



## 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. CRIMES AMENDMENT (ZOE’S LAW) BILL 2017\*

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

##### *Right to choose*

The Committee refers to Parliament for its consideration matters relating to offences against a child in utero, with particular reference to establishing a separate criminal offence for the serious harm to or the destruction of a child in the utero.

### 2. FIRE AND EMERGENCY SERVICES LEVY BILL 2017

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

##### *Right to receive refund*

The Committee notes that whilst policy holders are to receive refunds for over-collected amounts where practicable, in circumstances where it is impracticable to do so the over payments are to be paid into the Consolidated Fund. As the term ‘practicable’ is not defined in the legislation, the Committee refers the potential non-payment of over-collected funds to policy holders to Parliament for its further consideration.

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

##### *Regulations may amend an Act of Parliament*

The Bill contains several clauses which authorise regulations to amend the Act. The Committee generally prefers an Act of Parliament to be amended by a further Act of Parliament, not a regulation. Regulations are subject to some parliamentary scrutiny through the disallowance process in section 41 of the *Interpretation Act 1987*. However, there is a much greater level of parliamentary scrutiny associated with the passage of a Bill through the Parliament.

The provisions which the Bill proposes may be amended via regulation are associated with key definitions relating to classifying land for the purposes of the fire and emergency services levy. They may also consolidate savings and transitional provisions. The Committee notes that savings and transitional provisions can sometimes impact on rights and liberties issues depending on the content of those provisions. The Committee refers clauses 43, 46 and Schedule 3, clause 1 of the Bill to Parliament for further consideration as to whether authorising the regulations to amend various Schedules of the Act is appropriate in the circumstances.

### 3. LOCAL GOVERNMENT AMENDMENT (RATES – MERGED COUNCIL AREAS) BILL 2017

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

## 4. MOTOR ACCIDENT INJURIES BILL 2017

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

The Committee notes that requiring individuals to purchase insurance could be characterised as infringing on the rights of those individuals. However, given the public policy aims of the compulsory third party insurance schemes in NSW, the Committee makes no further comment on this issue.

*Privacy*

The Committee notes that the sharing of information between Roads and Maritime Services and the third-party insurer may impact on an individual's right to privacy. However, given that the insurer was already in receipt of private information from the individual, the provision of updating information is considered to be reasonable in the circumstances and the Committee makes no further comment.

The Committee notes that requiring the provision of health information to insurers trespasses on an individual's right to privacy. However, given the role of the insurer in delivering statutory benefits under the scheme and the insurer's statutory obligations to satisfy itself as to the veracity of claims for benefits, the Committee does not consider this to be an undue trespass on the right to privacy and makes no further comment.

*Right to privacy/right to silence/self-incrimination*

The Committee remains concerned over the wide ambit and unlimited timeframes of obtaining and keeping information, documents or evidence given to investigative officers may impact on individual rights and liberties such as the right to privacy. The Committee refers the matter to Parliament for its further consideration

Whilst the Committee notes that the Bill requires individuals to provide documentation in circumstances where it may incriminate them or make them liable to a penalty, the Committee also notes the inclusion of legislative safeguards, including clause 10.31 which provides that such information, documents and evidence will not be admissible in criminal proceedings if objections are made [Clause 10.31(2); 10.31(4)].

The Committee is concerned about the impact on privacy arising from the information sharing arrangements between the State Insurance Regulatory Authority (SIRA) and NSW Police. However given the objective of verifying information in order to assess motor accident claims, the Committee does not consider the trespass on privacy to be undue in the circumstances.

The Committee notes individual's right to silence and right against self-incrimination. The Committee notes the safeguards within the section and makes no further comment in relation to this issue.

*Restricting judicial discretion*

The Committee notes the removal of judicial discretion may impact on individual rights and liberties as such discretion enables the judiciary to deliver justice based on the individual circumstances of each matter. The Committee refers the restrictions on judicial discretion to Parliament for its further consideration.

*Increase in statutorily mandated costs*

The Committee notes that currently, providers of Uber services can use a generic third-party insurance. Taxis and hire cars are required to pay more expensive third-party insurance. This Bill will require point to point transport providers, including Uber drivers, to have specialised third-party insurance. This will increase the cost of third-party insurance for owners of cars that are being used in schemes such as Uber. However, given this cost relates to the undertaking of a commercial enterprise, the Committee considers it reasonable that legislation regulates point to point transport schemes such as Uber in a similar manner to the regulation of taxis and hire cars and makes no further comment on this issue.

*Quantum of compensation*

The Committee notes that under the statutory benefits scheme, earners injured as a result of a motor accident will receive less income per week in the amount of between five and 20 per cent of their pre-injury earnings. Whilst the Committee notes the public policy arguments in favour of incentivising a return to work, the Committee refers to Parliament the reasonableness of the statutory scheme not providing full compensation for loss of earnings following a motor accident.

The Committee notes that including a maximum weekly statutory benefit has a deleterious effect on those individuals who earned more than that amount prior to their injury. Notwithstanding the public policy aims of seeking to provide an affordable compulsory third-party insurance scheme, and the actuarial advantages to the scheme of providing for a maximum weekly statutory benefit, the Committee refers this matter to Parliament for its consideration.

The Committee notes the public policy advantages of encouraging injured people to return to their previous employment positions. The Committee also notes the actuarial advantages to the scheme of providing a statutory time limit on weekly benefits. However, the Committee refers to Parliament whether limiting the period of weekly benefits would be better tailored to the individual needs of each injured earner, rather than imposing blanket statutory time limits.

The Committee again notes the actuarial advantages of terminating weekly payments should an injured person reach retirement age whilst in receipt of weekly statutory benefits under this scheme. However, given that not all workers cease working at retirement age, and may wish to return to their substantive position at work following recovery from their motor vehicle injury, the Committee refers to Parliament the reasonableness of treating all injured people who reach retirement age the same under this scheme, rather than tailoring the delivery of the scheme to the needs of the individual.

The Committee again notes the actuarial advantages of outlining a maximum rate for the receipt of medical and other treatment. Given the public policy advantages of fixing a maximum rate, the Committee makes no further comment on this issue.

*Prerequisites for compensation*

The Committee notes the public policy arguments in favour of ensuring an injured person returns to wellness as soon as possible, and the importance of treatment and rehabilitation in that context. It is not clear to the Committee how attendance at vocational training may assist in recovery, and why it should be considered as a prerequisite for the receipt of the person's entitlement to weekly payments of statutory benefits. The Committee refers the inclusion of



vocational training as a prerequisite for the receipt of benefits to Parliament for its further consideration.

*Common law right to damages*

The Committee notes a person with minor injuries under this scheme is not entitled to more than 26 weeks of statutory benefits. The Committee also notes that a person with minor injuries under this scheme is precluded from seeking common law damages. Given that a person may still be suffering quantifiable damages 26 weeks after a motor accident, the Committee refers to Parliament for its further consideration the reasonableness of restricting such injured individuals from seeking common law damages.

The Committee again notes the actuarial advantages of providing for a maximum amount of damages that may be sought for non-economic loss and for restricting such claims for damages to those who have experienced more than a 10 per cent degree of permanent impairment. However, the Committee notes that such a restriction is a trespass on an individual's right to pursue common law damages in the state's courts. Given that the statutory benefits may not have been sufficient to compensation an injured worker, the Committee refers to Parliament the reasonableness of restricting those workers from seeking further compensation through the courts.

The Committee notes that the removal of the right to claim exemplary or punitive damages may impact on individual rights and liberties. However, given the objectives of the Bill to simplify the claims process within strict timeframes, the Committee makes no further comment.

*Reduction of amount of economic loss*

Given that clause 4.9 already provides for a discount rate of 5 per cent – or another amount prescribed in the regulations - to be applied to an award of damages, the Committee is concerned that the regulations may provide for the further reduction of an award of damages for economic loss. The Committee considers that any further reduction of an award of damages for economic loss is more appropriately included in the principal legislation. The Committee also considers that the discount rate is a rate that ought to be defined in the principal legislation rather than in the regulations. The Committee refers both of these matters to Parliament for its consideration.

*Access to legal representation*

The Committee notes that the effect of preventing lawyers from being paid for certain legal services is that injured road users are prevented from seeking legal advice in relation to those issues. Whilst the Committee is cognisant of the aims of the legislation in relation to keeping costs down, the Committee also notes that compensation schemes can be difficult for some individuals to understand. Removing the ability for lawyers to charge for services relating to certain aspects of motor accident injuries can have deleterious consequences for these individuals. The Committee refers this issue to Parliament for its further consideration.

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

*Definition of 'reasonable'*

The Committee refers to Parliament whether the term 'reasonable funeral expenses' ought to be more clearly defined.

*Grounds for issuing a penalty notice*

The Committee refers to Parliament whether, when issuing a penalty notice, an authorised officer should be satisfied to a higher standard than ‘the appearance’ of the commission of penalty notice offence.

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

*Arbitration clause*

The Committee notes that arbitral decisions leave little scope for judicial review. However, given the public policy aims of the legislation and noting that arbitration relates to a commercial dispute, the Committee makes no further comment on this issue.

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

*Matters in the Motor Accident Guidelines*

The Committee is keen to comment when matters that are more properly included in the principal legislation feature instead in delegated legislation. The Committee has this concern in relation to the Motor Accident Guidelines. However, given the administrative convenience of enabling SIRA to produce Guidelines that provide for the administration of the scheme, and noting that the Guidelines will be a disallowable instrument that Parliament may scrutinise, the Committee makes no further comment in relation to this issue.

*Cancellation of third-party policies*

The Committee notes that suspending the registration of a motor vehicle is a serious action, and refers to Parliament whether there is sufficient clarity in subclause 2.8(5) as to whether false statements may merely be alleged. The Committee also refers to Parliament whether providing for the circumstances in which an insurer may request such a suspension by Roads and Maritime Services ought to be included in the principal legislation rather than the regulations.

*Creation of penalty offences in the regulations*

The Committee considers that penalty unit offences ought to be outlined in the principal legislation rather than created by the Executive and provided for in the regulations. The Committee refers this regulation making power to the Parliament for its consideration.

*Matters left to regulations rather than principal legislation*

The Committee notes that in some instances matters that could be better defined in the principal legislation have instead been referred to the regulations. However, given that any regulation is subject to parliamentary scrutiny through the disallowance processes under section 41 of the Interpretation Act 1987, the Committee makes no further comment.

*Commencement by proclamation*

The Committee notes the administrative convenience of commencing complicated schemes such as the compulsory third-party scheme by way of proclamation. However, the Committee also notes that the Minister has outlined to the Parliament that the scheme will commence on 1 December 2017. The Committee refers to Parliament the commencement of this Act by proclamation in these circumstances.

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

The Committee notes the administrative convenience of constructing and restructuring the Dispute Resolution Service by way of regulation. However, in circumstances where the Service was to be substantially restructured, the Committee considers such changes would be more appropriately enacted by way of an Act of Parliament. The Committee refers the power to amend schedule 2 by way of regulation to the Parliament for its consideration.

## 5. PUBLIC HEALTH (MEDICINAL CANNABIS) BILL 2017\*

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

The Committee notes that some individuals might consider providing a photograph that may be kept in official records to infringe on their right to privacy. However, given the public policy concerns in relation to ensuring the supply and use of medicinal cannabis is restricted to a specific group of individuals, the Committee makes no further comment on this issue.

*Freedom of movement*

The Committee notes the aims of the legislation, in particular the alleviation of pain and symptoms relating to a wide range of terminal or serious medical conditions. The Committee refers to Parliament whether such registered users should be restricted from accessing medicinal cannabis treatment in a public place.

*Compensation*

The Committee refers to Parliament whether a person who legally purchased medicinal cannabis should be subject to forfeiture, destruction or disposal requirements without appropriate compensation following the cancellation of their registration under the scheme.

**Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA***Attendance requirement at a non-defined place*

The Committee is concerned that the legislation does not provide for the specified place(s) at which an individual might be required to attend to have a photograph taken. Given the risk that the required place may place a disproportionate burden on individuals, the Committee considers that the specified place(s) should be defined in the principal legislation.

*Power to cancel registration*

The Committee notes that subclauses 6(3)(a)-(c) provide a broad power to the Health Secretary in relation to the grounds on which registration may be cancelled, including the committing of more than one offence against the principal Act or the regulations. The Committee notes that the Health Secretary must notify the registered person of the proposed cancellation and allow 14 days in which the registered person may make submissions. Notwithstanding this procedural safeguard, the Committee considers that providing further grounds for cancellation in regulations may be unnecessary and provides the Executive with an insufficiently defined administrative power. As such, the Committee refers this regulation-making power to the Parliament for its consideration.

*Conflicting requirements*

The Committee notes that in circumstances where a registered user or carer has returned their certificate of registration to the Health Secretary in compliance with subclause 7(2) they will be unable to comply with subclause 7(1). The Committee refers these inconsistent clauses to Parliament for its consideration.

*Scheme to be established by regulations*

Whilst the Committee notes the administrative convenience of empowering the regulations to establish the scheme for the provision of medicinal cannabis, the Committee refers to Parliament whether such a scheme that includes the granting and revocation of licences would be more appropriately included in principal legislation.

*Power to create offences in the regulations*

The Committee considers that the creation of offences is most appropriately undertaken by the Parliament. The Committee refers to Parliament the power of the regulations to create offences in this Bill.

**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 that the Executive does not have unfettered control of the commencement date. However, the Committee acknowledges that, in this instance, the Bill would introduce various changes to law relating to the supply and use of cannabis. Due to the complex nature of these changes, and the subsequent requirement for a public information campaign, the Committee understands that some flexibility may be desirable with respect to the commencement date.

*Certainty*

The Committee acknowledges the bureaucratic convenience of providing for the administrative scheme in the regulations. However, the Committee is concerned that the regulations may be able to place a time limit on registration in circumstances where an individual meets the requirements of the principal legislation. The Committee refers to Parliament whether the regulations should be able to limit the period of the registration of a person who otherwise meets the legislated requirements of registration.

## Part One – Bills

### 1. Crimes Amendment (Zoe's Law) Bill 2017\*

Date introduced	9 March 2017
House introduced	Legislative Council
Member responsible	Reverend the Hon. Fred Nile MLC
	*Private Member's Bill

#### Purpose and description

1. The object of this Bill is to amend the *Crimes Act 1900*:
  - (a) to establish a separate offence for conduct causing serious harm to or the destruction of a child in utero, and
  - (b) to extend the offence of dangerous driving causing death or grievous bodily harm to dangerous driving causing the destruction of, or serious harm to, a child in utero.

#### Background

2. This Bill has been introduced in response to a number of similar cases, including a case where a pregnant woman was struck by a driver under the influence of drugs. She subsequently lost her child, Zoe, after a stillbirth. According to the Second Reading Speech, the driver was charged with inflicting grievous bodily harm on Zoe's mother, but the stillbirth of Zoe was "rendered legally irrelevant".
3. In the Second Reading speech, the Reverend the Hon. Fred Nile MLC cited the Hon. Mervyn Finlay QC's recommendation in the 2003 report *Review of Laws surrounding Criminal Incidents Involving the Death of an Unborn Child* to create a separate criminal offence for the destruction of a child capable of being born.
4. The Bill seeks to introduce a separate criminal offence for inflicting serious harm or destruction of a child in utero. In addition, the amendment includes the definition of a *child in utero* as the prenatal offspring of a woman.
5. The Bill doesn't apply to anything done in the course of a medical procedure or with the consent of the mother of the child in utero.

#### Issues considered by committee

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

##### *Right to choose*

6. At present, the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, is a factor considered when determining the severity of grievous bodily harm offence under section 4 of the Crimes Act 1900 No 40. This Bill will

instead allow a separate offence to be brought against the offender for the serious harm to or destruction of the child in utero in a reckless or intentional manner.

7. The Committee recognises that this Bill specifically excludes any medical procedures including abortion or anything done by or with the consent of the mother of the child in the utero.
8. In Digest 43/55, 13 September 2013, the Committee noted its concerns regarding the potential legal ramifications of creating a separate criminal offence for inflicting serious harm or destruction of a child in an utero and providing a legal definition to a child in utero.
9. The Committee appreciates the significant sensitivities that exist when seeking to introduce legislative amendments of this nature.

**The Committee refers to Parliament for its consideration matters relating to offences against a child in utero, with particular reference to establishing a separate criminal offence for the serious harm to or the destruction of a child in the utero.**

## 2. Fire and Emergency Services Levy Bill 2017

Date introduced	7 March 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasury

### Purpose and description

1. The object of this Bill is to provide for the imposition of a fire and emergency services levy (the levy). The levy will be payable on all land (other than government land) that is situated in the area of a council or on Lord Howe Island.
2. The person liable for the levy will generally be the owner of the land. However, in some cases a lessee of land owned by the Crown or a State owned corporation will be liable for the levy.
3. The levy is payable in respect of each financial year, starting with the year commencing on 1 July 2017.
4. There are 2 components to the levy: a fixed component and an ad valorem component.
5. The fixed component of the levy is a base rate specified in the proposed Act (which can be varied by regulation). The ad valorem component of the levy is calculated by applying an ad valorem rate specified by the Treasurer to the land value of the land. The Treasurer calculates the ad valorem rate in accordance with a formula that takes into account the funding targets of the various emergency services (fire brigades, rural fire brigades and state emergency services).
6. Both components of the levy vary according to the classification of the land on which the levy is charged.
7. Land can be classified into the following property sectors under the proposed Act:
  - (a) government land,
  - (b) public benefit land,
  - (c) farmland,
  - (d) residential land,
  - (e) industrial land,
  - (f) commercial land.
8. Only government land is exempt from the levy.
9. Councils will be responsible for classifying land in their area into those property sectors.
10. The levy is to be charged by, and collected by, councils on behalf of the State. Councils will be responsible for recovering the levy along with the rates and charges that they levy under the *Local Government Act 1993*. Councils will be required to account for the

levy by paying a proportion of all money collected as rates, charges and levies to the State.

11. The levy replaces the emergency services contributions that are currently required to be made by insurance companies. Those contributions are abolished by the proposed Act and provision is also made for the winding up of those contribution schemes.

## Background

12. The Minister, in his Second Reading Speech, explained that while everyone in NSW benefits from fire and emergency services, only people who purchase insurance contribute to those services through an insurance-based emergency services levy. Under the changes proposed by the Bill, every property owner in NSW will pay a levy which will fund these services.
13. Apart from being a fairer way of raising the same amount of money, the Minister also indicated that the new scheme will help address the issue of non-insurance in NSW. Thirty six percent of households do not have contents insurance and five percent do not have building insurance. The current insurance-based levy increases the cost of household premiums by approximately 20 percent. The proposed changes will lower the cost of insurance. In addition, all other mainland States have already moved to a land-based levy.
14. In developing these reforms, the Government held a four-month public consultation in 2012 and considered more than 500 submissions. It also consulted with a range of peak bodies and considered the experiences of other States that have already implemented similar funding arrangements.

## Issues considered by committee

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

#### *Right to receive refund*

15. Clause 9 of Schedule 4 of the Bill provides that the Emergency Services Levy Insurance Monitor must investigate and assess whether insurance companies are liable for over-collection amounts under the final two years of the scheme, and where practicable endeavour to ensure that the insurance company refunds the over-collection amount to relevant policy holders. If not practicable, the amount is to be paid to the Chief Commissioner for payment into the Consolidated Fund.

**The Committee notes that whilst policy holders are to receive refunds for over-collected amounts where practicable, in circumstances where it is impracticable to do so the over payments are to be paid into the Consolidated Fund. As the term 'practicable' is not defined in the legislation, the Committee refers the potential non-payment of over-collected funds to policy holders to Parliament for its further consideration.**

#### *Imposition of new levy*

16. Part 2 of the Bill provides for the imposition of a fire and emergency services levy on all land situated in a council area. Part 6 of the Bill provides for the charging and collection of that levy by councils. A similar levy was previously paid by insurance policy holders.



Under the previous scheme, only insurance policy holders paid the levy. Under the new scheme, all rate payers will pay the levy unless the council is exempt.

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

*Regulations may amend an Act of Parliament*

17. The Bill contains what are known as Henry VIII clauses that allow the Executive to amend the Act by regulation. This is contrary to the traditional Westminster democratic tradition of the legal primacy of Parliament. The following provisions authorise regulations to amend the Act:
  - (a) Councils are required to classify land for the purpose of charging the fire and emergency services levy. Clause 43 of the Bill specifies criteria for classifying land as 'public benefit land'. Schedule 1 of the Bill assists with this classification by listing uses of land that may contribute to it being determined as 'public benefit land'. The regulations may amend Schedule 1.
  - (b) Clause 46 of the Bill specifies criteria for classifying land as 'industrial land'. If the dominant use of the land is for a purpose listed in Schedule 2 then the land will be industrial land. The regulations may amend Schedule 2.
  - (c) Schedule 3 of the Bill contains savings, transitional and other provisions. Clause 1 of that Schedule authorises regulations to contain provisions of a savings or transitional nature. Those provisions can be separate to Schedule 3 or may amend that Schedule to consolidate savings and transitional provisions.

**The Bill contains several clauses which authorise regulations to amend the Act. The Committee generally prefers an Act of Parliament to be amended by a further Act of Parliament, not a regulation. Regulations are subject to some parliamentary scrutiny through the disallowance process in section 41 of the *Interpretation Act 1987*. However, there is a much greater level of parliamentary scrutiny associated with the passage of a Bill through the Parliament.**

**The provisions which the Bill proposes may be amended via regulation are associated with key definitions relating to classifying land for the purposes of the fire and emergency services levy. They may also consolidate savings and transitional provisions. The Committee notes that savings and transitional provisions can sometimes impact on rights and liberties issues depending on the content of those provisions. The Committee refers clauses 43, 46 and Schedule 3, clause 1 of the Bill to Parliament for further consideration as to whether authorising the regulations to amend various Schedules of the Act is appropriate in the circumstances.**

### 3. Local Government Amendment (Rates – Merged Council Areas) Bill 2017

Date introduced	8 March 2017
House introduced	Legislative Council
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Resources, Energy and Utilities

#### Purpose and description

1. The object of this Bill is to amend the *Local Government Act 1993*:
  - (a) to enable the Minister for Local Government, by determination published in the Gazette, to require a newly merged council to maintain pre-merger rate paths in levying rates for land in the new local government area, and
  - (b) to provide that a determination is to apply to the levying of rates for 3 rating years (in addition to the rating year for which the new council is required to maintain pre-merger rate paths by the proclamation constituting the new council).

#### Background

2. In 2016, the Government created 20 new councils. Prior to that, the Government made a commitment that residents in the newly created councils would pay no more for their rates than under their previous council for a period of four years.
3. In 2015, the former Premier asked the Independent Pricing and Regulatory Tribunal (IPART) to review the local government rating system and provide recommendations on how to implement the rate path protection commitment for four years.
4. IPART's report was released in August 2016 and recommended implementing the rate path protection commitment through amending the *Local Government Act 1993* to provide the Minister for Local Government with an instrument-making power, which is now provided for in the Bill.

#### 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.**

## 4. Motor Accident Injuries Bill 2017

Date introduced	9 March 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Minister for Finance, Services and Property

### Purpose and description

1. The object of this Bill is to replace the current compulsory third-party motor accidents scheme under the *Motor Accidents Compensation Act 1999* with a new scheme to cover persons injured in motor accidents after the commencement of the proposed Act.
2. The principal features of the new scheme are as follows:
  - (a) Insurance for liability of the driver or owner of a registered motor vehicle relating to the death of or injury to other persons as a consequence of motor accidents continues to be compulsory.
  - (b) Insurance under the new scheme continues to be privately underwritten and the insurance risk remains with the private sector. Insurers are licensed and supervised by the State Insurance Regulatory Authority (the Authority). The Authority is provided with enhanced powers to regulate premiums for compulsory third-party policies to ensure that premium levels are adequate to fund the obligations of insurers and excessive underwriting profits are avoided. The factors to be used in the calculation of third-party premiums will ensure that insurer costs and expenses and estimates of claims costs and expenses are reasonable.
  - (c) Transitional provisions will facilitate the adjustment of third-party premiums after the commencement of the new scheme to avoid excess profits and losses arising from the effect on cost of claims of the new scheme and to apply any unearned premium surplus in reduction of premiums. The Authority will review the need for the provisions after 3 years from the commencement of the scheme.
  - (d) No-fault statutory benefits will be payable by insurers for motor accidents. Statutory benefits will include weekly payments for loss of earnings, payment of treatment and care expenses and payment of funeral expenses. Statutory benefits will be payable for loss of earnings or for treatment and care for up to 6 months after the motor accident regardless of fault.
  - (e) Statutory benefits will not be payable after 6 months from the date of the motor accident to injured persons suffering minor injuries only. Except in the case of minor injuries, statutory benefits will be payable to cover the ongoing cost of treatment and care after 6 months if the injured person was not most at fault or was under the age of 16 years at the time of the accident. Statutory benefits will generally be payable for loss of earnings for up to 2 years (and in some cases up to 5 years) where the injured person was not most at fault and the injuries are not minor injuries.

- (f) The maximum amount of weekly statutory benefits is set at 2.5 times average weekly earnings (\$3,853).
- (g) Common law damages will be recoverable only for specified categories of economic loss, including past and future loss of earnings and non-economic loss (statutory benefits will be payable to cover the cost of treatment and care). No common law damages will be recoverable for minor injuries. Damages for non-economic loss will not be recoverable unless permanent impairment is greater than 10%.
- (h) Funding arrangements for levies to fund the administration of the scheme will provide for the Authority to determine and collect a single levy from compulsory third-party policy holders that is required for the purposes of meeting the obligations of the Authority and the Lifetime Care and Support Authority.
- (i) If the motor vehicle involved in the accident was not insured or cannot be identified, compensation continues to be payable under a Nominal Defendant scheme operated by the Authority (with licensed insurers acting for the Authority in connection with claims).
- (j) Parties will be required to comply with certain duties in connection with claims, including the duty of insurers and claimants to act with good faith and the duty of claimants to take reasonable steps to minimise loss.
- (k) A claim for damages will be required to be made within 3 years after the motor accident. A claim for damages cannot be made before 20 months from the date of the motor accident unless the claim relates to a death or the degree of permanent impairment is greater than 10%. A claim for statutory benefits will be required to be made within 3 months after the motor accident.
- (l) A Dispute Resolution Service will be established within the Authority (replacing the Motor Accidents Claims Assessment and Resolution Service and the Motor Accidents Medical Assessment Service) for the resolution of disputes in connection with motor accident claims for statutory benefits or common law damages. The Service consists of staff of the Authority and independent merit reviewers, medical assessors and claims assessors.
- (m) Claims for damages are to be assessed by claims assessors before court proceedings can be commenced (unless they are exempt from assessment). The courts are the final arbiters on the issues of liability to pay common law damages and the assessment of the amount of damages required to be paid by way of compensation.
- (n) A system of independent medical assessment is continued for the resolution of disputes about degree of permanent impairment, treatment, impairment of earning capacity and other medical matters.
- (o) Other disputes may be referred to the Dispute Resolution Service for merit review or for assessment. Decisions determining merit reviews and medical assessments will generally be binding on the parties to the dispute, subject to a right of review by a review panel. Decisions on the assessment of disputes about claims for statutory benefits (other than by merit review or medical assessment) will be binding on the parties.

- (p) The process for the resolution of disputes about statutory benefits (and some disputes about claims for damages) will generally require internal review by an insurer before a dispute can be referred to the Dispute Resolution Service for determination by way of merit review or medical or other assessment (except claims assessment). Internal reviews are to be conducted in accordance with guidelines issued by the Authority.
- (q) Parties to a claim for damages will no longer be required to participate in a settlement conference and exchange the documents on which they propose to rely for the purposes of an assessment of the claim. The parties to the claim will be required to use their best endeavours to settle the claim before referring it to the Dispute Resolution Service for assessment. A claim will not be able to be referred for assessment more than 3 years after the motor accident unless there is a full and satisfactory explanation for the delay.
- (r) A claim for damages will not be able to be settled within 2 years after the motor accident unless the injured person has a degree of permanent impairment of greater than 10%. A claim for damages will not be able to be settled at any time unless the claimant is legally represented or the settlement is approved by the Dispute Resolution Service.
- (s) Specific principles apply to a court when assessing compensation payments in any award of damages (including restrictions on compensation for pain and suffering and other categories of damages).
- (t) The regulations will fix maximum costs for legal services provided in a motor accidents matter. Legal costs will not be recoverable for statutory benefits claims unless permitted by the regulations or the Dispute Resolution Service.
- (u) The Authority will be authorised to issue Motor Accident Guidelines dealing with various matters in connection with the scheme.

## **Background**

- 3. The current compulsory third-party insurance system is being reformed due to the delayed nature of the payments of benefits, and the limited percentage of funds collected through the scheme being returned to injured road users.
- 4. In his second reading speech, the Minister outlined that to achieve a fairer system the new compulsory third-party scheme would be a hybrid one – featuring statutory benefits whilst retaining the right to claim modified common law damages in certain circumstances.

## **Issues considered by committee**

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

#### *Compulsory insurance*

- 5. Subclause 1.3(2)(c) and Division 2.1 of the Bill outlines that the object of the act is to continue to make third-party bodily insurance compulsory for all owners of motor vehicles registered in NSW.

**The Committee notes that requiring individuals to purchase insurance could be characterised as infringing on the rights of those individuals. However, given the public policy aims of the compulsory third party insurance schemes in NSW, the Committee makes no further comment on this issue.**

*Privacy*

6. Clause 2.15 requires Roads and Maritime Services (RMS) to notify the licensed insurer under a third-party policy in force in relation to a motor vehicle of any change in any registered particulars relating to the motor vehicle that is notified to RMS.

**The Committee notes that the sharing of information between Roads and Maritime Services and the third-party insurer may impact on an individual's right to privacy. However, given that the insurer was already in receipt of private information from the individual, the provision of updating information is considered to be reasonable in the circumstances and the Committee makes no further comment.**

7. Clause 3.14 requires insurers to be provided with evidence of a person's injuries and fitness to work.

**The Committee notes that requiring the provision of health information to insurers trespasses on an individual's right to privacy. However, given the role of the insurer in delivering statutory benefits under the scheme and the insurer's statutory obligations to satisfy itself as to the veracity of claims for benefits, the Committee does not consider this to be an undue trespass on the right to privacy and makes no further comment.**

*Right to privacy/right to silence/self-incrimination*

8. Clause 10.30 provides powers to investigative officers to obtain information, documents and evidence on reasonable grounds in circumstances where the officer believes that the information, documents or evidence relates to a possible contravention of the Bill. Clause 10.30(4) allows the investigative officer to take and retain possession of documents for as long as necessary for the purposes of the Act.

**The Committee remains concerned over the wide ambit and unlimited timeframes of obtaining and keeping information, documents or evidence given to investigative officers may impact on individual rights and liberties such as the right to privacy. The Committee refers the matter to Parliament for its further consideration**

9. Subclause 10.30(7) of the Bill requires individuals to provide information, documentation and evidence even though it may incriminate them or make them liable to a penalty.

**Whilst the Committee notes that the Bill requires individuals to provide documentation in circumstances where it may incriminate them or make them liable to a penalty, the Committee also notes the inclusion of legislative safeguards, including clause 10.31 which provides that such information, documents and evidence will not be admissible in criminal proceedings if objections are made [Clause 10.31(2); 10.31(4)].**

10. Subclause 6.11(1) has a wide ambit, which allows the Authority to access information from the NSW Police Force including the registration numbers of all motor vehicles involved in the accident, the names of all persons killed or injured in the accident, the names of the hospitals to which the injured were taken and the motor vehicle or vehicles most likely to have been at fault in the accident.

**The Committee is concerned about the impact on privacy arising from the information sharing arrangements between the State Insurance Regulatory Authority (SIRA) and NSW Police. However given the objective of verifying information in order to assess motor accident claims, the Committee does not consider the trespass on privacy to be undue in the circumstances.**

11. Clause 10.31 requires individuals to produce documents, make statements, provide information and evidence or answer questions even if doing so might incriminate that person or make the person liable to a penalty [subclause 10.31(1)]. However, subclause 10.31(2) provides that such evidence would not be admissible in evidence against that person in criminal proceedings if the person objected at the time on the grounds that it might incriminate them or the person was not warned at an appropriate time that the person may object to giving the answer, information or evidence on the ground that it might incriminate the person.

**The Committee notes individual's right to silence and right against self-incrimination. The Committee notes the safeguards within the section and makes no further comment in relation to this issue.**

#### *Restricting judicial discretion*

12. A number of clauses in the Bill mandate the manner in which a court is to respond to a particular factual scenario. These subclauses include 2.18(1) where a court must direct that a judgment be entered against a licensed insurer following 30 days after the entering of a judgment which has not been satisfied in full; 3.38(2) where a court must direct a finding of contributory negligence unless the injured person could not have reasonably be expected to have declined to become a passenger in or on the motor vehicle; 4.17(2)(a)-(e) where a court must direct a finding of contributory negligence unless the injured person could not have reasonably be expected to have declined to become a passenger in or on the motor vehicle; 6.10(3) where the court must dismiss the proceedings unless satisfied that sufficient cause existed to justify the non-compliance; 6.14(7) and 6.15(7) where the court must dismiss the proceedings unless satisfied the claimant has a full and satisfactory explanation for the delay in making the claim or for non-compliance; 6.32(3) where the court must not grant the leave of the court unless the claimant provides a full and satisfactory to the court for the delay and the total damages of all kinds is likely to be 25% of the maximum awarded for non-economic loss under 4.13.

**The Committee notes the removal of judicial discretion may impact on individual rights and liberties as such discretion enables the judiciary to deliver justice based on the individual circumstances of each matter. The Committee refers the restrictions on judicial discretion to Parliament for its further consideration.**

*Increase in statutorily mandated costs*

13. Clause 2.26 outlines that special provisions apply in relation to taxis, hire vehicles and cars being used for other passenger and booking services. This includes individuals transporting people via 'Uber' and other similar arrangements.

**The Committee notes that currently, providers of Uber services can use a generic third-party insurance. Taxis and hire cars are required to pay more expensive third-party insurance. This Bill will require point to point transport providers, including Uber drivers, to have specialised third-party insurance. This will increase the cost of third-party insurance for owners of cars that are being used in schemes such as Uber. However, given this cost relates to the undertaking of a commercial enterprise, the Committee considers it reasonable that legislation regulates point to point transport schemes such as Uber in a similar manner to the regulation of taxis and hire cars and makes no further comment on this issue.**

*Quantum of compensation*

14. Clause 3.6 provides that injured earners who claim through Part 3's statutory benefits scheme are limited to claiming 95 per cent of the different between their pre-accident weekly earnings and their post-accident earning capacity for the first 13 weeks post injury. This percentage falls under clause 3.7 to 80 per cent of the person's pre-accident weekly earnings in the case of total loss of earning capacity or 85 per cent of the person's pre-accident weekly earnings in the case of partial loss of earning capacity in weeks 14-78 following the motor accident.

**The Committee notes that under the statutory benefits scheme, earners injured as a result of a motor accident will receive less income per week in the amount of between five and 20 per cent of their pre-injury earnings. Whilst the Committee notes the public policy arguments in favour of incentivising a return to work, the Committee refers to Parliament the reasonableness of the statutory scheme not providing full compensation for loss of earnings following a motor accident.**

15. Clause 3.9 provides that the maximum weekly statutory benefit is \$3,853. This is regardless of whether an individual earned more than this amount pre-injury.

**The Committee notes that including a maximum weekly statutory benefit has a deleterious effect on those individuals who earned more than that amount prior to their injury. Notwithstanding the public policy aims of seeking to provide an affordable compulsory third-party insurance scheme, and the actuarial advantages to the scheme of providing for a maximum weekly statutory benefit, the Committee refers this matter to Parliament for its consideration.**

16. Clause 3.11 provides that an injured person is not entitled to weekly statutory benefits after 26 weeks if that person only suffered minor injuries. Clause 3.12 provides for the cessation of weekly payments to other injured persons not caught by the definition in 3.11 after the maximum weekly payments period. Similarly, clause 3.28 outlines that statutory benefits for treatment and care will not be provided after 26 weeks if the injured person only suffered minor injuries.



**The Committee notes the public policy advantages of encouraging injured people to return to their previous employment positions. The Committee also notes the actuarial advantages to the scheme of providing a statutory time limit on weekly benefits. However, the Committee refers to Parliament whether limiting the period of weekly benefits would be better tailored to the individual needs of each injured earner, rather than imposing blanket statutory time limits.**

17. Clause 3.13 provides that the payment of weekly statutory benefits terminates on retiring age.

**The Committee again notes the actuarial advantages of terminating weekly payments should an injured person reach retirement age whilst in receipt of weekly statutory benefits under this scheme. However, given that not all workers cease working at retirement age, and may wish to return to their substantive position at work following recovery from their motor vehicle injury, the Committee refers to Parliament the reasonableness of treating all injured people who reach retirement age the same under this scheme, rather than tailoring the delivery of the scheme to the needs of the individual.**

18. Clause 3.30 provides that the Motor Accident Guidelines may fix a maximum rate of reimbursement for treatment and care at hospitals, the conveying of people via ambulance and the payment for any medical or dental treatment of or rehabilitation services provided to injured persons.

**The Committee again notes the actuarial advantages of outlining a maximum rate for the receipt of medical and other treatment. Given the public policy advantages of fixing a maximum rate, the Committee makes no further comment on this issue.**

*Prerequisites for compensation*

19. Clause 3.17 provides that an insurer must require an injured person who is in receipt of weekly payments of statutory benefits to undertake such reasonable and necessary treatment, rehabilitation or vocational training at the Motor Accident Guidelines may require.

**The Committee notes the public policy arguments in favour of ensuring an injured person returns to wellness as soon as possible, and the importance of treatment and rehabilitation in that context. It is not clear to the Committee how attendance at vocational training may assist in recovery, and why it should be considered as a prerequisite for the receipt of the person's entitlement to weekly payments of statutory benefits. The Committee refers the inclusion of vocational training as a prerequisite for the receipt of benefits to Parliament for its further consideration.**

*Common law right to damages*

20. Division 4.1 outlines that no damages may be awarded to an injured person if the person's only injuries resulting from the motor accident were minor injuries (clause 4.4). Division 3.3 provides that if a person's only injuries were minor injuries, that person is

not entitled to weekly payments of statutory benefit for more than 26 weeks after the motor accident occurred (clause 3.11).

**The Committee notes a person with minor injuries under this scheme is not entitled to more than 26 weeks of statutory benefits. The Committee also notes that a person with minor injuries under this scheme is precluded from seeking common law damages. Given that a person may still be suffering quantifiable damages 26 weeks after a motor accident, the Committee refers to Parliament for its further consideration the reasonableness of restricting such injured individuals from seeking common law damages.**

21. Division 4.3 provides that only those persons with a degree of permanent impairment greater than 10 per cent may seek damages for non-economic loss. Of those persons with a degree of permanent impairment greater than 10 per cent, clause 4.13 provides that the maximum amount of damages that may be awarded for non-economic loss is \$521,000.

**The Committee again notes the actuarial advantages of providing for a maximum amount of damages that may be sought for non-economic loss and for restricting such claims for damages to those who have experienced more than a 10 per cent degree of permanent impairment. However, the Committee notes that such a restriction is a trespass on an individual's right to pursue common law damages in the state's courts. Given that the statutory benefits may not have been sufficient to compensation an injured worker, the Committee refers to Parliament the reasonableness of restricting those workers from seeking further compensation through the courts.**

22. Clause 4.21 of the Bill removes the right to claim exemplary or punitive damages when seeking damages. This may impact on individual rights and liberties to claim for damages in instances of intentional harm towards a claimant.

**The Committee notes that the removal of the right to claim exemplary or punitive damages may impact on individual rights and liberties. However, given the objectives of the Bill to simplify the claims process within strict timeframes, the Committee makes no further comment.**

*Reduction of amount of economic loss*

23. Clause 4.10 provides that an award of damages for economic loss of an injured or deceased person as a consequence of a motor accident is to be reduced by any amount of a kind prescribed by the regulations.

**Given that clause 4.9 already provides for a discount rate of 5 per cent – or another amount prescribed in the regulations - to be applied to an award of damages, the Committee is concerned that the regulations may provide for the further reduction of an award of damages for economic loss. The Committee considers that any further reduction of an award of damages for economic loss is more appropriately included in the principal legislation. The Committee also considers that the discount rate is a rate that ought to be defined in the principal legislation rather than in the regulations. The Committee refers both of these matters to Parliament for its consideration.**

*Access to legal representation*

24. Clause 8.3 provides that the regulation may declare that no costs are payable for legal services or other matters of a kind specified in those regulations. It also provides that legal practitioners are not entitled to be paid for any legal services provided in relation to claims for statutory benefits.

**The Committee notes that the effect of preventing lawyers from being paid for certain legal services is that injured road users are prevented from seeking legal advice in relation to those issues. Whilst the Committee is cognisant of the aims of the legislation in relation to keeping costs down, the Committee also notes that compensation schemes can be difficult for some individuals to understand. Removing the ability for lawyers to charge for services relating to certain aspects of motor accident injuries can have deleterious consequences for these individuals. The Committee refers this issue to Parliament for its further consideration.**

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

*Definition of 'reasonable'*

25. Division 3.2 of the Bill provides that if the death of a person results from a motor accident, statutory benefits are payable for reasonable funeral expenses.

**The Committee refers to Parliament whether the term 'reasonable funeral expenses' ought to be more clearly defined.**

*Grounds for issuing a penalty notice*

26. Clause 11.10 provides that an authorised officer may issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence.

**The Committee refers to Parliament whether, when issuing a penalty notice, an authorised officer should be satisfied to a higher standard than 'the appearance' of the commission of penalty notice offence.**

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

*Arbitration clause*

27. Clause 2.22 of the Bill provides for the circumstances in which the State Insurance Regulatory Authority (SIRA) may reject an insurance premium. Subclause 2.22(6) provides that a dispute between SIRA and the insurer in relation to the rejected premium is to be determined by arbitration. The potential for judicial review of arbitral decisions is more limited than the judicial review available to a decision of the courts.

**The Committee notes that arbitral decisions leave little scope for judicial review. However, given the public policy aims of the legislation and noting that arbitration relates to a commercial dispute, the Committee makes no further comment on this issue.**

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

*Matters in the Motor Accident Guidelines*

28. Division 10.2 of the Bill provides that the Authority, being the State Insurance Regulatory Authority (SIRA), may issue Motor Accident Guidelines (the Guidelines). Clause 10.6 outlines that these Guidelines are a disallowable instrument. The Bill provides for a variety of matters to be canvassed in the Guidelines, including making provision for or with respect to the assessment of whether an injury is a minor injury [subclause 1.6(5)], specifying the manner in which premiums are to be determined [subclause 2.19(2)], providing for an alternative to fortnightly payments [clause 3.23], providing instances which may excuse non-compliance with Part 6 of the Bill in specified circumstances [subclause 6.15(4)], providing directions to the insurer in instances of a failure to provide relevant particulars of claims for damages [subclause 6.26(2)], relating requests for internal review, the time within which a request for an internal review is to be made, the individuals who may or may not conduct an internal review or the way in which an internal review is to be conducted (including requiring the giving of reasons for and supporting documentation in relation to an insurer's decision on an internal review [subclause 7.9 (3)], limiting the time within which a merit review application may be made after a reviewable decision is made [clause 7.12] and limiting timeframes within which an application for review of a medical assessment by the review panel may be made [clause 7.27].

**The Committee is keen to comment when matters that are more properly included in the principal legislation feature instead in delegated legislation. The Committee has this concern in relation to the Motor Accident Guidelines. However, given the administrative convenience of enabling SIRA to produce Guidelines that provide for the administration of the scheme, and noting that the Guidelines will be a disallowable instrument that Parliament may scrutinise, the Committee makes no further comment in relation to this issue.**

*Cancellation of third-party policies*

29. Clause 2.8 of the Bill provides for circumstances in which an insurer may request Roads and Maritime Services (RMS) suspend the registration of a motor vehicle. This includes circumstances where a false statement is made by or on behalf of the insured person in connection with the issue of the policy [subclause 2.8(5)]. The Bill does not specify to whether an allegation of a false statement is sufficient to satisfy subclause 2.8(5). As a safeguard, insurers must notify the owner of the motor vehicle that the insurer intends to request RMS to suspend the registration. An insurer must also receive the approval of the Authority or meet requirements 'authorised by the regulations'.

**The Committee notes that suspending the registration of a motor vehicle is a serious action, and refers to Parliament whether there is sufficient clarity in subclause 2.8(5) as to whether false statements may merely be alleged. The Committee also refers to Parliament whether providing for the circumstances in which an insurer may request such a suspension by Roads and Maritime Services ought to be included in the principal legislation rather than the regulations.**

*Creation of penalty offences in the regulations*

30. Subclause 11.12(3) of the Bill provides that a regulation may create an offence punishable by a penalty not exceeding 5 penalty units.

**The Committee considers that penalty unit offences ought to be outlined in the principal legislation rather than created by the Executive and provided for in the regulations. The Committee refers this regulation making power to the Parliament for its consideration.**

*Matters left to regulations rather than principal legislation*

31. Subclause 4.17 (2)(e) authorises regulations to prescribe circumstances where a finding of contributory negligence must be made. Subclause 7.25(2) provides that grounds for a further medical assessment after the initial medical assessment may be included in the regulations. Clause 7.35(1)(a) outlines that claims may be exempted from assessment under Division 7.6 of the Bill if the claim is of a kind specified in the regulations as such an exempt claim.

**The Committee notes that in some instances matters that could be better defined in the principal legislation have instead been referred to the regulations. However, given that any regulation is subject to parliamentary scrutiny through the disallowance processes under section 41 of the Interpretation Act 1987, the Committee makes no further comment.**

*Commencement by proclamation*

32. Clause 1.2 provides that commencement of the Act is to be on a day or days to be appointed by proclamation. In his second reading speech, the Minister outlined that the scheme would commence on 1 December 2017.

**The Committee notes the administrative convenience of commencing complicated schemes such as the compulsory third-party scheme by way of proclamation. However, the Committee also notes that the Minister has outlined to the Parliament that the scheme will commence on 1 December 2017. The Committee refers to Parliament the commencement of this Act by proclamation in these circumstances.**

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

*Henry VIII clause*

33. Clause 7.50 provides that the regulations may amend or replace schedule 2 of the Bill. Schedule 2 outlines the jurisdiction of the Dispute Resolution Service. In circumstances where the Service is completely restructured, such changes would be more appropriately enacted by way of an Act of Parliament.

**The Committee notes the administrative convenience of constructing and restructuring the Dispute Resolution Service by way of regulation. However, in circumstances where the Service was to be substantially restructured, the Committee considers such changes would be more appropriately enacted by way of an Act of Parliament. The Committee refers the power to amend schedule 2 by way of regulation to the Parliament for its consideration.**

## 5. Public Health (Medicinal Cannabis) Bill 2017\*

Date introduced	9 March 2017
House introduced	Legislative Assembly
Member responsible	Mr Luke Foley MP
	* Private Member's Bill

### Purpose and description

1. The objects of this Bill are:
  - (a) to establish a registration scheme for medicinal users of cannabis and their carers, and
  - (b) to enable regulations to be made establishing a scheme of authorities for cultivating cannabis plants, manufacturing cannabis and supplying cannabis for the use of registered medicinal users, and
  - (c) to protect registered medicinal users and carers and those acting under authorities under the regulations from criminal liability.

### Background

2. In 2013, the NSW Legislative Council tabled a report on *The use of cannabis for medical purposes*. This Bill adopts key recommendations of that report. In his second reading speech, the Opposition Leader noted that the Bill seeks to remove criminal sanctions in relation to people who are using, or wish to use, medicinal cannabis products for pain relief.

### Issues considered by committee

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

##### *Privacy*

3. Subclause 5(13) requires that registered medicinal users and registered carers are issued with a certificate of registration that incorporates a recent photograph.

**The Committee notes that some individuals might consider providing a photograph that may be kept in official records to infringe on their right to privacy. However, given the public policy concerns in relation to ensuring the supply and use of medicinal cannabis is restricted to a specific group of individuals, the Committee makes no further comment on this issue.**

##### *Freedom of movement*

4. Clause 10 provides that a registered user may not administer cannabis in a public place.

**The Committee notes the aims of the legislation, in particular the alleviation of pain and symptoms relating to a wide range of terminal or serious medical conditions. The Committee refers to Parliament whether such registered users should be restricted from accessing medicinal cannabis treatment in a public place.**

*Compensation*

5. Clause 13 provides that following the cancellation of the registration of a user or carer, the Health Secretary may require the person to forfeit, destroy or dispose of any cannabis in their possession.

**The Committee refers to Parliament whether a person who legally purchased medicinal cannabis should be subject to forfeiture, destruction or disposal requirements without appropriate compensation following the cancellation of their registration under the scheme.**

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

*Attendance requirement at a non-defined place*

6. Subclause 5(14) empowers the Health Secretary to require a person to attend a specified place to have a photograph taken for the purposes of registering medicinal users and carers.

**The Committee is concerned that the legislation does not provide for the specified place(s) at which an individual might be required to attend to have a photograph taken. Given the risk that the required place may place a disproportionate burden on individuals, the Committee considers that the specified place(s) should be defined in the principal legislation.**

*Power to cancel registration*

7. Subclause 6(3)(d) provides that the regulations may set out the grounds in which a person's registration as a carer or user may be cancelled.

**The Committee notes that subclauses 6(3)(a)-(c) provide a broad power to the Health Secretary in relation to the grounds on which registration may be cancelled, including the committing of more than one offence against the principal Act or the regulations. The Committee notes that the Health Secretary must notify the registered person of the proposed cancellation and allow 14 days in which the registered person may make submissions. Notwithstanding this procedural safeguard, the Committee considers that providing further grounds for cancellation in regulations may be unnecessary and provides the Executive with an insufficiently defined administrative power. As such, the Committee refers this regulation-making power to the Parliament for its consideration.**

*Conflicting requirements*

8. Subclause 7(1) provides that a registered user or carer must provide their certificate to an authorised officer, with a maximum penalty of 5 penalty units in circumstances of non-compliance. Subclause 7(2) provides that a registered user or carer must at the

written request of the Health Secretary return their certificate of registration to the Health Secretary, with a maximum penalty of 2 penalty units for non-compliance.

**The Committee notes that in circumstances where a registered user or carer has returned their certificate of registration to the Health Secretary in compliance with subclause 7(2) they will be unable to comply with subclause 7(1). The Committee refers these inconsistent clauses to Parliament for its consideration.**

*Scheme to be established by regulations*

9. Part 3 of the Bill provides that the regulations may establish a scheme for authorising activities designed to enable cannabis to be obtained for use by registered medicinal users, including the granting of licences and permits; the imposition, variation or revocation of conditions of licences and permits; and the suspension or cancellation of licences or permits.

**Whilst the Committee notes the administrative convenience of empowering the regulations to establish the scheme for the provision of medicinal cannabis, the Committee refers to Parliament whether such a scheme that includes the granting and revocation of licences would be more appropriately included in principal legislation.**

*Power to create offences in the regulations*

10. Subclause 14(2) provides that the regulations may create offences punishable by a penalty not exceeding 20 penalty units.

**The Committee considers that the creation of offences is most appropriately undertaken by the Parliament. The Committee refers to Parliament the power of the regulations to create offences in this Bill.**

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

*Commencement by proclamation*

11. If passed, the Act would commence on a day or days to be appointed by proclamation

**The Committee generally prefers legislation to commence on a fixed date, or on assent, so that the Executive does not have unfettered control of the commencement date. However, the Committee acknowledges that, in this instance, the Bill would introduce various changes to law relating to the supply and use of cannabis. Due to the complex nature of these changes, and the subsequent requirement for a public information campaign, the Committee understands that some flexibility may be desirable with respect to the commencement date.**

*Certainty*

12. The Bill provides for the provision of medicinal cannabis to registered persons with a terminal or serious medical condition. Subclause 5(9) of the Bill provides that registration remains in force for a period set out in the regulations.

**The Committee acknowledges the bureaucratic convenience of providing for the administrative scheme in the regulations. However, the Committee is**



**concerned that the regulations may be able to place a time limit on registration in circumstances where an individual meets the requirements of the principal legislation. The Committee refers to Parliament whether the regulations should be able to limit the period of the registration of a person who otherwise meets the legislated requirements of registration.**

## 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.