



## 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

|                 |   |
|-----------------|---|
| CHAIR           | Mr Michael Johnsen MP, Member for Upper Hunter  |
| DEPUTY CHAIR    | Mr Lee Evans MP, Member for Heathcote   |
| MEMBERS         | Ms Melanie Gibbons MP, Member for Holsworthy<br>Mr James Griffin MP, Member for Manly<br>Mr David Mehan MP, Member for The Entrance<br>The Hon Shaoquett Moselmane MLC<br>The Hon Gregory Pearce MLC<br>Mr David Shoebridge MLC |
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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. APPROPRIATION BILL 2017; APPROPRIATION (PARLIAMENT) BILL 2017; STATE REVENUE AND OTHER LEGISLATION AMENDMENT (BUDGET MEASURES) BILL 2017; EMERGENCY SERVICES LEVY BILL 2017

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

#### State Revenue Bill

##### *Liability of insured person for wrongly claiming exemption*

The Committee notes that section 259D in the *Duties Act* requires a person who wrongly claims a small business exemption to pay to the insurer an amount equal to the duty, and any interest or penalty tax payable. The section applies even if the declaration is not made dishonestly. The Committee is concerned that the insurer is not required to notify an insured person of the default within a given time, particularly as an insured person who makes a mistaken but honest declaration may have limited control over the amount of interest incurred by the insurer on its behalf. The Committee draws this to the attention of Parliament.

##### *Consent of transferred employee*

Schedule 5[3] inserts section 22 of the *Growth Centres Act* which allows the transfer of a Landcom staff member to the Urban Growth NSW Development Corporation Staff Agency (UrbanGrowth), without their consent. The Committee notes that the power to transfer an employee without their consent may trespass on that employee's right to choose their employer. However, the Committee understands that the transfer of Landcom to UrbanGrowth is primarily an administrative change and also acknowledges that there may be terms and conditions in some employment contracts which may permit the transfer of employees. The Committee therefore makes no further comment.

##### *Variation of terms and conditions of employment*

The Committee notes that the section 23(3)(b) creates a transition period of 2 years for permanent employees of Landcom who have been transferred to UrbanGrowth. The Committee is concerned that creating a transition period of 2 years during which the terms and conditions of employment cannot be varied (except by agreement with the employee) suggests that those terms and conditions can be varied after the transition period. This may trespass on an employee's right to continue their employment on a permanent basis, and on the same terms and conditions on which they were previously employed at Landcom. Given that it is also proposed that an employee can be transferred without their consent, the Committee draws this to the attention of the Parliament.

#### Emergency Services Levy Bill

##### *Right to refund*

The Committee notes that section 21(6) of the *Emergency Services Levy Bill* entitles an insured person to recover certain contributions from the foreign insurer as a debt, including the costs of recovery. The Committee notes that the right to a refund may be difficult to enforce as against a large insurer and that the ability to offset the debt is an inadequate safeguard as it

would likely require an insured person to renew a policy or hold another policy with that insurer. The Committee draws this to the attention of the Parliament.

*Protection of insured persons*

The Committee notes that sections 37 and 41 of the *Emergency Services Levy Bill* may not adequately protect insured persons from the risk of overcharging. This risk may be increased in future because the *Emergency Services Levy Insurance Monitor Act 2017* (the *Insurance Monitor Act*), which contains oversight and enforcement mechanisms, is to be repealed on 1 July 2020 following a 2 year transition period.

*Right to privacy*

While section 47 of the *Emergency Services Levy Bill* contains safeguards that help protect against the disclosure of personal information, the Committee notes that the section still has potential to trespass on an individual's right to privacy.

*Retrospectivity*

The Committee generally prefers that regulations do not apply retrospectively. However, given the safeguards in clause 1 of Schedule 2 to the *Emergency Services Levy Bill* relating to retrospectivity, and the administrative convenience of creating such savings and transitional provisions in the context of a complex regulatory change, the Committee makes no further comment.

The Committee is generally concerned whenever a law applies retrospectively, such as in clause 4 of Schedule 2 to the *Emergency Services Levy Bill*. It is unclear whether there are differences between the re-established scheme and the historical scheme, which was enacted in the *Fire Brigades Act 1989*, the *Rural Fires Act 1997* and the *State Emergency Services Act 1989*, such that it is inappropriate for the Act to now apply retrospectively. The Committee refers this question to the Parliament for its consideration

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

*Emergency Services Levy Bill*

*Wide-ranging powers*

The Committee notes that section 20 of the *Emergency Services Levy Bill* allows the Chief Commissioner to dispense with the requirement to issue an initial assessment notice in any circumstances that the Chief Commissioner considers appropriate, which may be considered an ill-defined and wide-ranging power. While the Committee acknowledges the utility of the discretion in certain instances, it prefers that Parliament provide greater certainty regarding when it may be appropriate for the Chief Commissioner to dispense with the initial assessment notice, particularly noting that there is a detailed regime for assessment and payment of the initial contribution amount.

The Committee notes the wide discretion of the Chief Commissioner to issue a late assessment notice in section 25(b) of the *Emergency Services Levy Bill*. The Committee acknowledges that this may be justified because section 26 provides for the contribution to become payable at least 60 days after service of the notice, or the date on which the instalment would otherwise be payable, whichever is later.

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

*Emergency Services Levy Bill*

*Exclusion of liability*

Section 42 of the *Emergency Services Levy Bill* excludes liability of the State, the Treasurer or the Chief Commissioner in respect of anything done in good faith in protecting policy holders under Part 7. The Committee generally cautions against the use of privative clauses given that the separation of powers and the role of the judiciary is central to the Westminster democratic system. The Committee however acknowledges that the provision may be justified given the aim of protecting policy holders and also because the clause is limited to actions or omissions done in good faith.

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

*State Revenue Bill*

*Commencement by proclamation*

Certain provisions in the *State Revenue Bill* commence on proclamation. The Committee prefers that legislation 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 the deferred commencement of Schedule 2.1[3], regarding refunds for certain Australian-based developers that are foreign persons, and Schedule 2.2[5], regarding surcharge land tax for Australian-based developers, may be administratively convenient. This is because of the overall complexity of the scheme and that the deferred commencement may provide time for the Treasurer to exercise his power in both sections to issue an order informing the exercise of the Chief Commissioner's discretion. In these circumstances, the Committee makes no further comment.

*Delegation to Treasurer*

Schedule 2.1[3] and 2.2[5] of the *State Revenue Bill* provide for refunds for certain Australian-based developers that are foreign persons and exemptions from surcharge land tax for Australian-based developers. The Chief Commissioner determines the amount of the refund or extent of liability under these sections, but is required to comply with any order made by the Treasurer that may be published in the Gazette. In circumstances where the relevant provisions concern the entitlement to a refund and potential exemptions from tax liability, the Committee prefers that the relevant criteria are comprehensively defined in the principal legislation.

*Emergency Services Levy Bill*

*Henry VIII clauses*

The Committee notes that the *Emergency Services Levy Bill* contains Henry VIII clauses, which allow regulations to amend legislation. This is contrary to the traditional Westminster democratic tradition of the legal primacy of Parliament. Although the Committee acknowledges the administrative convenience of such provisions, and that the Parliament retains the power to disallow such a regulation, the Committee draws these provisions to the attention of the Parliament.



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

*State Revenue Bill*

*Matters left to regulations and guidelines*

Schedule 1.1[16] defines an ‘approved equity partner’ in the *Duties Act* as ‘a person who is prescribed by the regulations as an approved equity partner for the purposes of this section or who belongs to a class of persons so prescribed’. The Committee generally prefers that terms are defined in principal legislation rather than subordinate legislation and also notes that the phrase ‘who belongs to a class of persons so prescribed’ lacks sufficient clarity.

Schedule 1.1[16] amends the *Duties Act* to empower the Treasurer to issue guidelines for the approval of shared equity schemes and requires that the Chief Commissioner comply with these guidelines. The Committee generally acknowledges the administrative convenience of guidelines but is concerned that it is not appropriate in circumstances where they are not disallowable yet compliance with those guidelines by the Chief Commissioner is mandatory. The Committee draws this to the attention of the Parliament.

Schedule 4[4] defines small business to include such entities as described in the *Income Tax Assessment Act 1997* and ‘in any other circumstances prescribed by the regulations’. The Committee generally prefers that terms are defined comprehensively in the principal legislation rather than the subordinate legislation. The Committee notes that under the Bill a person who makes an incorrect declaration that they are a small business may then commit a tax default and have to pay interest and penalty tax. A person who makes a declaration which is false or misleading in a material particular could also be subject to criminal penalty. For these reasons, the Committee draws the definition of ‘small business’ to the attention of Parliament.

*Emergency Services Levy Bill*

*Matters left to regulations*

The Committee notes that in some instances matters that are more appropriately defined in the principal legislation have been referred to the regulations. However, given the administrative complexity of the emergency services levy reform, and the disallowance processes in section 41 of the Interpretation Act 1987, the Committee makes no further comment in relation to the balance of the provisions.

2. JUSTICE LEGISLATION AMENDMENT BILL 2017

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

*Reverse onus of proof*

The accused person must show cause as to why his or her detention is not justified. The effect of the show cause requirement for the purposes of bail in section 16A and 16B is to reverse the onus of proof on the accused. However, the Committee notes the policy implications in relation to the show cause requirement for certain serious offences. Thereby, the requirement is reasonable under the circumstances and the Committee makes no further comment.

*Right to personal privacy/broad scope of search powers*

The Committee is concerned with the broad scope of police powers to search a person which may infringe an individual's right to personal privacy. However, the Committee noted the safeguards to preserve an individual's privacy and dignity under Schedule 5 of the Act and the policy implications in relation to the serious nature of terrorist acts, the infringement is not unreasonable under the circumstances and the Committee makes no further comment.

#### *Retrospectivity*

The Committee notes that the *Justice Legislation Amendment Act 2017* applies to the *Confiscation of Proceeds of Crime Act 1989* with some retrospective effect. Retrospectivity is contrary to the rule of law that allows people knowledge of what the law is at any given time, so they may behave accordingly. However, the Committee notes the retrospectivity does not operate to remove rights or liberties or impose burdens on an individual. As such, the Committee makes no further comment.

#### *Conviction without charge*

The Committee notes that proposed section 193E(2B) enables a jury to convict an individual for an offence that they may not have been charged with. The Committee recognises the limited circumstances, in which this could apply. Despite this, it is incumbent on the Committee to identify possible trespasses on individual rights, including provisions that allow an individual to be convicted of an offence without a direct charge of that offence. However, the Committee notes the policy implications of this in relation to alternative verdicts, particularly for money laundering, and makes no further comment.

### 3. TERRORISM LEGISLATION AMENDMENT (POLICE POWERS AND PAROLE) BILL 2017

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

##### *Right to life/freedom from violence*

In clarifying the circumstances in which force, including lethal force, may be used, the Committee observes that section 24B potentially trespasses on the right to life, including the right to life of innocent individuals or bystanders. The section may also trespass on the right of individuals to be free from violence.

The Committee acknowledges that there are a number of safeguards in section 24B, including the requirement that a declaration of a terrorist act must first be issued and that the force must be reasonably necessary. While the Committee generally prefers that objective standards are adopted, the Committee acknowledges that the inclusion of the subjective element of 'in the circumstances as the police officer perceives them' aims to avoid immobilising police action, which may occur if a higher threshold applied.

Despite this, it is incumbent on the Committee to identify possible trespasses on individual rights, including provisions that may trespass a person's right to life. The Committee refers this matter to the Parliament for its further consideration.

##### *Exemption from criminal liability*

The Committee notes that Schedule 1 of the Bill amends the *Terrorism (Police Powers) Act* to exempt police officers from any criminal liability for the use of force permitted in section 24B(1). This includes the use of lethal force in circumstances where a declaration of a terrorist act has been revoked or has been later found invalid.

The Committee notes that police officers, if found to have acted in accordance with section 24B(1), may be exempt from criminal liability for the use of lethal force even in circumstances where an innocent individual or bystander has been killed. This potentially trespasses on the ability of the State (and consequently the rights of victims and the wider community) to seek justice for acts or omissions which would in other circumstances be deemed criminal.

The Committee recognises that the Bill provides certain requirements that need to be fulfilled before the exemption applies, including that the force be ‘reasonably necessary, in the circumstances as the police officer perceives them...’ and be taken in ‘good faith’.

However, the Committee notes that the exemption appears to apply whether or not a certain standard of care has been taken by the police officers if the police action is for the purposes of the police action plan. The absence of any express standard of care in the section may exempt police officers from criminal liability even if actions resulting in the death of innocent individuals or bystanders were, in substance, criminally negligent or reckless.

#### *Presumption against parole*

The Committee notes that the insertion of Division 3A in the *Crimes (Administration of Sentences) Act* creates a presumption against parole for terrorism-related offenders and imposes a high onus on the offender to prove that he or she will not engage in, incite or assist others to engage in, terrorist acts or violent extremism. The Committee is concerned that the Division has potential to unduly trespass on the rights and liberties of some offenders and refers this to Parliament for its further consideration.

#### *Retrospectivity*

The Committee is generally concerned where legislation seeks to have retrospective effect, particularly legislation that trespasses on personal rights and liberties. However, the Committee observes that the parole amendments aim to provide the public with a continuing measure of safety from terrorism-related offenders at the end of their sentence period. In such circumstances, the amendments are reasonable and the Committee makes no further comment.

#### *Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: section 8A(1)(b)(ii)*

#### *Ambiguity*

Section 24B(2) exempts a police officer from criminal liability for action taken within the meaning of subsection (1) which is ‘for the purposes of a police action plan’. The Committee notes that this is a broad requirement and may mean that the force used, including lethal force, may not have been specified in or contemplated by the police action plan. Given that ‘police action plan’ is also not defined, the Committee refers this to Parliament for its further consideration.

Part 2AAA of the *Terrorism (Police Powers) Act* is not intended to limit the powers of police officers to deal with a terrorist act, even if a declaration under the Part has not been made. However, the Committee considers that section 24B(6) may be unnecessarily ambiguous as it does not identify the powers of police officers, or the source of power, to respond to a terrorist act in circumstances where a declaration under the Part has not been made. The Committee prefers that laws clearly identify the nature and source of any power, particularly

powers to use force against another individual (including lethal force) and refers this to Parliament for its consideration.

## PART TWO – REGULATIONS

### 1. APPRENTICESHIP AND TRAINEESHIP REGULATION 2017

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

#### *Right to privacy*

Clause 6 of the Regulation requires a registered training organisation to provide information to an employer on request in relation to the progress of an apprentice or trainee in obtaining a relevant qualification.

Under clause 6, registered training organisations are to provide information requested by an employer regarding the progress of an apprentice or trainee in obtaining a relevant qualification. While this may breach an individual's right to privacy, the Committee acknowledges that it is reasonable that employers who are signatories to a training plan and provide paid leave to enable an apprentice or trainee to undertake study in accordance with that plan can receive information about the individual's progress.

### 2. HOME BUILDING AMENDMENT (FEES) REGULATION 2017

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

#### *Ambiguity*

The *Home Building Amendment (Fees) Regulation 2017* replaces dollar amounts with fee units expressed in decimal amounts. While this may create ambiguity as to the true cost of administrative services, the Committee acknowledges the administrative convenience of using fee units to calculate future fees by reference to a formula which accounts for inflation. The Committee has identified this issue in several other fee regulations considered as part of this digest, but will not provide comment if this issue resurfaces in the context of future digests.

### 3. LIQUOR AMENDMENT (SPECIAL LICENCE CONDITIONS) REGULATION 2017

The regulation may have an adverse impact on the business community: s9(1)(b)(ii) of the LRA

#### *Special licence conditions*

The effect of Schedule 1[1] is to impose additional licence conditions on certain venues regulated under the *Liquor Act 2007*, which may have an adverse impact on the business community by reducing patronage and revenue. However, the Committee notes the broader public health and safety objectives associated with the conditions and therefore makes no further comment.

### 4. SERVICE NSW (ONE-STOP ACCESS TO GOVERNMENT SERVICES) AMENDMENT (APPROVED PERSONS) REGULATION 2017

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

#### *Privacy*

The Committee notes that the regulation expands the list of approved persons that may provide customer services on behalf of Service NSW. This includes services for multiple NSW

government agencies that handle sensitive personal information. The Committee is concerned that the release of personal information to a private company may trespass on the right to privacy of individuals. The Committee draws this right to privacy to the attention of the Parliament.

## Part One – Bills

### 1. Appropriation Bill 2017; Appropriation (Parliament) Bill 2017; State Revenue and Other Legislation Amendment (Budget Measures) Bill 2017; Emergency Services Levy Bill 2017

|                      |                               |
|----------------------|-------------------------------|
| Date introduced      | 20 June 2017                  |
| House introduced     | Legislative Assembly          |
| Minister responsible | The Hon. Dominic Perrottet MP |
| Portfolio            | Treasury                      |

#### PURPOSE AND DESCRIPTION

##### *Appropriation Bill 2017*

1. The object of this Bill is to appropriate from the Consolidated Fund various sums of money required during the 2017–18 financial year for the services of the Government, including:
  - (a) Departments of the Public Service, and
  - (b) various special offices.
2. The Bill appropriates a single sum for the services of each agency, including recurrent services, capital works and services and debt repayment.
3. The Consolidated Fund largely comprises receipts from, and payments out of, taxes, fines, some regulatory fees, Commonwealth grants and income from Crown assets.
4. The Bill for the 2017–18 financial year contains an additional appropriation that allocates revenue raised in connection with gaming machine taxes to the Minister for Health for spending on health related services.
5. The Bill for the 2017–18 financial year contains provision for transfer payments from the Commonwealth to non-Government schools and local government.
6. The Bill provides for appropriation for the whole of the 2017–18 financial year.
7. The Bill also sets out the recurrent services for which the “Advance to the Treasurer” appropriation was expended in the 2015–16 financial year, appropriates \$47,209,000 from the Consolidated Fund for those services and makes the necessary adjustment to the “Advance to the Treasurer” appropriation for that year.

*Appropriation (Parliament) Bill 2017*

8. The object of this Bill is to appropriate from the Consolidated Fund the sum of \$162,987,000 required during the 2017–18 financial year for the services of the Legislature, including recurrent services, capital works and services and debt repayment.

*State Revenue and Other Legislation Amendment (Budget Measures) Bill 2017*

9. The object of this Bill is to amend State revenue and other legislation in connection with the State budget for the 2017-2018 financial year as follows:

- (a) the *Duties Act 1997* (the *Duties Act*) is amended:
- (i) to make further provision with respect to the duty exemption and concession scheme for first home buyers (including by increasing the cap on property value for acquisitions eligible under the scheme, extending eligibility to certain joint purchasers under shared equity arrangements and removing a limitation restricting the scheme to new homes), and
  - (ii) to make further provision with respect to duty charged on certain residential land transactions involving foreign persons (including by increasing, from 4% to 8%, the rate of surcharge purchaser duty payable on those transactions and providing for an exemption from, or refund of, surcharge purchaser duty in certain circumstances), and
  - (iii) to limit a provision enabling a purchaser to defer liability for duty on an agreement for the sale of land “off the plan” to purchasers who intend to use and occupy the residence as a principal place of residence for a continuous period of at least 6 months, and
  - (iv) to abolish duty on lenders mortgage insurance, crop insurance and livestock insurance, and to abolish duty for small businesses on commercial vehicle insurance, commercial aviation insurance and occupational indemnity insurance,
- (b) the *First Home Owner Grant (New Homes) Act 2000* (the *First Home Owner Grant (New Homes) Act*) is amended to reduce (from \$750,000 to \$600,000) the first home owner grant cap for a contract to purchase a new home,
- (c) the *Land Tax Act 1956* (*Land Tax Act*) is amended to make further provision with respect to land tax levied on residential land owned by foreign persons (including by increasing, from 0.75% to 2%, the rate of surcharge land tax payable on the land, and providing for an exemption from, or refund of, surcharge land tax in certain circumstances),
- (d) the *Land Tax Management Act 1956* (the *Land Tax Management Act*) is amended to extend the principal place of residence exemption to land used and occupied by an owner under certain shared equity arrangements,
- (e) the *Government Sector Employment Act 2013* is amended to establish the UrbanGrowth NSW Development Corporation Staff Agency as a Public Service executive agency related to the Department of Premier and Cabinet,

- (f) the *Growth Centres (Development Corporations) Act 1974* (the *Growth Centres Act*) is amended:
  - (i) to make provision with respect to the transfer of Landcom staff, assets, rights and liabilities to the development corporations constituted under that Act and the Department of Planning and Environment, and
  - (ii) to add 2 new areas of land to the UrbanGrowth NSW Development Corporation growth centre,
- (g) the *Education Act 1990* is amended to enable the State to recover or assign to the Commonwealth a debt owed by the State to the Commonwealth in relation to financial assistance provided by the Commonwealth to a non-government school,
- (h) the *Greater Sydney Commission Act 2015* is amended to remove the provision that a District Commissioner of the Greater Sydney Commission is to be a State member and chairperson of a Sydney panning panel,
- (i) to make other minor or consequential amendments to those Acts.

#### *Emergency Services Levy Bill 2017*

10. The objects of this Bill are:
  - (a) to re-establish an emergency services insurance contribution scheme, and
  - (b) to postpone the introduction of the levy imposed by the *Fire and Emergency Services Levy Act 2017* (the *Fire and Emergency Services Levy Act*).
11. The *Fire and Emergency Services Levy Act* introduced a fire and emergency services levy that is payable in respect of all land in the State (other than government land). The levy will be payable by landowners and some lessees and charged and collected by councils as part of council rates. It is currently proposed to start in the 2017/2018 financial year.
12. The levy replaced the scheme for funding of emergency services through insurance contributions under:
  - (a) the *Fire Brigades Act 1989*, and
  - (b) the *Rural Fires Act 1997*, and
  - (c) the *State Emergency Service Act 1989*.
13. This Bill re-establishes the insurance contribution scheme formerly provided for by those Acts.
14. The re-established scheme requires a single emergency services contribution to be paid by insurers in each financial year to the Chief Commissioner of State Revenue (the Chief Commissioner), rather than requiring separate contributions for fire brigades, rural fires and state emergency services. The contribution is payable by instalment in advance of a determination being made by the Chief Commissioner of the final contribution amount payable by the insurer.



## BACKGROUND

15. These Bills give effect to the 2017-18 Budget.
16. Although they are separate Acts when operative, the *Appropriation Bill 2017*, the *Appropriation (Parliament) Bill 2017*, the *State Revenue and Other Legislation Amendment (Budget Measures) Bill 2017 (the State Revenue Bill)*, and the *Emergency Services Levy Bill 2017 (the Emergency Services Levy Bill)* are cognate Bills. Therefore, all four bills have been considered in one report.
17. However, the Committee makes no comment in relation to the *Appropriation Bill 2017* and the *Appropriation (Parliament) Bill 2017*.

## ISSUES CONSIDERED BY COMMITTEE

**Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA***State Revenue Bill**Liability of insured person for wrongly claiming exemption*

18. Schedule 4[4] inserts section 259D of the *Duties Act* requiring a person who wrongly claims a small business exemption to pay an amount equal to the insurance duty and any interest or penalty tax payable. The Committee notes that a person can be liable 'whether or not the declaration was made dishonestly'.

**The Committee notes that section 259D in the *Duties Act* requires a person who wrongly claims a small business exemption to pay to the insurer an amount equal to the duty, and any interest or penalty tax payable. The section applies even if the declaration is not made dishonestly. The Committee is concerned that the insurer is not required to notify an insured person of the default within a given time, particularly as an insured person who makes a mistaken but honest declaration may have limited control over the amount of interest incurred by the insurer on its behalf. The Committee draws this to the attention of Parliament.**

*Consent of transferred employee*

19. Section 22 of the *Growth Centres Act* allows the transfer of Landcom staff to the UrbanGrowth NSW Development Corporation Staff Agency without their consent.

**Schedule 5[3] inserts section 22 of the *Growth Centres Act* which allows the transfer of a Landcom staff member to the Urban Growth NSW Development Corporation Staff Agency (UrbanGrowth), without their consent. The Committee notes that the power to transfer an employee without their consent may trespass on that employee's right to choose their employer. However, the Committee understands that the transfer of Landcom to UrbanGrowth is primarily an administrative change and also acknowledges that there may be terms and conditions in some employment contracts which may permit the transfer of employees. The Committee therefore makes no further comment.**

*Variation of terms and conditions of employment*

20. Section 23(3)(b) in the *Growth Centres Act* creates a transition period of 2 years for former permanent employees of Landcom.

The Committee notes that the section 23(3)(b) creates a transition period of 2 years for permanent employees of Landcom who have been transferred to UrbanGrowth. The Committee is concerned that creating a transition period of 2 years during which the terms and conditions of employment cannot be varied (except by agreement with the employee) suggests that those terms and conditions can be varied after the transition period. This may trespass on an employee's right to continue their employment on a permanent basis, and on the same terms and conditions on which they were previously employed at Landcom. Given that it is also proposed that an employee can be transferred without their consent, the Committee draws this to the attention of the Parliament.

### Emergency Services Levy Bill

#### *Right to refund*

21. Section 21(6) of the *Emergency Services Levy Bill* entitles an insured person who has paid a contribution on behalf of a foreign insurer may recover that amount as a debt from the foreign insurer, together with the costs of recovery, or to offset that amount against any debt owed by the insured to the foreign insurer.

The Committee notes that section 21(6) of the *Emergency Services Levy Bill* entitles an insured person to recover certain contributions from the foreign insurer as a debt, including the costs of recovery. The Committee notes that the right to a refund may be difficult to enforce as against a large insurer and that the ability to offset the debt is an inadequate safeguard as it would likely require an insured person to renew a policy or hold another policy with that insurer. The Committee draws this to the attention of the Parliament.

#### *Protection of insured persons*

22. Section 37 of the *Emergency Services Levy Bill* provides that an insurer is not to issue a person any invoice or other statement regarding an insurance policy unless the statement also estimates the portion of the premium that is attributable to a contribution payable under the Act; that is, an 'attributed charge'. The requirement only applies to policies described in Part A of Schedule 1, and therefore excludes policies in Part B, such as motor vehicle and personal effects insurance.
23. Section 41 of the *Emergency Services Levy Bill* allows the Treasurer to decide, in certain circumstances, whether to make public a price discrepancy between the final contribution amount and total attributed charges estimated by an insurer, as well as the financial year to which that discrepancy relates. However, the section prevents the Treasurer from disclosing a final contribution amount, the total attributed charges, or the amount of a price discrepancy.

The Committee notes that sections 37 and 41 of the *Emergency Services Levy Bill* may not adequately protect insured persons from the risk of overcharging. This risk may be increased in future because the *Emergency Services Levy Insurance Monitor Act 2017* (the *Insurance Monitor Act*), which contains oversight and enforcement mechanisms, is to be repealed on 1 July 2020 following a 2 year transition period.

*Right to privacy*

24. Under section 47 of the *Emergency Services Levy Bill*, the Treasurer can require an insurer to provide specified information about insurance for which it receives or is entitled to receive premiums.
25. Section 47(2) provides that such information may only be obtained and used for the purposes of evaluation and implementation of emergency services levy reform.
26. Section 47(5) further provides that the Treasurer is not authorised to disclose personal information, within the meaning of the *Privacy and Personal Information Protection Act 1998*, to any person not employed in the Treasury.

**While section 47 of the *Emergency Services Levy Bill* contains safeguards that help protect against the disclosure of personal information, the Committee notes that the section still has potential to trespass on an individual's right to privacy.**

*Retrospectivity*

27. Clause 1 in Schedule 2 of the *Emergency Services Levy Bill* enables the regulations to make savings and transitional provisions which take effect from the date of assent to the Act concerned or a later date.

**The Committee generally prefers that regulations do not apply retrospectively. However, given the safeguards in clause 1 of Schedule 2 to the *Emergency Services Levy Bill* relating to retrospectivity, and the administrative convenience of creating such savings and transitional provisions in the context of a complex regulatory change, the Committee makes no further comment.**

28. On 30 May 2017, the NSW Government announced that it would defer the introduction of the fire and emergency services levy and re-establish an emergency services insurance contribution scheme. Accordingly, the *Emergency Services Levy Bill* was introduced, which seeks to defer the introduction of the proposed Fire and Emergency Services Levy, provided for in the *Fire and Emergency Services Levy Act*.
29. Clause 4 of Schedule 2 of the *Emergency Services Levy Bill* applies the re-established scheme to contributions and premiums subject to contribution under the former emergency services funding scheme; that is, prior to the 2017/18 financial year when the Act is to have commenced.

**The Committee is generally concerned whenever a law applies retrospectively, such as in clause 4 of Schedule 2 to the *Emergency Services Levy Bill*. It is unclear whether there are differences between the re-established scheme and the historical scheme, which was enacted in the *Fire Brigades Act 1989*, the *Rural Fires Act 1997* and the *State Emergency Services Act 1989*, such that it is inappropriate for the Act to now apply retrospectively. The Committee refers this question to the Parliament for its consideration**

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

*Emergency Services Levy Bill*

*Wide-ranging powers*

30. Section 20 of the *Emergency Services Levy Bill* empowers the Chief Commissioner to issue a final assessment notice for the financial year after the return date without first having issued an initial assessment notice, in any circumstances that the Chief Commissioner considers appropriate.

**The Committee notes that section 20 of the *Emergency Services Levy Bill* allows the Chief Commissioner to dispense with the requirement to issue an initial assessment notice in any circumstances that the Chief Commissioner considers appropriate, which may be considered an ill-defined and wide-ranging power. While the Committee acknowledges the utility of the discretion in certain instances, it prefers that Parliament provide greater certainty regarding when it may be appropriate for the Chief Commissioner to dispense with the initial assessment notice, particularly noting that there is a detailed regime for assessment and payment of the initial contribution amount.**

31. Section 25(b) of the Bill provides that the Chief Commissioner may issue a late assessment of an initial contribution amount 'in any other circumstances that the Chief Commissioner considers necessary'.

**The Committee notes the wide discretion of the Chief Commissioner to issue a late assessment notice in section 25(b) of the *Emergency Services Levy Bill*. The Committee acknowledges that this may be justified because section 26 provides for the contribution to become payable at least 60 days after service of the notice, or the date on which the instalment would otherwise be payable, whichever is later.**

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

*Emergency Services Levy Bill*

*Exclusion of liability*

32. The Committee notes that section 42 of the *Emergency Services Levy Bill* excludes liability that would otherwise be incurred by the State, Treasurer or Chief Commissioner, and others, in connection with the protection of policy holders.

**Section 42 of the *Emergency Services Levy Bill* excludes liability of the State, the Treasurer or the Chief Commissioner in respect of anything done in good faith in protecting policy holders under Part 7. The Committee generally cautions against the use of privative clauses given that the separation of powers and the role of the judiciary is central to the Westminster democratic system. The Committee however acknowledges that the provision may be justified given the aim of protecting policy holders and also because the clause is limited to actions or omissions done in good faith.**

**Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA**State Revenue Bill*Commencement by proclamation*

33. Schedule 2.1[3] and 2.2[5] are to commence 'on a day or days to be appointed by proclamation'.

**Certain provisions in the *State Revenue Bill* commence on proclamation. The Committee prefers that legislation 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 the deferred commencement of Schedule 2.1[3], regarding refunds for certain Australian-based developers that are foreign persons, and Schedule 2.2[5], regarding surcharge land tax for Australian-based developers, may be administratively convenient. This is because of the overall complexity of the scheme and that the deferred commencement may provide time for the Treasurer to exercise his power in both sections to issue an order informing the exercise of the Chief Commissioner's discretion. In these circumstances, the Committee makes no further comment.**

*Delegation to Treasurer*

34. Schedule 2.1[3] inserts section 104ZJA of the *Duties Act*, which provides that the amount of any refund is to be determined by the Chief Commissioner. The determination is made in accordance with an order made by the Treasurer for the purposes of this section and published in the Gazette.
35. Schedule 2.2 [5] inserts a similar provision in relation to exemptions from liability to pay surcharge land tax: section 5C(3) in the *Land Tax Act*.

**Schedule 2.1[3] and 2.2[5] of the *State Revenue Bill* provide for refunds for certain Australian-based developers that are foreign persons and exemptions from surcharge land tax for Australian-based developers. The Chief Commissioner determines the amount of the refund or extent of liability under these sections, but is required to comply with any order made by the Treasurer that may be published in the Gazette. In circumstances where the relevant provisions concern the entitlement to a refund and potential exemptions from tax liability, the Committee prefers that the relevant criteria are comprehensively defined in the principal legislation.**

Emergency Services Levy Bill*Henry VIII clauses*

36. The Committee notes that the *Emergency Services Levy Bill* contains Henry VIII clauses. This is contrary to the traditional Westminster democratic tradition of the legal primacy of Parliament. The following provisions authorise regulations to amend the Act:

1. Section 53 permits the regulations to amend Schedule 1, which means that the classes and relevant proportions of insurance that are subject to contributions can be determined by the Executive.

2. Schedule 3[8] of the Bill inserts section 153 of the *Fire and Emergency Services Levy Act*, which suspends certain key provisions of the Act during the postponement period, subject to the regulations. The section also enables regulations to suspend a provision of another Act or regulation relating to the levy, or to further provide for the effect of a suspension or revocation.

**The Committee notes that the *Emergency Services Levy Bill* contains Henry VIII clauses, which allow regulations to amend legislation. This is contrary to the traditional Westminster democratic tradition of the legal primacy of Parliament. Although the Committee acknowledges the administrative convenience of such provisions, and that the Parliament retains the power to disallow such a regulation, the Committee draws these provisions to the attention of the Parliament.**

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

*State Revenue Bill*

*Matters left to regulations and guidelines*

37. Schedule 1.1[16] inserts section 281(4) to the *Duties Act* which defines ‘approved equity partner’.

**Schedule 1.1[16] defines an ‘approved equity partner’ in the *Duties Act* as ‘a person who is prescribed by the regulations as an approved equity partner for the purposes of this section or who belongs to a class of persons so prescribed’. The Committee generally prefers that terms are defined in principal legislation rather than subordinate legislation and also notes that the phrase ‘who belongs to a class of persons so prescribed’ lacks sufficient clarity.**

38. Schedule 1.1[16] inserts section 281 to the *Duties Act* in relation to approved shared equity schemes.

**Schedule 1.1[16] amends the *Duties Act* to empower the Treasurer to issue guidelines for the approval of shared equity schemes and requires that the Chief Commissioner comply with these guidelines. The Committee generally acknowledges the administrative convenience of guidelines but is concerned that it is not appropriate in circumstances where they are not disallowable yet compliance with those guidelines by the Chief Commissioner is mandatory. The Committee draws this to the attention of the Parliament.**

39. Schedule 4[4] amends the *Duties Act* to insert a new Part 5A containing exemptions for small businesses.

**Schedule 4[4] defines small business to include such entities as described in the *Income Tax Assessment Act 1997* and ‘in any other circumstances prescribed by the regulations’. The Committee generally prefers that terms are defined comprehensively in the principal legislation rather than the subordinate legislation. The Committee notes that under the Bill a person who makes an incorrect declaration that they are a small business may then commit a tax default and have to pay interest and penalty tax. A person who makes a**

**declaration which is false or misleading in a material particular could also be subject to criminal penalty. For these reasons, the Committee draws the definition of 'small business' to the attention of Parliament.**

*Emergency Services Levy Bill*

*Matters left to regulations*

40. There are a number of clauses in the *Emergency Services Levy Bill* that refer matters to regulations:
1. Section 21(7) provides that the regulations may make further provision for the assessment and payment of contributions in relation to foreign insurers and for the application of the Act in respect of those contributions.
  2. Section 22(4) provides that the Treasurer is to publish a notice in the Gazette of the amount determined by the Treasurer as the contribution target for a financial year on or before 15 April or a later date appointed by the regulations.
  3. Section 46 enables regulations to provide for the winding up of the contribution scheme and transition to the fire and emergency levy scheme.
  4. Section 52 provides that the Governor may make regulations not inconsistent with this Act, for or with respect of any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
  5. The start date for the levy under the *Fire and Emergency Services Levy Act* is proposed to be set by regulation: see Schedule 3.2[8].

**The Committee notes that in some instances matters that are more appropriately defined in the principal legislation have been referred to the regulations. However, given the administrative complexity of the emergency services levy reform, and the disallowance processes in section 41 of the Interpretation Act 1987, the Committee makes no further comment in relation to the balance of the provisions.**

## 2. Justice Legislation Amendment Bill 2017

|                      |                           |
|----------------------|---------------------------|
| Date introduced      | 21 June 2017              |
| House introduced     | Legislative Assembly      |
| Minister responsible | The Hon. Mark Speakman MP |
| Portfolio            | Attorney-General          |

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to make minor amendments to the following Acts within, or with provisions relating to matters within, the Justice portfolio:
  - (a) the *Bail Act 2013*,
  - (b) the *Children (Criminal Proceedings) Act 1987*,
  - (c) the *Confiscation of Proceeds of Crime Act 1989*,
  - (d) the *Court Security Act 2005*,
  - (e) the *Crimes Act 1900*,
  - (f) the *Crimes (Sentencing Procedure) Act 1999*,
  - (g) the *Criminal Appeal Act 1912*,
  - (h) the *Criminal Assets Recovery Act 1990*,
  - (i) the *Criminal Procedure Act 1986*,
  - (j) the *Mental Health (Forensic Provisions) Act 1990*,
  - (k) the *Surveillance Devices Act 2007*,
  - (l) the *Terrorism (Police Powers) Act 2002*.

### BACKGROUND

2. The Attorney-General, the Hon. Mark Speakman, in his second reading speech stated the Bill would update and improve the operation of the New South Wales justice system by “clarifying criminal procedure and improving the efficiency and operation of legislation affecting the courts and other Justice Portfolio agencies.”
3. The Attorney noted that the Bill would make minor amendments to a number of Acts in order to:
  - a) reduce trauma for victims and witnesses including children, in sexual assault matters;
  - b) address gaps and anomalies in existing offences and obstacles to the successful prosecution of certain offending behaviour;
  - c) improve court process and criminal procedure in relation to proceedings involving children, orders relating to proceeds of crime and criminal assets,



the diversion of defendants with cognitive impairment for assessment, treatment or support, and proceedings in the Court of Criminal Appeal; and

- d) ensure that the language used, and the legislation referred to, in various pieces of legislation is accurate up to date and consistent.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Reverse onus of proof*

4. The amendment to Section 16B of the *Bail Act 2013* provides that a serious indictable offence under the *Firearms Act 1996* that involves acquiring, supplying, manufacturing or giving possession of a pistol or prohibited firearm or a firearm part that relates solely to a prohibited firearm will require the accused person to show cause as to why his or her detention is not justified in accordance with Division 2 (Unacceptable risk test – all offences.)

**The accused person must show cause as to why his or her detention is not justified. The effect of the show cause requirement for the purposes of bail in section 16A and 16B is to reverse the onus of proof on the accused. However, the Committee notes the policy implications in relation to the show cause requirement for certain serious offences. Thereby, the requirement is reasonable under the circumstances and the Committee makes no further comment.**

#### *Right to personal privacy/broad scope of search powers*

5. Schedule 1.12 amends Schedule 1[3] of the *Terrorism (Police Powers) Act 2002* provides that a police officer who is authorised to search a person may, in conducting the search:
  - (a) Quickly run his or her hands over the person's outer clothing, and
  - (b) Require the person to remove his or her coat or jacket or similar article of clothing and any gloves, shoes, socks and hat (but not, except in the case of a strip search, all of the person's clothes), and
  - (c) Examine anything in possession of the person, and
  - (d) Pass an electronic metal detection device over or in close proximity to the person's outer clothing or anything removed from the person, and
  - (e) Do anything authorised by this Act for the purposes of the search.

**The Committee is concerned with the broad scope of police powers to search a person which may infringe an individual's right to personal privacy. However, the Committee noted the safeguards to preserve an individual's privacy and dignity under Schedule 5 of the Act and the policy implications in relation to the serious nature of terrorist acts, the infringement is not unreasonable under the circumstances and the Committee makes no further comment.**

*Retrospectivity*

6. Schedule 1.3[6] amends the *Confiscation of Proceeds of Crime Act 1989* to apply the amendments contained in the *Justice Legislation Amendment Act 2017* to retrospectively extend to a person
- (a) who has been convicted of, but not sentenced for, a serious offence before the commencement of that amendment, or
  - (b) who has been sentenced for a serious offence within the period of six months before the commencement of that amendment.

**The Committee notes that the *Justice Legislation Amendment Act 2017* applies to the *Confiscation of Proceeds of Crime Act 1989* with some retrospective effect. Retrospectivity is contrary to the rule of law that allows people knowledge of what the law is at any given time, so they may behave accordingly. However, the Committee notes the retrospectivity does not operate to remove rights or liberties or impose burdens on an individual. As such, the Committee makes no further comment.**

*Conviction without charge*

7. Schedule 1.5[2] provides that during the trial of a person charged with a money laundering offence under section 193C(1), in circumstances where the jury is not satisfied that the accused is guilty of the offence charged, then the jury may, if satisfied, find the accused guilty of an alternative offence under section 193C(2). The accused is then liable to punishment accordingly.

**The Committee notes that proposed section 193E(2B) enables a jury to convict an individual for an offence that they may not have been charged with. The Committee recognises the limited circumstances, in which this could apply. Despite this, it is incumbent on the Committee to identify possible trespasses on individual rights, including provisions that allow an individual to be convicted of an offence without a direct charge of that offence. However, the Committee notes the policy implications of this in relation to alternative verdicts, particularly for money laundering, and makes no further comment.**

### 3. Terrorism Legislation Amendment (Police Powers and Parole) Bill 2017

|                      |                                |
|----------------------|--------------------------------|
| Date introduced      | 21 June 2017                   |
| House introduced     | Legislative Assembly           |
| Minister responsible | The Hon. Gladys Berejiklian MP |
| Portfolio            | Premier                        |

#### PURPOSE AND DESCRIPTION

1. The objects of this Bill are:

(a) to amend the *Terrorism (Police Powers) Act 2002* (the *Terrorism (Police Powers) Act*) to enable the Commissioner of Police to declare an incident to which police officers are responding to be a terrorist act requiring planned and coordinated police action, and thereby authorise the use of force (including lethal force) that is reasonably necessary to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty, and;

(b) to amend the *Crimes (Administration of Sentences) Act 1999* (the *Crimes (Administration of Sentences) Act*) to provide that terrorism-related offenders are not to be released on parole unless the Parole Authority is satisfied that the offender will not engage in, or incite or assist others to engage in, terrorist acts or violent extremism.

#### BACKGROUND

2. The Premier, in her Second Reading Speech, said the Bill is in response to the key recommendations of the State Coroner's report on the Inquest into the deaths arising from the Lindt Café siege. The State Coroner, Magistrate Michael Barnes, delivered his findings on 24 May 2017.
3. Recommendation 24 of the State Coroner's report stated that the Minister for Police should consider whether the provisions of the *Terrorism (Police Powers) Act* should be amended to ensure that police officers have sufficient legal protection to respond to terrorist incidents in a manner most likely to minimise the risk to members of the public.
4. On 8 June 2017, the NSW Government announced that it had accepted and supported all of the State Coroner's 45 recommendations. The Premier also stated that the Government had committed to immediately legislate to provide certainty to NSW Police when required to use force, including lethal force, during terrorist incidents.
5. The Bill also responds to the decision of COAG on 9 June 2017 to ensure that there will be a presumption that neither bail nor parole will be granted to those persons who have demonstrated support for, or have links to, terrorist activity.

6. In her Second Reading Speech, the Premier stated that the Bill builds upon the Government's announcement in May 2017 that radicalisation would now be considered as part of parole decisions in New South Wales.
7. This Bill was declared urgent and passed by both houses without amendment on 21 June 2017. As such, the Committee acknowledges that its report on the Bill is after it was assented to on 22 June 2017. However, as per section 8A(2) of the *Legislation Review Act 1987*, 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.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Right to life/freedom from violence*

8. Section 24B of the Bill amends the *Terrorism (Police Powers) Act* to permit police officers to authorise, direct or use force, including lethal force, 'that is reasonably necessary, in the circumstances as the police officer perceives them, to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty'.
9. Sections 24B(4) permits the use of lethal force even in circumstances where a declaration of a terrorist act is revoked, provided that the police officer has not yet become aware or ought to have become aware of the revocation.
10. Section 24B(5) provides that if a declaration made under the Part is later found to be invalid, the section continues to apply to any action taken by a police officer before the finding as if it were a valid declaration.
11. Section 24B(6) does not limit the power of police officers to deal with a terrorist act, including whether or not the Commissioner has been requested or has declined to make a declaration under the Part in relation to the terrorist act.
12. The Committee understands that the provision clarifies that the threshold permitting police officers to use force during a terrorist act is 'to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty'. This is lower than the threshold of 'an imminent threat of death or serious injury' which was understood to apply by senior police officers in the context of the Lindt Café siege, as outlined in Chapter 14 of the State Coroner's report.

**In clarifying the circumstances in which force, including lethal force, may be used, the Committee observes that section 24B potentially trespasses on the right to life, including the right to life of innocent individuals or bystanders. The section may also trespass on the right of individuals to be free from violence.**

**The Committee acknowledges that there are a number of safeguards in section 24B, including the requirement that a declaration of a terrorist act must first be issued and that the force must be reasonably necessary. While the Committee generally prefers that objective standards are adopted, the Committee acknowledges that the inclusion of the subjective element of 'in the**

circumstances as the police officer perceives them' aims to avoid immobilising police action, which may occur if a higher threshold applied.

Despite this, it is incumbent on the Committee to identify possible trespasses on individual rights, including provisions that may trespass a person's right to life. The Committee refers this matter to the Parliament for its further consideration.

#### *Exemption from criminal liability*

13. Section 24B(2) in Schedule 1 of the Bill exempts police officers from 'any criminal liability for taking such police action', including the use of lethal force permitted in section 24B(1), 'for the purposes of a police action plan of the police officer in charge of the police officers responding to the terrorist act'.
14. Sections 24B(4) and 24B(5) apply this exemption to action which is undertaken in accordance with the section, even if the declaration is later revoked (provided that such action is undertaken before a police officer becomes aware or ought to become aware of the revocation) or is later found to be invalid.

**The Committee notes that Schedule 1 of the Bill amends the *Terrorism (Police Powers) Act* to exempt police officers from any criminal liability for the use of force permitted in section 24B(1). This includes the use of lethal force in circumstances where a declaration of a terrorist act has been revoked or has been later found invalid.**

**The Committee notes that police officers, if found to have acted in accordance with section 24B(1), may be exempt from criminal liability for the use of lethal force even in circumstances where an innocent individual or bystander has been killed. This potentially trespasses on the ability of the State (and consequently the rights of victims and the wider community) to seek justice for acts or omissions which would in other circumstances be deemed criminal.**

**The Committee recognises that the Bill provides certain requirements that need to be fulfilled before the exemption applies, including that the force be 'reasonably necessary, in the circumstances as the police officer perceives them...' and be taken in 'good faith'.**

**However, the Committee notes that the exemption appears to apply whether or not a certain standard of care has been taken by the police officers if the police action is for the purposes of the police action plan. The absence of any express standard of care in the section may exempt police officers from criminal liability even if actions resulting in the death of innocent individuals or bystanders were, in substance, criminally negligent or reckless.**

#### *Presumption against parole*

15. Schedule 2 of the Bill insert Division 3A in Part 6 of the *Crimes (Administration of Sentences) Act* to provide that terrorism-related offenders are not to be released on parole unless the Parole Authority is satisfied that the offender will not engage in, or incite or assist others to engage in, terrorist acts or violent extremism.

16. Section 159B applies Division 3A to a wide category of offenders, including an offender 'who has any association or affiliation with any persons or groups advocating support for terrorist acts or violent extremism'. The Committee notes that 'association', 'affiliation' and 'violent extremism' are not defined.
17. Section 159C(2) provides that a parole order may be revoked if 'the Parole Authority has become aware that the offender *may* engage in, or incite or assist others to engage in, terrorist acts or violent extremism' (the Committee's emphasis). This could be considered a relatively low threshold for revocation.
18. Section 159C(4) also refers to section 50 of the *Crimes (Sentencing Procedure) Act 1999* (the *Crimes (Sentencing Procedure) Act*). Section 50 provides that a court must make an order directing the release of the offender on parole at the end of the non-parole period for offenders with a term of imprisonment of three years or less. Under section 159C(4), a court may decline a parole order that it would ordinarily be required to make under section 50, if the offender is known to the court as a terrorism related offender. The Committee notes that section 159C(4) weakens the presumption in section 50 of the *Crimes (Sentencing Procedure) Act* that offenders sentenced to 3 years or less will be released on parole at the end of their non-parole period, if they are a terrorism related offender.

**The Committee notes that the insertion of Division 3A in the *Crimes (Administration of Sentences) Act* creates a presumption against parole for terrorism-related offenders and imposes a high onus on the offender to prove that he or she will not engage in, incite or assist others to engage in, terrorist acts or violent extremism. The Committee is concerned that the Division has potential to unduly trespass on the rights and liberties of some offenders and refers this to Parliament for its further consideration.**

#### *Retrospectivity*

19. Section 159D(5) in Schedule 2 of the Bill amends the *Crimes (Administration of Sentences) Act* and provides that this Division 'extends to applications for parole orders pending on the commencement of this Division and to parole orders made before that commencement'.
20. The Committee notes that section 159B(5) seeks to have retrospective effect in relation to parole orders pending on or made before commencement of the section and orders made before commencement.

**The Committee is generally concerned where legislation seeks to have retrospective effect, particularly legislation that trespasses on personal rights and liberties. However, the Committee observes that the parole amendments aim to provide the public with a continuing measure of safety from terrorism-related offenders at the end of their sentence period. In such circumstances, the amendments are reasonable and the Committee makes no further comment.**

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

*Ambiguity*

21. Section 24B(2) also prevents police officers from incurring criminal liability for the use of force for 'taking any such police action for the purposes of a police action plan of the police officer in charge of the police officers responding to the terrorist act'.

**Section 24B(2) exempts a police officer from criminal liability for action taken within the meaning of subsection (1) which is 'for the purposes of a police action plan'. The Committee notes that this is a broad requirement and may mean that the force used, including lethal force, may not have been specified in or contemplated by the police action plan. Given that 'police action plan' is also not defined, the Committee refers this to Parliament for its further consideration.**

22. Section 24B(6) of the Bill provides that Part 2AAA - relating to police powers permitted to respond to a declared terrorist act - does not limit the powers of police officers to deal with a terrorist act, and police officers may exercise those powers whether or not the Commissioner of Police has been requested or has declined to make a declaration under this Part in relation to the terrorist act.

**Part 2AAA of the *Terrorism (Police Powers) Act* is not intended to limit the powers of police officers to deal with a terrorist act, even if a declaration under the Part has not been made. However, the Committee considers that section 24B(6) may be unnecessarily ambiguous as it does not identify the powers of police officers, or the source of power, to respond to a terrorist act in circumstances where a declaration under the Part has not been made. The Committee prefers that laws clearly identify the nature and source of any power, particularly powers to use force against another individual (including lethal force) and refers this to Parliament for its consideration.**

## Part Two – Regulations

### 1. Apprenticeship and Traineeship Regulation 2017

|                      |                            |
|----------------------|----------------------------|
| Date published       | 2 June 2017                |
| Disallowance date    | 21 September 2017          |
| Minister responsible | The Hon. John Barilaro, MP |
| Portfolio            | Minister for Skills        |

#### PURPOSE AND DESCRIPTION

1. The object of the Regulation is to repeal and remake, with minor amendments, the provisions of the *Apprenticeship and Traineeship Regulation 2010*, which would otherwise be repealed on 1 September 2017 by section 10(2) of the *Subordinate Legislation Act 1989*.
2. The Regulation makes provision with respect to the following:
  1. the making of applications to establish apprenticeships and traineeships,
  2. the employment of persons under the age of 21 years in certain trade vocations,
  3. the payment of the expenses of witnesses before the Civil and Administrative Tribunal of New South Wales in connection with apprenticeships and traineeships,
  4. the procedures relating to appeals,
  5. the form for an industry training officer's certificate of identification,
  6. the payment of fees and the circumstances in which fees may be waived or refunded,
  7. the nomination of persons for appointment of the vocational Training Review Panel of New South Wales,
  8. repeals, savings and formal matters.



## ISSUES CONSIDERED BY COMMITTEE

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

### *Right to privacy*

3. Clause 6 of the Regulation requires a registered training organisation to provide information to an employer on request in relation to the progress of an apprentice or trainee in obtaining a relevant qualification.

**Under clause 6, registered training organisations are to provide information requested by an employer regarding the progress of an apprentice or trainee in obtaining a relevant qualification. While this may breach an individual's right to privacy, the Committee acknowledges that it is reasonable that employers who are signatories to a training plan and provide paid leave to enable an apprentice or trainee to undertake study in accordance with that plan can receive information about the individual's progress.**

## 2. Home Building Amendment (Fees) Regulation 2017

|                      |                                  |
|----------------------|----------------------------------|
| Date published       | 24 May 2017                      |
| Disallowance date    | 13 September 2017                |
| Minister responsible | The Hon. Matt Keane MP           |
| Portfolio            | Innovation and Better Regulation |

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Home Building Regulation 2014* as follows:
  - (a) to increase the fees payable in connection with the administration of the *Home Building Act 1989*,
  - (b) to provide for a mechanism for the automatic adjustment for inflation of those fees in future.
2. The fee increases effected by this Regulation are generally in line with movements in the Consumer Price Index (rounded to the nearest dollar).

### ISSUES CONSIDERED BY COMMITTEE

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

#### *Ambiguity*

3. Schedules 1[3] and 1[5] of the Regulation amends the *Home Building Regulation 2014* to remove references to the specified fee amounts payable and now expresses this amount in 'fee units', which is a decimal amount.
4. The Committee is concerned that this may create ambiguity as to the cost of administrative services under the Regulation. However, the Committee notes that the new fee units can be inserted into a formula also provided in the Regulation, so that the instrument does not require updating on a yearly basis to account for inflation.
5. The Committee has identified the same issue in the regulations listed below:
  - Tattoo Parlours (Fees) Regulation 2017
  - Landlord and Tenant Amendment (Fees) Regulation 2017
  - Associations Incorporation Amendment (Fees) Regulation 2017
  - Co-operative Housing and Starr-Bowkett Societies Amendment (Fees) Regulation 2017
  - Co-operatives (New South Wales) Amendment (Fees) Regulation 2017
  - Conveyancers Licensing Amendment (Fees) Regulation 2017
  - Motor Dealers and Repairers Amendment (Fees) Regulation 2017

**The *Home Building Amendment (Fees) Regulation 2017* replaces dollar amounts with fee units expressed in decimal amounts. While this may create ambiguity as to the true cost of administrative services, the Committee acknowledges the administrative convenience of using fee units to calculate future fees by reference to a formula which accounts for inflation. The Committee has identified this issue in several other fee regulations considered as part of this digest, but will not provide comment if this issue resurfaces in the context of future digests.**

### 3. Liquor Amendment (Special Licence Conditions) Regulation 2017

|                      |                        |
|----------------------|------------------------|
| Date published       | 26 May 2017            |
| Disallowance date    | 14 September 2017      |
| Minister responsible | The Hon. Paul Toole MP |
| Portfolio            | Racing                 |

#### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to change the list of licensed premises that are subject to the special licence conditions set out in Schedule 4 to the *Liquor Act 2007*.

#### ISSUES CONSIDERED BY COMMITTEE

The regulation may have an adverse impact on the business community: s9(1)(b)(ii) of the LRA

##### *Special licence conditions*

2. Schedule 1[1] operates to declare ten new venues as level 2 licensed premises, and one new venue as a level 1 licensed premises.

**The effect of Schedule 1[1] is to impose additional licence conditions on certain venues regulated under the *Liquor Act 2007*, which may have an adverse impact on the business community by reducing patronage and revenue. However, the Committee notes the broader public health and safety objectives associated with the conditions and therefore makes no further comment.**

## 4. Service NSW (One-stop Access to Government Services) Amendment (Approved Persons) Regulation 2017

|                      |                                |
|----------------------|--------------------------------|
| Date published       | 19 May 2017                    |
| Disallowance date    | 10 August 2017                 |
| Minister responsible | The Hon. Victor Dominello MP   |
| Portfolio            | Finance, Services and Property |

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to prescribe various corporations as approved persons that may provide customer service functions on behalf of the Chief Executive Officer of Service NSW.
2. This Regulation is made under the *Service NSW (One-stop Access to Government Services) Act 2013*, including sections 12 (2) and 21 (the general regulation-making power).
3. On 22 June 2017, the opposition moved to disallow this Regulation on the basis that it privatised the function of a NSW government agency that deals with private and personal information. In response to this disallowance motion, the Minister for Finance, Services and Property, stated that the regulation is intended to provide government services 'quickly, conveniently and simply.'

### ISSUES CONSIDERED BY COMMITTEE

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

#### *Privacy*

4. The regulation amends Clause 4 of the *Service NSW (One-stop Access to Government Services) Amendment (Approved Persons) Regulation 2017* ('the principal regulation') to expand the number of 'approved persons' that may provide customer service functions on behalf of the Chief Executive Officer of Service NSW.
5. The Committee notes that the regulations list an additional seven companies as approved persons that are able to provide the functions of Service NSW. The functions include the delivery of services for multiple NSW government agencies that deal with sensitive personal information such as Roads and Maritime Services, the Office of Births, Deaths and Marriages, and Fair Trading offices.

**The Committee notes that the regulation expands the list of approved persons that may provide customer services on behalf of Service NSW. This includes services for multiple NSW government agencies that handle sensitive personal**

**information. The Committee is concerned that the release of personal information to a private company may trespass on the right to privacy of individuals. The Committee draws this right to privacy to the attention of the Parliament.**

# 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.