



Legislation Review Committee

LEGISLATION REVIEW DIGEST

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

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Membership

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Guide to the Digest

COMMENT ON BILLS

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

COMMENT ON REGULATIONS

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

Regulations for the special attention of Parliament

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

Conclusions

PART ONE – BILLS

1. APPRENTICESHIP AND TRAINEESHIP AMENDMENT BILL 2017

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

Removal of Vocational Training Review Panel as an avenue of review

The Committee notes that the abolition of the Vocational Training Review Panel may reduce an avenue of review for individuals. However, the Committee also notes the policy objectives and administrative convenience of a centralised board for determinations and conflict resolution. The Committee also notes the new avenues of redress opened up before the NSW Civil and Administrative Tribunal as well as the transitional and savings provisions that will preserve rights to the Review Panel for existing matters. Given these alternative review processes and policy objectives, the Committee makes no further comment.

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

Commencement by proclamation

The Committee is generally concerned where Acts provide the Executive with unfettered control over the commencement of an Act. The Committee prefers legislation to commence on assent or a fixed date. However, given the Act implements several changes across many agencies and other Acts, the Committee notes the administrative convenience of the provision. In these circumstances, the Committee makes no further comment.

2. ENVIRONMENTAL PLANNING AND ASSESSMENT ELECTORAL LEGISLATION AMENDMENT (PLANNING PANELS AND ENFORCEMENT) BILL 2017

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

Right to democratic representation

The Bill inserts section 23I of the Act, which vests certain functions of council in local planning panels. While the Committee notes that this potentially trespasses on the democratic rights of community members to be represented by their elected councillors, the Committee is of the view that the amendment may be justified given that it is aimed at improving the quality and consistency of local-decision making by reducing the risk that planning outcomes are subject to improper influence by councillors.

Right to privacy

The Committee notes that the clause 15 of Schedule 4B requires a panel member to disclose certain pecuniary interests. Given that particulars of the disclosure must be recorded and available for inspection by the public, the Committee notes that this provision may trespass on the right to privacy. However, subsection (4) suggests that the disclosure would be quite general and would not necessarily include personal information. For this reason, and noting that the provision is aimed at ensuring transparent decision-making, the Committee makes no further comment.

Retrospectivity

The Committee notes that proposed section 21CA(5) of the *Parliamentary Electorates and Elections Act 1912* applies retrospectively. The Committee is concerned whenever a provision seeks to apply retrospectively as it conflicts with the principle that a person should only be bound by a law which exists at the relevant time and therefore of which they could have been aware. However, in this instance, the Committee considers that the provision is justified given that the retrospectivity does not relate to provisions of the *Local Government Act 1993* but the ability of the *Electoral Commission* to enforce compliance with the provisions of that Act as they existed at the relevant time.

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

Matters not defined

The Bill introduces section 23K, which enables the Minister to approve certain ‘independent persons’ who are capable of being appointed to a local planning panel. While the phrase ‘approved independent persons’ is defined, the definition is circular because it does not state what is meant by an ‘independent person’. The Committee notes that it generally prefers that definitions are comprehensive. .

Wide discretionary powers

Clause 15(6) in proposed Schedule 4B provides that, once a members’ pecuniary interest in an application is disclosed, the Minister or the panel may determine that the member may remain present during deliberation or take part in any decision of the panel with respect to the matter. The Committee is concerned that there are no parameters guiding the discretion of the Minister and the panel to allow a member who has disclosed a pecuniary interest to take part in deciding that application. This has potential to infringe the rights of interested parties to have a DA decided on its merits by individuals who are not biased or subject to improper influence. The Committee refers this matter to Parliament for its further consideration.

Section 6(1) in the Bill provides that a council can remove a member of a local planning panel at any time for any reason and without notice. The Committee notes that the wide-ranging nature of the power may result in it being exercised for political reasons, such as to frustrate the progress of a development application.

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

Fee to be determined by panel

The Bill requires that a register of pecuniary interests of members of planning panels, and other relevant persons, is available to inspection by the public. However, clause 15 of Schedule 4B in the Bill provides that the register can be inspected upon ‘payment of the fee determined by the panel.’ The Committee would prefer that the amount of the fee or formula for its calculation is determined by Parliament as the current drafting creates potential for an exorbitant fee to be charged to discourage access to the register.

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

Matters ‘subject to the regulations’

The Bill describes certain matters as subject to the regulations. The Committee observes that this can create uncertainty and that regulations are subject to a lower degree of Parliamentary scrutiny. However, the Committee acknowledges that regulations may be disallowed pursuant to section 41 of the *Interpretation Act 1987* and therefore makes no further comment.

3. PUBLIC ACCOUNTABILITY LEGISLATION AMENDMENT (SYDNEY MOTORWAY CORPORATION) BILL 2017*

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

4. PUBLIC HEALTH AMENDMENT (REVIEW) BILL 2017

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

Right to patient confidentiality

The Bill proposes a new subsection that requires a medical practitioner involved in the treatment of persons with scheduled medical conditions or notifiable diseases to, in certain circumstances, provide information regarding that person to the Secretary of Health.

The proposed amendments to sections 54, 55 and 83 potentially infringe the right to patient confidentiality. However, the Committee acknowledges that these subsections mirror obligations which already apply to doctors who diagnose the relevant scheduled medical condition. Section 83 also already imposes a similar obligation on Hospital CEOs. The provisions protect the health of the public by reducing the potential for ‘information gaps’ regarding a scheduled medical condition, and that the Bill proposes an additional safeguard for those with HIV or AIDS in section 56. As such, the Committee makes no further comment in relation to the proposed amendments to section 54 and 55.

However, the Committee refers to Parliament the question of whether a similar safeguard should be included in section 83 of the Act for information provided in respect of a person who has a notifiable disease.

The Bill amends section 56(4)(b) of the Act, so that information regarding a person’s HIV or AIDS status can now be disclosed to a person who is involved in the provision of care, treatment or counselling to the person concerned, regardless of whether the information is relevant to the provision of such care, treatment or counselling.

The Committee is concerned that the amendment removes a safeguard which prevented service providers (such as pathology laboratories) from unnecessarily disclosing information regarding a person’s HIV or AIDS status to a care provider where that information was not relevant to a person’s care. While the Committee notes that a treating professional is in the best position to assess whether a person’s HIV or AIDS status is relevant to a person’s care, the Committee is nevertheless concerned that the subsection is now too broad and refers this matter to Parliament for its consideration.

The Bill proposes to amend section 98 of the Act, which currently contains certain privacy protections in respect of registers established under the Act. The amendment proposed is to replace ‘register’ with ‘register established under this section.’

While the effect of the amendments may not be clear, the Statutory Review appears to indicate that ‘register established under this section’ distinguishes the privacy protections

afforded to registers established under section 98 with other registers that may be established under the Act. Although this distinction may be justified on public policy grounds, the Committee is unclear as to the nature and appropriateness of any safeguards or limits in place relating to the use of personal information in the context of these other registers. While the Committee notes that the Crown is bound by the *Health Records and Information Privacy Act 2002*, the Committee refers the question of whether there are adequate privacy safeguards in place for registers which may contain personal information to Parliament for its further consideration.

Proposed section 130A(1) provides that the Secretary cannot be compelled to produce information to a Court that it has received under Part 4 or 5 of the Act, which relate to scheduled medical conditions and other disease control measures. However, proposed section 130A(2) enables the Secretary to consent to the disclosure of such information ‘for the purpose of any legal proceedings.’ The Committee is concerned that the absence of parameters guiding the exercise of the Secretary’s discretion may result in unnecessary trespasses on the privacy of individuals and refers this matter to Parliament for its consideration.

Right to be free from discrimination

The Bill amends the *Public Health Regulation 2012* to exempt certain classes of children, including Aboriginal and Torres Strait Islander children and those in out-of-home care, from initial vaccination pre-enrolment requirements at child care facilities. While the Committee acknowledges that this potentially discriminates against these children on the basis of their race or care situation, the Committee is of the view that the provision is justified given that the section is designed to minimise disadvantage. The Committee also acknowledges that the second reading speech indicates that the Regulation will require these vaccination records to be provided within 12 weeks of enrolment.

Restrictions on liberty/freedom of movement

The Bill proposes new section 62(4), which enables an authorised medical practitioner to order the detention of a person with a Category 4 or 5 condition, or a ‘contact order condition’, at a specified place for the duration of the order in certain circumstances. This power was previously restricted to individuals with a Category 5 condition. The Committee notes that detaining an individual against their will trespasses on their right to liberty and freedom of movement. However, the section contains safeguards, including that the person must be a risk to public health because of their behaviour, and the practitioner must be satisfied that the detention is the most effective way to prevent any risk to public health. The public health orders are also subject to confirmation and review by NCAT: see sections 64 and 66. For these reasons, and noting the public health objectives of the amendment, the Committee makes no further comment.

Ambiguity – definition of child

The Bill proposes to replace ‘primary school’ with ‘school’ in sections 85, 86 and 88 of the Act, which relate to vaccination requirements. The Committee understands that, consistent with the second reading speech, this is because recommendation 28 of the Statutory Review suggests extending the requirements to high schools. However, the Committee notes that ‘child’ is defined by reference to the *Public Health Regulation 2012*, which defines ‘child’ as children enrolled in child care facilities or primary schools. The Committee is therefore

concerned that the effect of the amendments to sections 85, 86 and 88 of the Act is ambiguous. However, the Committee assumes that the definition of ‘child’ will be updated in the regulation and therefore makes no further comment.

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

Power to amend Act by order

The Bill proposes to amend section 51(2) so that the Minister can order the amendment or substitution of Schedule 1A to the Act, which lists contact order conditions and their relevant expiry periods. In this instance, it is not clear to the Committee that the order would be classed as a statutory rule and therefore may not be subject to the disallowance processes in section 41 of the *Interpretation Act 1987*. The Bill also proposes that public health orders can be made in respect of certain persons at risk of developing a contact order condition. While the Committee acknowledges the administrative convenience of the subsection, in circumstances where public health orders can significantly curtail a person’s liberty, the Committee would prefer that any amendment to Schedule 1A is made by way of an Act so it is subject to an appropriate level of parliamentary scrutiny.

5. SYDNEY PUBLIC RESERVES (PUBLIC SAFETY) BILL 2017

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

Right to access and use public space

The Committee notes that the Bill can be applied to any person using a public reserve or in the presence of a public reserve. This Committee is concerned that this is a broad definition that may encompass many ordinary uses of a public reserve. This may encroach on a person’s right to access and use public space. The Committee draws this to the attention of the Parliament.

Right to personal property

The Committee notes that the Bill provides that a police officer may seize or remove any personal item from a public reserve, and provides police with the discretion to either return the items to the person it was seized from, dispose of it, impound it. This potentially encroaches on a person’s right to personal property, particularly as the Bill does not outline what considerations must be taken into account before a police officer may decide to dispose or impound the property rather than returning it to the person from whom it was seized. The Committee draws this to the attention of the Parliament.

Freedom of assembly/Freedom of association

The Committee notes that the Bill permits police officers to give directions to a group of persons, which potentially encroaches on the common law right to freedom of assembly. The Committee acknowledges that section 11 excludes certain groups of persons, including in relation to an industrial dispute and any authorised demonstration, protest or procession. However, the Committee is concerned that this still captures a broad range of activities related to the freedom of assembly and, by extension, freedom of association. The Committee refers this to the Parliament for its further consideration.

Ambiguity regarding rights of persons

The Committee notes that the regulations may prescribe a code of practice relating to the exercise of police powers and the rights of persons to whom directions are given under the

Act. The Bill is not clear as to what these powers or rights may include. The Committee is generally concerned where police powers and, in particular, the rights of persons are not clarified in the principal legislation. The Committee is also concerned that these powers and rights are to be prescribed by the regulations and not subject to Parliamentary scrutiny. The Committee refers this lack of clarity and lack of parliamentary scrutiny regarding the rights of persons to the Parliament.

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

Application and extensions of Act by proclamation

The Committee notes that Section 3 of the Bill applies to the Martin Place Reserve and ‘any other public reserve in the City of Sydney’ by a proclamation of the Governor on the recommendation of the Minister. Such a proclamation may be amended or revoked by a further proclamation. The Committee prefers that applications of Acts, particularly extensions or revocations of parts of the Act, be commenced by a fixed date or assent to provide certainty to those that are affected by the Act. This is particularly concerning where persons who fail to comply with the Act may incur a penalty offence under sections 7(4) and 8(3).

The Committee also notes that the Bill provides a safeguard that such a direction is only recommended by the Minister if it is in the public interest to do so. However, this requirement is quite broad and subjective and does not provide certainty to when this may be applied. The Committee draws this to the attention of the Parliament.

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

Regulations that may create offences

The Committee notes that section 16(2) of the Bill permits the regulations to create penalty notices offences up to the amount of 50 penalty units. The Committee would prefer that provisions containing offences, particularly offences that potentially involve a large monetary sum, to subject to parliamentary scrutiny. The Committee particularly notes that the penalties provided for in the Bill may disproportionately impact the class of persons likely to be affected by the Bill. The Committee draws this to the attention of the Parliament for its further consideration.

PART TWO - REGULATIONS

1. BIOSECURITY REGULATION 2017

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

Fair consideration and determination of applications

The Committee notes that the regulations contain several provisions outlining that a failure to determine a claim within 60 days after the application is made is to be taken as a refusal of the claim. The Committee is concerned that this may lead to claims being taken to be deemed refused because of a lapse of time without proper consideration or determination of the application. In particular, applications in relation to biosecurity registration and permits may impact a person’s ability to work in agricultural or biosecurity-related fields. It would be preferable that a determination is made in every case so that the applicant is provided with reasons for the refusal. The Committee draws this to the attention of the Parliament.

2. SURVEILLANCE DEVICES AMENDMENT (CORRESPONDING LAW) REGULATION 2017

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

Right to privacy in NSW

The Surveillance Devices Amendment (Corresponding Law) Regulation 2017 amends the Surveillance Devices Regulation 2014 to declare the Crimes (Surveillance Devices) Act 2010 of the Australian Capital Territory a corresponding law for the purposes of the definition of ‘corresponding law’ in section 4 (1) of the Surveillance Devices Act 2007.

The Surveillance Devices Act 2007 uses the term ‘corresponding law’ regularly, including in the context of authorising the use of a surveillance device issued without a warrant under a corresponding law, pursuant to a ‘corresponding emergency authorisation’ under section 38. This is defined to be an ‘authorisation in the nature of an emergency authorisation given under the provisions of a corresponding law, being an authorisation in relation to a relevant offence within the meaning of the corresponding law.’

The Committee therefore acknowledges that listing the Crimes (Surveillance Devices Act) 2010 as a corresponding law potentially trespasses on an individual’s right to privacy as it exists in NSW, including by authorising surveillance without a warrant where the relevant emergency authorisation was issued under a separate Act.

However, the Committee is of the view that the amending Regulation is justified given that law enforcement authorities must be able to, in certain circumstances, undertake surveillance operations extraterritorially to ensure the effective investigation and prosecution of crimes. The Committee also notes that clause 3 of the Surveillance Devices Regulation 2014 already identifies corresponding laws in Victoria, Queensland, Northern Territory and Tasmania.

3. TRANSPORT ADMINISTRATION (GENERAL) AMENDMENT (POINT TO POINT TRANSPORT COMMISSIONER) REGULATION 2017

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

Ambiguity

The Committee notes that the regulation makes reference to ‘the definition of *authorised person*’ in section 31(3)(b)’ of the parent Act. However the parent act does not provide a definition for ‘authorised person’. It does instead provide a definition for, and provisions relating to, an ‘authorised officer’ under section 3 and in Division 1 of Part 7. The Committee notes that it is unclear from the regulation which definition or part is being referred to. The Committee draws this to the attention of the Parliament.

Part One – Bills

1. Apprenticeship and Traineeship Amendment Bill 2017

Date introduced	9 August 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. John Barilaro MP
Portfolio	Deputy Premier, Regional New South Wales, Skills and Small Businesses

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Apprenticeship and Traineeship Act 2001* (***the Act***) as follows
 - (a) to abolish the Vocational Training Review Panel (the Review Panel),
 - (b) to provide for a right to apply to the Civil and Administrative Tribunal (NCAT) for an administrative review of certain decisions of the Commissioner for Vocational Training (the Commissioner) under the Act (replacing the right to apply to the Review Panel for a review of those decisions and the right of external appeal to NCAT from decisions of the Review Panel),
 - (c) to confer on the Commissioner the functions of the Review Panel relating to the hearing and determination of complaints under the Act,
 - (d) to provide for a process of conciliation in the first instance for complaints made by a party to an apprenticeship or traineeship, and for review by the Commissioner where complaints cannot be settled,
 - (e) to declare that certain provisions of the Act and regulations made under the Act are excluded from the application of section 9 of the *National Vocational Education and Training Regulator Act 2011* of the Commonwealth so that State laws will apply to certain organisations registered under the Commonwealth Act that provide training, assessment or instruction in relation to recognised trade vocations or recognised traineeship vocations,
 - (f) to provide that trainee apprenticeships are not permitted to be established under the Act,
 - (g) to provide for the making of applications for the establishment of apprenticeships or traineeships by an agent on behalf of an employer,
 - (h) to further provide for the matters of which the Commissioner must be satisfied before approving an application for the establishment of an apprenticeship or traineeship,

- (i) to further provide for the making of training contracts and training plans,
- (j) to require apprentices and trainees to undergo assessments of competence before being issued with a certificate of proficiency in the relevant vocation,
- (k) to enable the Commissioner to require an applicant for the recognition of trade training to undergo an assessment of competence and seek expert advice in connection with the application,
- (l) to require the Commissioner to obtain the unanimous recommendation of nominated industrial representatives before determining that applicants for recognition of qualifications or experience are adequately trained to pursue certain vocations,
- (m) to further provide for the making of orders prohibiting employers from entering into apprenticeships or traineeships,
- (n) to remove requirements to issue craft certificates and certificates of completion,
- (o) to require applications under the Act to be made in the manner and form approved by the Commissioner,
- (p) to provide for the issue of penalty notices for certain offences against the Act or regulations made under the Act,
- (q) to increase the maximum amount of penalty that can be imposed for certain offences against the Act or regulations,
- (r) to make other minor and consequential amendments, including savings and transitional provisions consequent on the proposed amendments.

BACKGROUND

2. In his second reading speech, the Deputy Premier stated the object of the Bill was to amend the *Apprenticeship and Traineeship Act 2001* that “regulate the employment and training of apprentices and trainees in New South Wales.”
3. The Bill proposes obligations and accountability measures on employers, apprentices, trainees and training organisations through training contracts, and provide a variety of different apprenticeship models to meet the needs of employers, apprentices, trainees and the industry.
4. In addition, the Bill would abolish the Vocational Training Review Panel and move handling of complaints and disputes resolutions to the Commissioner of Vocational Training.

ISSUES CONSIDERED BY COMMITTEE

Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA*Removal of Vocational Training Review Panel as an avenue of review*

5. The Vocational Training Review Panel provides an avenue of appeal for a decision made by the Commissioner of Vocational Training with respect to traineeship and apprenticeship applications, including the dismissal of applications.
6. There are a number of clauses in the Bill which have removed or omitted the Vocational Training Review Panel (Review Panel).
7. In the second reading speech, the Deputy Premier stated that the removal of the Review Panel was to “reduce the administrative burden associated with the panel, which only considered 15 disputes in 2016”.
8. The Committee notes that the complaints handling and disputes resolution functions will be moved to the Commissioner of Vocational Training in the first instance
9. For matters that remain outstanding, the transitional or saving provisions of the Bill provides for proceedings that are pending before Review Panel to be concluded
10. Lastly, the Bill provides for an avenue of appeal under section 54 of Part 5 allowing a person aggrieved by a decision to apply to the NSW Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997*.

The Committee is concerned the removal of the Review Panel may reduce an avenue of review for aggrieved individuals. However, the Committee also notes the new procedures to be established to allow for alternative avenues of review and complaint.

The Committee notes that the abolition of the Vocational Training Review Panel may reduce an avenue of review for individuals. However, the Committee also notes the policy objectives and administrative convenience of a centralised board for determinations and conflict resolution. The Committee also notes the new avenues of redress opened up before the NSW Civil and Administrative Tribunal as well as the transitional and savings provisions that will preserve rights to the Review Panel for existing matters. Given these alternative review processes and policy objectives, the Committee makes no further comment.

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

11. Clause 2 provides that the commencement of the *Apprenticeship and Traineeship Amendment Act 2017* is to commence on a day or days to be appointed by proclamation.

The Committee is generally concerned where Acts provide the Executive with unfettered control over the commencement of an Act. The Committee prefers legislation to commence on assent or a fixed date. However, given the Act implements several changes across many agencies and other Acts, the

Committee notes the administrative convenience of the provision. In these circumstances, the Committee makes no further comment.

2. Environmental Planning and Assessment Electoral Legislation Amendment (Planning Panels and Enforcement) Bill 2017

Date introduced	8 August 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Planning

PURPOSE AND DESCRIPTION

1. The Bill amends the *Environmental Planning & Assessment Act 1979* to require councils in the Greater Sydney Region and Wollongong to establish a local planning panel. The consent authority functions of the council are to be exercised by the panel or by council staff as delegates of the council.
2. Such panels will have 4 members, with an independent chairperson (approved by the Minister), 2 other independent persons with relevant experience (also approved by the Minister) and a community representative for the area.
3. The Bill also proposes that local planning panels advise on planning proposals referred to the panel by the council or as directed by the Minister.
4. The Bill also amends the:
 1. *Environmental Planning & Assessment Regulation 2000*, to make ancillary provisions relating to a local planning panel;
 2. *State Environmental Planning Policy (State and Regional Development) 2011*, including to increase the threshold for regional panels to development exceeding a capital investment value of \$30 million;
 3. *Parliamentary Electorates and Elections Act 1912*, including to authorise the Electoral Commission to institute proceedings for offences under the *Local Government Act 1993* in connection with the conduct of local government elections; and
 4. *Local Government Act 1993* to extend the time for bringing criminal proceedings for an offence under the Act in connection with the conduct of local government elections.

BACKGROUND

5. In New South Wales, 15 councils already have existing panels, known as Independent Hearing Assessment Panels or 'IHAPs'. The Bill proposes to extend these to all council areas in the Sydney and Wollongong.
6. The second reading speech states that panels may reduce the risk of corruption and increase the potential for strategic, streamlined and balanced decision-making when assessing development applications.
7. The Committee notes that the Bill was passed by both houses on 10 August 2017, shortly after its introduction, and this report is published after that date. However, section 8A(2) of the *Legislation Review Act 1987* provides that 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 if the Bill has passed or become an Act.

Issues considered by committee

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

Right to democratic representation

8. Schedule 1[5] of the Bill inserts section 23I of the Act, which provides that certain functions of a council as a consent authority are not exercisable by councillors but are exercisable by others including the local planning panel.
9. The Committee notes that this amendment may potentially trespass on the right of community members to be represented by their elected councillors. Relevantly, the DAs that are to be decided by local planning panels under the Bill are likely to be significant in scale and community impact, given that they include DAs with more than 10 objections, those valued over \$5 million, residential flat buildings, and the demolition of heritage items.
10. However, the Committee acknowledges that the purpose of referring these functions to local planning panels is to seek to improve the quality and consistency of local decision-making by reducing the opportunity for councillors to advance their own personal interests.
11. The Committee also notes that the panel will contain a community representative, and so the views of the community may continue to be represented in some capacity (but noting that the Bill provides little detail about who can become such a representative).

The Bill inserts section 23I of the Act, which vests certain functions of council in local planning panels. While the Committee notes that this potentially trespasses on the democratic rights of community members to be represented by their elected councillors, the Committee is of the view that the amendment may be justified given that it is aimed at improving the quality and consistency of local decision making by reducing the risk that planning outcomes are subject to improper influence by councillors.

Right to privacy

12. Clause 15 of Schedule 4B requires a member of a panel to disclose the nature of any pecuniary interests of the member or their spouse, de facto partner or a relative, among others. Particulars of any disclosure must be recorded by the panel and be available for inspection by the public upon payment of a fee.

The Committee notes that the clause 15 of Schedule 4B requires a panel member to disclose certain pecuniary interests. Given that particulars of the disclosure must be recorded and available for inspection by the public, the Committee notes that this provision may trespass on the right to privacy. However, subsection (4) suggests that the disclosure would be quite general and would not necessarily include personal information. For this reason, and noting that the provision is aimed at ensuring transparent decision-making, the Committee makes no further comment.

Retrospectivity

13. Section 21CA in the Bill, which extends certain enforcement functions of the Electoral Commission, is proposed to be included in the Parliamentary Electorates and Elections Act 1912. Subsection (5) provides that the section applies to local government elections held before the commencement of this section.

The Committee notes that proposed section 21CA(5) of the *Parliamentary Electorates and Elections Act 1912* applies retrospectively. The Committee is concerned whenever a provision seeks to apply retrospectively as it conflicts with the principle that a person should only be bound by a law which exists at the relevant time and therefore of which they could have been aware. However, in this instance, the Committee considers that the provision is justified given that the retrospectivity does not relate to provisions of the *Local Government Act 1993* but the ability of the *Electoral Commission* to enforce compliance with the provisions of that Act as they existed at the relevant time.

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

Matters not defined

14. Section 23K in the Bill enables a council to appoint to a planning panel ‘approved independent persons’, being persons approved by the Minister. While ‘approved independent persons’ is defined, the definition itself refers to ‘an independent person approved by the Minister...’.
15. The Committee is concerned that ‘independent’ is not defined, and as such the Minister may have discretion to approve persons who are aligned with a particular political party or who are not truly independent. This may undermine the perceived or actual political independence of planning panels when deciding matters which have potential to significantly impact a local community.

The Bill introduces section 23K, which enables the Minister to approve certain ‘independent persons’ who are capable of being appointed to a local planning panel. While the phrase ‘approved independent persons’ is defined, the

definition is circular because it does not state what is meant by an ‘independent person’. The Committee notes that it generally prefers that definitions are comprehensive. .

Wide discretionary powers

16. The Bill requires panel members to disclose certain pecuniary interests. Clause 15(6) in proposed Schedule 4B provides that, once an interest is disclosed, the Minister or the panel may determine that the panel member may remain present during deliberations or take part in any decision of the panel with respect to the matter. However, no parameters are provided.

Clause 15(6) in proposed Schedule 4B provides that, once a members’ pecuniary interest in an application is disclosed, the Minister or the panel may determine that the member may remain present during deliberation or take part in any decision of the panel with respect to the matter. The Committee is concerned that there are no parameters guiding the discretion of the Minister and the panel to allow a member who has disclosed a pecuniary interest to take part in deciding that application. This has potential to infringe the rights of interested parties to have a DA decided on its merits by individuals who are not biased or subject to improper influence. The Committee refers this matter to Parliament for its further consideration.

17. The Committee notes that section 6(1) in the Bill empowers a council to remove a member of a panel at any time for any reason and without notice. While reasons need to be provided, the Committee is concerned that there are no parameters guiding the exercise of the council’s discretion.

Section 6(1) in the Bill provides that a council can remove a member of a local planning panel at any time for any reason and without notice. The Committee notes that the wide-ranging nature of the power may result in it being exercised for political reasons, such as to frustrate the progress of a development application.

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

Fee to be determined by panel

18. Clause 15 of Schedule 4B in the Bill makes the register of pecuniary interests of members and other relevant persons available to the public upon payment of a fee to be determined by the panel.

The Bill requires that a register of pecuniary interests of members of planning panels, and other relevant persons, is available to inspection by the public. However, clause 15 of Schedule 4B in the Bill provides that the register can be inspected upon ‘payment of the fee determined by the panel.’ The Committee would prefer that the amount of the fee or formula for its calculation is determined by Parliament as the current drafting creates potential for an exorbitant fee to be charged to discourage access to the register.

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

Matters 'subject to the regulations'

19. The Bill describes a number of matters as 'subject to the regulations':
 1. Clause 2 in proposed Schedule 4B provides that a member of a panel holds office for a period not exceeding 3 years, subject to the Act and the regulations,
 2. Clause 7(2) in Schedule 4B provides that a member may be appointed subject to the Act and the regulations.

The Bill describes certain matters as subject to the regulations. The Committee observes that this can create uncertainty and that regulations are subject to a lower degree of Parliamentary scrutiny. However, the Committee acknowledges that regulations may be disallowed pursuant to section 41 of the *Interpretation Act 1987* and therefore makes no further comment.

3. Public Accountability Legislation Amendment (Sydney Motorway Corporation) Bill 2017*

Date introduced	10 August 2017
House introduced	Legislative Assembly
Member responsible	Ms Jodi McKay MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
 - (a) to amend the *Government Information (Public Access) Act 2009* to provide that information held by the Sydney Motorway Corporation may be accessed under that Act,
 - (b) to amend the *Independent Commission Against Corruption Act 1988* to enable the ICAC to investigate allegations or complaints of corrupt conduct that relate to the Sydney Motorway Corporation and its employees,
 - (c) to amend the *Ombudsman Act 1974* to enable complaints to be made to the Ombudsman about the conduct of the Sydney Motorway Corporation,
 - (d) to amend the *Public Finance and Audit Act 1983* to provide for the financial reports and transactions of the Sydney Motorway Corporation to be inspected and audited by the Auditor-General,
 - (e) to amend the *Public Interest Disclosures Act 1994* to extend the protections under that Act to employees of the Sydney Motorway Corporation who make disclosures in the public interest about any wrongdoing.

BACKGROUND

2. In her second reading speech, Ms McKay stated the aim of the *Public Accountability Legislation Amendment (Sydney Motorway Corporation) Bill 2017* is to 'restore accountability and transparency to the Sydney Motorway Corporation and in turn the projects it manages, WestConnex.'

ISSUES CONSIDERED BY COMMITTEE

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

4. Public Health Amendment (Review) Bill 2017

Date introduced	10 August 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

PURPOSE AND DESCRIPTION

1. The object of the Bill is to amend the *Public Health Act 2010*, informed in part by a statutory review of the Act.

BACKGROUND

2. In November 2016, the *Report on the Statutory Review of the Public Health Act 2010* (the Statutory Review) was tabled, informed by a discussion paper and more than 200 submissions from stakeholders and members of the public.
3. The Statutory Review concluded that an additional object should be included in the Act: 'to monitor diseases and conditions affecting public health.' The majority of amendments proposed in the Bill relate to this object and include:
 - (a) Tightening of vaccination requirements for child care centres and schools (but also including the creation of certain exemptions from vaccination enrolment requirements);
 - (b) Increasing the Secretary's ease of access to information regarding scheduled medical conditions and notifiable diseases;
 - (c) Amendments to public health orders;
 - (d) Changing the disclosure requirements for patients with HIV; and
 - (e) Removing the requirement for persons with a sexually transmitted infection (STI) to notify partners.
4. Other amendments proposed in the Bill relate to environmental health premises and the supply of water. In the Minister's second reading speech, Mr Hazzard noted that the Bill also removes provisions relating to the Pap Test Register as a result of the establishment of a national cancer screening register.

ISSUES CONSIDERED BY COMMITTEE

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

Right to patient confidentiality

5. The Bill proposes amendments to sections 54 and 55 of the Act, which apply to individuals with Category 1 and 2, and Category 3, conditions respectively. These Categories all list various scheduled medical conditions, including communicable and non-communicable diseases, cancer, and events such as birth. The Bill proposes to insert a subsection which requires a medical practitioner involved in the treatment of a person with a Category 1 -3 condition to provide the Secretary of Health with information about the person's medical condition, transmission and risk factors.
6. A similar subsection is proposed to be inserted in section 83 of the Act, which requires a Hospital CEO to notify the Secretary of notifiable diseases, such as hepatitis and cancer
7. The Committee notes that the proposed subsection(s) potentially infringe the right to confidentiality which underpins the doctor-patient relationship.
8. That said, a similar subsection already applies to doctors who diagnose a scheduled medical condition. The Bill simply extends this obligation to other treating doctors. The Committee also notes that the Bill proposes an additional safeguard in section 56 which prevents a registered medical practitioner from including a patient's name or address in information provided under section 54 or 55 if that information relates to a Category 5 condition (i.e. AIDS or HIV), essentially de-identifying the patient.

The Bill proposes a new subsection that requires a medical practitioner involved in the treatment of persons with scheduled medical conditions or notifiable diseases to, in certain circumstances, provide information regarding that person to the Secretary of Health.

The proposed amendments to sections 54, 55 and 83 potentially infringe the right to patient confidentiality. However, the Committee acknowledges that these subsections mirror obligations which already apply to doctors who diagnose the relevant scheduled medical condition. Section 83 also already imposes a similar obligation on Hospital CEOs. The provisions protect the health of the public by reducing the potential for 'information gaps' regarding a scheduled medical condition, and that the Bill proposes an additional safeguard for those with HIV or AIDS in section 56. As such, the Committee makes no further comment in relation to the proposed amendments to section 54 and 55.

However, the Committee refers to Parliament the question of whether a similar safeguard should be included in section 83 of the Act for information provided in respect of a person who has a notifiable disease.

9. Section 56(3) of the Act requires a person who conducts a service (including a pathology test) and learns that a person is being tested for or has had a Category 5 condition to take all reasonable steps to ensure that information is not disclosed.

10. The Bill proposes an amendment to section 56(4)(b) of the Act, so that such information can be disclosed to a person who is involved in the provision of care, treatment or counselling to the person concerned, regardless of whether that information is relevant to the provision of such care, treatment or counselling. Currently, the section requires the information to be relevant before it is disclosed.
11. The Committee notes that the effect of the amendment is to remove a safeguard which prevented the unnecessary disclosure of information regarding a person's HIV or AIDS status to a care provider where that information was not relevant to that person's care. The Committee is also of the view, however, that the amendment may be justified given that a treating professional is in the best position to assess whether a person's HIV or AIDS status is relevant (for instance, if a procedure or medication is required). Currently, the power to decide whether that information is capable of disclosure rests with a person who may not be qualified to assess its relevance.
12. However, the Committee holds some concerns that the subsection is now too broad and risks unnecessarily trespassing on a person's right to privacy, given that a person's HIV or AIDS status is not necessarily relevant to all forms of 'care, treatment or counselling' for example, in the case of alternative therapies or counselling.

The Bill amends section 56(4)(b) of the Act, so that information regarding a person's HIV or AIDS status can now be disclosed to a person who is involved in the provision of care, treatment or counselling to the person concerned, regardless of whether the information is relevant to the provision of such care, treatment or counselling.

The Committee is concerned that the amendment removes a safeguard which prevented service providers (such as pathology laboratories) from unnecessarily disclosing information regarding a person's HIV or AIDS status to a care provider where that information was not relevant to a person's care. While the Committee notes that a treating professional is in the best position to assess whether a person's HIV or AIDS status is relevant to a person's care, the Committee is nevertheless concerned that the subsection is now too broad and refers this matter to Parliament for its consideration.

13. The Bill proposes to amend section 98 of the Act by replacing 'register' with 'register established under this section' wherever occurring in sections 98(5) and (6). Section 98 enables the Secretary to establish and maintain a register of a kind specified by a Ministerial order made under section 97. Section 98 provides that such registers must not containing identifying particulars, except with the consent of the person.
14. The Bill also proposes an amendment to section 97(1) of the Act such that a register may also be established for '(f) any other purposes prescribed by the regulations for the purpose of this section.'

15. Although the effect of sections 97 and 98 may be unclear, the Committee understands that different types of registers may be established under the Act. The Committee further understands from the Statutory Review that the amendments to section 98 seek to limit the privacy protections afforded in respect of some registers established under the Act.

The Bill proposes to amend section 98 of the Act, which currently contains certain privacy protections in respect of registers established under the Act. The amendment proposed is to replace ‘register’ with ‘register established under this section.’

While the effect of the amendments may not be clear, the Statutory Review appears to indicate that ‘register established under this section’ distinguishes the privacy protections afforded to registers established under section 98 with other registers that may be established under the Act. Although this distinction may be justified on public policy grounds, the Committee is unclear as to the nature and appropriateness of any safeguards or limits in place relating to the use of personal information in the context of these other registers. While the Committee notes that the Crown is bound by the *Health Records and Information Privacy Act 2002*, the Committee refers the question of whether there are adequate privacy safeguards in place for registers which may contain personal information to Parliament for its further consideration.

16. The Bill inserts section 130A, which provides that the Secretary cannot be compelled to produce information that has been provided under Part 4 or 5 that relates to scheduled medical conditions and other disease control measures in any proceedings. However, section 130A(2) provides that ‘the Secretary may consent to the disclosure of any such information for the purpose of any legal proceedings.’
17. The Committee is concerned that there are no parameters guiding the exercise of the Secretary’s discretion to produce information provided under Part 4 or 5. This may result in unnecessary trespasses on an individual’s privacy.

Proposed section 130A(1) provides that the Secretary cannot be compelled to produce information to a Court that it has received under Part 4 or 5 of the Act, which relate to scheduled medical conditions and other disease control measures. However, proposed section 130A(2) enables the Secretary to consent to the disclosure of such information ‘for the purpose of any legal proceedings.’ The Committee is concerned that the absence of parameters guiding the exercise of the Secretary’s discretion may result in unnecessary trespasses on the privacy of individuals and refers this matter to Parliament for its consideration.

Rights of parents and children

18. The Bill proposes changes to section 87 of the Act so that a child care facility can only enrol a child if the facility receives evidence that the child is age appropriately

vaccinated, on an approved catch-up schedule, or has a medical contraindication to vaccination.

19. The Committee's view is that the provision is justified given the scientific evidence regarding the effectiveness of vaccines and the importance of herd immunity. The Committee also acknowledges the right of the child to be protected from preventable and life-threatening communicable diseases. The provision also does not stop a parent from choosing not to vaccinate their child.

Right to be free from discrimination

20. The Bill also proposes minor amendments to the *Public Health Regulation 2012* in relation to classes of persons which are exempt from the initial vaccination pre-enrolment requirements relating for child care, including:

- (a) A child subject to a guardianship order under section 79A of the *Children and Young Persons (Care and Protection) Act 1998* or who is in out-of-home care (within the meaning of that Act), or
- (b) A child who is Aboriginal or Torres Strait Islander.

21. Minister Hazzard stated in his second reading speech that these groups of children are exempt from the initial requirement to produce vaccination records as parents and guardians may find it more difficult to produce records on enrolment and therefore children may be disproportionately negatively affected. However, the regulation will still require those children to provide these records within 12 weeks of enrolment.

The Bill amends the *Public Health Regulation 2012* to exempt certain classes of children, including Aboriginal and Torres Strait Islander children and those in out-of-home care, from initial vaccination pre-enrolment requirements at child care facilities. While the Committee acknowledges that this potentially discriminates against these children on the basis of their race or care situation, the Committee is of the view that the provision is justified given that the section is designed to minimise disadvantage. The Committee also acknowledges that the second reading speech indicates that the Regulation will require these vaccination records to be provided within 12 weeks of enrolment.

Restrictions on liberty/freedom of movement

22. Proposed section 62(4) enables an authorised medical practitioner to order the detainment of a person with a Category 4 or 5 condition, or a 'contact order condition', at a specified place for the duration of the order. The Committee notes that category 4 conditions include communicable diseases such as SARS and Category 5 conditions include HIV and AIDS. Previously, this power was only available in respect of individuals with a Category 5 condition.
23. The Committee notes that the section expands the circumstances in which an authorised medical practitioner can restrict the liberty and freedom of movement of an

individual. However, there are safeguards in the section, including that the medical practitioner must have regard to the principle that ‘any restriction on the liberty of a person should be imposed only if it is the most effective way to prevent any risk to public health’: section 62(6)(a).

24. In practice, the order is likely to be made in limited circumstances. This is because the following must be satisfied:
- (a) the person has a relevant condition; or
 - (b) the person has been exposed to a contact order condition and is at risk of developing that condition; and
 - (c) because of the way the person behaves they may, as a consequence of that condition, be a risk to public health.
25. Further, public health orders relating to Category 5 and contact order conditions have to be confirmed within 3 days by NCAT under the amended section 64, and can also be varied and revoked. Public health orders for Category 4 conditions are also subject to review by NCAT under section 66, but do not have to be confirmed within 3 days.

The Bill proposes new section 62(4), which enables an authorised medical practitioner to order the detainment of a person with a Category 4 or 5 condition, or a ‘contact order condition’, at a specified place for the duration of the order in certain circumstances. This power was previously restricted to individuals with a Category 5 condition. The Committee notes that detaining an individual against their will trespasses on their right to liberty and freedom of movement. However, the section contains safeguards, including that the person must be a risk to public health because of their behaviour, and the practitioner must be satisfied that the detainment is the most effective way to prevent any risk to public health. The public health orders are also subject to confirmation and review by NCAT: see sections 64 and 66. For these reasons, and noting the public health objectives of the amendment, the Committee makes no further comment.

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

Ambiguity – definition of child

26. The Committee observes that ‘primary school’ has been replaced by ‘school’ in relation to the vaccination provisions in sections 85, 86 and 88 of the Act.

27. Section 85 defines 'child' by reference to the regulations. For the purposes of Division 4 of Part 5 of the Act, which relates to vaccination, the *Public Health Regulation 2012* defines 'child' as children whose enrolment at a child care facility is sought, children who are or who previously were enrolled at a child care facility, and children who are enrolled at a primary school. The Bill does not amend the definition of 'child' to include high school-aged children.

The Bill proposes to replace 'primary school' with 'school' in sections 85, 86 and 88 of the Act, which relate to vaccination requirements. The Committee understands that, consistent with the second reading speech, this is because recommendation 28 of the Statutory Review suggests extending the requirements to high schools. However, the Committee notes that 'child' is defined by reference to the *Public Health Regulation 2012*, which defines 'child' as children enrolled in child care facilities or primary schools. The Committee is therefore concerned that the effect of the amendments to sections 85, 86 and 88 of the Act is ambiguous. However, the Committee assumes that the definition of 'child' will be updated in the regulation and therefore makes no further comment.

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

Power to amend Act by order

28. The Bill proposes to amend section 51(2) of the Act. That subsection currently empowers the Minister by way of order to amend or substitute Schedule 1 of the Act, which lists a number of scheduled medical conditions. The Bill proposes that this power be extended to new Schedule 1A of the Act, which lists a number of contact order conditions and their expiry periods.
29. New section 62(1) enables an authorised medical practitioner to make a public health order in respect of a person who has been exposed to a contact order condition listed in schedule 1A, is at risk of developing that condition, and because of the way the person behaves, may be a risk to public health. Public health orders can require a person's detention or mandatory treatment at a specified place.

The Bill proposes to amend section 51(2) so that the Minister can order the amendment or substitution of Schedule 1A to the Act, which lists contact order conditions and their relevant expiry periods. In this instance, it is not clear to the Committee that the order would be classed as a statutory rule and therefore may not be subject to the disallowance processes in section 41 of the *Interpretation Act 1987*. The Bill also proposes that public health orders can be made in respect of certain persons at risk of developing a contact order condition. While the Committee acknowledges the administrative convenience of the subsection, in circumstances where public health orders can significantly curtail a person's liberty, the Committee would prefer that any amendment to Schedule 1A is made by way of an Act so it is subject to an appropriate level of parliamentary scrutiny.

5. Sydney Public Reserves (Public Safety) Bill 2017

Date introduced	8 August 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Toole MP
Portfolio	Lands and Forestry

PURPOSE AND DESCRIPTION

1. The Bill authorises police officers to give directions to persons occupying the Martin Place Reserve to remove or remedy the interference or unlawful occupation and authorises police officers to seize and remove tents, goods and other things for that purpose.

BACKGROUND

2. The object of this Bill is to address the occupation of public reserves in the City of Sydney that interferes with the reasonable enjoyment of the rights of the public or that is unlawful. In particular, this Bill was introduced in response to the unauthorised campsite comprising tents and other materials located in Martin Place Reserve.
3. The Bill applies to the Martin Place Reserve and to any other public reserve in the City of Sydney declared by the Governor by proclamation following a recommendation by the Minister that it is in the public interest because of the relocation of persons occupying those public reserves.
4. The Bill was declared urgent and passed by both houses without amendment on 9 August 2017. As such, the Committee acknowledges that its report on the Bill is after it was assented to on 11 August 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 access and use public space

5. Section 3 defines the 'occupation' of a public reserve to include 'the use of the reserve or the presence of a person in the reserve'. Under Part 2, the Bill may be applied to anyone occupying a public reserve specified in the declaration of the Governor.

The Committee notes that the Bill can be applied to any person using a public reserve or in the presence of a public reserve. This Committee is concerned that this is a broad definition that may encompass many ordinary uses of a public

reserve. This may encroach on a person's right to access and use public space. The Committee draws this to the attention of the Parliament.

Right to personal property

6. Section 8 outlines provisions relating to the seizure and removal of things to remove or remedy interference or unlawful occupation. Specifically, section 8(1) provides that 'a police officer may seize and remove from a public reserve any tent, goods or other thing if the police officer believes on reasonable grounds that it is necessary or expedient for the purposes of removing or remedying any interference or unlawful occupation...'
7. Section 8(4) further provides that a thing that a police officer has seized and removed from a public reserve may be returned to the person from whom it was seized if it is lawful for the person to have possession of the thing, or may be disposed of in accordance with the directions of the Commissioner of Police. Section 8(4)(c) also provides that a thing seized by police under the Bill may be delivered to the council of the area in which the reserve is situated. Under section 8(5), the thing delivered to the council is taken to be an article duly impounded by an impounding officer appointed by the council in accordance with the *Impounding Act 1993*.

The Committee notes that the Bill provides that a police officer may seize or remove any personal item from a public reserve, and provides police with the discretion to either return the items to the person it was seized from, dispose of it, impound it. This potentially encroaches on a person's right to personal property, particularly as the Bill does not outline what considerations must be taken into account before a police officer may decide to dispose or impound the property rather than returning it to the person from whom it was seized. The Committee draws this to the attention of the Parliament.

Freedom of assembly/Freedom of association

8. Section 10 outlines provisions for a police officer to give a direction under the Bill to persons comprising a group. Section 11(1) limits this power to specify that the exercise of police powers under this Bill does not extend to an industrial dispute. Section 11(2) also provides that the Bill does not authorise a police officer to exercise a power in relation to a demonstration, protest, procession or assembly that is an authorised public assembly for the purposes of Part 4 of the *Summary Offences Act 1988*.

The Committee notes that the Bill permits police officers to give directions to a group of persons, which potentially encroaches on the common law right to freedom of assembly. The Committee acknowledges that section 11 excludes certain groups of persons, including in relation to an industrial dispute and any authorised demonstration, protest or procession. However, the Committee is concerned that this still captures a broad range of activities related to the freedom of assembly and, by extension, freedom of association. The Committee refers this to the Parliament for its further consideration.

Ambiguity regarding rights of persons

9. Section 12 states that 'the regulations may prescribe a code of practice relating to the exercise of powers by police officers under this Act and the rights of persons to whom directions are given under this Act'. It is not clear from the Bill as to what rights this may include.

The Committee notes that the regulations may prescribe a code of practice relating to the exercise of police powers and the rights of persons to whom directions are given under the Act. The Bill is not clear as to what these powers or rights may include. The Committee is generally concerned where police powers and, in particular, the rights of persons are not clarified in the principal legislation. The Committee is also concerned that these powers and rights are to be prescribed by the regulations and not subject to Parliamentary scrutiny. The Committee refers this lack of clarity and lack of parliamentary scrutiny regarding the rights of persons to the Parliament.

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

Application and extensions of Act by proclamation

10. Section 3 defines a 'public reserve to which this Act applies' to include the Martin Place Reserve and 'any other public reserve in the City of Sydney to which this Act is applied by a proclamation under Part 2'. Section 5(1) under Part 2 clarifies that the Governor may, by proclamation made on the recommendation of the Minister, apply this Act to any other public reserve within the City of Sydney. Section 5(3) extends this power by providing that 'a proclamation under this section may be amended or revoked by a further proclamation of the Governor.
11. Section 5(2) provides that the Minister is not to recommend the making of a proclamation under this section unless satisfied that, as a result of the relocation of persons occupying the Martin Place Reserve or any other occupation of a public reserve, it is in the public interest that police officers exercise powers under this Act in relation to the public reserve.

The Committee notes that Section 3 of the Bill applies to the Martin Place Reserve and 'any other public reserve in the City of Sydney' by a proclamation of the Governor on the recommendation of the Minister. Such a proclamation may be amended or revoked by a further proclamation. The Committee prefers that applications of Acts, particularly extensions or revocations of parts of the Act, be commenced by a fixed date or assent to provide certainty to those that are affected by the Act. This is particularly concerning where persons who fail to comply with the Act may incur a penalty offence under sections 7(4) and 8(3).

The Committee also notes that the Bill provides a safeguard that such a direction is only recommended by the Minister if it is in the public interest to do so. However, this requirement is quite broad and subjective and does not provide certainty to when this may be applied. The Committee draws this to the attention of the Parliament.

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

Regulations that may create offences

12. Section 16(2) states that the regulations may create offences punishable by a penalty not exceeding 50 penalty units.

The Committee notes that section 16(2) of the Bill permits the regulations to create penalty notices offences up to the amount of 50 penalty units. The Committee would prefer that provisions containing offences, particularly offences that potentially involve a large monetary sum, to subject to parliamentary scrutiny. The Committee particularly notes that the penalties provided for in the Bill may disproportionately impact the class of persons likely to be affected by the Bill. The Committee draws this to the attention of the Parliament for its further consideration.

Part Two - Regulations

1. Biosecurity Regulation 2017

Date published	2 June 2017
Disallowance date	21 September 2017
Minister responsible	The Hon. Niall Blair MLC
Portfolio	Primary Industries

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to make provision with respect to the following:
 - (a) specifying that testing for a biosecurity matter or releasing or publishing the results of a test is a dealing with the matter,
 - (b) the mandatory measures that persons are to take with respect to biosecurity matters or carriers,
 - (c) the establishment of biosecurity zones,
 - (d) the giving of notification,
 - (e) the granting of biosecurity registration,
 - (f) the accreditation of biosecurity certifiers,
 - (g) the appointment of biosecurity auditors,
 - (h) the approval of accreditation authorities,
 - (i) the granting of permits,
 - (j) creating offences relating to labels and identifiers required under the Biosecurity Act 2015,
 - (k) the setting of fees that are payable for services under the Biosecurity Act 2015,
 - (l) the offences for which penalty notices may be issued.

This Regulation is made under the *Biosecurity Act 2015* (“the parent Act”).

ISSUES CONSIDERED BY COMMITTEE

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

Fair consideration and determination of applications

1. The regulations contain several provisions (sections 80, 95, 101, 106, and 110) that outline circumstances for deemed refusal of an application. It is noted that these sections provide that an application is taken to have been refused 60 days after the application is made. These deemed refusals are for applications in relation to biosecurity registration (section 80), accreditation of biosecurity auditors (section 95), appointment of biosecurity auditors (section 101), approval of accreditation authorities (section 106), and applications for permits (section 110). Approval or refusal of these applications may affect a person's ability to work in the biosecurity or agricultural industry.

The Committee notes that the regulations contain several provisions outlining that a failure to determine a claim within 60 days after the application is made is to be taken as a refusal of the claim. The Committee is concerned that this may lead to claims being taken to be deemed refused because of a lapse of time without proper consideration or determination of the application. In particular, applications in relation to biosecurity registration and permits may impact a person's ability to work in agricultural or biosecurity-related fields. It would be preferable that a determination is made in every case so that the applicant is provided with reasons for the refusal. The Committee draws this to the attention of the Parliament.

2. Surveillance Devices Amendment (Corresponding Law) Regulation 2017

Date published	23 June 2017,
Disallowance date	12 October 2017
Minister responsible	The Hon. Mark Speakman MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Surveillance Devices Regulation 2014* to declare the *Crimes (Surveillance Devices) Act 2010* of the Australian Capital Territory as a corresponding law for the purposes of the definition of ‘corresponding law’ in section 4 (1) of the *Surveillance Devices Act 2007*.
2. This Regulation is made under the *Surveillance Devices Act 2007*, including sections 4 (1) and 59 (the general regulation-making power).

ISSUES CONSIDERED BY COMMITTEE

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

Right to privacy in NSW

3. One of the effects of the *Surveillance Devices Amendment (Corresponding Law) Regulation 2017* is to authorise the use in NSW of a surveillance device issued without warrant in the ACT under the *Crime (Surveillance Devices) Act 2010*, pursuant to a ‘corresponding emergency authorisation’: section 38 of the *Surveillance Devices Act 2007*.
4. The Act defines ‘corresponding emergency authorisation’ as an ‘authorisation in the nature of an emergency authorisation given under the provisions of a corresponding law, being an authorisation in relation to a relevant offence within the meaning of the corresponding law.’ A ‘relevant offence’ is defined to include offences in other states or territories.
5. These provisions suggest that the effect of the Regulation is that surveillance without a warrant can be undertaken in NSW, even if it concerns an offence which is only an offence in the ACT, or if the corresponding emergency authorisation issued in the ACT would not have been issued under NSW law.

The Surveillance Devices Amendment (Corresponding Law) Regulation 2017 amends the Surveillance Devices Regulation 2014 to declare the Crimes (Surveillance Devices) Act 2010 of the Australian Capital Territory a

corresponding law for the purposes of the definition of ‘corresponding law’ in section 4 (1) of the Surveillance Devices Act 2007.

The Surveillance Devices Act 2007 uses the term ‘corresponding law’ regularly, including in the context of authorising the use of a surveillance device issued without a warrant under a corresponding law, pursuant to a ‘corresponding emergency authorisation’ under section 38. This is defined to be an ‘authorisation in the nature of an emergency authorisation given under the provisions of a corresponding law, being an authorisation in relation to a relevant offence within the meaning of the corresponding law.’

The Committee therefore acknowledges that listing the Crimes (Surveillance Devices Act) 2010 as a corresponding law potentially trespasses on an individual’s right to privacy as it exists in NSW, including by authorising surveillance without a warrant where the relevant emergency authorisation was issued under a separate Act.

However, the Committee is of the view that the amending Regulation is justified given that law enforcement authorities must be able to, in certain circumstances, undertake surveillance operations extraterritorially to ensure the effective investigation and prosecution of crimes. The Committee also notes that clause 3 of the Surveillance Devices Regulation 2014 already identifies corresponding laws in Victoria, Queensland, Northern Territory and Tasmania.

3. Transport Administration (General) Amendment (Point to Point Transport Commissioner) Regulation 2017

Date published	26 May 2017
Disallowance date	14 September
Minister responsible	The Hon. Andrew Constance MP
Portfolio	Transport and Infrastructure

PURPOSE AND DESCRIPTION

1. The object of this regulation is to amend the *Transport Administration (General) Regulation 2013* to prescribe the class consisting of persons holding the office of Point to Point Transport Commissioner, or acting in that office, as persons to whom Transport for NSW may delegate its functions.
2. The Regulation refer to provisions under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* ('the parent Act').

ISSUES CONSIDERED BY COMMITTEE

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

3. Clause 3 of the regulation inserts 86A to the Transport Administrative (General) Regulation 2013, and states that:

“For the purposes of the definition of *authorised person* in section 31(3)(b) of the Act, the class of persons consisting of person holding the office of Point to Point Transport Commissioner under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016*, and persons acting in that office, is prescribed as a class.”
4. The regulation refers to the definition of ‘authorised person’ as defined in the parent Act. However, the parent Act does not list a definition of ‘authorised person’ under the definitions contained in section 3. The parent Act does, however, list a definition for an ‘authorised officer’ and contains further provisions related to this term under Division 1 of Part 7. It is unclear from the regulation which definition is being referred to.

The Committee notes that the regulation makes reference to ‘the definition of *authorised person*’ in section 31(3)(b) of the parent Act. However the parent act does not provide a definition for ‘authorised person’. It does instead provide a definition for, and provisions relating to, an ‘authorised officer’ under section 3 and in Division 1 of Part 7. The Committee notes that it is unclear from the

regulation which definition or part is being referred to. The Committee draws this 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.