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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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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. GREYHOUND RACING BILL 2017

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

Right to privacy/right to silence/self-incrimination

The Committee acknowledges the objectives of the Bill to provide inspectors with the powers to investigate animal welfare offences. However given the long tradition to the right to privacy, right to silence and right against self-incrimination and the minimal safeguards provided against self-incrimination in clause 83, the Committee notes that the wide ambit in relation to search and seizure powers may impact on individual's rights and liberties.

Double punishment

The Committee notes that the effect of cancelling a person's registration and permanently disqualifying them from being registered under the Act following a guilty finding for a live baiting offence may have the effect of serving as an additional punishment. However, the Committee considers it reasonable that the registration scheme established by the Act be empowered to exclude individuals who have been found guilty of live baiting. In these circumstances, disqualifying individuals who have been found guilty of a live baiting offence from being registered under the Act is reasonable.

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

Definition of 'reasonable'

Given the impact on individuals who may have their registrations cancelled, or be disqualified or warned of racetracks as well as subject to the imposition of fines, the Committee considers that the procedural fairness provisions outlined in subclause 58(3) could be more clearly stated rather than relying on the undefined term 'reasonable opportunity'.

Insufficiently defined administrative power

The Committee notes the regulation making power in relation to registrations by the proposed Commission is broad. The Committee notes the conditions to be included in the regulations may have an impact on rights and liberties.

Onerous burden on individuals to comply with undefined requirements

Given that the powers of the Commission in relation to outlining the registration requirements of a greyhound trial track are not clearly expressed in the principal legislation, the Committee is concerned that it is not well placed to judge whether the penalty units outlined in subclause 46(2) are onerous. The Committee believes greyhound trial track registration compliance should be clearly stated in the principal legislation.

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

Commencement by proclamation

The Committee is concerned to provide the Executive with unfettered control over the commencement of an Act. The Committee prefers legislation to comment on assent or a fixed date. However, given the administrative work to be undertaken in relation to establishing the scheme set out in the Bill, the Committee makes no further comment.

2. LAND AND PROPERTY INFORMATION NSW (AUTHORISED TRANSACTION) REPEAL BILL 2017*

The Committee makes no comment on the Bill in the respect of issues set out in section 8A of the Legislation Review Act 1987.

3. LOCAL GOVERNMENT AMENDMENT (DISQUALIFICATION FROM CIVIC OFFICE) BILL 2017*

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

Right to stand for election

The Committee refers to Parliament for its consideration matters relating to disqualifying persons from holding a civic office based on their employment as real estate agents or property developers.

4. SECURITY INDUSTRY AMENDMENT BILL 2017

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

Right to be heard

The Committee generally considers it reasonable that the subject of an administrative decision to not grant a licence for an otherwise legal activity be provided with an opportunity to be heard in relation to that decision. The new section 25 would abrogate such a right. However, given that the Commissioner may have compelling reasons to immediately suspend a licence, and given the public policy aims of this legislation, the Committee makes no further comment on this issue.

Provision of a caution

Section 39L provides a broad power to enforcement officers who may make 'any requirement' of a person in relation to the exercise of the functions of that enforcement officer. Given that this is stated so broadly, the Committee considers it reasonable that the officer be required to warn a person that a failure to comply is an offence. The Committee refers the removal of this warning to Parliament for its further consideration.

Attendance requirements when not under arrest

The powers in subsection 39Q(3) to compel a person to attend a specified place and time were previously ameliorated by the requirement that such attendance be reasonably required. The removal of that requirement may have rendered this subsection an undue trespass on an individual's right to the quiet enjoyment of life. The Committee refers the removal of the qualification to the Parliament for its consideration.

The effect of removing subsection 39(4) is twofold: the affected person may no longer nominate the time and place to meet when compelled to present themselves in person; and in circumstances where the enforcement officer nominates the time and place there is no longer a requirement that this be 'reasonable in the circumstances'. Given the Committee's comments above that the requirement to attend to answer questions may be undue trespass on an individual's rights and liberties, the Committee also refers to Parliament this issue being

that affected individuals may be required to attend at a time and place that is no longer required to be 'reasonable in the circumstances'.

Right against self-incrimination

The Committee notes that the Bill sets aside the common law right against self-incrimination. The Committee notes the small safeguard that such material is inadmissible in circumstances where a person asserts their right against self-incrimination contemporaneously. Notwithstanding this safeguard, the Committee refers this matter to Parliament for its further consideration.

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

Use of criminal intelligence reports or other criminal information

The Committee notes that the effect of enabling the Commissioner to refuse a licence based on the contents of a criminal intelligence report or other criminal information which cannot be made available to the applicant has the effect of making an individual's right to work dependent on a decision which is non-reviewable. This brings into conflict the right of an individual to be provided with reasons for a decision, so that they can correct the record where appropriate, with the importance of ensuring criminal intelligence reports and other criminal information remains confidential. The Committee refers to Parliament whether the appropriate balance has been struck in this legislation.

The proposed amendments to clause 25 of the Security Industry Regulation 2016 bring into conflict two important principles. The first principle is the right to be given reasons when an application for a licence to carry out what is otherwise legal employment is rejected. The second principle relates to the importance of ensuring criminal intelligence reports and other criminal information remains confidential – including the existence of such reports and information. The Committee notes that the amended regulation would see these two principles in conflict. The Committee refers to Parliament whether the appropriate balance has been struck by providing the Commissioner with an opportunity not to provide reasons when declining a licence because of information outlined in criminal intelligence reports or other criminal information.

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

Replacing a legislative prohibition with a discretionary power

The Committee refers to Parliament for its consideration whether the replacement of a requirement previously passed by Parliament to prohibit the use of dogs in relation to specified licences with a requirement to seek the approval of the Commissioner for the use of dogs constitutes an inappropriate delegation of legislative powers.

5. SUMMARY OFFENCES AMENDMENT (SAFE ACCESS TO REPRODUCTIVE HEALTH CLINICS) BILL 2017*

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

Freedom of movement

Whilst the Committee notes that the Clause 11L may restrict an individual's freedom of movement, the Committee also notes that given the public policy aims of the legislation to protect the safety, well-being and dignity of those accessing the services provided at

reproductive health clinics, the restriction to an individual's freedom of movement is reasonable and the Committee makes no further comment.

Freedom of expression/ right to protest

Whilst the Committee notes Clause 11M may restrict an individual's freedom to express and right to protest, the Committee also notes that given the public policy aims of the legislation to protect the safety, well-being and dignity of those accessing the services provided at reproductive health clinics and safeguards in Clause 11P, the restriction to an individual's rights and liberties is reasonable and the Committee makes no further comment.

Seizure powers

The Committee is concerned when police are granted seizure powers in circumstances where a warrant is not required. The Committee refers the matter to Parliament for its consideration whether seizure powers are reasonable in these circumstances.

6. TATTOO PARLOURS AMENDMENT BILL 2017

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

Freedom of association

The Committee notes that providing the Commissioner with the scope to make an adverse security determination in relation to an individual based on a finding that 'a close associate of the applicant is not a fit and proper person', as proposed in schedule 1 clause 1 of the Bill, impacts on an individual's freedom to associate with business partners, employees and contractors of their choice. The Committee refers to Parliament whether it is appropriate to enable an adverse security determination to be made with reference to an applicant or licensee in such circumstances.

Double punishment

The Committee notes that excluding the operation of section 12 of the *Criminal Records Act 1991* has the effect of including an individual's spent criminal conviction for consideration in circumstances where Parliament has clearly outlined that it should no longer be considered. The Committee draws this to Parliament's attention for its careful consideration.

Presumption of innocence

Given the impact on the presumption of innocence, the Committee refers to Parliament the appropriateness of a decision maker including in their consideration matters relating to criminal charges that have not been heard, proven and may have been dismissed, withdrawn or discharged.

Unreasonable timeframe, ill-defined term

Whilst the Committee notes that the cancellation of a licence in circumstances where it has not been collected within 60 days is now framed more reasonably in that the Secretary is no longer compelled to cancel such a licence, the Committee refers to Parliament whether 60 days is sufficient time, given that a licensee may be travelling interstate or overseas. The Committee also notes that the Act does not specify the location for collection, which may add an additional administrative burden for some applicants. However, in these circumstances the principal Act requires that the Secretary not cancel the licence without first considering reasons why the licence should not be cancelled as provided by the licensee. There is also the

right to seek administrative review from the Civil and Administrative Tribunal. Given these safeguards, the Committee makes no further comment on this issue.

Right to silence, right against self-incrimination

The Committee brings to Parliament's attention an additional power of authorised officers who have lawfully entered a premises, being the power to make such examinations and inquiries as the authorised officer considers necessary. The Committee notes that this power is broadly defined and may impact on an individual's right to silence. The Committee particularly notes that self-incrimination is not a ground for refusing to comply with such a request, unless a contemporaneous objection is made.

Retrospectivity

The Committee notes that the new scheme outlined in the Bill will be applied retrospectively to existing applications under the principal Act. However, the Committee does not consider it unreasonable for an administrative scheme to change the manner in which it processes licences from time to time. Whilst the Committee will always comment when a scheme operates retrospectively, the Committee makes no further comment in relation to this issue.

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

Use of criminal intelligence reports or other criminal information

The proposed amendments to section 20 of the principal Act bring into conflict two important principles. The first principle is the right to be given reasons when an application for a licence to carry out what is otherwise legal employment is rejected. The second principle relates to the importance of ensuring criminal intelligence reports and other criminal information remains confidential – including the existence of such reports and information. The Committee notes that amended section 20 will see these two principles in conflict. The Committee refers to Parliament whether the appropriate balance has been struck by providing the Commissioner with an opportunity not to provide reasons when declining a licence because of information outlined in criminal intelligence reports or other criminal information.

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

Prescribing penalties in the regulations

The Committee considers that for penalty notice offences, both the offence and the amount payable should be defined in the principal legislation rather than in the regulations. The Committee refers this matter to Parliament for its consideration.

Commencement by proclamation

The Committee generally prefers legislation to commence on asset or a fixed date. However, given the number of administrative changes that will need to be implemented following the passage of the Bill, the Committee does not consider commencement by proclamation to be unreasonable in these circumstances.

7. TRANSPORT ADMINISTRATION AMENDMENT (TRANSPORT ENTITIES) BILL 2017

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

Insufficiently clear power

The Committee notes that a possible effect of Schedule 1, clause 67 is to enable the regulations to authorise a de facto transfer of any legislative matter currently pertaining to the State Rail Authority Residual Holding Corporation to another, unnamed person or body. The Committee would prefer that such a power be retained by the legislature, rather than vested in the Executive via the regulations.

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

Exceptions to the Act may be included in the Regulations

The Committee notes that the aim of Schedule 4 to the *Transport Administration Act 1988* is to provide certainty to contracting parties in circumstances where entities such as RailCorp, Sydney Trains and NSW Trains are re-constituted. This certainty is achieved by outlining that whatever rights and liabilities exist immediately before a transfer of licence or other authorisation continue on the same terms. However, the Bill provides that the regulations may exempt an authorisation from the operation of this clause.

Commencement by proclamation

The Committee generally prefers legislation to commence on assent or a fixed date. However, in this instance the Committee notes that the Bill is implementing a number of reforms which alter the administrative and legal arrangements for the operation of the Sydney-wide and State-wide railways. The Committee considers that flexibility as to the commencement of this legislation is desirable. The Committee makes no further comment.

Part One – Bills
1. Greyhound Racing Bill 2017

Date introduced	28 March 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Toole
Portfolio	Minister for Lands and Forestry, and Minister for Racing

Purpose and description

1. The objects of this Bill are as follows:

(a) to remove the prohibition on greyhound racing in NSW that was due to commence on 1 July 2017,

(b) to constitute the Greyhound Welfare and Integrity Commission (the Commission) as an independent regulator to oversee the gaming racing industry, promote and protect the welfare of greyhounds and ensure compliance with the requirements under the proposed Act,

(c) to reconstitute Greyhound Racing NSW (GRNSW) (which currently has both regulatory and commercial functions) as a commercial entity exercising functions (such as conducting greyhound race meetings and registering greyhound racing clubs) subject to and in accordance with an operating licence granted by the Minister,

(d) to provide for the making of an enforceable code of practice for the welfare of greyhounds that contains standards relating to the care and treatment of greyhounds,

(e) to require any greyhound owned, bred or kept by a greyhound racing industry participant to be registered under the proposed Act,

(f) to require greyhound racing industry participants (including persons who own, breed to keep greyhounds, handle greyhounds at greyhound races or trials or provide health services to greyhounds) to be registered under the proposed Act,

(g) to require greyhound trial tracks where greyhounds are trialled or trained for racing to be registered under the proposed Act

(h) to impose a lifetime ban on any involvement in the greyhound racing industry on any person who is found guilty of a live baiting offence (ie using an animal as a lure or kill in connection with greyhound trialling, training or racing),

(i) to create an offence of keeping any animal that is reasonably capable of being used as a lure in connection with the trialling, training or racing of greyhounds, or the carcass or skin of such an animal, on premises where greyhounds are kept, trialled, trained or raced,

(j) to make it clear that live baiting is a serious act of cruelty for the purposes of an offence under section 530 of the Crimes Act 1900,

(k) to confer on inspectors under the proposed Act investigative and enforcement powers, including powers to make video recordings or take photographs while conducting a search.

BACKGROUND

2. The Bill has been introduced to repeal the *Greyhound Racing Prohibition Act 2016* that was due to commence on 1 July 2017 and to provide the foundations and governance structures for a "sustainable greyhound racing industry with the highest animal welfare and integrity standards in the country". The Minister in his second reading speech advised that since the assent of the *Greyhounds Racing Prohibition Act 2016*, the Government has been in consultation with stakeholders to assess the potential impact and issues the Act would have on the greyhound racing industry. This Bill seeks to redress these issues.

3. The Minister noted the stakeholders associated with the greyhound racing industry wanted an opportunity to reform from previous industry practices.

> "This Government has listened to the community which wants the industry to have the opportunity to prove it can operate appropriately. It is clear that the community wants the industry to provide jobs and continue to make a valuable economic and social contribution to this State. Nowhere is that sentiment felt more strongly than in parts of regional New South Wales where greyhound racing is the source of direct and indirect employment for so many and where clubs exercise an important social function in bringing people together and providing services to the community. We have listened to community and engaged with the industry to find a sustainable way forward for greyhound racing in New South Wales."

4. In his Second Reading Speech, the Minister stated the proposed Bill would adopt the 121 recommendations from the Greyhound Industry Reform Panel's report and would apply strict animal welfare standards with new offences and penalties. The Bill also establishes the Greyhound Welfare and Integrity Commission which will initiate, develop and implement policies in relation to greyhounds. The Commission will also be responsible for researching and undertaking investigations of best industry practices and monitor and enforce compliance within a regulatory framework.

ISSUES CONSIDERED BY COMMITTEE

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

Right to privacy/right to silence/self-incrimination

5. Clause 75 provides the inspector with the power to enter premises to inspect and seize things in circumstances where an inspector is of the opinion this is necessary under Part

7 of the Act. Subclause 75(3) includes the power to seize anything in connection with an offence, if there are reasonable grounds to believe that an offence has been committed.

The Committee acknowledges the objectives of the Bill to provide inspectors with the powers to investigate animal welfare offences. However given the long tradition to the right to privacy, right to silence and right against self-incrimination and the minimal safeguards provided against self-incrimination in clause 83, the Committee notes that the wide ambit in relation to search and seizure powers may impact on individual's rights and liberties.

Double punishment

6. Division 3 of Part 4 of the Bill provides that if a court finds a person guilty of a live baiting offence, the person's registration under this Act is automatically cancelled and the person is permanently disqualified.

The Committee notes that the effect of cancelling a person's registration and permanently disqualifying them from being registered under the Act following a guilty finding for a live baiting offence may have the effect of serving as an additional punishment. However, the Committee considers it reasonable that the registration scheme established by the Act be empowered to exclude individuals who have been found guilty of live baiting. In these circumstances, disqualifying individuals who have been found guilty of a live baiting offence from being registered under the Act is reasonable.

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

Definition of 'reasonable'

7. Part 6 of the Bill outlines the Disciplinary Provisions relating to the scheme established by the Bill. Disciplinary action can include the suspension or cancellation of registration, imposing a fine not exceeding 200 penalty units, disqualification and warning off racetracks.

8. Subclause 58(3) provides that no disciplinary action against or in respect of a person under the Part 6 disciplinary provisions may occur without written notice being provided, and the provision of a 'reasonable opportunity' to be heard and to make submissions about the matter.

Given the impact on individuals who may have their registrations cancelled, or be disqualified or warned of racetracks as well as subject to the imposition of fines, the Committee considers that the procedural fairness provisions outlined in subclause 58(3) could be more clearly stated rather than relying on the undefined term 'reasonable opportunity'.

Insufficiently defined administrative power

9. There are a number of subclauses in the Bill that make reference to the provision being in accordance with the regulations. These include 48(1) which provides for the registration of greyhounds by the Commission, 49(1) which provides for the registration by the Commission of a person as a greyhound racing industry participant, and

subclause 50(1) which relates to the registration by the Commission of greyhound tracks.

The Committee notes the regulation making power in relation to registrations by the proposed Commission is broad. The Committee notes the conditions to be included in the regulations may have an impact on rights and liberties.

Onerous burden on individuals to comply with undefined requirements

10. Subclause 46(2) provides that the proprietor of a greyhound track must comply with 'any conditions' to which the registration of the greyhound trial track is subject. The maximum penalty is 1,000 penalty units for a corporation and 200 penalty units and/or imprisonment for two years in the case of an individual.

Given that the powers of the Commission in relation to outlining the registration requirements of a greyhound trial track are not clearly expressed in the principal legislation, the Committee is concerned that it is not well placed to judge whether the penalty units outlined in subclause 46(2) are onerous. The Committee believes greyhound trial track registration compliance should be clearly stated in the principal legislation.

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

Commencement by proclamation

11. Clause 2(1) provides that the commencement of the Act is on a day or days to be appointed by proclamation.

The Committee is concerned to provide the Executive with unfettered control over the commencement of an Act. The Committee prefers legislation to comment on assent or a fixed date. However, given the administrative work to be undertaken in relation to establishing the scheme set out in the Bill, the Committee makes no further comment.

2. Land and Property Information NSW (Authorised Transaction) Repeal Bill 2017*

Date introduced	30 March 2017
House introduced	Legislative Assembly
Member responsible	Mr Clayton Barr
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to repeal the *Land and Property Information NSW (Authorised Transaction) Act 2016.*

BACKGROUND

2. In his second reading speech, Mr Barr outlined that he was seeking to repeal the legislation with a view to returning the entirety of the Land and Property Information service to public ownership.

3. Mr Barr observed that leasing part of the Land and Property Information service would undermine the integrity of the system and increase the costs associated with purchasing a house.

ISSUES CONSIDERED BY COMMITTEE

The Committee makes no comment on the Bill in the respect of issues set out in section 8A of the Legislation Review Act 1987.

3. Local Government Amendment (Disqualification from Civic Office) Bill 2017*

Date introduced	30 March 2017
House introduced	Legislative Council
Member responsible	*The Hon. Peter Primrose MLC
	Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to disqualify property developers and real estate agents from holding a civic office (being the office of councillor or mayor of a council or, in the case of a county council, the office of chairperson or member).

BACKGROUND

2. The Hon. Peter Primrose MLC, in his Second Reading Speech, advised that the object of the Bill was to disqualify property developers and real estate agents from holding a civic office. Mr Primrose noted that the potential conflicts of interests of a real estate agent or property developer holding a civic office were far too great.

3. Mr Primrose advised that the new provisions would not apply if the elected persons ceased to work as a real estate agent or property developer before the first meeting of the council concern or in other circumstances outlined in proposed section 275(8) of the principal Act.

ISSUES CONSIDERED BY COMMITTEE

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

Right to stand for election

4. The Bill proposes to disqualify persons from holding a civic office if that person is a real estate agent or a property developer. The Committee recognises the amendments excludes persons who have ceased to be a real estate agent or property developer before the first meeting of the council concerned after the election. The Bill has defined property developer as the same meaning as section 96GB of the *Election Funding, Expenditure and Disclosures Act 1981* and real estate agent has the same meaning as the *Property, Stock and Business Agents Act 2002*.

5. The Committee notes their concerns and potential legal ramifications of excluding a person from civic office based on their occupation.

6. The Committee appreciates the significant sensitivities that exist when seeking to amend legislation of this nature.

The Committee refers to Parliament for its consideration matters relating to disqualifying persons from holding a civic office based on their employment as real estate agents or property developers.

4. Security Industry Amendment Bill 2017

Date introduced	30 March 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Troy Grant MP
Portfolio	Minister for Police

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Security Industry Act 1997* (the principal Act) as follows:

   (a) to provide that the Commissioner of Police may, in determining whether the grant or renewal of a licence under the principal Act would be contrary to the public interest, have regard to any criminal intelligence report or other criminal information held in relation to the applicant or licensee,

   (b) to make it clear that the Commissioner may approve persons or organisations to provide training, assessment and instruction in connection with licence conditions under the principal Act that require the undertaking of training, assessment and instruction by a licensee while the licence is in force,

   (c) to provide that the Commissioner must refuse an application to renew a licence if the Commissioner is satisfied that, if the applicant were applying for a new licence, the application would be required to be refused,

   (d) to provide that the Commissioner may suspend a licence for a period of 60 days without the licensee being given an opportunity to be heard,

   (e) to ensure that criminal intelligence reports or other criminal information before NCAT can be withdrawn and protected against disclosure,

   (f) to provide that the privilege against self-incrimination does not excuse a person who is required to furnish records or information to police and other enforcement officers, or to answer questions under the principal Act from furnishing that information or those records or from answering those questions,

   (g) to make other amendments of a minor, administrative or consequential nature. The Bill also amends the Security Industry Regulation 2016 in the manner outlined in Schedule 2.

BACKGROUND

2. This amending legislation was introduced at the request of the regulator of the private security industry in NSW, the NSW Police. It includes clauses that seek to abrogate the common law privilege against self-incrimination; provide the power to suspend a licence without providing an opportunity for the licensee to be heard; and limit the capacity to access police criminal intelligence holdings.

3. These changes are proposed in the context of an industry that is described in the second reading speech as a 'high-risk activity. Security licensees are given access to firearms and to large quantities of cash. They often have access to commercially sensitive sites and information, as well as being routinely asked to maintain order in public areas and to diffuse potentially dangerous situations.'

ISSUES CONSIDERED BY COMMITTEE

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

Right to be heard

4. Schedule 1(13) amends the existing provision in relation to the suspension of licences. The existing provision requires the Commissioner to provide the licensee with an opportunity to give reasons why the licence should not be revoked. The proposed amendment maintains the requirement that the Commissioner request that the licensee provide the Commissioner with reasons why the licence should not be revoked, but includes a new subclause which outlines that the Commissioner is not required to give a licensee an opportunity to be heard before suspending the licence.

> **The Committee generally considers it reasonable that the subject of an administrative decision to not grant a licence for an otherwise legal activity be provided with an opportunity to be heard in relation to that decision. The new section 25 would abrogate such a right. However, given that the Commissioner may have compelling reasons to immediately suspend a licence, and given the public policy aims of this legislation, the Committee makes no further comment on this issue.**

Provision of a caution

5. Division 1 of Part 3B of the principal Act currently provides for powers of entry and search of premises. Section 39L outlines that a person must not obstruct, hinder or interfere with an enforcement officer in relation to this Part and must not fail, without reasonable excuse to comply with 'any requirement' made of the person by an enforcement officer in the exercise of a function under this Part. This attracts a penalty of a maximum 100 penalty units, with the qualification that a person is not guilty of an offence of failing to comply with a requirement made of the person by an enforcement officer unless the person was warned on that occasion that a failure to comply is an offence. This Bill proposes to remove that qualification.

> **Section 39L provides a broad power to enforcement officers who may make 'any requirement' of a person in relation to the exercise of the functions of that enforcement officer. Given that this is stated so broadly, the Committee considers it reasonable that the officer be required to warn a person that a failure to comply is an offence. The Committee refers the removal of this warning to Parliament for its further consideration.**

Attendance requirements when not under arrest

6. Also in Division 1 of Part 3B of the principal Act, subsection 39Q(3) provides that an enforcement officer may, by notice in writing, require a person to attend at a specified place and time to answer questions under this section. This subsection includes the qualification 'if attendance at that place is reasonably required in order that the

questions can be properly put and answered'. This Bill proposes to remove that qualification.

The powers in subsection 39Q(3) to compel a person to attend a specified place and time were previously ameliorated by the requirement that such attendance be reasonably required. The removal of that requirement may have rendered this subsection an undue trespass on an individual's right to the quiet enjoyment of life. The Committee refers the removal of the qualification to the Parliament for its consideration.

7. Subsection 39(4) currently requires that the place or time is to be nominated by the person unless that place and time is not reasonable in the circumstances or the person fails to nominate a time and place, the enforcement officer is to nominate a time and place that is reasonable in the circumstances. This Bill proposes to remove subsection 39(4).

The effect of removing subsection 39(4) is twofold: the affected person may no longer nominate the time and place to meet when compelled to present themselves in person; and in circumstances where the enforcement officer nominates the time and place there is no longer a requirement that this be 'reasonable in the circumstances'. Given the Committee's comments above that the requirement to attend to answer questions may be undue trespass on an individual's rights and liberties, the Committee also refers to Parliament this issue being that affected individuals may be required to attend at a time and place that is no longer required to be 'reasonable in the circumstances'.

Right against self-incrimination

8. The Bill inserts a new Division in Part 3B. Proposed section 39R provides that self-incrimination is not an excuse when required to furnish records or information. Such information may only be inadmissible as evidence against that person if that person contemporaneously objects on the grounds of self-incrimination.

The Committee notes that the Bill sets aside the common law right against self-incrimination. The Committee notes the small safeguard that such material is inadmissible in circumstances where a person asserts their right against self-incrimination contemporaneously. Notwithstanding this safeguard, the Committee refers this matter to Parliament for its further consideration.

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

Use of criminal intelligence reports or other criminal information

9. Schedule 1(18) provides that when seeking administrative review by the Civil and Administrative Tribunal, the applicant does not have the right to review any material that is contained in a criminal intelligence report or comprising other criminal information.

The Committee notes that the effect of enabling the Commissioner to refuse a licence based on the contents of a criminal intelligence report or other criminal information which cannot be made available to the applicant has the effect of making an individual's right to work dependent on a decision which is non-

reviewable. This brings into conflict the right of an individual to be provided with reasons for a decision, so that they can correct the record where appropriate, with the importance of ensuring criminal intelligence reports and other criminal information remains confidential. The Committee refers to Parliament whether the appropriate balance has been struck in this legislation.

10. Schedule 2(2) of the Bill amends the Security Industry Regulation 2016 to provide that a Commissioner may have regard to any criminal intelligence report or other criminal information when determining an application or renewal for a licence. It also states that the Commissioner is not required to give reasons for revoking a licence if giving reasons would disclose the existence or content of any criminal intelligence report or other criminal information.

The proposed amendments to clause 25 of the Security Industry Regulation 2016 bring into conflict two important principles. The first principle is the right to be given reasons when an application for a licence to carry out what is otherwise legal employment is rejected. The second principle relates to the importance of ensuring criminal intelligence reports and other criminal information remains confidential – including the existence of such reports and information. The Committee notes that the amended regulation would see these two principles in conflict. The Committee refers to Parliament whether the appropriate balance has been struck by providing the Commissioner with an opportunity not to provide reasons when declining a licence because of information outlined in criminal intelligence reports or other criminal information.

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

Replacing a legislative prohibition with a discretionary power

11. The principal Act currently places a prohibition on licensees with class 1A, class 1B, class 1C, class 1E and class 1F licences from carrying out the security activity authorised by the licence with a dog. Schedule 1(10-(12) removes this prohibition, and instead inserts a clause outlining that a dog is not to be used 'except with the approval of the Commissioner'.

The Committee refers to Parliament for its consideration whether the replacement of a requirement previously passed by Parliament to prohibit the use of dogs in relation to specified licences with a requirement to seek the approval of the Commissioner for the use of dogs constitutes an inappropriate delegation of legislative powers.

5. Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017*

Date introduced	30 March 2017
House introduced	Legislative Council
Member responsible	The Hon. Penny Sharpe MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object if this Bill is to amend the *Summary Offences Act 1988*:

   (a) to provide for safe access zones around reproductive zones around reproductive health clinics at which abortions are provided so as to protect the safety, well-being of and respect the privacy and dignity of those accessing the services provided at reproductive health clinics and those who need to access those premises in the course of their responsibilities and duties, and

   (b) to prohibit the publication and distribution of certain recording of those persons in safe access zones.

BACKGROUND

2. This Bill has been introduced in response to a number of similar cases, including a case where a couple was physically harassed by protestors for attending a reproductive health clinic. In her second reading speech, the Hon. Penny Sharpe MLC voiced her concerns that women and reproductive health clinic employees in New South Wales are subject to harassment and intimidation as they attempt to enter reproductive health clinics and the object of the bill is to protect the safety, well-being, privacy and dignity of women accessing reproductive health services across New South Wales.

> "It is unacceptable that women trying to enter reproductive health clinics have to run the gauntlet of people who try to stop them with physical harassment and verbal abuse. It is unacceptable that women are jostled and filmed. It is unacceptable that women are forced to look at distorted graphic images and told that they are murderers and that they are going to hell. It is unacceptable that the dedicated staff are often followed and harassed on the way into and out of work."

3. The Bill seeks to prohibit certain behaviours and create offences that are committed within safe access zones. A safe access zone is defined as an area within a radius of 150 metres of a reproductive health clinic at which abortions are provides or a pedestrian access point to a building that houses a reproductive health clinic at which abortions are provided. Ms Sharpe notes that the radius of 150 meters for a safe access zone is

consistent with four other Australian jurisdictions – the Australian Capital Territory, Northern Territory, Tasmania and Victoria.

4. In her second reading speech, Ms Sharpe makes it clear this Bill is not a debate about whether women are able to access abortion and other reproductive health services. The Bill proposes to protect the right of a person to attend a reproductive health clinic without fear of intimidation, harassment or have their privacy invaded or their dignity attacked or diminished.

5. Ms Sharpe asserts that the Bill does not restrict an individual's right to assembly or to protest:

> "The bill makes it clear that conduct occurring in the forecourt of, or on the footpath or road outside Parliament House here in Macquarie Street, the carrying out of any survey or opinion poll by or with the authority of a candidate, or the distribution of any handbill or leaflet by or with the authority of a candidate during the course of a Commonwealth, State or local government election, referendum or plebiscite are not subject to these offences. The laws will not interfere with the right to public assembly or protest relating to abortion when it comes to the Parliament or elections."

ISSUES CONSIDERED BY COMMITTEE

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

Freedom of movement

6. Clause 11L provides that a person who is in a safe access zone must not, without reasonable excuse, obstruct or block a footpath or road leading to any reproductive health clinic at which abortions are provided. The maximum penalty for the offence is 15 penalty units or imprisonment for 12 months.

> **Whilst the Committee notes that the Clause 11L may restrict an individual's freedom of movement, the Committee also notes that given the public policy aims of the legislation to protect the safety, well-being and dignity of those accessing the services provided at reproductive health clinics, the restriction to an individual's freedom of movement is reasonable and the Committee makes no further comment.**

Freedom of expression/ right to protest

7. Clause 11M provides that a person who is in a safe access zone must not make a communication that relates to abortion, by any means in a manner that is able to be seen or heard by a person accessing, leaving, attempting to access or leave, or inside, a reproductive health clinic at which abortions are provided and that is reasonably likely to cause distress or anxiety to any such person. [Clause 11M (1)(a); Clause 11M (1)(b)]. The maximum penalty for the offence is 150 penalty units or imprisonment for 12 months.

> **Whilst the Committee notes Clause 11M may restrict an individual's freedom to express and right to protest, the Committee also notes that given the public policy aims of the legislation to protect the safety, well-being and dignity of those accessing the services provided at reproductive health clinics and**

safeguards in Clause 11P, the restriction to an individual's rights and liberties is reasonable and the Committee makes no further comment.

Seizure powers

8. Clause 11O provides that a police office may seize all or part of a thing that the officer suspects on reasonable grounds may provide evidence of the commission of an offence under this Division.

The Committee is concerned when police are granted seizure powers in circumstances where a warrant is not required. The Committee refers the matter to Parliament for its consideration whether seizure powers are reasonable in these circumstances.

6. Tattoo Parlours Amendment Bill 2017

Date introduced	30 April 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Troy Grant MP
Portfolio	Minister for Police

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Tattoo Parlours Act 2012* (the principal Act) as follows:

   (a) to enable licences under the principal Act to be renewed rather than requiring an application to be made for a new licence when the licence expires,

   (b) to provide that the privilege against self-incrimination does not excuse a person who is required to furnish records or information to police and other authorised officers, or to answer questions, under the principal Act from furnishing that information or those records or from answering those questions,

   (c) to make a number of other amendments of a minor, administrative or consequential nature.

BACKGROUND

2. In the second reading speech, it was highlighted that the purpose of the Bill was to improve the efficiency and effectiveness of the principal Act by reducing the involvement of organised crime in the tattoo parlour industry.

ISSUES CONSIDERED BY COMMITTEE

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

Freedom of association

3. Schedule 1(1) provides an additional ground on which an adverse security determination may be made, being 'that a close associate of the applicant is not a fit and proper person'. Identification of close associates is required in relation to:

   - the renewal of a licence under the principal Act [Schedule 1(3)],
   - investigations, inquiries and referrals pertaining to licence applications and renewals [schedule 1(7)(9)],
   - security determinations about applicants and licensees [schedule 1(19)(20)],
   - changes to the particulars of a licence [schedule 1(30)].

   The Committee notes that providing the Commissioner with the scope to make an adverse security determination in relation to an individual based on a

finding that 'a close associate of the applicant is not a fit and proper person', as proposed in schedule 1 clause 1 of the Bill, impacts on an individual's freedom to associate with business partners, employees and contractors of their choice. The Committee refers to Parliament whether it is appropriate to enable an adverse security determination to be made with reference to an applicant or licensee in such circumstances.

Double punishment

4. Schedule 1(3), excludes the operation of section 12 of the *Criminal Records Act 1991*. Section 12 outlines that if a conviction of a person is spent, the person is not required to disclose information concerning the spent conviction and not make mention if it is in relation to enquiries about their criminal history. Excluding the operation of section 12 in this manner has the effect of including a criminal history for consideration in circumstances where the Parliament has explicitly stated that it should no longer be a consideration. Schedule 1(21) also specifically excludes the operation of section 12 in relation to the making of a determination about applicants and licences.

The Committee notes that excluding the operation of section 12 of the *Criminal Records Act 1991* has the effect of including an individual's spent criminal conviction for consideration in circumstances where Parliament has clearly outlined that it should no longer be considered. The Committee draws this to Parliament's attention for its careful consideration.

Presumption of innocence

5. Schedule 1(21) provides that when making a determination under Part 3 Division 3 of the principal Act, the Commissioner may have reference to information relating to criminal charges, whether or not heard, proven, dismissed, withdrawn or discharged.

Given the impact on the presumption of innocence, the Committee refers to Parliament the appropriateness of a decision maker including in their consideration matters relating to criminal charges that have not been heard, proven and may have been dismissed, withdrawn or discharged.

Unreasonable timeframe, ill-defined term

6. Schedule 1(32) inserts into the principal Act a provision which outlines that if, within 60 days of being notified of the grant or renewal of the licence, the licensee fails to collect the licence from the place nominated by the Secretary, the Secretary *may* cancel the licence. Schedule 1(31) repeals the current provision which states that the Secretary *must* cancel the licence in such circumstances.

Whilst the Committee notes that the cancellation of a licence in circumstances where it has not been collected within 60 days is now framed more reasonably in that the Secretary is no longer compelled to cancel such a licence, the Committee refers to Parliament whether 60 days is sufficient time, given that a licensee may be travelling interstate or overseas. The Committee also notes that the Act does not specify the location for collection, which may add an additional administrative burden for some applicants. However, in these circumstances the principal Act requires that the Secretary not cancel the licence without first considering reasons why the licence should not be cancelled as provided by the licensee. There is also the right to seek

administrative review from the Civil and Administrative Tribunal. Given these safeguards, the Committee makes no further comment on this issue.

Right to silence, right against self-incrimination

7. Schedule 1(42) includes an additional power that may be exercised by an authorised officer at any premises lawfully entered, being the power to 'make such examinations and inquiries as the authorised officer considers necessary'.

8. In addition to schedule 1(42), a new section 33A is inserted by schedule 1(43) which provides safeguards in relation to the right to silence. However, proposed subsection 33A(2) provides that a person is not excused from a requirement to furnish records or information or to answer a question on the ground that the record, information or answer might incriminate the person or make the person liable to a penalty unless a contemporaneous objection is made.

The Committee brings to Parliament's attention an additional power of authorised officers who have lawfully entered a premises, being the power to make such examinations and inquiries as the authorised officer considers necessary. The Committee notes that this power is broadly defined and may impact on an individual's right to silence. The Committee particularly notes that self-incrimination is not a ground for refusing to comply with such a request, unless a contemporaneous objection is made.

Retrospectivity

9. Schedule 1(46) provides that any pending applications are to be considered under the scheme outlined in this Bill under proposed section 13A. The Committee notes that this has the effect of applying new legislation to applications that have already been lodged. Existing applications may have been lodged in good faith under the administrative scheme that existed before the introduction of this Bill.

The Committee notes that the new scheme outlined in the Bill will be applied retrospectively to existing applications under the principal Act. However, the Committee does not consider it unreasonable for an administrative scheme to change the manner in which it processes licences from time to time. Whilst the Committee will always comment when a scheme operates retrospectively, the Committee makes no further comment in relation to this issue.

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

Use of criminal intelligence reports or other criminal information

10. Schedule 1(23) provides that the Commissioner may make a determination under the Act and not give any reasons for that determination if those reasons would disclose the existence or content of any criminal intelligence report or other criminal information.

The proposed amendments to section 20 of the principal Act bring into conflict two important principles. The first principle is the right to be given reasons when an application for a licence to carry out what is otherwise legal employment is rejected. The second principle relates to the importance of ensuring criminal intelligence reports and other criminal information remains

confidential – including the existence of such reports and information. The Committee notes that amended section 20 will see these two principles in conflict. The Committee refers to Parliament whether the appropriate balance has been struck by providing the Commissioner with an opportunity not to provide reasons when declining a licence because of information outlined in criminal intelligence reports or other criminal information.

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

Prescribing penalties in the regulations

11. Schedule 1(44) provides that the amount payable under a penalty notice issued under section 35 of the principal Act is the amount prescribed for the alleged offence by the regulations.

The Committee considers that for penalty notice offences, both the offence and the amount payable should be defined in the principal legislation rather than in the regulations. The Committee refers this matter to Parliament for its consideration.

Commencement by proclamation

12. Clause 2 of the Bill provides that the Act is to commence on a day or days to be appointed by proclamation.

The Committee generally prefers legislation to commence on asset or a fixed date. However, given the number of administrative changes that will need to be implemented following the passage of the Bill, the Committee does not consider commencement by proclamation to be unreasonable in these circumstances.

7. Transport Administration Amendment (Transport Entities) Bill 2017

Date introduced	29 March 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasury

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

   (a) to amend the Transport Administration Act 1988:

      i to provide that NSW Trains and Sydney Trains are not subsidiaries of Rail Corporation New South Wales (RailCorp), and

      ii to convert RailCorp into a State owned corporation named Transport Asset Holding Entity, and

      iii to establish a new corporation, to be named Residual Transport Corporation, and

      iv to provide for the objectives, functions and management of those entities,

   (b) to make amendments to other legislation consequential on the amendments referred to in paragraph (a).

BACKGROUND

2. The Bill converts RailCorp into a State owned corporation, renamed Transport Asset Holding Entity. NSW Trains and Sydney Trains are established as separate stand-alone entities in the form of subsidiary corporations.

3. The Treasurer outlined in his second reading speech that there are 'many benefits in separating service delivery functions from asset owner functions.' He noted that this reflects best industry practice. He highlighted that it means 'having a structure in place that properly accounts for the costs of recurrent services and capital expenditure and provides an identifiable return to the taxpayers on their massive investment in infrastructure'.

4. This Bill seeks to achieve this by delineating between a publicly owned asset holder and the State as a direct service provider. The status of Transport Asset Holding Entity as a state owned corporation is designed to provide the necessary distance from day-to-day Government control to demonstrate its assets are being managed commercially.

ISSUES CONSIDERED BY COMMITTEE

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

Insufficiently clear power

5. Schedule 1.1, clause 67 of the Bill empowers the regulations to provide that a reference in any other Act or instrument made under any other Act or in any other instrument of any kind to the State Rail Authority Residual Holding Corporation is to be taken as a reference to another specified person or body.

> **The Committee notes that a possible effect of Schedule 1, clause 67 is to enable the regulations to authorise a de facto transfer of any legislative matter currently pertaining to the State Rail Authority Residual Holding Corporation to another, unnamed person or body. The Committee would prefer that such a power be retained by the legislature, rather than vested in the Executive via the regulations.**

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

Exceptions to the Act may be included in the Regulations

6. Schedule 1.1, clause 53 of the Bill applies to an authorisation granted to a transferor under an Act or statutory rule in force immediately before a transfer by an order to which Schedule 4 of the *Transport Administration Act 1988* applies. An authorisation is, to the extent that it relates to assets, rights or liabilities, taken to be held on the same terms and conditions as held immediately before the transfer. However, at proposed clause 11(3), the Bill outlines that the regulations may exempt an authorisation from the operation of this clause.

> **The Committee notes that the aim of Schedule 4 to the *Transport Administration Act 1988* is to provide certainty to contracting parties in circumstances where entities such as RailCorp, Sydney Trains and NSW Trains are re-constituted. This certainty is achieved by outlining that whatever rights and liabilities exist immediately before a transfer of licence or other authorisation continue on the same terms. However, the Bill provides that the regulations may exempt an authorisation from the operation of this clause.**

Commencement by proclamation

7. Clause 2 of the Bill provides that the Act is to commence on a day or days to be appointed by proclamation.

> **The Committee generally prefers legislation to commence on assent or a fixed date. However, in this instance the Committee notes that the Bill is implementing a number of reforms which alter the administrative and legal arrangements for the operation of the Sydney-wide and State-wide railways. The Committee considers that flexibility as to the commencement of this legislation is desirable. The Committee makes no further comment.**

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

1 The functions of the Committee with respect to Bills are:

(a) to consider any Bill introduced into Parliament, and

(b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:

i trespasses unduly on personal rights and liberties, or

ii makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or

iii makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or

iv inappropriately delegates legislative powers, or

v insufficiently subjects the exercise of legislative power to parliamentary scrutiny

2 A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations

1 The functions of the Committee with respect to regulations are:

(a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,

(b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:

i that the regulation trespasses unduly on personal rights and liberties,

ii that the regulation may have an adverse impact on the business community,

iii that the regulation may not have been within the general objects of the legislation under which it was made,

iv that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

v that the objective of the regulation could have been achieved by alternative and more effective means,

vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,

vii that the form or intention of the regulation calls for elucidation, or

viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and

(c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

2 Further functions of the Committee are:

(a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and

(b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

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