



Legislation Review Committee

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

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Membership

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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. FAIR TRADING AMENDMENT (COMMERCIAL AGENTS) BILL 2016

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

Unjust penalty

The Committee notes that expired convictions of an identified nature, and an unidentified nature (offences yet to be declared by the regulations), disqualify individuals from carrying out commercial agent activity under the Bill. The Committee also notes that excluding individuals based on expired convictions may be considered to be an ongoing penalty, and therefore unjust. However, given the aims of the Bill in relation to the regulation of the debt collection industry and the fact that the restrictions on individuals convicted of criminal offences are similar to those Fair Trading applies to other occupational licences, the Committee considers the exclusions outlined in the principal legislation to be appropriate and makes no further comment on this issue.

The Committee notes that the Bill prescribes that persons who are members of a declared organisation under the *Crimes (Criminal Organisations Control) Act 2012* are disqualified from carrying out commercial agent activity. The Committee also notes that this may be considered to be an unjust penalty placed on an individual who is a member of such an organisation. However, the Committee also notes that this provision already exists under section 27 of the *Crimes (Criminal Organisations Control) Act 2012* and the aims of the Bill in relation to the regulation of the debt collection industry. The Committee makes no further comment.

Strict liability

The Committee notes that the operation of proposed subsection 60B does not assess an individual's *mens rea* in relation to the offence of carrying out commercial agent activity under the amended *Fair Trading Act*. The Committee particularly notes that a class of people can be disqualified from carrying out commercial agent activity by the regulations. The Committee notes that these two provisions could operate together in a manner which might see a person disqualified by the regulations unwittingly carrying out such activity subsequently imprisoned for up to 12 months. However, given the process outlined in the Bill that requires the Secretary to give a person notice and an opportunity to show why they should not be disqualified, the Committee makes no further comment on the issue of strict liability.

Reversal of onus of proof

The Committee notes that the effect of requiring individuals to demonstrate why they should be permitted to continue to operate as a commercial agent is a reversal of the onus of proof. Given the new negative licensing approach for commercial agents, and the rights of review outlined in proposed subsection 60D(6), the Committee does not necessarily consider this to be an unfair burden and makes no further comment.

Denial of compensation

The Committee notes that the Bill may deny individuals who are currently conducting commercial agent activity a common law right to compensation should they become

disqualified persons. The Committee also notes that it does not know the full extent of the classes of people who may be excluded from operating as commercial agents because the regulations are empowered to create classes of disqualified people. In this context, the Committee is unable to assess the appropriateness of excluding compensation and refers this matter to Parliament.

Privacy

The Committee notes that providing for the release photographs collected for the purposes of licensing drivers in relation to the conduct of criminal proceedings against commercial agents may be a breach of privacy. However, given that the power to release such photographs already exists under section 57(1)(d)(ii) of the *Road Transport Act 2013*, the Committee makes no further comment in relation to this issue.

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

Matters in regulations that ought to be in principal legislation

The Committee notes that providing for classes of people to be excluded from carrying out commercial agent activity via regulation rather than in the principal legislation may inappropriately delegate legislative powers and refers this proposed subsection to the Parliament for its consideration.

Notwithstanding that the Bill provides a framework for the kinds of matters that the regulations may consider in proposed subsection 60E(2) of the Bill, the Committee refers to Parliament whether the regulations are an appropriate methodology for prohibiting practices that may lead to an individual being prohibited from practising as a commercial agent.

Notwithstanding that the classes of people excluded from the operation of this scheme by subsections 60F(a)-(g) appear appropriate given the aims of the legislation, the Committee is of the opinion that adding to this list is more appropriately achieved through amendment to the principal legislation rather than by regulation and refers this matter to Parliament.

2. HEALTH LEGISLATION AMENDMENT BILL 2016

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

Extension of involuntary detention

The Bill allows an interim extension order detaining a forensic patient to be extended by an additional 24 hours. This will lengthen the patient's term of involuntary detention. However, the Committee acknowledges that the extension is ordered by the court and is to allow patients to be assessed by a medical practitioner to determine whether or not they need to continue to be subject to involuntary detention as a civil patient. The extension is only for a very short period of time. The Committee also highlights the health and safety objectives of the proposed change. The Committee makes no further comments.

Privacy

Allowing sensitive personal and health information about forensic patients to be shared between Ministers with responsibilities under the *Mental Health (Forensic Provisions) Act 1990* could impact on individuals' privacy. However, the Committee notes that three Ministers have responsibilities in relation to this legislation and they will only be able to share this sensitive information in relation to carrying out their functions under the Act or otherwise administering or executing the Act. Because of the limitation on how this information can be shared, the

Committee does not consider that the proposed provision would unduly trespass on the right to privacy.

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

Commencement by proclamation

The Committee notes that the Bill commences on the date of assent apart from the repeal of the *New South Wales Institute of Psychiatry Act 1964*, which commences on a day to be appointed by proclamation. The Committee generally prefers Acts of Parliament to commence on a fixed date, or on assent, so the Executive does not have unfettered control over the commencement date. However, as the repeal of the *New South Wales Institute of Psychiatry Act 1964* is dependent on matters which are still being finalised, the Committee does not consider the repeal of this legislation on a date to be appointed by proclamation to be inappropriate in the circumstances.

3. LAND AND PROPERTY INFORMATION NSW (AUTHORISED TRANSACTION) BILL 2016

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

Employment rights

In the context of enabling the Treasurer to transfer the employment of employees to another public sector agency, the Committee notes that employees may have a preference for working for their current agency, particularly in relation to their skillset, knowledge and expertise and the location of the agency. The Committee also notes that clause 20 ensures that such employees are employed in accordance with applicable statutory provisions, awards, agreements and determinations. The Committee also notes the public policy aims of transferring titling and registry services to the private sector. The Committee considers providing the Treasurer with the power to transfer employees within the public sector is a measure to ensure the ongoing employment of public sector employees. Provisions of this nature have been included in past transaction legislation.

Whilst the Committee notes that transferring employees within public sector agencies may have an adverse impact on those employees, given the aims of ensuring the ongoing employment of those employees the Committee makes no further comment.

The Committee reiterates its comments in relation to the transfer of staff from their current place of employment, this time in the context of transferring public sector staff to the private sector. In addition to its previous comments, the Committee notes that some staff may have a preference for working in the public sector. Again, the Committee notes that clause 21 protects the terms and conditions of non-contract staff.

However, the Committee notes that such employment is subject to an employment guarantee period of two years. The Committee notes that this may assuage some concerns of public sector staff who are transferred to the private sector. Provisions of this nature have been included in past transaction legislation. Transferring employees will also have continuity of entitlements, including those relating to superannuation, annual leave and long service leave.

Notwithstanding the administrative convenience of requiring existing staff to relocate to the new private sector land titling and registering service, the Committee considers that requiring public sector staff to move to the private sector or else forego any other kind of compensation

(such as redundancy) may be an unfair trespass on employment rights, and refers this matter to Parliament.

Power of entry; right against self-incrimination

The Committee notes that requiring the authorised operator to provide information in circumstances where an official has entered the premises where land titles operations are carried out without a warrant may impact on the authorised operator's right against self-incrimination. However, these provisions form part of the suite of measures designed to protect the integrity of the Register. The Committee makes no further comment in relation to this issue.

Exclusion of liability

The Committee notes that this is an appropriate protection for any person appointed by the Minister to be an Administrator and who is acting in good faith in performance of that role. The Bill contains similar protections for both directors operating under the direction of the Treasurer and the Registrar General acting under the direction of the Minister or the Treasurer. Similar protections have been included in past transaction legislation. The Committee makes no further comment.

Compensation not payable

Provisions of this nature have been included in past transaction legislation. Notwithstanding the administrative convenience of excluding compensation in relation to enacting this legislation, the Committee refers to Parliament the reasonableness of excluding the payment of compensation in circumstances where representations are negligent, false or misleading.

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

Matters in regulations

The Committee notes that fees paid in relation to titling and registering properties that are set by the Registrar-General do not provide the Parliament or the Executive with an opportunity to adjust those initial fees.

It is common for regulated businesses to have prices set by a regulator (rather than Parliament or the Executive) and this mechanism provides for regulatory oversight of price-setting for new services for the duration of the concession. The introduction of any new services will be subject to approval by the Registrar-General, who is a public servant and is subject to direction of the Minister. As such, the Committee makes no further comment.

The level of detail in the price-setting formula is more appropriate for regulation than the Bill. Fees are currently set by regulation and the formula for resetting them should be included in the same legal instrument. As such, the Committee makes no further comment.

4. LAW ENFORCEMENT CONDUCT COMMISSION BILL 2016

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

Retrospectivity

Clause 9 of the Bill will allow the Law Enforcement Conduct Commission to investigate misconduct which occurred before the commencement of the provision. Ultimately, such investigations may result in the Commission providing evidence to the Director of Public

Prosecutions with a view to the affected individual facing criminal prosecution. However, the Committee notes that the new Commission will take over functions from several existing oversight offices. The Committee notes that allowing the Commission to investigate misconduct which occurred before this Bill commences will facilitate this transition. In particular, it will empower the Commission to continue misconduct investigations commenced by the other oversight offices. The Committee therefore makes no further comments.

Procedural fairness at examinations

The Bill anticipates that in limited circumstances persons appearing at an examination before the Law Enforcement Conduct Commission will not be informed of the general scope and purpose of the examination in advance. This may only occur where the Commissioner believes providing such information would seriously prejudice the investigation. The Committee notes that requiring a person to attend an examination without giving them information as to the nature of the examination may impact on procedural fairness for the person involved. This is particularly so in light of other provisions relating to examinations. For example, there is no guaranteed right to legal representation and the Commission is not bound by the rules of evidence. The Committee acknowledges that similar provisions exist in the current oversight scheme and that the general presumption is that persons will be informed of the general scope and purpose of the examination in all but very limited circumstances. The Committee therefore makes no further comments.

Privacy

Allowing the Law Enforcement Conduct Commission to review the systems of the NSW Police Force and the Crime Commission for dealing with misconduct may impact on the right to privacy as there is likely to be a large amount of personal information, and possibly some health information, in those systems. However, the Committee notes that information is only required to be provided to the extent that it is relevant to the exercise of a function by the Commission under clause 32 of the Bill. In light of this limitation, the Committee does not consider that clause 32 would unduly impact on the right to privacy. The Committee therefore makes no further comments.

Public officers will be under a duty to report suspected officer misconduct or serious maladministration to the Law Enforcement Conduct Commission, despite any prohibition in the NSW privacy legislation, which may impact on the right to privacy. However, the Committee notes that departure from the requirements of the privacy legislation is limited to information relevant to the misconduct or maladministration in question. In light of this, the Committee does not consider that clause 33 of the Bill would unduly impact on the right to privacy.

Abrogation of privileges

Clause 56 of the Bill abrogates certain rules, privileges and duties which would allow a person or authority to resist the production of information, documents or other things as required by the Commission.

When undertaking its investigatory function, the LECC has the status of a standing Royal Commission. This means that it is able to compel people to provide evidence, including at an examination, even when that evidence might incriminate that person. The Independent Commission Against Corruption also has the status of a standing Royal Commission for its investigations.

The Committee notes that the LECC's investigation powers are to be reserved for only the most serious matters of law enforcement misconduct and maladministration. For example, the powers can be used to investigate corruption or serious misconduct within the NSW Police Force.

In light of the serious nature of the types of investigations the LECC carries, the Committee makes no further comment.

Right against self-incrimination

Clause 57 of the Bill impacts on the right against self-incrimination by allowing incriminating information which an individual has objected to producing to be used against that person in various circumstances including in proceedings for offences against the Bill and contempt under the Bill. The Committee notes that provisions of this kind exist in the current oversight scheme, although the new provision appears more extensive.

The Committee also recognises that the Bill has built in safeguards as to how compelled evidence can be used. For example, self-incriminatory evidence given by a person at an examination cannot be used against that person in criminal proceedings (except for an offence against the LECC Act)

The Committee refers to Parliament for further consideration whether the incursions into the right against self-incrimination in clause 57 of the Bill is justified in the circumstances.

Right to silence and right against self-incrimination

Clause 74 of the Bill impacts on the right to silence by requiring witnesses appearing at an examination to answer relevant questions and produce documents or other things required by summons or the examining Commissioner.

It also impacts on the right against self-incrimination by allowing incriminating information which a witness has objected to producing to be used against that person in various circumstances including in proceedings for offences against the Bill and contempt under the Bill. Such information may also be used to seek advice from the DPP about possible criminal proceedings. The Committee notes that provisions of this kind exist in the current oversight scheme, although the new provisions appear more extensive. The Committee again notes the safeguards as to how compelled evidence can be use, including the exclusion of self-incriminatory evidence given to be used against the individual at any subsequent criminal proceeding.

The Committee refers to Parliament for further consideration whether the incursions into the right to silence and the right against self-incrimination in clause 74 of the Bill are justified in the circumstances.

No guaranteed right to legal representation

The Commissioner must give a reasonable opportunity for a person giving evidence at an examination to be represented by a legal practitioner. The presumption is that a person will be able to be legally represented.

However, this is not an absolute right and is ultimately at the discretion of the Commissioner. There may be situations in which an examination needs to be held before a person is able to secure legal representation, such as an urgent examination. The Committee notes that similar provisions exist in the current oversight scheme.

However, the Committee is concerned that some persons may be denied their request for legal representation at an examination which may negatively impact on their ability to understand their rights with respect to dealing with the Commission and their potential liabilities.

The Committee highlights other provisions in the Bill which have been referred to in this report which may impact on rights and liberties more broadly and which are examples of issues about which a person under examination may wish to seek legal advice. The Committee refers clause 66 of the Bill to Parliament for further consideration as to whether providing the Commission with a discretion to refuse to allow a person legal representation when under examination unduly impacts on rights and liberties.

Disproportionate punishment and ill-defined concepts

The Committee notes that some of the circumstances in which a person may be in contempt of the Law Enforcement Conduct Commission appear vague and ill-defined, for example, persons who misbehave themselves or interrupt proceedings during an examination.

The Committee draws attention to the provisions which provide that a person found guilty of contempt of the Law Enforcement Conduct Commission may be subject to the same punishment as if it were contempt of the Supreme Court. The Commission is not part of the judiciary and does not have the same status as the Supreme Court. It does, however, have the status of a standing Royal Commission. The contempt offences that apply to the LECC are based on those that apply to Royal Commissions. These contempt offences also apply to the Independent Commission Against Corruption.

These contempt provisions may be required in some circumstances to ensure that proceedings are not undermined. However, the punishment for contempt in these circumstances may be disproportionate to the conduct in question.

The Committee also highlights that acts or omissions may be punished as contempt or as an offence. While individuals must not be punished twice, the Committee is concerned that choosing between contempt and other offences may result in some offenders receiving unfair punishments.

The Committee notes that similar provisions exist in the current oversight scheme. However, the Committee refers the provisions in the Bill relating to contempt to Parliament for further consideration.

Consideration of spent convictions and criminal charges of prospective staff

When vetting prospective staff or consultants, the Law Enforcement Conduct Commission will have access to a significant amount of information about a person's criminal history. The vast majority of employers would not have access to a person's spent convictions or broad information relating to criminal charges. The Committee notes that in most cases, allowing employers access to this kind of information could impact on an individual's privacy and potentially result in a previous offender continuing to be punished despite already receiving a court-ordered penalty for their crime.

However, given the nature of the work to be carried out by the Law Enforcement Conduct Commission, the Committee does not consider it to be an undue trespass on rights and liberties for the Commission to have access to more extensive criminal history information about prospective staff.

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

Limitation on appeals

The Bill will allow the Law Enforcement Conduct Commission to exercise some functions under the Criminal Assets Recovery Act 1990 that apply to the Crime Commission in connection with matters arising during or out of the Law Enforcement Conduct Commission's investigations. Clause 31(5) of the Bill provides there is no ground for an appeal or any other challenge to the exercise by the Law Enforcement Conduct Commission of these functions. The Crime Commission currently has various powers under that legislation, including to apply to the Supreme Court for restraining orders, assets forfeiture orders and search warrants.

The Committee notes that the Bill prevents an appeal based on the exercising of certain functions under the Criminal Assets Recovery Act 1990 when those functions are not exercised in relation to a LECC investigation. It does not restrict any appeal rights granted under the Criminal Assets Recovery Act 1990.

The Committee refers to Parliament for further consideration whether it is appropriate to limit appeal and other legal rights in circumstances where the newly created Commission may exercise powers which may impact on an individual's property rights.

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

Commencement by proclamation

The Committee generally prefers Acts of Parliament to commence on a fixed date or on assent so the Executive does not have unfettered control over the commencement date. However, the Committee acknowledges that in this instance, a staged commencement process may be desirable given the transition from existing oversight arrangements to the new arrangements provided for in the Bill. The Committee therefore makes no further comments.

5. WYONG SPECIAL AREA (PROTECTION) BILL 2016*

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

Retrospectivity

The Committee reiterates the issues that it identified in relation to the 2015 Bill of the same name. The Committee notes that cancelling planning approvals granted prior to the commencement of the Act may run counter to the rule of law. In some circumstances, the committee may regard this as an undue trespass on personal rights and liberties. However, the Committee also notes that individuals are unlikely to be affected parties under this legislation, and notes the objectives of the Act are to protect the water supply for residents of the Wyong special area. The Committee makes no further comment.

PART TWO - REGULATIONS

1. CHILDREN (CRIMINAL PROCEEDINGS) REGULATION 2016

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

Rights of minors in the criminal justice system

The Committee notes that the principal legislation authorises the Executive to prescribe an offence as a serious children's indictable offence by regulation. The Committee acknowledges

the serious nature of the offence which has been prescribed in that manner by this Regulation. However, the Committee also highlights that minors charged with serious children's indictable offences will be treated differently by the criminal justice system in certain respects compared to minors charged with other offences. This could impact on their rights and liberties such as the right to privacy and rights associated with ensuring that children in the criminal process are treated differently to adults to take into account factors such as age and immaturity.

The Committee merely notes its preference that matters which may impact on the rights of children being prosecuted in the criminal justice system be dealt with via an Act of Parliament, rather than a Regulation.

Part One – Bills

1. Fair Trading Amendment (Commercial Agents) Bill 2016

Date introduced	13 September 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Minister for Innovation and Better Regulation

PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
 - (a) to repeal the *Commercial Agents and Private Inquiry Agents Act 2004* so that persons who carry out commercial agent activities (being debt collection, repossession and process serving) are no longer required to hold a licence, and
 - (b) to amend the *Fair Trading Act 1987* to provide for a negative licensing scheme that permits anyone other than certain disqualified persons to carry out commercial agent activities.

BACKGROUND

2. The Bill repeals the *Commercial Agents and Private Inquiry Agents Act 2004* which provides for the licensing of commercial agents and private inquiry agents in NSW. This Bill introduces a less costly and burdensome regulation regime for commercial agents, and provides for the transfer of responsibility for their regulation to NSW Fair Trading.
3. The Bill also introduces changes in relation to debt recovery. Following a 2014 report by the Legislative Assembly Legal Affairs Committee, the previous licensing system for debt collection agents has been replaced with a negative licensing system. As recommended by the Committee, the responsibility for commercial agents has been transferred from the Police Force to NSW Fair Trading. Responsibility for private inquiry agents remains with the police.

ISSUES CONSIDERED BY COMMITTEE

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

Unjust penalty

4. The Committee notes that the following classes of people are precluded from being a commercial agent: persons who have been convicted in the last five years of a disqualifying offence, which includes offences involving violence, fraud, drugs or dishonesty that are punishable by imprisonment for three months or more, as well as persons who have been convicted of offences in relation to the *ASIC Act 2001* (Cth) or

the Australian Consumer Law or offences to be declared by the regulations (Schedule 1[1] of the Bill).

The Committee notes that expired convictions of an identified nature, and an unidentified nature (offences yet to be declared by the regulations), disqualify individuals from carrying out commercial agent activity under the Bill. The Committee also notes that excluding individuals based on expired convictions may be considered to be an ongoing penalty, and therefore unjust. However, given the aims of the Bill in relation to the regulation of the debt collection industry and the fact that the restrictions on individuals convicted of criminal offences are similar to those Fair Trading applies to other occupational licences, the Committee considers the exclusions outlined in the principal legislation to be appropriate and makes no further comment on this issue.

The Committee notes that the Bill prescribes that persons who are members of a declared organisation under the *Crimes (Criminal Organisations Control) Act 2012* are disqualified from carrying out commercial agent activity. The Committee also notes that this may be considered to be an unjust penalty placed on an individual who is a member of such an organisation. However, the Committee also notes that this provision already exists under section 27 of the *Crimes (Criminal Organisations Control) Act 2012* and the aims of the Bill in relation to the regulation of the debt collection industry. The Committee makes no further comment.

Strict liability

5. Proposed subsection 60B outlines that a disqualified person must not carry out commercial agent activity and that a disqualified person who does so is subject to a maximum penalty of 200 penalty units or imprisonment for 12 months or both.

The Committee notes that the operation of proposed subsection 60B does not assess an individual's *mens rea* in relation to the offence of carrying out commercial agent activity under the amended *Fair Trading Act*. The Committee particularly notes that a class of people can be disqualified from carrying out commercial agent activity by the regulations. The Committee notes that these two provisions could operate together in a manner which might see a person disqualified by the regulations unwittingly carrying out such activity subsequently imprisoned for up to 12 months. However, given the process outlined in the Bill that requires the Secretary to give a person notice and an opportunity to show why they should not be disqualified, the Committee makes no further comment on the issue of strict liability.

Reversal of onus of proof

6. Proposed section 60C requires the Secretary to provide a show cause notice to an individual the Secretary suspects to have been operating as a commercial agent despite being disqualified.

The Committee notes that the effect of requiring individuals to demonstrate why they should be permitted to continue to operate as a commercial agent is a reversal of the onus of proof. Given the new negative licensing approach for commercial agents, and the rights of review outlined in proposed subsection

60D(6), the Committee does not necessarily consider this to be an unfair burden and makes no further comment.

Denial of compensation

7. Schedule 1[2] of the Bill provides that no compensation is payable in relation to the deregulation of the commercial agent industry.

The Committee notes that the Bill may deny individuals who are currently conducting commercial agent activity a common law right to compensation should they become disqualified persons. The Committee also notes that it does not know the full extent of the classes of people who may be excluded from operating as commercial agents because the regulations are empowered to create classes of disqualified people. In this context, the Committee is unable to assess the appropriateness of excluding compensation and refers this matter to Parliament.

Privacy

8. Schedule 2[2] outlines that photographs kept in relation to the licensing of drivers may be released in relation to criminal proceedings involving commercial agents.

The Committee notes that providing for the release photographs collected for the purposes of licensing drivers in relation to the conduct of criminal proceedings against commercial agents may be a breach of privacy. However, given that the power to release such photographs already exists under section 57(1)(d)(ii) of the *Road Transport Act 2013*, the Committee makes no further comment in relation to this issue.

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

Matters in regulations that ought to be in principal legislation

9. Proposed subsection 60A(2)(d) of the *Fair Trading Act 1987* outlines that a person can be disqualified from carrying out commercial agent activity if they have committed an offence declared by the regulations to be a disqualifying offence.

The Committee notes that providing for classes of people to be excluded from carrying out commercial agent activity via regulation rather than in the principal legislation may inappropriately delegate legislative powers and refers this proposed subsection to the Parliament for its consideration.

10. Proposed subsection 60E(1) provides that the regulations may prescribe rules of conduct for the carrying out of commercial agent activities, including the prohibition of certain practices.

Notwithstanding that the Bill provides a framework for the kinds of matters that the regulations may consider in proposed subsection 60E(2) of the Bill, the Committee refers to Parliament whether the regulations are an appropriate methodology for prohibiting practices that may lead to an individual being prohibited from practising as a commercial agent.

11. Proposed subsection 60F(h) outlines that the regulation of commercial agents will not apply to a person of a class prescribed by the regulations.

Notwithstanding that the classes of people excluded from the operation of this scheme by subsections 60F(a)-(g) appear appropriate given the aims of the legislation, the Committee is of the opinion that adding to this list is more appropriately achieved through amendment to the principal legislation rather than by regulation and refers this matter to Parliament.

2. Health Legislation Amendment Bill 2016

Date introduced	15 September 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. Jillian Skinner MP
Portfolio	Minister for Health

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

- (a) to repeal the *New South Wales Institute of Psychiatry Act 1964*,
- (b) to amend the *Health Administration Act 1982* to update certain references and remove a redundant provision,
- (c) to amend the *Health Services Act 1997*:
 - i to update and ensure consistency between the governance provisions for local health districts and statutory health corporations, and
 - ii to update and simplify provisions relating to the making of by-laws, and
 - iii to avoid any conflicts that may arise when a local health district board is exercising employer functions (in anticipation of the commencement of certain provisions of the *Government Sector Employment Legislation Amendment Act 2016*), and
 - iv to extend the existing protection from personal liability provision, and
 - v to make provision in relation to the liability of members of staff of the NSW Health Service who assist in the exercise of functions under the *Guardianship Act 1987* and the *Children and Young Persons (Care and Protection) Act 1998*,
- (d) to amend the *Mental Health Act 2007* to ensure that a President of the Mental Health Review Tribunal who holds the office of judge retains their judicial commission, rank, salary and other privileges,
- (e) to amend the *Mental Health (Forensic Provisions) Act 1990*:
 - i to impose certain restrictions on the power of the Mental Health Review Tribunal to make an order that a forensic patient be classified as an involuntary patient, and
 - ii to provide for an interim extension order to continue in force for an additional 24 hours in certain circumstances to enable a medical practitioner or accredited

- person to assess whether a mental health certificate should be given in respect of the patient, and
- iii to allow the sharing of certain information between Ministers administering the Act, and
 - iv to clarify that the Tribunal must comply with release criteria in section 43 before releasing a forensic patient, and
 - v to provide delegation powers for the Ministers administering the Act and the Secretary of the Department of Justice, and
 - vi to make further provision in relation to when the Minister for Health and the Attorney General may appear before the Tribunal, or make submissions to the Tribunal,
- (f) to make other minor and statute law revision amendments to the Acts specified above.

BACKGROUND

2. The Bill makes amendments to, and repeals, various pieces of health legislation. The Bill arises from the Government's regular review of legislation within the Health portfolio to ensure that it remains up to date and relevant.

ISSUES CONSIDERED BY COMMITTEE

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

Extension of involuntary detention

3. Forensic patients under the *Mental Health (Forensic Provisions) Act 1990* include patients who have been found not guilty of a crime due to mental illness and individuals who are not fit to be tried for an offence and who are detained after a special hearing (see in particular section 42 of the *Mental Health (Forensic Provisions) Act 1990*).
4. If a forensic patient is detained in a mental health facility or correctional centre as a result of an interim extension order, the court may order that the person be detained for an additional 24 hours to enable a medical practitioner or accredited person to assess whether the person should be further detained as an involuntary civil patient.
5. The order ceases to authorise the detention of the person if the medical practitioner or accredited person does not issue a certificate for the involuntary detention of the person as a civil patient (see Schedule 4, clause [15] of the Bill).

The Bill allows an interim extension order detaining a forensic patient to be extended by an additional 24 hours. This will lengthen the patient's term of involuntary detention. However, the Committee acknowledges that the extension is ordered by the court and is to allow patients to be assessed by a medical practitioner to determine whether or not they need to continue to be subject to involuntary detention as a civil patient. The extension is only for a very short period of time. The Committee also highlights the health and safety objectives of the proposed change. The Committee makes no further comments.

Privacy

6. The Bill amends the *Mental Health (Forensic Provisions) Act 1990* so that the Ministers administering the Act may disclose forensic patient information obtained under the legislation to each other. This will include personal and health information about those patients. The Ministers are permitted to share this information to enable or assist each other to exercise functions under the Act or in relation to the administration or execution of the Act (see Schedule 4, clause [17] of the Bill).
7. At present, three Ministers have responsibilities in relation to the *Mental Health (Forensic Provisions) Act 1990* – the Minister for Health, the Minister for Mental Health and the Attorney-General.
8. Information held under the *Mental Health (Forensic Provisions) Act 1990* is likely to be particularly sensitive information about individuals as the legislation relates to criminal proceedings involving persons affected by mental illness.

Allowing sensitive personal and health information about forensic patients to be shared between Ministers with responsibilities under the *Mental Health (Forensic Provisions) Act 1990* could impact on individuals' privacy. However, the Committee notes that three Ministers have responsibilities in relation to this legislation and they will only be able to share this sensitive information in relation to carrying out their functions under the Act or otherwise administering or executing the Act. Because of the limitation on how this information can be shared, the Committee does not consider that the proposed provision would unduly trespass on the right to privacy.

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

Commencement by proclamation

9. The Act will commence on the date of assent, apart from the repeal of the *New South Wales Institute of Psychiatry Act 1964*, which will commence a day to be appointed by proclamation (see clause 2 of the Bill).
10. In her Second Reading Speech, Minister Skinner explains that the *New South Wales Institute of Psychiatry Act 1964* establishes the Institute of Psychiatry, which provides mental health education and training. The functions of the Institute of Psychiatry will be transferred to the Health Education and Training Institute. However, the Health Education and Training Institute is still in the process of obtaining accreditation as a higher education provider. Other arrangements also need to take place before this transfer of functions can be finalised. As such, the *New South Wales Institute of Psychiatry Act 1964* will not be repealed until the transfer of functions can take place effectively.

The Committee notes that the Bill commences on the date of assent apart from the repeal of the *New South Wales Institute of Psychiatry Act 1964*, which commences on a day to be appointed by proclamation. The Committee generally prefers Acts of Parliament to commence on a fixed date, or on assent, so the Executive does not have unfettered control over the commencement date. However, as the repeal of the *New South Wales Institute of Psychiatry Act 1964* is dependent on matters which are still being finalised, the Committee

does not consider the repeal of this legislation on a date to be appointed by proclamation to be inappropriate in the circumstances.

3. Land and Property Information NSW (Authorised Transaction) Bill 2016

Date introduced	13 September 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. Gladys Berejiklian
Portfolio	Treasurer

PURPOSE AND DESCRIPTION

1. The object of this Bill is to authorise and facilitate the grant of a concession (the authorised concession) to a private sector entity to provide the services currently provided by the Registrar-General in the exercise of the Registrar-General's titling and registry functions. The Bill provides for the following for the purposes of the authorised concession:
 - (a) the transfer to the private sector of assets, rights and liabilities of the State that are deployed in the exercise of the titling and registry functions of the Registrar-General (this is the authorised asset transfer),
 - (b) the grant of the authorised concession to the private sector entity (the authorised operator) to which assets, rights and liabilities are transferred pursuant to the authorised asset transfer with a maximum term of 35 years (subject to provision for a further authorised concession in the event of early termination of the authorised concession),
 - (c) the re-vesting of assets, rights and liabilities on termination of the authorised concession (this is re-vesting on termination),
 - (d) arrangements for the transfer of public sector staff to employment by the new operator under the authorised concession,
 - (e) step-in powers of the portfolio Minister to take control of the authorised operator's business if necessary to protect the integrity of the Register under the *Real Property Act 1900* and registers under the *Conveyancing Act 1919*,
 - (f) amendments to the *Real Property Act 1900* and other Acts to facilitate and support the authorised concession,
 - (g) the payment of the proceeds of the transaction into the Restart NSW Fund.

BACKGROUND

2. The Bill enables the private sector to invest in and operate the titling and registry business of Land and Property Information for a period of 35 years.

ISSUES CONSIDERED BY COMMITTEE

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

Employment rights

3. Part 5 of the Bill provides that the Treasurer may transfer the employment of a relevant employee to another public sector agency (clause 20).

In the context of enabling the Treasurer to transfer the employment of employees to another public sector agency, the Committee notes that employees may have a preference for working for their current agency, particularly in relation to their skillset, knowledge and expertise and the location of the agency. The Committee also notes that clause 20 ensures that such employees are employed in accordance with applicable statutory provisions, awards, agreements and determinations. The Committee also notes the public policy aims of transferring titling and registry services to the private sector. The Committee considers providing the Treasurer with the power to transfer employees within the public sector is a measure to ensure the ongoing employment of public sector employees. Provisions of this nature have been included in past transaction legislation.

Whilst the Committee notes that transferring employees within public sector agencies may have an adverse impact on those employees, given the aims of ensuring the ongoing employment of those employees the Committee makes no further comment.

4. Part 5 of the Bill provides that the Treasurer may transfer the employment of relevant employees to the employment of a private sector entity (clause 21).

The Committee reiterates its comments in relation to the transfer of staff from their current place of employment, this time in the context of transferring public sector staff to the private sector. In addition to its previous comments, the Committee notes that some staff may have a preference for working in the public sector. Again, the Committees notes that clause 21 protects the terms and conditions of non-contract staff.

However, the Committee notes that such employment is subject to an employment guarantee period of two years. The Committee notes that this may assuage some concerns of public sector staff who are transferred to the private sector. Provisions of this nature have been included in past transaction legislation. Transferring employees will also have continuity of entitlements, including those relating to superannuation, annual leave and long service leave.

Notwithstanding the administrative convenience of requiring existing staff to relocate to the new private sector land titling and registering service, the Committee considers that requiring public sector staff to move to the private sector or else forego any other kind of compensation (such as redundancy) may be an unfair trespass on employment rights, and refers this matter to Parliament.

Power of entry; right against self-incrimination

5. Part 6 of the Bill provides the portfolio Minister with emergency step-in powers in relation to the work of the Register. Clause 28 provides an Administrator appointed by the Minister with the power to enter and remain on any land or premises where land titles operations are carried on. Persons who do not provide all reasonable assistance to the Administrator face penalties of up to 500 penalty units. Clause 29 provides that information must be provided by the authorised operator to the Minister or Administrator on request, or face a maximum penalty of 5,000 penalty units.

The Committee notes that requiring the authorised operator to provide information in circumstances where an official has entered the premises where land titles operations are carried out without a warrant may impact on the authorised operator's right against self-incrimination. However, these provisions form part of the suite of measures designed to protect the integrity of the Register. The Committee makes no further comment in relation to this issue.

Exclusion of liability

6. Clause 31 provides that an Administrator acting in good faith and within power cannot be subject to any action, liability claim or demand.

The Committee notes that this is an appropriate protection for any person appointed by the Minister to be an Administrator and who is acting in good faith in performance of that role. The Bill contains similar protections for both directors operating under the direction of the Treasurer and the Registrar General acting under the direction of the Minister or the Treasurer. Similar protections have been included in past transaction legislation. The Committee makes no further comment.

Compensation not payable

7. Clause 44 provides that compensation is not payable by or on behalf of the State in relation to the enactment or operation of this Bill or because of any statement or conduct relating to the enactment of the Bill.

Provisions of this nature have been included in past transaction legislation. Notwithstanding the administrative convenience of excluding compensation in relation to enacting this legislation, the Committee refers to Parliament the reasonableness of excluding the payment of compensation in circumstances where representations are negligent, false or misleading.

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

Matters in regulations

8. Fees relating to the new titling and registry service are to be fixed by the Registrar-General, instead of prescribed by regulations or by the principal legislation (clause 57 of Schedule 4.4 of the Bill). However, the regulations may limit any increase in this fee, charge or expense.

The Committee notes that fees paid in relation to titling and registering properties that are set by the Registrar-General do not provide the Parliament or the Executive with an opportunity to adjust those initial fees.

It is common for regulated businesses to have prices set by a regulator (rather than Parliament or the Executive) and this mechanism provides for regulatory oversight of price-setting for new services for the duration of the concession. The introduction of any new services will be subject to approval by the Registrar-General, who is a public servant and is subject to direction of the Minister. As such, the Committee makes no further comment.

9. Clause 5 of Schedule 4.5 of the Bill outlines that the regulations may include provisions for increases on an annual or other basis in accordance with a formula prescribed by the regulations of fees prescribed by the regulations.

The level of detail in the price-setting formula is more appropriate for regulation than the Bill. Fees are currently set by regulation and the formula for resetting them should be included in the same legal instrument. As such, the Committee makes no further comment.

4. Law Enforcement Conduct Commission Bill 2016

Date introduced	13 September 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. Troy Grant MP
Portfolio	Justice and Police

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
 - (a) to promote the integrity and good repute of the NSW Police Force and the Crime Commission by ensuring that they properly carry out their functions and responsibilities in relation to the handling of complaints (and information that the Commission becomes aware of otherwise than through a complaint that indicates or suggests conduct is (or could be) officer misconduct or officer maladministration or agency maladministration),
 - (b) to provide for the independent detection, investigation and exposure of serious misconduct and serious maladministration within the NSW Police Force and the Crime Commission that may have occurred, be occurring, be about to occur or that is likely to occur,
 - (c) to provide for independent oversight and review (including, where appropriate, real time monitoring and review) of the investigation by the NSW Police Force of misconduct matters concerning the conduct of its members and the Crime Commission concerning its officers,
 - (d) to prevent officer misconduct and officer maladministration and agency maladministration within the NSW Police Force and the Crime Commission by:
 - i providing for the identification of systemic issues that are likely to be conducive to the occurrence of officer misconduct, officer maladministration and agency maladministration, and
 - ii assessing the effectiveness and appropriateness of their procedures relating to the legality and propriety of activities of their members and officers, and
 - iii encouraging collaborative evaluation of opportunities for, and implementation of, desirable changes in such procedures, and
 - iv making recommendations with respect to education and training about prevention of officer misconduct, officer maladministration and agency maladministration,

- (e) to ensure that agencies work collaboratively to support and promote the prevention of officer misconduct, officer maladministration and agency maladministration and to improve their processes and systems,
 - (f) to recognise the primary responsibilities of the NSW Police Force and Crime Commission to investigate and prevent officer misconduct and officer maladministration within those agencies and agency maladministration while providing for oversight of those functions,
 - (g) to foster an atmosphere in which complaints, provision of other information about misconduct and independent oversight are viewed positively as ways of preventing officer misconduct, officer maladministration and agency maladministration,
 - (h) to provide for independent oversight and real time monitoring of critical incident investigations undertaken by the NSW Police Force,
 - (i) to provide for the scrutiny of the exercise of powers by the Law Enforcement Conduct Commission and its officers by an Inspector and for the Commission and for the Inspector to be accountable to the Parliament,
 - (j) to provide for the oversight of the use of covert powers under various Acts.
2. The Bill constitutes the Law Enforcement Conduct Commission (the Commission) as a single, independent, accountable body that is responsible for functions, relating to the detection, investigation, exposure and prevention of police corruption and officer misconduct and officer and agency maladministration and for the oversight of certain operations and procedures of the NSW Police Force and the Crime Commission. The functions are broadly similar to those currently exercised by the Police Integrity Commission, the Inspector of the Crime Commission and the Ombudsman. The Commission is also empowered to monitor the carrying out of investigations of critical incidents involving police officers and other members of the NSW Police Force and provides for an Inspector of the Commission (the Inspector) to audit and oversee its operations and the conduct of its officers.
 3. The Bill contains amendments to a number of Acts and regulations to confer functions on the Inspector involving the monitoring of the exercise of covert investigative powers by investigative agencies.
 4. The Bill also amends various Acts and a regulation to override secrecy and non-disclosure provisions in that legislation that prohibit the disclosure of evidence and information obtained at hearings or inquiries or in the carrying out of other functions to permit the disclosure of such information to a health practitioner for the purposes of providing medical or psychiatric care, treatment or counselling (including but not limited to psychological counselling) to persons required to give evidence or information at the hearings or inquiries or to the persons exercising the functions.

BACKGROUND

5. The Bill responds to a report, *Review of police oversight*, by Mr Andrew Tink AM, from 31 August 2015. The NSW Government commissioned Mr Tink to consider how oversight of the NSW Police Force and the NSW Crime Commission could be streamlined and improved.

6. Mr Tink's review was informed by public consultations including meetings with stakeholders and giving stakeholders the opportunity to make submissions.

ISSUES CONSIDERED BY COMMITTEE

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

Retrospectivity

7. The definitions of 'police misconduct', 'administrative employee misconduct' and 'Crime Commission officer misconduct' extend to misconduct which occurred before the commencement of the provisions (see clause 9 of the Bill).
8. Similar provisions exist in the current oversight scheme (see for example, section 5 of the *Police Integrity Commission Act 1996*).
9. While the Law Enforcement Conduct Commission is not a prosecutor or a judicial body, it can assemble evidence that may be admissible against a person for a criminal offence and give such evidence to the Director of Public Prosecutions (see for example clause 28 of the Bill).

Clause 9 of the Bill will allow the Law Enforcement Conduct Commission to investigate misconduct which occurred before the commencement of the provision. Ultimately, such investigations may result in the Commission providing evidence to the Director of Public Prosecutions with a view to the affected individual facing criminal prosecution. However, the Committee notes that the new Commission will take over functions from several existing oversight offices. The Committee notes that allowing the Commission to investigate misconduct which occurred before this Bill commences will facilitate this transition. In particular, it will empower the Commission to continue misconduct investigations commenced by the other oversight offices. The Committee therefore makes no further comments.

Procedural fairness at examinations

10. A person appearing at an examination by the Law Enforcement Conduct Commission is entitled to be informed of the general scope and purpose of the examination, unless the Commissioner is of the opinion that this would seriously prejudice the investigation concerned (see clause 62 of the Bill).
11. Similar provisions exist in the current oversight scheme (see for example section 32 of the *Police Integrity Commission Act 1996*).

The Bill anticipates that in limited circumstances persons appearing at an examination before the Law Enforcement Conduct Commission will not be informed of the general scope and purpose of the examination in advance. This may only occur where the Commissioner believes providing such information would seriously prejudice the investigation. The Committee notes that requiring a person to attend an examination without giving them information as to the nature of the examination may impact on procedural fairness for the person involved. This is particularly so in light of other provisions relating to examinations. For example, there is no guaranteed right to legal representation and the Commission is not bound by the rules of evidence. The Committee

acknowledges that similar provisions exist in the current oversight scheme and that the general presumption is that persons will be informed of the general scope and purpose of the examination in all but very limited circumstances. The Committee therefore makes no further comments.

Privacy

12. The Law Enforcement Conduct Commission is to scrutinise the systems established within the NSW Police Force and the Crime Commission for dealing with misconduct matters. The Law Enforcement Conduct Commission may request the Commissioner of Police and the Crime Commissioner to provide information about those systems and their operations.
13. Information is required to be provided to the Law Enforcement Conduct Commission despite the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002* to the extent that it is relevant to the exercise of this function by the Commission (see clause 32 of the Bill).

Allowing the Law Enforcement Conduct Commission to review the systems of the NSW Police Force and the Crime Commission for dealing with misconduct may impact on the right to privacy as there is likely to be a large amount of personal information, and possibly some health information, in those systems. However, the Committee notes that information is only required to be provided to the extent that it is relevant to the exercise of a function by the Commission under clause 32 of the Bill. In light of this limitation, the Committee does not consider that clause 32 would unduly impact on the right to privacy. The Committee therefore makes no further comments.

14. Public officers will be required to report any suspected officer misconduct or serious maladministration to the Law Enforcement Conduct Commission. This duty applies to the Ombudsman, the Crime Commissioner, the Commissioner of Police, the ICAC Commissioner, the principal officer of a public authority and any officer who constitutes a public authority.
15. A report must be provided to the Commission despite any prohibition in the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*. However, this is limited to information that is relevant to officer misconduct or serious maladministration in question (see clause 33 of the Bill).

Public officers will be under a duty to report suspected officer misconduct or serious maladministration to the Law Enforcement Conduct Commission, despite any prohibition in the NSW privacy legislation, which may impact on the right to privacy. However, the Committee notes that departure from the requirements of the privacy legislation is limited to information relevant to the misconduct or maladministration in question. In light of this, the Committee does not consider that clause 33 of the Bill would unduly impact on the right to privacy.

Abrogation of privileges

16. Generally, the Law Enforcement Conduct Commission must set aside a requirement for a person to produce any thing if it appears that the person has a ground of privilege which might be recognised in a court of law.

17. However, an individual must comply with a requirement of the Commission to produce a thing despite:
 - (a) any rule that in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or
 - (b) any privilege of a public authority or official that could be claimed in a court of law, or
 - (c) any duty of secrecy or other restriction on disclosure applying to a public authority or public official (see clause 56 of the Bill).
18. Similar provisions exist in the current oversight structure (for example, see section 27 of the *Police Integrity Commission Act 1996*).

Clause 56 of the Bill abrogates certain rules, privileges and duties which would allow a person or authority to resist the production of information, documents or other things as required by the Commission.

When undertaking its investigatory function, the LECC has the status of a standing Royal Commission. This means that it is able to compel people to provide evidence, including at an examination, even when that evidence might incriminate that person. The Independent Commission Against Corruption also has the status of a standing Royal Commission for its investigations.

The Committee notes that the LECC's investigation powers are to be reserved for only the most serious matters of law enforcement misconduct and maladministration. For example, the powers can be used to investigate corruption or serious misconduct within the NSW Police Force.

In light of the serious nature of the types of investigations the LECC carries, the Committee makes no further comment.

Right against self-incrimination

19. Generally, under the Bill, where a person is required to produce information that tends to incriminate them and the individual has objected to producing it, the information cannot be used against them. However, information can be used against a person in the following circumstances:
 - (a) in proceedings for offences against the Bill;
 - (b) in proceedings for contempt under the Bill;
 - (c) for the purposes of the investigation;
 - (d) in deciding whether to make an order under section 173 or 181D of the *Police Act 1990* (and is admissible in proceedings under Division 1A or 1C of Part 9 of that Act);
 - (e) in deciding whether to make an order under section 183A of the *Police Act 1990* or any proceedings for the purposes of Division 2A of Part 9 of that Act with respect to such an order, and
 - (f) in deciding whether to make an order in any disciplinary proceedings, and

(g) in deciding whether to take action under section 69 or 70 of the *Government Sector Employment Act 2013* (see clause 57 of the Bill).

20. Similar provisions also exist in the current oversight scheme, although the new provision appears more extensive (see for example section 28 of the *Police Integrity Commission Act 1996*).

Clause 57 of the Bill impacts on the right against self-incrimination by allowing incriminating information which an individual has objected to producing to be used against that person in various circumstances including in proceedings for offences against the Bill and contempt under the Bill. The Committee notes that provisions of this kind exist in the current oversight scheme, although the new provision appears more extensive.

The Committee also recognises that the Bill has built in safeguards as to how compelled evidence can be used. For example, self-incriminatory evidence given by a person at an examination cannot be used against that person in criminal proceedings (except for an offence against the LECC Act)

The Committee refers to Parliament for further consideration whether the incursions into the right against self-incrimination in clause 57 of the Bill is justified in the circumstances.

Right to silence and right against self-incrimination

21. A witness summoned to attend and appear at an examination is not entitled to refuse:

- (a) to be sworn or to make an affirmation, or
- (b) to answer any question relevant to an investigation, or
- (c) to produce documents that the person is required by summons or by the examining Commissioner to produce.

22. The witness is not excused from answering any question or producing any document or other thing at an examination on the ground that the answer or production may incriminate them, or on any other ground of privilege, a duty of secrecy, other restriction on disclosure or any other ground.

23. If an answer made or document or other thing produced might in fact tend to incriminate the witness and the witness objects to answering the question or the production at the time, the information will not be admissible in evidence in proceedings except:

- (a) disciplinary proceedings, or
- (b) proceedings for an offence against the Bill, or
- (c) proceedings for contempt under the Bill, or
- (d) for the purposes of the investigation,

- (e) in deciding whether to make an order under section 173 or 181D of the *Police Act 1990* (and is admissible in proceedings under Division 1A or 1C of Part 9 of that Act);
 - (f) in deciding whether to make an order under section 183A of the *Police Act 1990* (and is admissible in proceedings under Division 2A of Part 9 of that Act),
 - (g) in deciding whether to take action under section 69 or 70 of the *Government Sector Employment Act 2013*,
 - (h) for the purpose of the Director of Public Prosecutions providing advice about the commencement of proceedings against particular persons for criminal offences against laws of the State (see clause 74 of the Bill).
24. Similar provisions exist in the current oversight scheme, although the new provisions appear more extensive (see for example section 40 of the *Police Integrity Commission Act 1996*).

Clause 74 of the Bill impacts on the right to silence by requiring witnesses appearing at an examination to answer relevant questions and produce documents or other things required by summons or the examining Commissioner.

It also impacts on the right against self-incrimination by allowing incriminating information which a witness has objected to producing to be used against that person in various circumstances including in proceedings for offences against the Bill and contempt under the Bill. Such information may also be used to seek advice from the DPP about possible criminal proceedings. The Committee notes that provisions of this kind exist in the current oversight scheme, although the new provisions appear more extensive. The Committee again notes the safeguards as to how compelled evidence can be used, including the exclusion of self-incriminatory evidence given to be used against the individual at any subsequent criminal proceeding.

The Committee refers to Parliament for further consideration whether the incursions into the right to silence and the right against self-incrimination in clause 74 of the Bill are justified in the circumstances.

No guaranteed right to legal representation

25. The Bill does not provide a guaranteed right for a person being examined by the Law Enforcement Conduct Commission to be represented by a legal practitioner. However, the Commissioner may authorise a person giving evidence to be represented by a legal practitioner and must give a 'reasonable opportunity' for a person to be so represented (see clause 66 of the Bill).
26. Similar provisions exist in the current oversight scheme (see for example section 35 of the *Police Integrity Commission Act 1996*).

The Commissioner must give a reasonable opportunity for a person giving evidence at an examination to be represented by a legal practitioner. The presumption is that a person will be able to be legally represented.

However, this is not an absolute right and is ultimately at the discretion of the Commissioner. There may be situations in which an examination needs to be held before a person is able to secure legal representation, such as an urgent examination. The Committee notes that similar provisions exist in the current oversight scheme.

However, the Committee is concerned that some persons may be denied their request for legal representation at an examination which may negatively impact on their ability to understand their rights with respect to dealing with the Commission and their potential liabilities.

The Committee highlights other provisions in the Bill which have been referred to in this report which may impact on rights and liberties more broadly and which are examples of issues about which a person under examination may wish to seek legal advice. The Committee refers clause 66 of the Bill to Parliament for further consideration as to whether providing the Commission with a discretion to refuse to allow a person legal representation when under examination unduly impacts on rights and liberties.

Disproportionate punishment and ill-defined concepts

27. The Bill lists a number of situations in which a person will be guilty of contempt of the Commission. Some examples are, where a person without reasonable excuse:
- (a) fails to attend an examination as required by the summons,
 - (b) fails to produce any document or other thing that the person is required by summons to produce,
 - (c) when called or examined as a witness, refuses to be sworn or to make an affirmation or refuses to answer any question put to the person by a Commissioner,
 - (d) misbehaves himself or herself during an examination,
 - (e) interrupts an examination, or
 - (f) does any thing that if the Commission were a court of law having power to commit for contempt, would be contempt of that court (see clause 91 of the Bill).
28. A contempt of the Commission will be dealt with by the Supreme Court. If the Supreme Court is satisfied that the person is guilty of contempt, the Court may punish or take steps for the punishment of the person in the same way and to the same extent as if the person had committed that contempt in or in relation to proceedings in the Supreme Court (see clause 92 of the Bill)
29. An act or omission may be punished as a contempt of the Commission or an offence. However, if it constitutes both, the affected individual is not to be punished twice (see clause 96 of the Bill).
30. Similar provisions exist in the current oversight scheme (see for example Part 10 of the *Police Integrity Commission Act 1996*).

The Committee notes that some of the circumstances in which a person may be in contempt of the Law Enforcement Conduct Commission appear vague and ill-defined, for example, persons who misbehave themselves or interrupt proceedings during an examination.

The Committee draws attention to the provisions which provide that a person found guilty of contempt of the Law Enforcement Conduct Commission may be subject to the same punishment as if it were contempt of the Supreme Court. The Commission is not part of the judiciary and does not have the same status as the Supreme Court. It does, however, have the status of a standing Royal Commission. The contempt offences that apply to the LECC are based on those that apply to Royal Commissions. These contempt offences also apply to the Independent Commission Against Corruption.

These contempt provisions may be required in some circumstances to ensure that proceedings are not undermined. However, the punishment for contempt in these circumstances may be disproportionate to the conduct in question.

The Committee also highlights that acts or omissions may be punished as contempt or as an offence. While individuals must not be punished twice, the Committee is concerned that choosing between contempt and other offences may result in some offenders receiving unfair punishments.

The Committee notes that similar provisions exist in the current oversight scheme. However, the Committee refers the provisions in the Bill relating to contempt to Parliament for further consideration.

Consideration of spent convictions and criminal charges of prospective staff

31. When vetting prospective staff or consultants, the Law Enforcement Conduct Commission may have access to:
 - (a) information relating to spent convictions, despite anything to the contrary in the *Criminal Records Act 1991*,
 - (b) information relating to criminal charges, whether or not heard, proven, dismissed, withdrawn or discharged,
 - (c) information relating to offences, despite anything to the contrary in section 579 of the *Crimes Act 1900* (see clause 189 of the Bill).
32. Similar provisions exist in the current oversight scheme (see for example section 136A of the *Police Integrity Commission Act 1996*).

When vetting prospective staff or consultants, the Law Enforcement Conduct Commission will have access to a significant amount of information about a person's criminal history. The vast majority of employers would not have access to a person's spent convictions or broad information relating to criminal charges. The Committee notes that in most cases, allowing employers access to this kind of information could impact on an individual's privacy and potentially result in a previous offender continuing to be punished despite already receiving a court-ordered penalty for their crime.

However, given the nature of the work to be carried out by the Law Enforcement Conduct Commission, the Committee does not consider it to be an undue trespass on rights and liberties for the Commission to have access to more extensive criminal history information about prospective staff.

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

Limitation on appeals

33. The Bill provides that the *Criminal Assets Recovery Act 1990* will apply to the Law Enforcement Conduct Commission in the same way it applies to the Crime Commission. The functions attributed to the Crime Commission under that Act may be exercisable by either body according to arrangements made between them.
34. The Bill states that it is intended that the Commission will only exercise functions under that legislation in connection with matters arising during, or out of, its investigations. However, this is not intended to provide any grounds for an appeal against or any other challenge to the exercise by the Law Enforcement Conduct Commission of any such function (see clause 31 of the Bill).
35. The *Criminal Assets Recovery Act 1990* currently gives the NSW Crime Commission a number of powers, for example to apply to the Supreme Court for:
 - (a) restraining orders, to prevent persons from disposing of or dealing with property;
 - (b) assets forfeiture orders, requiring property to be forfeited to the Crown;
 - (c) search warrants.

The Bill will allow the Law Enforcement Conduct Commission to exercise some functions under the Criminal Assets Recovery Act 1990 that apply to the Crime Commission in connection with matters arising during or out of the Law Enforcement Conduct Commission's investigations. Clause 31(5) of the Bill provides there is no ground for an appeal or any other challenge to the exercise by the Law Enforcement Conduct Commission of these functions. The Crime Commission currently has various powers under that legislation, including to apply to the Supreme Court for restraining orders, assets forfeiture orders and search warrants.

The Committee notes that the Bill prevents an appeal based on the exercising of certain functions under the Criminal Assets Recovery Act 1990 when those functions are not exercised in relation to a LECC investigation. It does not restrict any appeal rights granted under the Criminal Assets Recovery Act 1990.

The Committee refers to Parliament for further consideration whether it is appropriate to limit appeal and other legal rights in circumstances where the newly created Commission may exercise powers which may impact on an individual's property rights.

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

Commencement by proclamation

36. Parts 1-3 of, and Schedules 1 to 3 and 7 to, the Act will commence on assent. The remaining provisions of the Act will commence on a day or days to be appointed by proclamation (see clause 2 of the Bill).
37. The Hon. Troy Grant MP, described the reasons for the staged commencement of some provisions of the Bill in his Second Reading Speech:

It is therefore fundamentally important that there are no gaps in the oversight system. It is for this reason that the commencement of the legislation establishing and governing the LECC will be staged. Some provisions of the Bill will commence straightaway. This will allow for the Chief Commissioner and commissioners to be appointed as soon as possible. This will also allow the structure and organisation of the LECC to be finalised. Importantly, the provisions providing the LECC with its investigation and oversight powers will not commence until the LECC, as an organisation, is ready to commence operations. The current oversight arrangements will therefore remain in place until this time.

The Committee generally prefers Acts of Parliament to commence on a fixed date or on assent so the Executive does not have unfettered control over the commencement date. However, the Committee acknowledges that in this instance, a staged commencement process may be desirable given the transition from existing oversight arrangements to the new arrangements provided for in the Bill. The Committee therefore makes no further comments.

5. Wyong Special Area (Protection) Bill 2016*

Date introduced	15 September 2016
House introduced	Legislative Assembly
Member responsible	David Harris MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to protect certain land at Wyong from mining and mining-related activities. This is achieved by prohibiting the granting, renewal or modification of licences, leases, claims and authorities, and the granting of planning approvals, that allow persons to prospect for, and mine, minerals and petroleum on that land. The land concerned is the site of the Wallarah 2 coal mine project.

BACKGROUND

2. In 2015, a Bill by this name was introduced by the Member for Wyong in November 2015, and lapsed in accordance with the Standing Orders on 14 April 2016.
3. As with the 2015 Bill, this Bill reflects an election promise made by NSW Labor during the 2015 election campaign in relation to the Wyong water catchment area.

ISSUES CONSIDERED BY COMMITTEE

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

Retrospectivity

4. Subclause 6(2) of the Bill cancels any approval for prospecting and mining in the Wyong special area granted before the commencement of the Act. The Bill is silent on whether there is any compensation for any such cancellation.

The Committee reiterates the issues that it identified in relation to the 2015 Bill of the same name. The Committee notes that cancelling planning approvals granted prior to the commencement of the Act may run counter to the rule of law. In some circumstances, the committee may regard this as an undue trespass on personal rights and liberties. However, the Committee also notes that individuals are unlikely to be affected parties under this legislation, and notes the objectives of the Act are to protect the water supply for residents of the Wyong special area. The Committee makes no further comment.

Part Two - Regulations

1. Children (Criminal Proceedings) Regulation 2016

PURPOSE AND DESCRIPTION

- (i) The object of this Regulation is to remake, with some amendments, the provisions of the *Children (Criminal Proceedings) Regulation 2011*, which is repealed on 1 September 2016 by section 10(2) of the *Subordinate Legislation Act 1989*. The main amendment made is to remove Part 2 of the previous Regulation, which related to youth conduct orders. The youth conduct orders scheme, established under Part 4A of the *Children (Criminal Proceedings) Act 1987*, was discontinued on 1 September 2014. Other minor amendments made include updating references to the Department of Justice and employees of the Department.
- (ii) The Regulation makes provision with respect to the following:
 - prescribing an offence relating to sexual assault as a serious children’s indictable offence,
 - the contents of the background report to be prepared for the purposes of sentencing a child,
 - the conditions that may be imposed under good behaviour bonds and prohibition orders,
 - the explanatory material to be provided to children when they are sentenced,
 - the officers employed in Juvenile Justice, Department of Justice who are authorised officers for the purposes of certain provisions of the Act relating to good behaviour bonds and prohibition orders,
 - formal matters relating to parole orders and warrants of commitment,
 - other miscellaneous matters.

ISSUES CONSIDERED BY COMMITTEE

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

Rights of minors in the criminal justice system

- (iii) The Regulation prescribes an offence under section 80A of the *Crimes Act 1900*, relating to sexual assault by forced self-manipulation, as a ‘serious children’s indictable offence’ if the victim of the offence was under the age of

10 years (see clause 4 of the Regulation). This provision was also in the previous version of the Regulation.

- (iv) This offence carries a maximum penalty of 14 years imprisonment or 20 years imprisonment if the offence was committed in circumstances of aggravation.
- (v) The *Children (Criminal Proceedings) Act 1987* authorises an offence to be prescribed as a 'serious children's indictable offence' by regulation (see section 3 of the *Children (Criminal Proceedings) Act 1987*).
- (vi) There are certain consequences that flow from an offence being prescribed as a 'serious children's indictable offence'. These consequences can impact on how minors who commit these offences are dealt with by the criminal justice system. For example:
 1. The Children's Court usually has jurisdiction to hear and determine proceedings in respect of any offence alleged to have been committed by a person who was a child when the offence was committed and who was under the age of 21 years when charged with the offence. However, in relation to serious children's indictable offences, the Children's Court can only hear and determine committal proceedings, not the proceedings in respect of the offence (see section 28 of the *Children (Criminal Proceedings) Act 1987*).
 2. Generally, persons under the age of 21 years of age who are sentenced to imprisonment for an indictable offence may be able to serve their sentence as a juvenile offender. There is also some scope for persons slightly over 21 years to still serve their sentence as a juvenile offender. However, a person sentenced to imprisonment in respect of a serious children's indictable offence is not eligible to serve a sentence of imprisonment as a juvenile offender after the person has attained the age of 18 years except if the court orders otherwise after considering set criteria (see section 19 of the *Children (Criminal Proceedings) Act 1987*).
 3. Generally, there is a prohibition against publishing or broadcasting the name of a child convicted of an offence. However, a minor who is convicted of a serious children's indictable offence may have their name broadcast or published if it is authorised by the court (see sections 15A and 15C of the *Children (Criminal Proceedings) Act 1987*).
 4. Usually, criminal proceedings are commenced against minors by court attendance notice, however, proceedings against those charged with serious children's indictable offences do not have to be commenced in this way (see section 8 of the *Children (Criminal Proceedings) Act 1987*).

The Committee notes that the principal legislation authorises the Executive to prescribe an offence as a serious children's indictable offence by regulation. The Committee acknowledges the serious nature of the offence which has been prescribed in that manner by this Regulation. However, the Committee also highlights that minors charged with serious children's indictable offences will be treated differently by the criminal justice system in certain respects

compared to minors charged with other offences. This could impact on their rights and liberties such as the right to privacy and rights associated with ensuring that children in the criminal process are treated differently to adults to take into account factors such as age and immaturity.

The Committee merely notes its preference that matters which may impact on the rights of children being prosecuted in the criminal justice system be dealt with via an Act of Parliament, rather than a Regulation.

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,

- 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.