



## Legislation Review Committee

### LEGISLATION REVIEW DIGEST

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

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# Membership

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# 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. BUILDING PROFESSIONALS AMENDMENT (INFORMATION) BILL 2016

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

#### *Privacy*

The Committee notes that the Bill enables the obtaining and sharing of information related to the certification and regulation of building work. Such information may concern information about people’s private residences, thus impacting on their right to privacy.

However, the Committee notes the objectives behind authorising the sharing of such information, notably, providing NSW Government agencies with accurate information about the state of buildings in New South Wales.

The Committee also notes the safeguards concerning the use of any information obtained. The Committee highlights that any information obtained is subject to the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*. The Committee also notes that in the Second Reading Speech, the Minister clarified that any information obtained will only be shared with government agencies and not with private entities. As such, the Committee does not consider the Bill unduly trespasses on personal rights and liberties and makes no further comment.

### 2. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT BILL 2016

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

#### *Reversal of onus of proof*

The Committee notes that the Bill introduces an onus of proof on the defendant to prove that they had a lawful authority or reasonable excuse regarding offences relating to Part 13A (places of detention). Given that the prosecution will still need to establish the contravention under Part 13A, the Committee does not think that it is unreasonable that a defendant is required to prove that they had a lawful authority or reasonable excuse in relation to that contravention. The Committee makes no further comment.

#### *Forfeiture of goods*

The Committee notes the general principle that property should not be subject to forfeiture. However, the Committee considers the forfeiture of offensive weapons or instruments that are found in places of detention to be appropriate and makes no further comment.

#### *Freedom of movement; powers of detention*

The Committee acknowledges a general principle of freedom of movement in public places. The Committee notes that the proposed subsection does not clearly define the area that will be the subject of the offence beyond being “about or near any place of detention”. However, given the aims of the Bill to safeguard places of detention, and the pre-existing laws in relation to loitering, the Committee makes no further comment on this issue.

The Committee notes that the power to stop, detain and search persons under subsection 253I(1) can only be executed in places of detention. Whilst the Committee is concerned that these actions can be exercised on a routine basis, in the context of the aims of the Bill in relation to safeguarding places of detention the Committee makes no further comment.

Although correctional officers are provided with a power to stop, detain and search persons outside a place of detention, the Committee notes that this power is restricted to ‘the immediate vicinity’ and can only be undertaken in circumstances where the officer has a reasonable suspicion. In these circumstances, the Committee makes no further comment.

The Committee notes that a person may be subject to being stopped, detained and searched without the requirement for reasonable suspicion on the part of a correctional officer if the search happens within a place of detention. The Committee notes that this could impact on the work of visitors to the centre, including lawyers. The Committee notes that whilst a person may be detained for up to four hours, the legislation outlines that they are to be held for no longer than is reasonably necessary. The Committee makes no further comment.

The Committee is concerned about the appropriateness of children or people with impaired intellectual functioning being detained for up to four hours in order to be searched. However, given the aims of the legislation in relation to safeguarding places of detention the Committee makes no further comment.

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

*Lawful excuses to be determined by policy*

The Committee notes that the existing and proposed exceptions listed in section 257 do not allow disclosure of information. Rather, the exceptions outline circumstances in which such disclosures are not a criminal offence. The Committee notes that exceptions are currently outlined in the principal legislation. The Committee is concerned about the appropriateness of enabling exceptions to a prohibition on disclosing information to be achieved by way of policy.

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

*Matters in regulations that ought to be in principal legislation*

The Committee notes that the existing section on information sharing outlines in the principal legislation which agencies may share information and for what purpose. The Committee also notes that the proposed section does not define the agencies that may share the information, the purpose for which information might be shared or describe what information may be shared. The Committee further notes that providing details of this nature in the regulations rather than the principal legislation may insufficiently subject the exercise of legislative power to parliamentary scrutiny.

### 3. EDUCATION AND TEACHING LEGISLATION AMENDMENT BILL 2016

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

*Commencement by proclamation*

The Committee generally prefers Acts to commence on a fixed date, or on assent, so the Executive does not have unfettered control over the commencement date. However, the

Committee recognises that the Bill establishes a new governing Board of the NSW Education Standards Authority and may require some flexibility as to its commencement.

#### 4. INDUSTRIAL RELATIONS AMENDMENT (INDUSTRIAL COURT) BILL 2016

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

##### *Access to justice*

The Committee highlights that while the jurisdiction of the Industrial Court will mostly be transferred to the Supreme Court of NSW, some functions will also be transferred to the District Court of NSW and the Industrial Relations Commission. The Committee notes the differences between these courts and the Commission including in relation to formality and potential costs. The Committee also notes the specialist expertise of the Industrial Court, although the Supreme Court also has judges with expertise in this area. The Committee highlights that this may result in differences in accessing justice for some individuals between the current scheme and the proposed scheme.

The Committee acknowledges that it is probably appropriate to transfer proceedings for summary offences to the District Court of NSW rather than the Supreme Court of NSW, given that these are less serious offences.

The Committee notes that an arbitrator presiding over determinations under section 90 of the *Health Services Act 1997* will cease to hold office from the day the relevant sections are repealed and is not entitled to compensation for any associated loss. However, this function was performed by the judicial member of the Commission, who is being appointed as a judge of the Supreme Court and will receive the higher of their current remuneration or the remuneration of a Supreme Court judge. In these circumstances, the Committee does not consider the removal of an entitlement to further compensation to be excessively unfair.

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

##### *Commencement by proclamation*

The Committee generally prefers Acts to commence on a fixed date, or on assent, so the Executive does not have unfettered control over the commencement date. However, the Committee notes that the Bill contains amendments to a number of different pieces of legislation. It is likely that various administrative arrangements will also need to be put in place to ensure the effective transfer of functions from the Industrial Court to the Supreme Court, District Court and the Industrial Relations Commission. As such, the Committee does not consider the commencement of the bulk of the Bill by proclamation to be inappropriate in the circumstances.

#### 5. SOCIAL AND AFFORDABLE HOUSING NSW FUND BILL 2016

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

### PART TWO - REGULATIONS

#### 1. LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) REGULATION 2016

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

##### *Previous comments of the Committee*



The Committee notes the impact the amended 2005 Regulation had on personal rights and liberties and that these impacts are ongoing in the 2016 Regulation.

*Strip searches / personal searches / body searches/ intimate searches*

Given the impact on personal privacy, the Committee refers to Parliament the appropriateness of enabling a person to undertake a personal search where that person has not been specified by the principal Act or the regulation.

*Right to silence*

Given the requirement in the principal Act that detained persons and protected suspects 'must' be cautioned, the Committee refers to Parliament the confusing use of the term 'if' such classes of people are cautioned. The Committee refers to Parliament whether the use of the term 'when' might be more appropriate.

**The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA**

*Use of plain English in forms*

The Committee prefers that forms that are provided to detained persons and protected suspects are in Plain English.

*Terminology*

The Committee reiterates its preference that forms provided to detained persons and protected suspects are in Plain English.

**2. SMOKE-FREE ENVIRONMENT REGULATION 2016**

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

*Limiting activity in public space*

The Committee notes that the regulation further limits public spaces in which smoking is legal. However, given the public health aims of the regulation and the principal Act the Committee makes no further comment.



## Part One – Bills

# 1. Building Professionals Amendment (Information) Bill 2016

Date introduced	21 September 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Innovation and Better Regulation

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Building Professionals Act 2005* as follows:
  - (a) The Building Professionals Board is authorised to enter into information sharing arrangements with councils, State and Commonwealth agencies and other persons and bodies that may be prescribed by regulations to share information relating to the certification or regulation of, or statutory insurance requirements relating to, building work. The purpose of sharing the information will be to assist the Board and the other party to the arrangement in the exercise of functions relating to the certification or regulation of, or statutory insurance requirements relating to, building work.
  - (b) Regulations may be made with respect to the provision of information about certification work, building work and related matters by persons who carry out, or are accredited to carry out, building certification work and other related work.

### BACKGROUND

2. In September 2014, the former Treasury Secretary Michael Lambert was appointed to conduct a review of the *Building Professionals Act*, in particular, certification and its application in the wider building industry. The review was completed in October 2015 and contained 150 recommendations.
3. This Bill implements specific recommendations concerning the use of certification data to improve the regulation of the industry.

### ISSUES CONSIDERED BY COMMITTEE

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

##### *Privacy*

4. The Bill enables the Building Professionals Board (the Board) to enter into sharing arrangements with relevant agencies regarding information concerning the certification and regulation of building work. Relevant agencies include councils, State and Commonwealth agencies and other bodies which may be prescribed by the regulations.

5. In addition, the Bill enables the making of regulations concerning the Board obtaining information about certification work, building work, and work relating to certification and accreditation.
6. The Bill provides that the authority to request and disclose information is subject to the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*.

**The Committee notes that the Bill enables the obtaining and sharing of information related to the certification and regulation of building work. Such information may concern information about people’s private residences, thus impacting on their right to privacy.**

**However, the Committee notes the objectives behind authorising the sharing of such information, notably, providing NSW Government agencies with accurate information about the state of buildings in New South Wales.**

**The Committee also notes the safeguards concerning the use of any information obtained. The Committee highlights that any information obtained is subject to the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*. The Committee also notes that in the Second Reading Speech, the Minister clarified that any information obtained will only be shared with government agencies and not with private entities. As such, the Committee does not consider the Bill unduly trespasses on personal rights and liberties and makes no further comment.**

## 2. Crimes (Administration of Sentences) Amendment Bill 2016

Date introduced	21 September 2016
House introduced	Legislative Council
Minister responsible	The Hon. David Elliott MP
Portfolio	Minister for Corrections

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Crimes (Administration of Sentences) Act 1999* (the principal Act) as follows:
  - (a) to enable Magistrates to perform the functions of a Visiting Magistrate under the principal Act without having to be specifically appointed as a Visiting Magistrate,
  - (b) to transfer to the principal Act certain powers and associated offences relating to places of detention that are currently contained in Part 4A of the *Summary Offences Act 1988* and various provisions of the *Crimes (Administration of Sentences) Regulation 2014*,
  - (c) to ensure that the prohibition on disclosure of information in the principal Act does not criminalise disclosures that are a routine part of the core business of Corrective Services NSW and to increase the penalty for breach of the prohibition,
  - (d) to enable the Commissioner of Corrective Services (the Commissioner) to disclose for prescribed purposes, information obtained in connection with the exercise of the Commissioner's official functions,
  - (e) to streamline the information sharing provisions in the principal Act,
  - (f) to provide for other minor, consequential and ancillary matters (including changing or updating references to certain entities),
  - (g) to enact provisions of a savings or transitional nature consequent on the enactment of the proposed Act.
2. The Bill also makes consequential amendments to the *Crimes (Administration of Sentences) Regulation 2014*, the *Summary Offences Act 1988* and the *Summary Offences Regulation 2015*.

### BACKGROUND

3. The Bill is part of the Government's regular legislative review program. The bill seeks to amend the *Crimes (Administration of Sentences) Act 1999*, which governs the administration of most sentences in NSW and is the legislation under which Corrective Services NSW operates.

4. As well enabling all Magistrates to perform the functions of a Visiting Magistrate and consolidating provisions in relation to detain and search powers of corrective services officers in the *Crimes (Administration of Sentences) Amendment Act 1999*, the Bill seeks to provide greater scope for disclosure by Corrective Services to relevant agencies of information that is otherwise confidential.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Reversal of onus of proof*

5. The Bill proposes a new Part 13A be included in the *Crimes (Administration of Sentences) Amendment Act 1999* (the Act). Part 13A reverses the onus of proof, being that in any proceedings for an offence against a provision of this Part, the onus of proving that a person had a lawful authority or a reasonable excuse lies with the defendant.

**The Committee notes that the Bill introduces an onus of proof on the defendant to prove that they had a lawful authority or reasonable excuse regarding offences relating to Part 13A (places of detention). Given that the prosecution will still need to establish the contravention under Part 13A, the Committee does not think that it is unreasonable that a defendant is required to prove that they had a lawful authority or reasonable excuse in relation to that contravention. The Committee makes no further comment.**

#### *Forfeiture of goods*

6. Proposed subsection 253E(2) provides that the court may make a forfeiture order in relation to an offensive weapon or instrument which is being possessed by a person in a place of detention without reasonable excuse.

**The Committee notes the general principle that property should not be subject to forfeiture. However, the Committee considers the forfeiture of offensive weapons or instruments that are found in places of detention to be appropriate and makes no further comment.**

#### *Freedom of movement; powers of detention*

7. Proposed subsection 253G(1)(a) makes it an offence to loiter about or near any place of detention without lawful authority.

**The Committee acknowledges a general principle of freedom of movement in public places. The Committee notes that the proposed subsection does not clearly define the area that will be the subject of the offence beyond being “about or near any place of detention”. However, given the aims of the Bill to safeguard places of detention, and the pre-existing laws in relation to loitering, the Committee makes no further comment on this issue.**

8. Proposed subsection 253I(1) provides correctional officers with the power to stop, detain and search persons and vehicles in places of detention. There is no requirement for reasonable grounds to be established prior to such a search.

**The Committee notes that the power to stop, detain and search persons under subsection 253I(1) can only be executed in places of detention. Whilst the**

**Committee is concerned that these actions can be exercised on a routine basis, in the context of the aims of the Bill in relation to safeguarding places of detention the Committee makes no further comment.**

9. Proposed subsection 253I(2) provides correctional officers with the power to stop, detain and search persons in the immediate vicinity of a place of detention if they have reasonable grounds to suspect that the person has in his or her possession, or under his or her control, items that are controlled by Part 13A.

**Although correctional officers are provided with a power to stop, detain and search persons outside a place of detention, the Committee notes that this power is restricted to ‘the immediate vicinity’ and can only be undertaken in circumstances where the officer has a reasonable suspicion. In these circumstances, the Committee makes no further comment.**

10. A person who is searched under proposed subsection 253I (1) or 253I(2) can be detained for a further search by a police officer. This detention may last for up to 4 hours [subsection 253M (1)].

**The Committee notes that a person may be subject to being stopped, detained and searched without the requirement for reasonable suspicion on the part of a correctional officer if the search happens within a place of detention. The Committee notes that this could impact on the work of visitors to the centre, including lawyers. The Committee notes that whilst a person may be detained for up to four hours, the legislation outlines that they are to be held for no longer than is reasonably necessary. The Committee makes no further comment.**

11. Proposed subsections 253I(1) and (2) can be used to detain children or people with impaired intellectual functioning, with certain safeguards in relation to this being done in the presence of specified adults.

**The Committee is concerned about the appropriateness of children or people with impaired intellectual functioning being detained for up to four hours in order to be searched. However, given the aims of the legislation in relation to safeguarding places of detention the Committee makes no further comment.**

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

*Lawful excuses to be determined by policy*

12. Section 257 of the Act provides that a person must not disclose any information obtained in connection with the administration or executive of the Act, unless that disclosure is made in accordance with a number of grounds listed including the ground of ‘lawful excuse’. This Bill seeks to add two additional subsections, enabling disclosures to be made if authorised by the Commissioner or in accordance with an official policy made by the Commissioner [proposed subsection 257(3) and (4)].

**The Committee notes that the existing and proposed exceptions listed in section 257 do not allow disclosure of information. Rather, the exceptions outline circumstances in which such disclosures are not a criminal offence. The**

**Committee notes that exceptions are currently outlined in the principal legislation. The Committee is concerned about the appropriateness of enabling exceptions to a prohibition on disclosing information to be achieved by way of policy.**

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

*Matters in regulations that ought to be in principal legislation*

13. The Bill proposes replacing section 257A with a new 257A. The existing section 257A outlines that information may be shared between the Commissioner of Corrective Services and the Commissioner of Fines Administration. The information sharing arrangement is limited to information that assists in the exercise of the functions of either Commissioner as outlined in the Act or regulations.
14. The proposed section 257A would enable information sharing with any agency prescribed by the regulations for any purpose prescribed by the regulations in relation to information prescribed by the regulations.

**The Committee notes that the existing section on information sharing outlines in the principal legislation which agencies may share information and for what purpose. The Committee also notes that the proposed section does not define the agencies that may share the information, the purpose for which information might be shared or describe what information may be shared. The Committee further notes that providing details of this nature in the regulations rather than the principal legislation may insufficiently subject the exercise of legislative power to parliamentary scrutiny.**



### 3. Education and Teaching Legislation Amendment Bill 2016

Date introduced	21 September 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. Adrian Piccoli MP
Portfolio	Education

#### PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
  - (a) to rename and reconstitute the Board of Studies, Teaching and Educational Standards as the NSW Education Standards Authority (the Authority),
  - (b) to provide for the Authority to have a governing Board comprising an independent Chairperson and up to 12 other members appointed by the Minister, along with a Chief Executive Officer who will be responsible for the day to day management of the activities of the Authority,
  - (c) to require the Authority to have a charter (prepared by the Board of the Authority and approved by the Minister) outlining its key responsibilities and objectives and to provide that the Minister may, in an annual Statement of Expectations, determine priorities in relation to the Authority's functions,
  - (d) to ensure that the functions of the Authority may be delegated to committees of the Board (which will include the Quality Teaching Committee established under the *Teacher Accreditation Act 2004*),
  - (e) to authorise the Authority, in addition to its other functions under the education and teaching legislation, to conduct reviews into matters arising under that legislation,
  - (f) to enable the Authority's inspectors to conduct audits and carry out inspections on education premises (which will include premises that are used to provide professional development in accordance with the professional teaching standards under the *Teacher Accreditation Act 2004* and the premises of teacher accreditation authorities under that Act) and to provide that the powers of an inspector may be exercised in relation to education premises without any requirement to give notice,
  - (g) to ensure that the Authority is informed of the establishment, change of name or closure of government schools,
  - (h) to provide that the Authority is to monitor, and provide advice to the Minister and the Secretary of the Department of Education on, the compliance by government schools with similar requirements to those applying to non-government schools under section 47 of the *Education Act 1990* and to enable the Authority to recommend the taking of action in relation to any non-compliance with those requirements,

- (i) to modify the registration requirements for non-government schools, including a new requirement that the school must be financially viable,
- (j) to ensure that matters relating to the quality of student learning are taken into consideration in determining whether the registration requirements will be or are being complied with at or in relation to a school,
- (k) to enable the Minister to impose conditions of registration in relation to non-government schools and to provide that the registration of a school may be revoked if such conditions are not complied with,
- (l) to abolish the Quality Teaching Council and to re-establish it as a committee of the Board of the Authority to be known as the Quality Teaching Committee,
- (m) to authorise the Authority (rather than the Minister) to approve of teacher education courses and programs in connection with the accreditation of teachers and to approve persons or bodies to provide professional development in accordance with the requirements of the professional teaching standards,
- (n) to provide that the Authority (but not any other teacher accreditation authority) may suspend or revoke a person's accreditation as a teacher,
- (o) to require employers of teachers and teacher accreditation authorities to notify the Authority of information that may be relevant to the grounds on which a teacher's accreditation may be suspended or revoked,
- (p) to establish a new Public Service staff agency comprising those persons who are employed under the *Government Sector Employment Act 2013* to enable the Authority to exercise its functions and to provide for the Chief Executive Officer of the Authority to be the head of that staff agency,
- (q) to make a number of other amendments to the education and teaching legislation that are of an administrative, minor or consequential nature.

## BACKGROUND

2. In March 2016, the Minister for Education commissioned a review of the Board of Studies, Teaching and Educational Standards. The Review received 43 submissions from stakeholders and 4 700 responses to an online survey completed by principals, teachers, parents and students.
3. The review made 13 recommendations and 41 sub-recommendations concerning four key themes which emerged from the review:
  - shifting the regulatory focus to one that is outcomes and risk based;
  - directing effort to areas that will have the greatest impact on student outcomes;
  - improving strategy and agility; and

- ensuring clearer accountability and decision making.<sup>1</sup>
4. This Bill amends the *Board of Studies, Teaching and Educational Standards Act 2013* to give effect to the Review's findings.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Commencement by proclamation*

5. Clause 2 provides for the commencement of the Bill on a day or days to be appointed by proclamation. This delegates to the Executive the power to commence the Act on a day or days of its choosing, or not at all.

**The Committee generally prefers Acts to commence on a fixed date, or on assent, so the Executive does not have unfettered control over the commencement date. However, the Committee recognises that the Bill establishes a new governing Board of the NSW Education Standards Authority and may require some flexibility as to its commencement.**

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<sup>1</sup> Report of the Independent Panel, *Review of the Board of Studies, Teaching and Educational Standards*, June 2016, p 4

## 4. Industrial Relations Amendment (Industrial Court) Bill 2016

Date introduced	21 September 2016
House introduced	Legislative Council
Minister responsible	The Hon. Gladys Berejiklian MP and The Hon. Gabrielle Upton MP
Portfolio	Industrial Relations and Attorney General

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
  - (a) to amend the *Industrial Relations Act 1996*:
    - i to abolish the Industrial Court (also referred to in that Act as the Industrial Relations Commission in Court Session), and
    - ii to appoint the current President of the Industrial Relations Commission (in his capacity as the only remaining judicial member of the Commission) as a Judge of the Supreme Court, and
    - iii to reconstitute the Industrial Relations Commission so that it consists of a Chief Commissioner and Commissioner, and
  - (b) to amend certain legislation:
    - i to transfer the functions of the Industrial Court principally to the Supreme Court and, in some cases, to the District Court and the Industrial Relations Commission, and
    - ii to update references consequent on the reconstitution of the Industrial Relations Commission, and
  - (c) to repeal certain other Acts.

### BACKGROUND

2. The Minister, in his Second Reading Speech, explains that the decision to integrate the Industrial Court with the Supreme Court is in response to the significant reduction in the workload of the Industrial Court.
3. The Minister says the reduction in the Industrial Court's workload is as a result of:
  - (a) referral to the Commonwealth of New South Wales industrial relations powers over private sector employees and employers in 2009;

- (b) the transfer of occupational health and safety prosecutions to the District Court in 2013.
- 4. The Minister explains that New South Wales will mirror the Commonwealth industrial relations framework where the Federal Court and Federal Circuit Court determine industrial relations matters that require judicial consideration and non-judicial matters are dealt with by the Fair Work Commission.
- 5. The Minister outlines that the Chief Justice of the Supreme Court and the current President of the Industrial Relations Commission were both closely consulted on the proposals in the Bill. An exposure draft of the Bill was also released to stakeholders. Submissions were received from the Heads of Jurisdiction, the Law Society, the Bar Association, various government agencies, Unions NSW and affiliates and the NSW Business Chamber.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Access to justice*

- 6. The functions of the Industrial Court are mostly being transferred to the Supreme Court of NSW. However, in some instances, functions are being transferred to the District Court of NSW or the Industrial Relations Commission.
- 7. In particular, the following matters will be transferred to the District Court of NSW:
  - (a) proceedings for an offence against the *Dangerous Goods (Road and Rail Transport) Act 2008* or the regulations that are prescribed to be dealt with summarily;
  - (b) proceedings for an offence against the *Explosives Act 2003* or the regulations which may be dealt with summarily;
  - (c) proceedings against a person for a contravention of a WHS civil penalty provision under the *Work Health and Safety Act 2011*;
  - (d) proceedings for an offence against the *Workplace Injury Management and Workers Compensation Act 1998*, the *Workers Compensation Act 1987* or the regulations which are to be dealt with summarily (see Schedule 2 clauses 2.14[1], 2.19, 2.37[3]; 2.38[1] of the Bill).
- 8. The following matters will be transferred to the Industrial Relations Commission:
  - (a) cancellation of the registration of an association of employing contractors under the *Industrial Relations Act 1996*;
  - (b) appeals under the *Employment Protection Act 1982* (see Schedule 1 clause [77]; Schedule 2 clause 2.16[4] of the Bill).

**The Committee highlights that while the jurisdiction of the Industrial Court will mostly be transferred to the Supreme Court of NSW, some functions will also be transferred to the District Court of NSW and the Industrial Relations Commission. The Committee notes the differences between these courts and the Commission including in relation to formality and potential costs. The**

**Committee also notes the specialist expertise of the Industrial Court, although the Supreme Court also has judges with expertise in this area. The Committee highlights that this may result in differences in accessing justice for some individuals between the current scheme and the proposed scheme.**

**The Committee acknowledges that it is probably appropriate to transfer proceedings for summary offences to the District Court of NSW rather than the Supreme Court of NSW, given that these are less serious offences.**

*Denial of compensation*

9. A person appointed as an arbitrator for determinations under section 90 of the *Health Services Act 1997* will cease to hold office from the day on which the relevant provisions are repealed.
10. Uncompleted arbitrations cannot be completed by that person but nothing prevents another person from being appointed as an arbitrator.
11. Determinations relate to medical services provided by visiting medical officers under fee-for-service contracts and/or sessional contracts in respect of:
  - (a) the terms and conditions of work,
  - (b) the amounts or rates of remuneration,
  - (c) the bases on which those amounts or rates are applicable, and
  - (d) the dates from which the determination will have effect (see section 89 of the *Health Services Act 1997*).
12. No compensation will be available to any person, including a person who ceases to hold office as an arbitrator, for any loss resulting from the operation of the provision (see proposed Schedule 4, Part 18, clause 72 of the *Industrial Relations Act 1996*).
13. The Minister's Second Reading Speech notes that the only remaining judicial member of the Commission currently arbitrates these disputes. However, this function will now be performed by an independent arbitrator.
14. The judicial member of the Commission will be appointed as a judge of the Supreme Court. This person is entitled to receive the same remuneration as the person received as President of the Commission until the remuneration of a judge of the Supreme Court exceeds that remuneration (see proposed Schedule 4, Part 18, clause 62 of the Bill)

**The Committee notes that an arbitrator presiding over determinations under section 90 of the *Health Services Act 1997* will cease to hold office from the day the relevant sections are repealed and is not entitled to compensation for any associated loss. However, this function was performed by the judicial member of the Commission, who is being appointed as a judge of the Supreme Court and will receive the higher of their current remuneration or the remuneration of a Supreme Court judge. In these circumstances, the Committee does not consider the removal of an entitlement to further compensation to be excessively unfair.**

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

### *Commencement by proclamation*

15. Schedule 1, clauses [115] to [117] of the Bill will commence on the date of assent. Otherwise, the bulk of the Bill will commence on a day or days to be appointed by proclamation (see clause 2 of the Bill).

**The Committee generally prefers Acts to commence on a fixed date, or on assent, so the Executive does not have unfettered control over the commencement date. However, the Committee notes that the Bill contains amendments to a number of different pieces of legislation. It is likely that various administrative arrangements will also need to be put in place to ensure the effective transfer of functions from the Industrial Court to the Supreme Court, District Court and the Industrial Relations Commission. As such, the Committee does not consider the commencement of the bulk of the Bill by proclamation to be inappropriate in the circumstances.**

## 5. Social and Affordable Housing NSW Fund Bill 2016

Date introduced	21 September 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. Gladys Berejiklian MP
Portfolio	Treasurer and Minister for Industrial Relations

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to establish the Social and Affordable Housing NSW Fund for the purpose of providing funding for the delivery of social and affordable housing in New South Wales.

### BACKGROUND

2. The Minister's Second Reading Speech explains that the social and affordable housing funding model provided for in the Bill is outcomes-focused and has been developed in consultation with the NSW Council of Social Service (NCOSS). A memorandum of understanding with Infrastructure Partnerships Australia was also signed in March 2015.
3. In its first phase, the fund established by the Bill will deliver up to 3,000 additional social and affordable homes for vulnerable families.

### ISSUES CONSIDERED BY COMMITTEE

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



## Part Two - Regulations

# 1. Law Enforcement (Powers and Responsibilities) Regulation 2016

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to remake, with some amendments, the provisions of the *Law Enforcement (Powers and Responsibilities) Regulation 2005*, which is repealed on 1 September 2016 by section 10 (2) of the *Subordinate Legislation Act 1989*.
2. The Regulation makes provision for the following matters:
  - (a) the form of the following:
    - i applications for various kinds of warrants, and for notices requiring the production of documents by authorised deposit-holding institutions (notices to produce documents), under the *Law Enforcement (Powers and Responsibilities) Act 2002* (the principal Act),
    - ii records to be made by or on behalf of authorised officers in relation to their determination of such applications,
    - iii notices required under the principal Act to be given to occupiers of premises at which certain warrants are executed,
    - iv reports to authorised officers on the execution of warrants and the giving of notices to produce documents,
  - (b) the issue of receipts for things seized in the execution of warrants,
  - (c) the keeping of documents relating to warrants and notices to produce documents, and the inspection of those documents,
  - (d) the persons who may act as custody managers for persons detained under Part 9 of the principal Act,
  - (e) the guidelines to be observed by custody managers and other police officers, and the keeping and inspection of custody records, in relation to those detained persons,
  - (f) the detention under Part 9 of the principal Act of vulnerable persons—that is, children, persons with impaired intellectual or physical functioning, Aboriginal persons or Torres Strait Islanders and persons of non-English speaking backgrounds,
  - (g) the detention and return of vehicles that have been seized by police in connection with the public disorder emergency powers under Part 6A of the principal Act (including provisions for the payment of towing and storage fees in relation to seized vehicles),

- (h) the train and bus routes in relation to which dogs may be used to carry out general drug detection without a warrant under the principal Act,
  - (i) the creation of a penalty notice offence for the offence of failing to comply with a direction of a police officer under Part 14 of the principal Act.
3. The Regulation also includes provisions relating to amendments made by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014* (the amending Act). These provisions provide for:
- (a) the kinds of persons of the same sex (other than police officers) who may conduct searches, and
  - (b) the safeguards applicable to certain persons (called protected suspects) who are in the company of police officers for the purpose of participating in investigative procedures in connection with offences under Part 9 of the principal Act, and
  - (c) the forms for the summary of Part 9 of the principal Act to be given to detained persons and protected suspects by custody managers, and
  - (d) the rural areas in which crime scene powers may be exercised for a period of 6 hours or less, and
  - (e) the code of practice relating to the exercise of powers by police officers under Part 14 of the principal Act.
4. This Regulation is made under the *Law Enforcement (Powers and Responsibilities) Act 2002* (as amended by the amending Act), including sections 32 (7A) (b), 60 (1), 65 (2), 66, 67 (2) (a), 67B (3) (b), 74 (1) (f), 74A, 87M (4), 92 (3), 103 (3), 112, 120 (1) (g), 131 (1) and (2), 132, 148 (1) (c), 200A (1), 209 (1), 235 and 238 (the general regulation-making power).

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Previous comments of the Committee*

- 5. In Digest 10 of 2009, the Committee commented on the following aspects of the *Law Enforcement (Powers and Responsibilities) Regulation*: the change in the threshold in relation to search powers from reasonable belief to reasonable suspicion, the increase in the length of a warrant from three days to seven days and the broad covert search warrant powers, especially in regard to persons not suspected of serious criminal activity.
- 6. Pre-existing trespasses on personal rights and liberties in the regulation include: police not outlining when there was obligation to provide identification details when such details are requested by the police; search and seizure powers without a warrant; search and seizure powers with a warrant and the subsequent impact on right to silence; power to search people in authorised areas without reasonable suspicion; and powers to move people on from public places.

**The Committee notes the impact the amended 2005 Regulation had on personal rights and liberties and that these impacts are ongoing in the 2016 Regulation.**

*Strip searches / personal searches / body searches / intimate searches*

7. The Committee notes new clause 47 which prescribes persons who may conduct personal searches. The Committee particularly notes new subclause 47(e) which enables the Commissioner to nominate a person to undertake such a search.

**Given the impact on personal privacy, the Committee refers to Parliament the appropriateness of enabling a person to undertake a personal search where that person has not been specified by the principal Act or the regulation.**

*Right to silence*

8. Section 122 of the principal Act provides that as soon as practicable after a person who is detained under Part 6 of the Act comes into custody or becomes a protected suspect the custody manager must caution the person about their right to silence verbally and in writing. Clause 38 of the regulation refers only to 'if' a detained person or protected suspect is given a caution in relation to the right to silence.

**Given the requirement in the principal Act that detained persons and protected suspects 'must' be cautioned, the Committee refers to Parliament the confusing use of the term 'if' such classes of people are cautioned. The Committee refers to Parliament whether the use of the term 'when' might be more appropriate.**

**The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA**

*Use of plain English in forms*

9. This regulation introduced forms 31 and 32 in Schedule 1. Form 31 provides a summary of Part 9 of the principal Act for detained persons (Part 9 outlines the process for investigations and questioning under the Act). Form 32 provides a similar summary of Part 9 for protected suspects. Division 3 of the regulation recognises that vulnerable people interact with the criminal justice system through this regulation and the principal Act. This includes children, people with impaired intellectual functioning, Aboriginal or Torres Strait Islanders and people from non-English speaking backgrounds. Given the explicit recognition of vulnerable people in the regulation, and the purpose of forms 31 and 32 being to explain legislation to lay people, the Committee considers that these forms could have been drafted with a greater emphasis on Plain English.

**The Committee prefers that forms that are provided to detained persons and protected suspects are in Plain English.**

*Terminology*

10. The Regulation introduces forms 31 and 32 (included in Schedule 1). Both of these forms have a heading "caution", with text below outlining that while an individual is with police they do not have to say or do anything, but anything they say or do may be used in evidence. The Committee considers that the

heading “caution” could be better replaced with a more meaningful heading, such as “the right to silence”.

**The Committee reiterates its preference that forms provided to detained persons and protected suspects are in Plain English.**

## 2. Smoke-free Environment Regulation 2016

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to remake, with minor changes, the *Smoke-free Environment Regulation 2007*, which is to be repealed on 1 September 2016 by section 10(2) of the *Subordinate Legislation Act 1989*.
2. This Regulation makes provision with respect to the following:
  - (a) smoke-free areas in respect of courtyards and gardens that adjoin buildings,
  - (b) the signs that occupiers of smoke-free areas are required to display under section 9(1) of the *Smoke-free Environment Act 2000 (the Act)*, and the manner in which such signs are required to be displayed,
  - (c) the exemption of certain public places from the requirements relating to the display of such signs (exempt places are public places where persons would reasonably be expected to know that smoking is not permitted and in which persons do not usually smoke),
  - (d) guidelines for determining what is an enclosed public place and when a covered outside area is considered to be substantially enclosed for the purposes of the Act,
  - (e) the creation of an offence of failing to keep certain doors and windows locked fully open in certain circumstances,
  - (f) the persons, or class of persons, who may bring proceedings for certain offences under the Act,
  - (g) prescribing the offence of smoking in a smoke-free area as an offence for which a penalty notice may be given.
3. This Regulation is made under the *Smoke-free Environment Act 2000*, including sections 4A, 6A, 9, 20 (2) (b), 20A and 23 (the general regulation-making power).

### ISSUES CONSIDERED BY COMMITTEE

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

#### *Limiting activity in public space*

4. The regulation further limits the public spaces in which smoking is legal.

**The Committee notes that the regulation further limits public spaces in which smoking is legal. However, given the public health aims of the regulation and the principal Act the Committee makes no further comment.**

# 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.