



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

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

Guide to the Digest

COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

COMMENT ON REGULATIONS

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the Digest. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the Digest drawing the regulation to the Parliament's "special attention". The criteria for the Committee's consideration of regulations are set out in s 9 of the *Legislation Review Act 1987*.

Regulations for the special attention of Parliament

When required, this section contains any reports on regulations subject to disallowance to which the Committee wishes to draw the special attention of Parliament.

Conclusions

PART ONE – BILLS

1. CHILD PROTECTION (WORKING WITH CHILDREN) AND OTHER CHILD PROTECTION LEGISLATION AMENDMENT BILL 2016

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

Employment rights; rights of appeal; presumption of innocence

The Committee notes that cancelling an individual's working with children clearance check may have an immediate impact on their current employment. The Committee notes that this amendment removes an appeal right in circumstances where a person's clearance has been cancelled upon the commencement of proceedings but prior to the finalisation of those proceedings, which has the effect of not affording that person the presumption of innocence. However, given the aims of the working with children scheme, the Committee makes no further comment.

Privacy

The Committee notes the policy objectives that inform this amendment which provides for the sharing of working with children check information with bodies that administer working with children check clearances in other jurisdictions. The Committee also notes that protocols will be adopted in relation to the sharing of this information. The Committee considers that such protocols ought to mandate privacy standards and the prohibition of disclosure of information outside of those standards. The Committee would prefer the use of the word "shall" in proposed section 36A(4) rather than "may". The Committee makes no other comment in relation to this issue.

Self-incrimination

The Committee notes that providing a power to compel the production of information may impact on an individual's right against self-incrimination. However, given the child protection aims of this legislation, the Committee makes no further comment.

Property

Whilst the Committee notes the general right of quiet enjoyment of property, given the child protection aims that inform this statutory right to enter a premises where the Children's Guardian suspects that a child is being employed in contravention of the Act, and the reasonableness threshold included in the amendment, the Committee makes no further comment on this issue.

2. CIVIL REMEDIES FOR SERIOUS INVASIONS OF PRIVACY BILL 2016*

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

Extinguishment of cause of action on death

If a party to an action for serious invasion of privacy dies, the plaintiff, or their estate, will no longer be entitled to pursue the action. This is contrary to a general legislative principle in New South Wales, which provides that causes of action generally survive the death of one of the parties. The Committee notes existing exceptions to this general principle and that the

provision as outlined in the Bill aligns with the recommendation of the Australian Law Reform Commission. Nevertheless, as there is a statutory presumption in this State that causes of action generally survive the death of a party, the Committee refers clause 21 of the Bill to Parliament for further consideration as to whether it is appropriate in the circumstances.

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

Commencement by proclamation

The Committee generally prefers legislation to commence on a fixed date, or on assent, so the Executive does not have unfettered control over the commencement date. However, the Committee acknowledges that, in this instance, the Bill introduces various changes to the jurisdiction of courts, the Civil and Administrative Tribunal of NSW and the NSW Privacy Commissioner. As such, some flexibility may be desirable with respect to the commencement date.

Matters which should be in principal legislation

The Committee notes that the term ‘government entity’ is not defined in the Bill. Instead, the regulations may prescribe entities, or classes of entities, as either falling inside or outside of this definition. Given that actions for serious invasion of privacy may be commenced against a government entity, the Committee would prefer these entities to be defined or listed in principal legislation, rather than regulations, to ensure appropriate parliamentary scrutiny and to provide clarity for potential plaintiffs. However, the Committee acknowledges that regulations can still be subject to parliamentary scrutiny through the disallowance process. As such, the Committee makes no further comments.

3. HOUSING LEGISLATION AMENDMENT BILL 2016

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

Privity of Contract; privacy

The Committee notes that when the Housing Corporation enters into concurrent leases with registered community housing providers, doing so will breach privity of contract between the Housing Corporation and the tenant. This will have privacy implications for the tenant as information, including personal and health information, may be transferred to the registered community housing provider in certain circumstances. The Committee notes that the new arrangements with registered community housing providers will reflect the current administrative framework as administered by the Housing Corporation, in that the information held by the Housing Corporation is necessary to its work as a landlord and the transfer of this information will facilitate the ongoing contract with the tenant. Given the aims of the legislation the Committee makes no further comment.

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

Matters in regulations rather than in principal legislation

The Committee notes that the establishment of a local registration scheme is to be subject to the Community Housing Providers National Law (NSW), dependant on ‘any modifications’ that may be prescribed by the Regulations. The Committee notes that this provides a wide an ambit for what may be provided for in the Regulations. The Committee makes no further comment on this issue.

4. JUSTICE PORTFOLIO LEGISLATION (MISCELLANEOUS AMENDMENTS) BILL 2016

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

Right to fair trial - one

The Committee notes the proposed amendments which remove the restriction that prevents the Children's Court from hearing certain committal proceedings jointly between child and adult co-defendants where the adult is more than three years older. The Committee notes that joint proceedings of two persons charged are considered a difficult area of criminal procedure as Courts must be mindful that one or both of the defendants are not prejudiced by evidence which may not apply to both defendants.

However, the Committee notes that it has been the practice of the Children's Court to join proceedings where there is an adult co-defendant less than three years older than the child co-defendant. As such, the Court is experienced in applying its discretion to appropriate cases.

In addition, the Committee notes that extending the circumstances where committal proceedings can be heard jointly lessens the impact on witnesses of having to provide evidence on multiple occasions; and reduces costs associated with conducting separate proceedings. The Committee makes no further comment.

Right to fair trial – two

The Committee notes replacing a judge mid trial may impact on the defendant's right to a fair trial. For example, where a judge has not had an opportunity to view all the evidence first hand and observe the demeanour of witnesses may compromise procedural fairness.

However, the Committee highlights the extensive list of matters which must be considered before a judge is replaced. These matters include important considerations such as where the progress of the trial is at; whether key witnesses have given evidence; and whether the decision to nominate a new judge would be unfair to any of the parties. The Committee makes no further comment.

Right to fair trial – three

As discussed previously by this Committee, the pre-recording of evidence may impact on an accused's right to a fair trial. Requiring an accused to cross-examine a witness before the trial has begun means they will be required to prepare and disclose their case in advance. This may provide the prosecution with further avenues for investigation and time to alter their case.

However, the Committee is still of the view that the advantages in pre-recording a child's evidence outweigh these concerns. The Committee considers that prerecording a child's evidence, including non-victim witnesses, will improve the quality of the evidence obtained and, most importantly, protect vulnerable witnesses. The Committee makes no further comment.

Open justice

The Committee notes the presumption in favour of open justice. The Committee also notes the existing presumption in favour of in camera evidence for complainants of sexual offences, and that this amendment extends this provision to evidence given via audio visual or audio recording. Noting the public policy aims and that this is an extension of the statutory presumption in relation to complainants of sexual offences when giving evidence, the Committee makes no further comment.

5. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (NO 2) 2016

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

6. SUITORS' FUND AMENDMENT (COSTS OF NCAT APPEALS) BILL 2016*

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

7. WASTE AVOIDANCE AND RESOURCE RECOVERY AMENDMENT (CONTAINER DEPOSIT SCHEME) BILL 2016

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

Strict liability

The Committee notes that the Bill introduces strict liability in relation to a number of offences. The Committee will always comment where strict liability occurs as the Crown is not required to prove intent, negligence or recklessness on the part of the accused. However, in these circumstances strict liability is designed to ensure compliance with the new measures and further the objectives of the Act in reducing litter and improving the environment. The Committee makes no further comment.

Onus of proof

The Committee notes that placing the onus on the defendant to show that the supply is not a first supply reverses the onus of proof and is contrary to the fundamental principle that the prosecution bears the burden of proof. However, the Committee notes that the participation of suppliers in the scheme is crucial for the scheme to work and placing obligations upon them is not unreasonable in the circumstances. As such, the Committee does not consider the reversal of proof trespasses unduly on rights and liberties.

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 in the Second Reading Speech, the Minister indicated that the scheme is due to commence from 1 July 2017. Between now and that time, the Department will be engaging with stakeholders to ensure all participants are informed of the scheme and their obligations. The Committee makes no further comment.

Part One – Bills

1. Child Protection (Working with Children) and Other Child Protection Legislation Amendment Bill 2016

| | |
|----------------------|--|
| Date introduced | 12 October 2016 |
| House introduced | Legislative Assembly |
| Minister responsible | The Hon. Brad Hazzard MP |
| Portfolio | Minister for Family and Community Services |

PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
 - (a) to amend the *Child Protection (Working with Children) Act 2012* (the Working with Children Act) to make provision for the exchange of information relating to working with children clearance checks with relevant bodies in other jurisdictions and other miscellaneous matters relating to clearances and the disclosure and notification of certain information, and
 - (b) to amend the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) to make provision for enforceable undertakings, entry without warrant into premises, the issue of penalty notices by certain employees of the Children's Guardian and the production of certain information relating to the employment of children, and
 - (c) to amend the *Teaching Service Act 1980* (the Teaching Act) and the *Education (School Administrative and Support Staff) Act 1987* (the Education Act) to provide that a person whose clearance has been cancelled pending determination of proceedings against the person for an offence, may be suspended or placed on alternative duties, rather than being immediately dismissed.

BACKGROUND

2. This Bill amends Child Protection legislation to address issues that have arisen during the operation of the Working With Children scheme. In particular, the Bill addresses inconsistencies across the existing legislation.

ISSUES CONSIDERED BY COMMITTEE

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

Employment rights; rights of appeal; presumption of innocence

3. Schedule 1[6] of the Bill amends section 26 of the *Working with Children Act* to exclude individuals who have had their working with children check clearance cancelled from access to the review process. These cancellations relate to individuals who have had

their clearance cancelled wholly or partly on the grounds that proceedings have been commenced against the person for an offence in Schedule 2 of the Act and the proceedings have not been finally determined.

The Committee notes that cancelling an individual's working with children clearance check may have an immediate impact on their current employment. The Committee notes that this amendment removes an appeal right in circumstances where a person's clearance has been cancelled upon the commencement of proceedings but prior to the finalisation of those proceedings, which has the effect of not affording that person the presumption of innocence. However, given the aims of the working with children scheme, the Committee makes no further comment.

Privacy

4. Schedule 1[13] of the Bill inserts a new section 36A in the *Working with Children Act*. This section provides for the sharing of working with children check information between bodies that administer working with children check clearances in other jurisdictions and the Children's Guardian. This is subject to the creation of protocols which may contain recommended privacy standards and may prohibit the disclosure of information if those standards are not adopted.

The Committee notes the policy objectives that inform this amendment which provides for the sharing of working with children check information with bodies that administer working with children check clearances in other jurisdictions. The Committee also notes that protocols will be adopted in relation to the sharing of this information. The Committee considers that such protocols ought to mandate privacy standards and the prohibition of disclosure of information outside of those standards. The Committee would prefer the use of the word "shall" in proposed section 36A(4) rather than "may". The Committee makes no other comment in relation to this issue.

Self-incrimination

5. Schedule 2[1] inserts a new section 226B in the *Care Act* which gives the Children's Guardian powers to compel the production of information with respect to the employment of children.

The Committee notes that providing a power to compel the production of information may impact on an individual's right against self-incrimination. However, given the child protection aims of this legislation, the Committee makes no further comment.

Property

6. Schedule 2[2] inserts a new section 236A in the *Care Act* which gives the Children's Guardian a power to enter premises without a warrant where the Guardian reasonably suspects that a child is being employed in contravention of the Act.

Whilst the Committee notes the general right of quiet enjoyment of property, given the child protection aims that inform this statutory right to enter a premises where the Children's Guardian suspects that a child is being employed

in contravention of the Act, and the reasonableness threshold included in the amendment, the Committee makes no further comment on this issue.

2. Civil Remedies for Serious Invasions of Privacy Bill 2016*

| | |
|----------------------|------------------------|
| Date introduced | 13 October 2016 |
| House introduced | Legislative Assembly |
| Minister responsible | Mr Paul Lynch MP |
| Portfolio | *Private Member's Bill |

PURPOSE AND DESCRIPTION

1. The object of this Bill is to implement the proposals for legislation in the Report on civil remedies for serious invasion of privacy, which is a report of the Standing Committee on Law and Justice of the Legislative Council, published in March 2016.
2. That report recommends:
 - the substantial adoption of the proposals for legislation in the Report of the Australian Law Reform Commission (Report 123 of 2014) in relation to the creation of a statutory tort of serious invasion of personal privacy, to be enforceable by court proceedings, and
 - the conferral of similar jurisdiction on the Civil and Administrative Tribunal (NCAT), and
 - the conferral of power on the Privacy Commissioner to receive and deal with complaints about serious invasion of personal privacy.
3. The proposed Act is divided into Parts, the significant ones being:
 - Part 2, which creates rights to proceed against a person in the Supreme Court or the District Court for a serious invasion of privacy, based on a statutory cause of action created by the proposed Act, and
 - Part 3, which creates rights to proceed against a person in NCAT for a serious invasion of privacy, based on rights analogous to the statutory cause of action in Part 2, and
 - Part 4, which enables a person to make a complaint to the Privacy Commissioner about a serious invasion of privacy.

BACKGROUND

4. As stated above, the Bill implements recommendations of the report entitled, *Remedies for the serious invasion of privacy in New South Wales*, by the Legislative Council Standing Committee on Law and Justice.

5. Mr Lynch MP, in his Second Reading Speech to the Bill, highlights that invasion of privacy is a serious issue for the community and that while some legal avenues to pursue this issue exist, none are adequate.
6. The main proposal in the Bill is to introduce a statutory cause of action for a serious breach of privacy. Mr Lynch notes that a number of reports have previously recommended that a remedy of this kind be introduced including reports of the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission.

ISSUES CONSIDERED BY COMMITTEE

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

Extinguishment of cause of action on death

7. A cause of action for serious invasion of privacy will not survive for the benefit of the plaintiff's estate or against the defendant's estate (see clause 21 of the Bill).
8. This proposed clause is contrary to the general presumption in New South Wales as set out in section 2 of the *Law Reform (Miscellaneous Provisions) Act 1944*. This provision provides that all causes of action subsisting against, or vested in, a person on their death shall survive against, or for the benefit of, their estate. However, this presumption does not apply to certain causes of action such as defamation.
9. The Australian Law Reform Commission's report from 2014, *Serious invasions of privacy in the digital era*, recommended that an action for serious invasion of privacy should not survive for the benefit of the plaintiff's estate or against the defendant's estate.

If a party to an action for serious invasion of privacy dies, the plaintiff, or their estate, will no longer be entitled to pursue the action. This is contrary to a general legislative principle in New South Wales, which provides that causes of action generally survive the death of one of the parties. The Committee notes existing exceptions to this general principle and that the provision as outlined in the Bill aligns with the recommendation of the Australian Law Reform Commission. Nevertheless, as there is a statutory presumption in this State that causes of action generally survive the death of a party, the Committee refers clause 21 of the Bill to Parliament for further consideration as to whether it is appropriate in the circumstances.

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

Commencement by proclamation

10. The Act commences on a day or days to be appointed by proclamation (see clause 2 of the Bill).

The Committee generally prefers legislation 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, the Bill introduces various changes to the jurisdiction of courts, the Civil and Administrative Tribunal of NSW and the NSW Privacy Commissioner. As such, some flexibility may be desirable with respect to the commencement date.

Matters which should be in principal legislation

11. An individual may commence an action for serious invasion of privacy against a government entity (see for example, clause 11 of the Bill).
12. However, the term 'government entity' is not fully defined in the Bill. Instead, there is a power for the regulations to either prescribe or exclude an entity, or a class of entities (see clause 3 of the Bill).

The Committee notes that the term 'government entity' is not defined in the Bill. Instead, the regulations may prescribe entities, or classes of entities, as either falling inside or outside of this definition. Given that actions for serious invasion of privacy may be commenced against a government entity, the Committee would prefer these entities to be defined or listed in principal legislation, rather than regulations, to ensure appropriate parliamentary scrutiny and to provide clarity for potential plaintiffs. However, the Committee acknowledges that regulations can still be subject to parliamentary scrutiny through the disallowance process. As such, the Committee makes no further comments.

3. Housing Legislation Amendment Bill 2016

| | |
|----------------------|--|
| Date introduced | 12 October 2016 |
| House introduced | Legislative Council |
| Minister responsible | The Hon. Brad Hazzard MP |
| Portfolio | Minister for Family and Community Services; Minister for Social Housing |

PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
 - (a) to amend the *Housing Act 2001* to provide for the New South Wales Land and Housing Corporation (the Housing Corporation) to enter into concurrent leases with registered community housing providers in respect of housing owned by the Housing Corporation (the housing subject to the concurrent lease will no longer be public housing and accordingly the tenants will no longer be eligible for a rental rebate under that Act but may instead be eligible for rental assistance from the Commonwealth), and
 - (b) to amend the *Community Housing Providers (Adoption of National Law) Act 2012* to provide for the establishment of a local registration scheme for community housing providers that are unable to be registered under the Community Housing Providers National Law (NSW) and to permit the Housing Corporation and the FACS Secretary to give assistance to locally registered community housing providers.

BACKGROUND

2. In the context of growing demand for social housing arising out of the needs of vulnerable members of the community and a declining stock of affordable private rental housing, this Bill seeks to enact the Government's new social housing strategy: Future Directions for Social Housing in NSW.
3. The strategy includes the Government further developing partnerships with non-government entities to deliver 23,000 new and renewed social housing dwellings, with a view to nearly 35% of social housing in New South Wales being managed by community housing providers.

ISSUES CONSIDERED BY COMMITTEE

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

Privity of Contract; privacy

4. Schedule 1[4] of the Bill inserts a new Section 13A in the *Housing Act 2001* which provides that the Housing Corporation may enter into a concurrent lease with a registered community housing provider. This has the effect of transferring the rights

and responsibilities of the landlord from the Housing Corporation to the registered community housing provider. This includes the transfer of personal and health information held by the Housing Corporation if the Housing Corporation is satisfied that the registered community housing provider can ensure the privacy of the information.

The Committee notes that when the Housing Corporation enters into concurrent leases with registered community housing providers, doing so will breach privity of contract between the Housing Corporation and the tenant. This will have privacy implications for the tenant as information, including personal and health information, may be transferred to the registered community housing provider in certain circumstances. The Committee notes that the new arrangements with registered community housing providers will reflect the current administrative framework as administered by the Housing Corporation, in that the information held by the Housing Corporation is necessary to its work as a landlord and the transfer of this information will facilitate the ongoing contract with the tenant. Given the aims of the legislation the Committee makes no further comment.

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

Matters in regulations rather than in principal legislation

5. Schedule 2[2] inserts a new section 25A in the *Community Housing Providers (Adoption of National Law) Act 2012*, which includes at 25A (4) that the Regulations may make provision for a local registration scheme separate from the scheme operated by under that Act. Specifically, it provides that provisions of the National Law are taken to apply in relation to the local registration scheme subject to any modifications that may be prescribed by the Regulations.

The Committee notes that the establishment of a local registration scheme is to be subject to the Community Housing Providers National Law (NSW), dependant on 'any modifications' that may be prescribed by the Regulations. The Committee notes that this provides a wide an ambit for what may be provided for in the Regulations. The Committee makes no further comment on this issue.

4. Justice Portfolio Legislation (Miscellaneous Amendments) Bill 2016

| | |
|----------------------|-----------------------------|
| Date introduced | 12 October 2016 |
| House introduced | Legislative Council |
| Minister responsible | The Hon. Gabrielle Upton MP |
| Portfolio | Attorney General |

PURPOSE AND DESCRIPTION

1. The object of this Bill is to make miscellaneous amendments to the following Acts within, or with provisions relating to matters within, the Justice portfolio:
 - (a) the *Bail Act 2013*,
 - (b) the *Bail Amendment Act 2015*,
 - (c) the *Children (Criminal Proceedings) Act 1987*,
 - (d) the *Crimes Act 1900*,
 - (e) the *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*,
 - (f) the *Crimes (Sentencing Procedure) Act 1999*,
 - (g) the *Criminal Procedure Act 1986*,
 - (h) the *District Court Act 1973*,
 - (i) the *Drug Misuse and Trafficking Act 1985*,
 - (j) the *Drug Misuse and Trafficking Amendment (Drug Exhibits) Act 2016*,
 - (k) the *Land and Environment Court Act 1979*,
 - (l) the *Legal Profession Uniform Law Application Act 2014*,
 - (m) the *Local Court Act 2007*,
 - (n) the *Statutory and Other Offices Remuneration Act 1975*,
 - (o) the *Strata Schemes Management Act 2015*,
 - (p) the *Supreme Court Act 1970*,
 - (q) the *Surveillance Devices Act 2007*.

BACKGROUND

2. This Bill forms part of the Government's legislative review and monitoring program. It makes amendments to a number of Acts which affect the courts and other justice cluster agencies.

ISSUES CONSIDERED BY COMMITTEE

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

Right to fair trial - one

3. Currently, in cases where there is a child co-defendant and an adult co-defendant, if the adult co-defendant is more than three years older than the child, committal proceedings must be held separately. For the child co-defendant these proceedings are held in the Children's Court. For the adult co-defendant these proceedings are held in the Local Court. For cases where an adult co-defendant is less than three years old, the committal proceedings can be heard jointly in the Children's Court.
4. Schedule 1.3 of the Bill amends the *Children (Criminal Proceedings) Act 1987* to allow for committal proceedings for a child co-defendant and an adult co-defendant to be joined in the Children's Court where the adult is more than three years older than the child co-defendant. It is at the discretion of the Children's Court to allow joint hearings of committal proceedings if it is in the interests of justice to do so.

The Committee notes the proposed amendments which remove the restriction that prevents the Children's Court from hearing certain committal proceedings jointly between child and adult co-defendants where the adult is more than three years older. The Committee notes that joint proceedings of two persons charged are considered a difficult area of criminal procedure as Courts must be mindful that one or both of the defendants are not prejudiced by evidence which may not apply to both defendants.

However, the Committee notes that it has been the practice of the Children's Court to join proceedings where there is an adult co-defendant less than three years older than the child co-defendant. As such, the Court is experienced in applying its discretion to appropriate cases.

In addition, the Committee notes that extending the circumstances where committal proceedings can be heard jointly lessens the impact on witnesses of having to provide evidence on multiple occasions; and reduces costs associated with conducting separate proceedings. The Committee makes no further comment.

Right to fair trial – two

5. Schedule 1.7 amends the *Criminal Procedure Act 1986* to provide that where a judge of a jury trial in the Supreme and District Courts dies, becomes ill, or is otherwise unable to continue the proceedings, the Chief Justice of the Supreme Court and the Chief Judge of the District Court may appoint a new judge to continue the trial.
6. Proposed section 164A includes a list of matters which must be considered in determining whether a new judge should be appointed or the jury discharged and a new trial ordered. Such matters include whether the new judge could take over the

proceedings within reasonable time; whether there is a transcript of the entire proceedings available; and submissions from both of the parties.

The Committee notes replacing a judge mid trial may impact on the defendant's right to a fair trial. For example, where a judge has not had an opportunity to view all the evidence first hand and observe the demeanour of witnesses may compromise procedural fairness.

However, the Committee highlights the extensive list of matters which must be considered before a judge is replaced. These matters include important considerations such as where the progress of the trial is at; whether key witnesses have given evidence; and whether the decision to nominate a new judge would be unfair to any of the parties. The Committee makes no further comment.

Right to fair trial – three

7. Schedule 1.7 amends the *Criminal Procedure Act 1986* to expand the reach of the Child Sexual Offence Evidence Pilot. Currently, the pilot provides that only children who are victims in the proceedings can give evidence through a pre-recorded hearing. This Bill extends the pilot to include all child prosecution witnesses including non-victims.

As discussed previously by this Committee,¹ the pre-recording of evidence may impact on an accused's right to a fair trial. Requiring an accused to cross-examine a witness before the trial has begun means they will be required to prepare and disclose their case in advance. This may provide the prosecution with further avenues for investigation and time to alter their case.

However, the Committee is still of the view that the advantages in pre-recording a child's evidence outweigh these concerns. The Committee considers that prerecording a child's evidence, including non-victim witnesses, will improve the quality of the evidence obtained and, most importantly, protect vulnerable witnesses. The Committee makes no further comment.

Open justice

8. Sub-schedules 1.7[2] and [3] clarify that in circumstances where a complainant of a sexual offence is giving evidence via audio visual or audio recording this it to be held in camera, unless the court directs otherwise.

The Committee notes the presumption in favour of open justice. The Committee also notes the existing presumption in favour of in camera evidence for complainants of sexual offences, and that this amendment extends this provision to evidence given via audio visual or audio recording. Noting the public policy aims and that this is an extension of the statutory presumption in relation to complainants of sexual offences when giving evidence, the Committee makes no further comment.

¹ Legislation Review Committee, Digest 9/56, 27 October 2015

5. Statute Law (Miscellaneous Provisions) Bill (No 2) 2016

| | |
|----------------------|-----------------------------|
| Date introduced | 12 October 2016 |
| House introduced | Legislative Council |
| Minister responsible | The Hon. Gabrielle Upton MP |
| Portfolio | Attorney General |

PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
 - (a) to make minor amendments to various Acts and instruments (Schedules 1 and 2), and
 - (b) to amend certain other Acts and instruments for the purpose of effecting statute law revision (Schedule 3), and
 - (c) to make other provisions of a consequential or ancillary nature (Schedule 4).

BACKGROUND

2. This Bill continues the statute law revision program which has been in place for over 30 years. In the Second Reading Speech, the Hon David Clarke MLC, on behalf of the Hon John Ajaka MLC, highlighted that Bills of this kind have been introduced in most sessions of Parliament since 1984 and are effective for making minor policy changes and maintaining the quality of the New South Wales statute book.

ISSUES CONSIDERED BY COMMITTEE

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

6. Suitors' Fund Amendment (Costs of NCAT Appeals) Bill 2016*

| | |
|----------------------|------------------------|
| Date introduced | 13 October 2016 |
| House introduced | Legislative Assembly |
| Minister responsible | Mr Paul Lynch MP |
| | *Private Member's Bill |

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Suitors' Fund Act 1951* to allow Appeal Panels of NCAT to grant indemnity certificates to respondents to successful internal appeals made under section 80 of the *Civil and Administrative Tribunal Act 2013*.
2. An indemnity certificate allows a respondent, in certain circumstances, to be reimbursed out of the Suitors' Fund all or part of the appellant's costs of the appeal paid by the respondent. In certain circumstances, an indemnity certificate entitles an appellant to be paid all or part of the appellant's costs of the appeal directly from the Suitors' Fund. In either instance, the effect of granting an indemnity certificate is to ensure that a person who makes an internal appeal to an Appeal Panel of NCAT on a question of law and succeeds on that appeal can recover costs of the appeal that are ordered to be paid by the Appeal Panel.
3. Indemnity certificates cannot be granted to corporations with paid-up share capital of \$200,000 or more, or to corporations related to body corporates with such capital.

BACKGROUND

4. As highlighted above, the Bill proposes allowing persons who are successful when making an internal appeal to an Appeal Panel of NCAT, relating to a question of law, to recover costs from the Suitors' Fund.
5. Mr Lynch, in his Second Reading Speech to the Bill, notes that the grant of an indemnity certificate by a tribunal is discretionary and the maximum amount that can be reimbursed per application is \$10,000.
6. Mr Lynch argues that the Suitors' Fund Scheme should be extended to NCAT because the Tribunal has a wide and significant jurisdiction. For example, Mr Lynch notes that NCAT can make an order of up to \$500,000 for a claim under the *Home Building Act 1989*.

ISSUES CONSIDERED BY COMMITTEE

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

7. Waste Avoidance and Resource Recovery Amendment (Container Deposit Scheme) Bill 2016

| | |
|----------------------|------------------------------|
| Date introduced | 12 October 2016 |
| House introduced | Legislative Assembly |
| Minister responsible | The Hon. Mark Speakman SC MP |
| Portfolio | Environment and Heritage |

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Waste Avoidance and Resource Recovery Act 2001* (the **principal Act**) to:
 - (a) recognise the responsibility that the beverage industry shares with the community for reducing and dealing with waste generated by beverage product packaging, and
 - (b) establish a cost effective State-wide container deposit scheme (the **Scheme**) to assist the beverage industry to discharge that responsibility and to promote the recovery, reuse and recycling of empty beverage containers, and
 - (c) confer on the Environment Protection Authority (the **EPA**) functions under the principal Act that are currently conferred on the Chief Executive of the Office of Environment and Heritage, and
 - (d) make other minor and consequential amendments and amendments of a savings and transitional nature.
2. The Scheme includes the following features:
 - (a) it provides for the establishment of a Scheme Coordinator and network operators with responsibility for the administration of the Scheme,
 - (b) it provides for the payment of refund amounts to persons depositing at collection points empty beverage containers that are subject to the Scheme,
 - (c) it provides for the establishment by the Scheme Coordinator of a cost recovery scheme under which beverage suppliers agree to make contributions towards the cost of paying those refund amounts,
 - (d) it prohibits the supply of beverages in containers that are subject to the Scheme by beverage suppliers who have not agreed with the Scheme Coordinator to make those contributions,
 - (e) it prohibits the supply of beverages in containers of a kind that are not approved by the EPA.

BACKGROUND

3. This Bill introduces the New South Wales Container Deposit Scheme aimed at reducing litter and improving the environment. In the Second Reading Speech, the Minister indicated that the volume of litter in New South Wales is significantly above the national average and that beverage containers represent the largest proportion of litter volume.
4. The proposed Scheme was the result of advice from an advisory committee and implementation working group which included representatives from the beverage industry, the waste and recycling industry, community groups, local government, retailers and other Australian jurisdictions.

ISSUES CONSIDERED BY COMMITTEE

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

Strict liability

5. The Bill introduces a number of strict liability clauses in relation to offences concerning the supply and collection of containers. That is, in any prosecution for an offence under the Act, the Crown will not have to show the accused intended to supply and collect containers contrary to the Act.
6. For example, under proposed section 38 a supplier must not supply a beverage in a container to any person unless a supply arrangement is in force and a container approval is in force. Similarly, a supplier must not supply a beverage in a container unless the container bears a refund marking. The maximum penalties for both offences are 4000 penalty units for a corporation and 1000 penalty units for an individual.
7. In these instances, the Bill has not provided any exceptions or defences for failure to comply with the provisions.
8. However, the Committee notes that these provisions are not uncommon in regulatory settings to enable compliance and strengthen the offence provisions.

The Committee notes that the Bill introduces strict liability in relation to a number of offences. The Committee will always comment where strict liability occurs as the Crown is not required to prove intent, negligence or recklessness on the part of the accused. However, in these circumstances strict liability is designed to ensure compliance with the new measures and further the objectives of the Act in reducing litter and improving the environment. The Committee makes no further comment.

Onus of proof

9. Proposed section 38 provides that a supplier must not supply a beverage in a container to any person unless a supply arrangement is in force and a container approval is in force. The offence is limited to the first supply in the State of the beverage in the container. That is, the offence is targeting the suppliers of beverages in the first instance as opposed to those who may receive the beverages after a number of movements.
10. Proposed section 38(3) provides that the onus of establishing that the supply is not a first supply in the State lies on the defendant.

The Committee notes that placing the onus on the defendant to show that the supply is not a first supply reverses the onus of proof and is contrary to the fundamental principle that the prosecution bears the burden of proof. However, the Committee notes that the participation of suppliers in the scheme is crucial for the scheme to work and placing obligations upon them is not unreasonable in the circumstances. As such, the Committee does not consider the reversal of proof trespasses unduly on rights and liberties.

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

Commencement by proclamation

11. 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 notes that in the Second Reading Speech, the Minister indicated that the scheme is due to commence from 1 July 2017. Between now and that time, the Department will be engaging with stakeholders to ensure all participants are informed of the scheme and their obligations. 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,

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- v that the objective of the regulation could have been achieved by alternative and more effective means,
 - vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - vii that the form or intention of the regulation calls for elucidation, or
 - viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

2 Further functions of the Committee are:

- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
- (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.