providing superannuation scheme administration and related services under the trading name Pillar Administration (*Pillar*).
2. The Bill requires the new private sector owner of Pillar to give a regional commitment to the Illawarra region under which it guarantees that the existing operations of Pillar that are associated with the delivery of member services to existing clients will continue to be located in the Illawarra for at least 10 years after completion of the transaction.
3. The Bill also has detailed provisions dealing with the transfer of Pillar employees and their rights and entitlements on transfer (see Part 4).

BACKGROUND

4. Pillar Administration is a provider of superannuation administration services based in the Illawarra region. In her Second Reading Speech, the Treasurer noted that this Bill follows a number of reviews conducted by both current and previous governments into whether government ownership of Pillar should continue. The Treasurer advised that there was consensus across the reviews that Pillar should not remain in government ownership.

ISSUES CONSIDERED BY COMMITTEE

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

Commencement by proclamation

5. The Bill provides for Schedule 5 to commence on a day or days to be appointed by proclamation. This delegates to the Executive the power to commence the proposed Schedule on whatever day it chooses or not at all.

The Committee will always note where an Act, or provisions within an Act, commence by proclamation. In this instance the Committee does not regard the

commencement by proclamation to be an inappropriate delegation of legislative power.

9. Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016

Date introduced	4 May 2016
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 *Terrorism (Police Powers) Act 2002* to authorise the arrest, detention and questioning of a person who is suspected of being involved in a recent or imminent terrorist act for the purposes of assisting in responding to or preventing the terrorist attack.
2. The Bill also extends by 3 years the sunset date until which membership of a terrorist organisation is also a State offence under the *Crimes Act 1900*.

BACKGROUND

3. The Premier, in his Second Reading Speech, said the Bill is modelled on a scheme in the United Kingdom and will assist the Police to respond to, and prevent, terrorist acts by allowing persons suspected of being involved in recent or imminent attacks to be arrested, questioned and detained.
4. The Premier also noted that COAG supports the Bill, with the Australian Capital Territory reserving its position:

This Bill was agreed in principle in April and COAG supported the New South Wales model for investigative detention of terrorist suspects being used as a basis for a nationally consistent model. In addition, New South Wales would introduce its legislation and, through this process, consult with other jurisdictions.

ISSUES CONSIDERED BY COMMITTEE

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

Arrest and detention without charge or warrant; broad definition of 'terrorism suspect'; retrospectivity; rights of minors; right to legal representation; and other rights potentially affected

Arrest, detention and questioning of terrorism suspect without charge and without a warrant

5. The Bill authorises the arrest, detention and questioning of persons suspected of being involved in recent or imminent terrorist attack to assist with responding to or preventing attacks (proposed section 25A of the *Terrorism (Police Powers) Act 2002*).
6. In particular, a police officer can arrest a terrorism suspect without a warrant for investigative detention if the associated terrorist act occurred in the last 28 days or the

officer has reasonable grounds to suspect the act could occur in the next 14 days. The police officer needs to be satisfied that investigative detention will substantially assist in responding to, or preventing, the terrorist act (proposed section 25E(1) of the *Terrorism (Police Powers) Act 2002*).

7. The Committee notes that the effect of this provision would be to arrest or detain an individual without charge or warrant, which would be contrary to the rule of law.

Broad definition of a 'terrorism suspect', which includes retrospective acts

8. A person is considered to be a 'terrorism suspect', and therefore subject to these provisions, if there are reasonable grounds to suspect that the person:
 - (a) has committed or will commit a terrorist act, or
 - (b) is, or has been, involved in preparing or planning an attack, or
 - (c) possesses something connected with the commission of, or preparation or planning for, a terrorist attack.
9. The definition also extends to a future terrorist attack even if the identity of the perpetrator, the kind of terrorist act or the place or time where the act will be committed are unknown. The provisions extend to terrorist acts committed before the commencement of the provisions. They also extend to acts done in preparation or planning for terrorist acts before the commencement of the provisions (proposed section 25B of the *Terrorism (Police Powers) Act 2002*).
10. The Committee notes that there are some limits to the definition. Firstly, the definition relies on the pre-existing definition of 'terrorist act' in the *Terrorism (Police Powers) Act 2002* which is widely used in Commonwealth and State counter terrorism legislation. Secondly, in order to detain a terrorism suspect under the Bill, the terrorist act concerned must have occurred in the last 28 days or a police officer must have reasonable grounds to suspect that it could occur within the next 14 days. Finally, the police officer must be satisfied that the detention of the terrorism suspect will substantially assist in responding to or preventing the terrorist act.
11. Despite these limits the Committee notes that the definition of a 'terrorism suspect' is relatively broad and includes acts committed retrospectively. The broad definition of 'terrorism suspect' may result in the conferral of a widely-defined administrative power onto the police.

Suspects may be detained for up to four days by the police and up to 14 days by the court

12. A terrorism suspect may be held by the police for investigative detention for up to four days. However, the police can apply to the court for warrants to extend the period of investigative detention for up to a maximum of 14 days.
13. In making such an application to the court, the police officer must have reasonable grounds for suspecting that the person continues to be a terrorism suspect and believes an extension of the detention period will substantially assist in responding to, or preventing, the terrorist act (proposed sections 25H and 25I of the *Terrorism (Police Powers) Act 2002*).

14. The Committee notes that the investigative detention of individuals for up to 14 days may constitute an unfair deprivation of liberty for individuals not yet charged with an offence.

Some minors may be subject to investigative detention

15. Persons under 14 years of age cannot be arrested or kept in investigative detention under the new provisions. However, minors between 14 and 18 could be arrested for investigative detention (proposed section 25F(1) of the *Terrorism (Police Powers) Act 2002*).
16. The Committee notes that subjecting minors to investigative detention may have impacts on the rights of a child.

Suspect detained does not have to be taken before the court as soon as practicable

17. A terrorism suspect who is arrested for investigative detention does not have to be taken before the court or an authorised officer as soon as practicable to be dealt with according to the law (proposed section 25C(3) of the *Terrorism (Police Powers) Act 2002*). The Committee notes that this decision must be independently reviewed at the time of arrest and every twelve hours thereafter. In addition, the terrorism suspect must be released from detention within 4 days if an eligible judge has not issued a warrant to extend the detention period.
18. Despite the above requirements, the Committee notes that not requiring an expeditious hearing before a court may have adverse impacts on procedural fairness for the individual and the discharge of justice more broadly.

Contact with specified legal representative may be prohibited

19. The police can request the court to make a prohibited contact direction to prevent a suspect in investigative detention from contacting a specified person, which can include a legal representative. This direction cannot be used to prevent the terrorism suspect from having access to *any* legal representative, only a particular legal representative who has been specified in the direction. The judge can make such a direction where he or she is satisfied that the direction is reasonably necessary to achieve the purpose of investigative detention (proposed section 25M of the *Terrorism (Police Powers) Act 2002*).
20. The Committee notes that prohibiting contact with a specified legal representative may have adverse impacts on the suspect's choice of legal counsel.

Examples of safeguards in the Bill

21. The Bill contains some safeguards for terrorism suspects who will be subject to these provisions. For example, a senior police officer is required to review whether investigative detention should be continued as soon as practicable after a suspect is arrested and every 12 hours thereafter. The senior police officer carrying out the review cannot be an officer who is in charge of, or involved in, the investigation (proposed section 25E(6) of the *Terrorism (Police Powers) Act 2002*).

22. Suspects who are questioned during investigative detention must be permitted to rest for a continuous period of at least eight out of 24 hours and to have reasonable breaks during questioning (proposed section 25G(4) of the *Terrorism (Police Powers) Act 2002*).
23. Some safeguards from the *Law Enforcement (Powers and Responsibilities) Act 2002*, such as in relation to minors under 18 years of age and other vulnerable persons, will also apply to those in investigative detention. In addition, the Bill provides that the regulations may specify further safeguards (proposed sections 25N and 25O of the *Terrorism (Police Powers) Act 2002*).

The Committee notes that the Bill is concerned with assisting the police to improve public safety and that it contains various safeguards for terrorism suspect who may be subject to investigative detention. However, the Committee highlights that the Bill may impact on various rights and liberties. In particular, the Committee is concerned that individuals may be arrested, questioned and detained without charge for up to 14 days with court approval, and that this can apply to individuals between 14 and 18 years of age. In addition, the definition of a 'terrorism suspect' is broad; suspects who are arrested do not have to be taken before the court as soon as practicable; and the court can prohibit a suspect from contacting certain persons including a specified legal representative. For these reasons, the Committee refers this Bill to Parliament for further consideration in relation to whether the impacts on rights and liberties are proportionate to the circumstances.

10. Water NSW Amendment (Staff Transfers) Bill 2016

Date introduced	Wednesday 4 May 2016
House introduced	Legislative Council
Minister responsible	The Hon. Niall Blair MLC
Portfolio	Lands and Water

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Water NSW Act 2014* (the principal Act) to enable employees of the Department of Industry, Skills and Regional Development to be transferred by Ministerial order to WaterNSW (which is a State owned corporation that employs its own staff).

BACKGROUND

2. The NSW Government has undertaken reforms to the management of water. Such reforms include the merging of the Sydney Catchment Authority and the State Water Corporation to become WaterNSW. This Bill follows on from those reforms and transfers staff from the Department of Industry Skills and Regional Development to WaterNSW.

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*.

Part Two – Regulations

1. Workers Compensation Amendment (Return to Work Assistance) Regulation 2016

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide for the following matters in relation to compensation under the *Workers Compensation Act 1987* for the cost of certain services and assistance provided to assist certain injured workers to return to work:
 - (a) the circumstances in which an employer is not liable to pay the compensation,
 - (b) the period within which a claim for the compensation must be determined.

ISSUES CONSIDERED BY COMMITTEE

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

Right to fair workers compensation

2. The Regulation prescribes certain circumstances in which an employer responsible for a work injury is not liable to pay compensation to assist the worker to return to work.
3. In particular, the employer is not liable to pay compensation for the cost of work assistance for a worker to return to work with a new employer where:
 - (a) the offer of employment with the new employer is for a period of less than three months, or
 - (b) the offer of employment has not been put in writing (see proposed clause 14 of the *Workers Compensation Regulation 2010*).
4. An employer is also not required to pay compensation for the cost of education or training to assist a worker to return to work where:
 - (a) the education or training is inconsistent with the retraining or employment objectives of the worker's injury management plan, or
 - (b) the education or training is not provided by an NVR registered training organisation under the *National Vocational Education and Training Regulator Act 2011* (Cth) or a registered higher education provider under the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (see proposed clause 14A of the *Workers Compensation Regulation 2010*).

The Regulation prescribes certain circumstances in which an employer responsible for a work injury is not liable to pay compensation to the relevant employee. However, the Committee recognises that the exclusions strike a fair

balance between workers and employers by ensuring workers gather appropriate evidence for their claim and carry out training and education from registered providers which is relevant to their future. Employers will also not be liable for work assistance which only leads to very short term re-employment. The Committee makes no further comments.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

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

9 Functions with respect to Regulations

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

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- 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.