



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. EDUCATION AMENDMENT (SCHOOL SAFETY) BILL 2017

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

Right to procedural fairness

The Bill generally requires the relevant decision-maker to provide a student, parent or others with information regarding a proposal to issue an enrolment direction or non-attendance direction. The parent usually can then make representations to the Minister regarding the order. However, the Bill also provides that such information can be withheld in certain circumstances, including if there are reasonable grounds to believe that to disclose such information would endanger a person's life or physical safety or prejudice a legal investigation. The Committee notes that this may compromise a person's right to procedural fairness. That said, the Committee acknowledges the policy reasons for such a provision, and that it only applies in a limited set of circumstances. As such, the Committee makes no further comment.

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

Right to an education

The Bill empowers the Minister to prevent a student from attending school in certain circumstances. These circumstances include if the Minister believes on reasonable grounds that there is a significant risk that the student will engage in serious or violent conduct, or the student supports terrorism or violent extremism. While 'serious or violent conduct' is defined, there is no further information in the Bill which informs what constitutes support of terrorism or violent extremism.

Every young person has a right to an education. The Committee is therefore concerned that the failure to properly define some of the circumstances in which a non-attendance direction can be issued risks making the right to receive an education unduly dependent on insufficiently defined administrative powers, including potentially wide and ambiguous language. While the period of non-attendance is likely to be short and will only arise in limited circumstances, the Committee draws this issue to Parliament's attention.

Generally, a decision-maker must provide parents with notice of a proposed enrolment direction and access to relevant information before issuing such a direction. The decision-maker is also bound to take into account any representations made by parents. The Bill proposes to extend this requirement to non-attendance directions, but also seeks to include a provision which clarifies that the Minister does not have to comply with these requirements before issuing a non-attendance direction for the first time. This is a broad power and the provision does not limit the circumstances in which a departure from the normal course is justified.

The Committee notes that the Act already enables the guidelines to permit non-compliance with the provision in the context of enrolment directions. However, noting the importance of the right to receive an education, and the relatively limited appeal rights available to parents in

the context of non-attendance directions, the Committee draws this new provision to Parliament's attention.

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

Limited nature of internal review

The Bill allows for the internal review of non-attendance directions of more than 5 days' duration, but does not specify a time limit for such a review. Such internal reviews must be conducted in accordance with the guidelines.

Noting that an internal review does not stay a non-attendance direction under review, the Committee is concerned that the lack of a time limit may have the effect of diminishing a person's internal review rights by creating a situation where a direction could expire before a review is completed. Given also that a non-attendance direction is only subject to external review if it prevents a student from attending school for more than 20 days, the Committee draws this to Parliament's attention.

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

Guidelines for internal review

The Committee notes that the Bill requires internal reviews to be conducted in accordance with the guidelines. The Committee notes that the guidelines are not disallowable and may therefore not be subject to an appropriate level of parliamentary scrutiny. However, as the Act already lists matters that must be covered in the guidelines, the Committee makes no further comment.

2. ELECTORAL BILL 2017

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

Right to vote – Prisoners

The Bill provides that a person is not entitled to vote or be enrolled to vote if currently serving a sentence of 12 months imprisonment or more. This would impact on an ordinary citizen's right to vote and the denial of voting rights disenfranchises a segment of the electorate for public participation in the democratic process. However, the Committee is mindful that the nature of imprisonment may mean the forfeiture of many ordinary civil rights and liberties, amongst them the right to vote. The Committee makes no further comment.

One vote, one value

The Bill allows for electorates to be redistributed with roughly an equal number of electors in each electorate, up to a margin of allowance of 10 per cent above or below the average enrolment. This may breach the democratic principle of one vote, one value. However, the Committee recognises the difficulties in achieving consistent numbers across all electorates, especially when considering the other criteria that must be taken into account when redistributing electorates. Given the margin of allowance is capped at 10 per cent, the Committee does not consider this provision unreasonable in the circumstances.

Time periods for enrolment

The Bill requires a 21 day period for enrolling or updating enrolment details at turning 18 years of age or changing residential address respectively. The Committee is concerned that the 21 day deadline may be too restrictive for the class of people affected. Despite this, the Committee notes the importance in enrolling and maintaining the integrity of the electoral role, together with the nominal penalty that applies. The Committee makes no further comment.

Privacy of electors

Sections 44 and 45 of the Bill provide that the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002* do not apply with respect to the collection and disclosure of personal information for the purposes of maintaining the Electoral Information Register. The Committee notes the likely interference on the privacy of individuals.

The Committee also notes that the personal information to be collected and disclosed is limited to electoral information required – including information that an elector has a disability for the purposes of technology assisted voting. The Committee also notes the restricted groups of people and organisations required to disclose personal information.

With regard to the importance of maintaining accurate electoral information, including the public interest in ensuring against electoral fraud, the Committee makes no further comment.

Excessive penalties

The Bill contains a number of offences in which significant penalties apply. This includes: (a) a prohibition against a scrutineer talking to any person and a voting centre; (b) an offence against an elector giving a false or misleading answer to an election official; and (c) a prohibition against distributing electoral material unless first registered under the Bill.

The maximum penalties for these offences range between 20 to 200 penalty units and/or six months to three years imprisonment.

The Committee recognises the importance of maintaining the integrity of the electoral system, and the strict requirements put in place to ensure such integrity. However, the Committee is mindful that the penalties for these particular offences may be unduly harsh and disproportionate to the offences committed. The Committee refers these matters to Parliament for its further consideration.

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

Commencement by proclamation

The Committee generally prefers legislation to commence on assent or a fixed date. However, given the amount of administrative changes required ahead of the Act taking effect, as well as the lengthy lead-in period until the next State election, the Committee makes no further comment.

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

Right to vote – Itinerant Electors

The Bill provides for the enrolment of itinerant electors, enabling homeless people and people without a fixed address the ability to vote in elections. However, the Bill does this by reference to Commonwealth legislation, which can be changed without the opportunity for the State Parliament to scrutinise any amendments. While the Committee is not aware of any changes to the rights of itinerant electors per se, it is incumbent upon the Committee to identify provisions in which the rights of individuals are not subject to sufficient parliamentary scrutiny. The Committee makes no further comment

3. ELECTRICITY SUPPLY (EMERGENCY MANAGEMENT) BILL 2017

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

4. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT BILL 2017

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

Right to a fair hearing

The Bill renames the Planning Assessment Commission (PAC) as the Independent Planning Commission (IPC). It allows the Minister to direct the IPC as to the members that should hear a particular matter or class of matters. This power is similar, but not identical, to an existing power in the Act. The Committee is concerned that the ability of the Minister to direct the IPC as to the specific members that should decide a particular matter may, or may be seen to, offend the independence of the IPC. The existing PAC often decides high-profile, controversial matters in which the community has a significant interest. Given that Government may also have a vested interest in the outcome of a particular matter, the Committee draws the existence of this power to Parliament's attention.

Under the Bill, it is generally optional for the IPC to conduct its meetings in public. However, the Bill provides that all other planning bodies are to conduct their meetings in public. The Committee is unaware of the policy rationale for the IPC being able to choose for a meeting to be held in private. Given that the IPC is likely to assess and decide high-profile, controversial developments, the Committee notes that the ability to hold meetings in private (for example, to meet with a particular interested party) may deny other interested parties, such as the community, the right to a fair hearing. The Committee draws this to Parliament's attention.

Right to legal representation

A number of provisions in the Bill allow the regulations to prescribe whether parties to matters being determined by the IPC or local, district or regional planning panels can be represented lawyers.

In some circumstances, these consent authorities decide development applications of a substantial monetary value with potentially significant environmental impacts. Accordingly, the Committee notes that this section may be seen to trespass on the right to be legally represented, particularly in relation to complex planning matters, which may often involve mixed questions of fact and law. However, the Committee makes no further comment, including because similar provisions already exist in the current Act and noting the Bill's aim of increasing the efficiency of the approval process.

Right to information

Under the Act, public authorities have the power to assess and approve development or ‘activities’ which they wish to undertake themselves, or which they wish to engage a contractor to undertake on their behalf. Such public authorities are required to prepare an environmental impact statement in a limited set of circumstances, including if an activity is likely to significantly affect the environment. The Bill provides that a public authority is not required to publish any part of an environmental impact statement if publication would, in the opinion of the authority, be contrary to the public interest because of its confidential nature or for any other reason. The Committee notes the broad exception to the requirement to publish may unduly trespass on the right of the community to have a say in relation to development which affects them. However, given a similar provision exists in the current Act, the Committee makes no further comment.

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

No appeal rights if public hearing

The Bill prohibits appeals of decisions of the IPC if the development concerned was approved following a public hearing. Although this restricts the ability of applicants to appeal a decision of the IPC in certain circumstances, it is noted that a substantially similar provision already exists in the Act. The Committee also notes that there may also be other appeal mechanisms available, such as judicial review. Accordingly, the Committee makes no further comment.

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

Inappropriate use of regulations

A number of substantive matters are referred to the regulations, including the exact circumstances in which a Planning Secretary can ‘step-in’ to the role of an approval body and issue general terms of approval. The regulations are also able to create offences which are punishable by a monetary penalty of up to \$110,000.

The Committee prefers that regulations are used for matters which are generally administrative in nature, given that they may be subject to a lower degree of Parliamentary scrutiny. In particular, the Committee is concerned that the Bill allows the regulations to create offences with a monetary penalty of up to \$110,000. This is a significant monetary penalty and accordingly the Committee draws this to Parliament’s attention.

Henry VIII clause

The Bill allows the tables in the Act setting out different types of development control orders to be amended by way of regulation. This is known as a Henry VIII clause. The Committee generally prefers that such clauses are not used because it undermines the primacy of Parliament by allowing regulations, a subordinate instrument made by the executive, to amend principal legislation. However, the Committee notes that regulations are subject to the disallowance processes in section 41 of the *Interpretation Act 1987* and makes no further comment.

Exclusion of certain provisions relating to the new regulation

The Bill creates the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* by transferring provisions in Schedule 13 of the Bill (i.e. the amending Act) to the new regulation. In doing so, the Bill excludes the application of various

provisions of the *Subordinate Legislation Act 1981* and the *Interpretation Act 1987* relating to the making, disallowance and staged repeal of regulations. While the Committee generally discourages departure from the usual procedures which apply to the making and existence of regulations, the Committee notes that the changes have been effected by way of an Act, promoting a relatively high level of Parliamentary scrutiny. The Committee also notes that the transferred provisions relate primarily to longstanding savings and transitional arrangements, and therefore makes no further comment.

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

Commencement by Proclamation

The Act commences on a day or days to be appointed by proclamation. The Committee generally prefers that bills nominate a date for proclamation, so the commencement of the Act is subject to an appropriate level of parliamentary scrutiny. Given that the Bill extensively amends the Act following a long consultation process, and the importance of certainty for the community, Councils and industry, the Committee draws this to Parliament's attention.

5. FORESTRY AMENDMENT (PUBLIC ENFORCEMENT RIGHTS) BILL 2017*

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

6. NATURAL RESOURCES ACCESS REGULATOR BILL 2017

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

7. ROAD TRANSPORT AND RELATED LEGISLATION AMENDMENT BILL 2017

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

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

Offences in statutory rules

The Bill amends the *Road Transport Act 2013* so that statutory rules may create offences punishable up to 50 penalty points. This means offences that incur a heavy fine are set out in the delegated legislation and not subject to parliamentary scrutiny. However, the Committee notes that the Act already permits the statutory rules to create punishable offences, and the amendment only increases the maximum amount from 34 to 50 penalty units. The Committee also acknowledges that the Bill intends for these large fines to be a deterrence measure for certain heavy vehicle offences. Even so, the Committee notes that this provisions increases the punishable scope for *any* road transport offence created by the statutory rule in the future, outside of the immediate goal of deterring certain heavy vehicle offences.

Certain decisions not reviewable by NCAT

The Bill prevents a review of a decision to cancel a surrendered authorisation or license. The provider or license holder may surrender authorisations or taxi license by giving notice to the Commissioner in an approved form. Given that this action is instigated by the provider or license holders themselves, it is unlikely to give rise to a review of the decision. In these circumstances, the Committee makes no further comment on the issue.

8. RURAL CRIME LEGISLATION AMENDMENT BILL 2017

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

Reversal of onus of proof

The Committee notes the effect of schedule 1.4[2] would be to reverse the onus of proof onto the accused. This is contrary to evidentiary principles that the burden to demonstrate the elements of an offence rests entirely with the prosecution. In the absence of clear policy reasons why the onus to disprove an aggravating factor rests on the accused, the Committee refers this to Parliament for its further consideration.

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

Matters left to regulations – Impacts on the right to property

The Committee notes that the Bill will enable person to apply to the Local Court to obtain a stock mustering order which in turn authorises that person to enter onto private property for the purposes of stock recovery. This may constitute a trespass on the affected landholder's property. However, given the clear policy reasons central to this Bill – as well as the requirement for approval to be first obtained from a court – the Committee does not consider this provision unreasonable in the circumstances.

The Committee also notes that the grounds for a stock mustering order application are prescribed in the regulations. Given the importance of granting of an order which authorises the lawful entry onto personal property, the Committee notes it may be more suitable for the grounds to be specified in an Act rather than in the regulations. The Committee makes no further comment.

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

Commencement by proclamation

The Committee generally prefers legislation to commence on assent or a fixed date. However, given the amount of administrative changes required to implement stock mustering orders, the Committee makes no further comment.

9. STATE REVENUE LEGISLATION AMENDMENT (SURCHARGE) BILL 2017

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

10. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (NO 2) 2017

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

Right to housing

Section 154E of the *Residential Tenancies Act 2010* lists certain factors that can inform a Tribunal's discretion when deciding whether to terminate a social housing agreement. These factors include the social housing history of the tenant and the effect of the tenant on other residents. However, under section 154D of the Act, the Tribunal must make a termination order in certain circumstances. For example, if the property is being used for illegal purposes.

That said, the Tribunal still retains the discretion to refrain from issuing an order if to make the order would inflict undue hardship on a child, or if there are other exceptional circumstances.

The Bill proposes to amend the relevant provisions by making clear that the factors in section 154E informing the exercise of a Tribunal's discretion to terminate an order should ordinarily not be taken into account when the Tribunal is otherwise bound to make an order.

The Committee notes that this may restrict the circumstances in which a Tribunal can decide not to make a termination order. This has potential to trespass on the right to housing, because it may mean that more social housing agreements are terminated in circumstances where the tenant otherwise has a good history.

Despite this, the Committee acknowledges the policy reasons for the mandatory termination provision. Moreover, the Tribunal still retains a discretion not to make a termination order if there are exceptional circumstances. Accordingly, the Committee makes no further comment.

Part One – Bills

1. Education Amendment (School Safety) Bill 2017

Date introduced	18 October 2017
House introduced	Legislative Council
Minister response	The Hon. Rob Stokes MP
Portfolio	Education

PURPOSE AND DESCRIPTION

1. The object of the Bill is to amend the *Education Act 1900* (the Act) to:
 - (a) enable the Minister to direct a student not to attend school for a specified period if the Minister believes on reasonable grounds that:
 - (i) there is a significant risk that the student will engage in serious violent conduct or the student supports terrorism or violent extremism, and
 - (ii) issuing the direction is necessary to protect the health or safety of school students and staff,
 - (b) to require the Minister to assess whether the attendance of the student at school constitutes a health or safety risk and, if appropriate, develop risk management strategies to enable the student to attend school
 - (c) to extend school disciplinary powers to student conduct that significantly affects, or is likely to significantly affect, the health or safety of students or staff, regardless of whether that conduct occurs on or outside school premises or within or outside school hours.

BACKGROUND

2. In the second reading speech, the Assistant Minister, Ms Sarah Mitchell MLC, advised that the Department of Education requires additional powers to ensure that government schools have the power to deal with students who pose a risk of seriously violent conduct.
3. Ms Mitchell noted that section 35 of the Act already provides suspension and expulsion powers to principals. Part 5A of the Act also contains some powers to assess the risk to health and safety in a school, but only in relation to enrolments.
4. According to Ms Mitchell, the Bill seeks to deal with the risk posed by the potential for a student to engage in seriously violent conduct. However, the non-attendance direction is not designed or intended to be a disciplinary power.

ISSUES CONSIDERED BY COMMITTEE

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

Right to procedural fairness

5. Section 26AA as set out in the Bill enables the Minister or Secretary to restrict the disclosure of information to students, parents and others in certain circumstances, including in the context of non-attendance directions. The section provides that such information can be withheld if there are reasonable grounds to believe that to disclose such information would endanger a person's life or physical safety, prejudice a legal investigation, or not be in the public interest (among other reasons).

The Bill generally requires the relevant decision-maker to provide a student, parent or others with information regarding a proposal to issue an enrolment direction or non-attendance direction. The parent usually can then make representations to the Minister regarding the order. However, the Bill also provides that such information can be withheld in certain circumstances, including if there are reasonable grounds to believe that to disclose such information would endanger a person's life or physical safety or prejudice a legal investigation. The Committee notes that this may compromise a person's right to procedural fairness. That said, the Committee acknowledges the policy reasons for such a provision, and that it only applies in a limited set of circumstances. As such, the Committee makes no further comment.

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

Right to an education

6. Proposed section 26HA of the Act empowers the Minister to issue a non-attendance direction to prevent a student from attending school for a specified period. The Minister may issue such a direction if he or she believes on reasonable grounds that there is a significant risk that the student will engage in serious or violent conduct or the student supports terrorism or violent extremism.
7. 'Serious or violent conduct' is defined, yet 'terrorism' or 'violent extremism' is not. These terms are also not defined elsewhere in the Act.

The Bill empowers the Minister to prevent a student from attending school in certain circumstances. These circumstances include if the Minister believes on reasonable grounds that there is a significant risk that the student will engage in serious or violent conduct, or the student supports terrorism or violent extremism. While 'serious or violent conduct' is defined, there is no further information in the Bill which informs what constitutes support of terrorism or violent extremism.

Every young person has a right to an education. The Committee is therefore concerned that the failure to properly define some of the circumstances in which a non-attendance direction can be issued risks making the right to receive an education unduly dependent on insufficiently defined administrative powers, including potentially wide and ambiguous language. While the period

of non-attendance is likely to be short and will only arise in limited circumstances, the Committee draws this issue to Parliament's attention.

8. Under the Act, a decision-maker must generally provide parents with notice of a proposed enrolment direction and access to relevant information before issuing such a direction. Any representations must also be taken into account. However, the Act currently provides that the guidelines may create exceptions to this rule.
9. The Bill extends this provision to both enrolment directions and non-attendance directions. The Bill also inserts new section 26l(4), which clarifies that the Minister is not required to comply with the requirements described above before issuing a non-attendance direction for the first time.

Generally, a decision-maker must provide parents with notice of a proposed enrolment direction and access to relevant information before issuing such a direction. The decision-maker is also bound to take into account any representations made by parents. The Bill proposes to extend this requirement to non-attendance directions, but also seeks to include a provision which clarifies that the Minister does not have to comply with these requirements before issuing a non-attendance direction for the first time. This is a broad power and the provision does not limit the circumstances in which a departure from the normal course is justified.

The Committee notes that the Act already enables the guidelines to permit non-compliance with the provision in the context of enrolment directions. However, noting the importance of the right to receive an education, and the relatively limited appeal rights available to parents in the context of non-attendance directions, the Committee draws this new provision to Parliament's attention.

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

Limited nature of internal review

10. Proposed section 26KA permits an internal review of non-attendance directions of more than 5 days' duration. Such reviews are to be made in accordance with any requirements specified in the guidelines.
11. The Bill does not specify a time limit for an internal review. Unless the Minister otherwise directs, an application for internal review does not have the effect of staying a decision to which the application relates.

The Bill allows for the internal review of non-attendance directions of more than 5 days' duration, but does not specify a time limit for such a review. Such internal reviews must be conducted in accordance with the guidelines.

Noting that an internal review does not stay a non-attendance direction under review, the Committee is concerned that the lack of a time limit may have the effect of diminishing a person's internal review rights by creating a situation where a direction could expire before a review is completed. Given also that a non-attendance direction is only subject to external review if it prevents a

student from attending school for more than 20 days, the Committee draws this to Parliament's attention.

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

Guidelines for internal review

12. The Bill provides that an internal review is to be conducted accordance with the guidelines. While the Act sets out matters which may be included in the guidelines, the guidelines are otherwise not subject to parliamentary scrutiny.

The Committee notes that the Bill requires internal reviews to be conducted in accordance with the guidelines. The Committee notes that the guidelines are not disallowable and may therefore not be subject to an appropriate level of parliamentary scrutiny. However, as the Act already lists matters that must be covered in the guidelines, the Committee makes no further comment.

2. Electoral Bill 2017

Date introduced	17 October 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Special Minister of State

PURPOSE AND DESCRIPTION

1. The object of this Bill is to make provision for the conduct of State Parliamentary elections. This Bill repeals and replaces the Parliamentary Electorates and Elections Act 1912 and makes a number of amendments to the existing electoral framework.

BACKGROUND

2. In his second reading speech, the Minister stated that the Bill is the product of an extensive review of the *Parliamentary Electorates and Elections Act 1912*, which outlines the conduct of NSW State parliamentary elections.
3. The Bill encompasses reforms as a result of the 2013 report by the Joint Standing Committee on Electoral Matters (JSCEM) which concluded that the existing electoral legislative framework required modernisation to ensure that the essential principals of the State's representative democracy remains valid. The Bill also includes recommendations stemming from the JSCEM report into the *Administration of the 2015 State Election and Related Matters*.
4. Lastly, the Bill incorporates those reforms requested by the Electoral Commissioner to reflect contemporary electoral practices and is the product of a lengthy consultation process with relevant stakeholders, including the receipt of submissions from organisations and individuals.

ISSUES CONSIDERED BY COMMITTEE

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

Right to vote – Prisoners

5. Section 30(4) of the Bill provides that a person is not entitled to be enrolled if the person has been convicted of an offence, whether in New South Wales or elsewhere, and has been sentenced in respect of that offence to imprisonment for 12 months or more and is in prison serving that sentenced.
6. The effect of this provision is to remove a prisoner's ability to vote while they are in prison, or disentitle a prisoner from enrolling to vote while they are in prison. This consequently affects a possible right to vote or right to enrol to vote.
7. The Committee is mindful that imprisonment for a criminal offence generally requires a forfeiture of many of the prisoner's ordinary civil rights and liberties. Amongst them is the right to vote.

The Bill provides that a person is not entitled to vote or be enrolled to vote if currently serving a sentence of 12 months imprisonment or more. This would impact on an ordinary citizen's right to vote and the denial of voting rights disenfranchises a segment of the electorate for public participation in the democratic process. However, the Committee is mindful that the nature of imprisonment may mean the forfeiture of many ordinary civil rights and liberties, amongst them the right to vote. The Committee makes no further comment.

One vote, one value

8. Section 21 of the Bill provides for the Redistribution Panel to take into account certain criteria when redistribution electoral districts. Under section 21(1)(a), one of the criteria the Redistribution Panel is to have to regard to are demographic trends to ensure as much as practicable that the number of electors in each electoral district is broadly consistent. The section does, however, provide for a margin of allowance of 10 per cent above or below the average enrolment.
9. This provision would allow for electoral distributions where some electorates have fewer electors than others. As each electorate returns one Member of Parliament, the effect would be to give greater value to each the votes cast in electorates with fewer electors than those with more electors. This may impact on the democratic principle of one vote, one value.
10. The Committee appreciates that the Bill requires the Redistribution Panel to take into account a series of criteria that may make achieving an equal number of electors in every electorate difficult. The Committee recognises that margins of allowance in electoral districts are long established in electoral laws and the 10 per cent cap can be regarded as an acceptable variance that reduces the impact of a breach of the one vote, one value principle.

The Bill allows for electorates to be redistributed with roughly an equal number of electors in each electorate, up to a margin of allowance of 10 per cent above or below the average enrolment. This may breach the democratic principle of one vote, one value. However, the Committee recognises the difficulties in achieving consistent numbers across all electorates, especially when considering the other criteria that must be taken into account when redistributing electorates. Given the margin of allowance is capped at 10 per cent, the Committee does not consider this provision unreasonable in the circumstances.

Time periods for enrolment

11. Section 32(1) of the Bill provides that every person who has attained the age of 18 years is required to be enrolled to vote within 21 days of becoming entitled. Similarly, section 32(2) of the Bill provides that if a person is enrolled and changes residence, that person must update their enrolment within 21 days of becoming entitled to enrol in the different address.
12. The Committee notes that the 21 day period may be considered too restrictive to either enrol or update enrolment details. This may be especially the case given that the class of individuals that these provisions will impact are new adults and people who have

recently moved – circumstances in which enrolling or updating enrolment may not be front of mind for either class of individuals.

13. Despite this, the Committee notes the importance of enrolling, and having an up-to-date and properly maintained electoral role. The Committee also notes that the maximum penalty for breach of this provision is merely 1 penalty unit.

The Bill requires a 21 day period for enrolling or updating enrolment details at turning 18 years of age or changing residential address respectively. The Committee is concerned that the 21 day deadline may be too restrictive for the class of people affected. Despite this, the Committee notes the importance in enrolling and maintaining the integrity of the electoral role, together with the nominal penalty that applies. The Committee makes no further comment.

Privacy of electors

14. Sections 44 and 45 of the Bill provide for the Electoral Commissioner to collect personal information, and require a number of government agencies and officials to disclose personal information, for the purposes of maintaining the Electoral Information Register. The Electoral Information Register is itself defined under section 41 and pertains to the name, residence and electoral district of an elector, together with other information for electoral purposes.
15. The Sections 44(3) and 45(5) expressly provide that the *Privacy and Personal Information Protection Act 1998* and – for the latter provision – the *Health Records and Information Privacy Act 2002* do not apply for the purposes of collecting and disclosing electoral information. As electoral information includes whether an elector is an early voter for the purposes of technology assisted voting, this presumably includes information about whether an elector has a disability as this is one of the criteria in which you are able to register for technology assisted voting.
16. The Committee notes the suspension of important privacy legislation and its likely interference on the privacy of individuals.

Sections 44 and 45 of the Bill provide that the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002* do not apply with respect to the collection and disclosure of personal information for the purposes of maintaining the Electoral Information Register. The Committee notes the likely interference on the privacy of individuals.

The Committee also notes that the personal information to be collected and disclosed is limited to electoral information required – including information that an elector has a disability for the purposes of technology assisted voting. The Committee also notes the restricted groups of people and organisations required to disclose personal information.

With regard to the importance of maintaining accurate electoral information, including the public interest in ensuring against electoral fraud, the Committee makes no further comment.

Excessive penalties

17. Section 121(b) of the Bill provides that a scrutineer must not communicate with any person in the voting centre or ballot counting place except so far as is necessary in the discharge of his or her functions. The maximum penalty for a breach of this provision is 50 penalty units or imprisonment for six months or both.
18. Section 128(4) of the Bill provides that an election official may, and at the request of any scrutineer must, put to any person claiming to vote a series of questions. That person must not give an answer to a question that the person knows is false or misleading in a material particular. The maximum penalty for a breach of this provision is 200 penalty units or imprisonment for three years, or both.
19. Section 195(1)(b) of the Bill provides that a person must not distribute electoral material unless first registered under the Bill. The maximum penalty for a breach of this provision is 20 penalty units or imprisonment for six months or both.
20. The Committee notes that the penalties for these offences may be disproportionate to the offence committed. This is particularly so in light of the nature of the possible offences committed. In the first example, a six month sentence given to scrutineer for talking to people at the polling station may be regarded as excessive. Similarly, in the second example, a three year penalty for giving a false or misleading answer to an election official may be considered severe – especially when that answer was not given under oath or where an individual was not forewarned about the implications of giving a false or misleading answer. Lastly, a possible six month penalty for an individual for distribution unregistered electoral material may be similarly be considered onerous depending on the nature of the material and the extent of any awareness that unauthorised distribution was an offence.

The Bill contains a number of offences in which significant penalties apply. This includes: (a) a prohibition against a scrutineer talking to any person and a voting centre; (b) an offence against an elector giving a false or misleading answer to an election official; and (c) a prohibition against distributing electoral material unless first registered under the Bill.

The maximum penalties for these offences range between 20 to 200 penalty units and/or six months to three years imprisonment.

The Committee recognises the importance of maintaining the integrity of the electoral system, and the strict requirements put in place to ensure such integrity. However, the Committee is mindful that the penalties for these particular offences may be unduly harsh and disproportionate to the offences committed. The Committee refers these matters to Parliament for its further consideration.

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

21. Section 2 of the Bill provides that the Bill is to commence on a day or days to be appointed by proclamation.

The Committee generally prefers legislation to commence on assent or a fixed date. However, given the amount of administrative changes required ahead of the Act taking effect, as well as the lengthy lead-in period until the next State election, the Committee makes no further comment.

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

Right to vote – Itinerant Electors

22. The Bill provides for the enrolment of itinerant electors, enabling homeless people and people without a fixed address the ability to vote in elections. However, the section 30(2) of the Bill expressly refers to section 96 of the *Commonwealth Electoral Act 1918* to determine the definition of an itinerant and the provisions concerning their enrolment.
23. The Committee notes that any change concerning the enrolment and votes of itinerant electors will take place at a Commonwealth level and, by reference to the *Commonwealth Electoral Act 1918* under this Bill, then apply to State elections. In this respect, the Committee appreciates the policy reasons in creating consistency between the Commonwealth and State tiers of Government.
24. However, the effect of this is to put the rights of homeless electors beyond the scope of State parliamentary scrutiny should the Commonwealth amend its own legislation. While the Committee is not aware of any changes to the rights of itinerant electors per se, it is incumbent upon the Committee to identify provisions in which the rights of individuals are not subject to sufficient parliamentary scrutiny.

The Bill provides for the enrolment of itinerant electors, enabling homeless people and people without a fixed address the ability to vote in elections. However, the Bill does this by reference to Commonwealth legislation, which can be changed without the opportunity for the State Parliament to scrutinise any amendments. While the Committee is not aware of any changes to the rights of itinerant electors per se, it is incumbent upon the Committee to identify provisions in which the rights of individuals are not subject to sufficient parliamentary scrutiny. The Committee makes no further comment

3. Electricity Supply (Emergency Management) Bill 2017

Date introduced	18 October 2017
House introduced	Legislative Council
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Energy and Utilities

PURPOSE AND DESCRIPTION

1. The object of the Bill is to amend the *Electricity Supply Act 1995* (the principal Act) to provide for streamlined emergency management powers in the event of an electricity supply emergency in the State. Under the proposed scheme provided by the Act:
 - (a) the Premier will be able to declare an electricity supply emergency, if satisfied that the supply of electricity to all or any part of the State is significantly disrupted or that there is a real risk that electricity supply may be significantly disrupted and
 - (b) During the declaration of an electricity supply emergency made by the Premier, the Minister is able to
 - Give directions that are reasonably necessary to respond to the emergency;
 - Require information to be provided in connection with an electricity supply emergency (whether or not a declared emergency); and
 - Authorise officers to have powers to enter the premises and carry out investigations to determine whether a direction by the Minister has been complied with.

BACKGROUND

2. The Bill aims to 'provide the NSW Government with a streamlined and updated tools needed to take action in the management of an electricity supply emergency'.
3. In his second reading speech, the Minister noted the Bill implements the NSW Energy Security Taskforce recommendation to 'simplify and update the existing New South Wales specific electricity powers'. The Minister noted a key concern was that the 'NSW Energy Minister is unable to act with speed and efficiency under the current NSW electricity emergency legislation.'
4. The Australian Energy Market Operator (AEMO) remains the primary manager of the electricity system and emergencies. However, there may be instances where the AEMO is 'not able to do what is needed because of the limits on its powers' and may require assistance.

ISSUES CONSIDERED BY COMMITTEE

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

4. Environmental Planning and Assessment Amendment Bill 2017

Date introduced	18 October 2017
House introduced	Legislative Council
Member responsible	The Hon. Don Harwin MLC
Portfolio	Planning

PURPOSE AND DESCRIPTION

1. The object of the Bill is to amend the *Environmental Planning & Assessment Act 1979* (the Act) to, among other things:
 - (a) revise and consolidate provisions relating to the administration of planning bodies, including the Planning Assessment Commission (which will become the Independent Planning Commission), Sydney district planning panels, regional planning panels and local planning panels.
 - (b) require planning authorities to prepare community participation plans including by revising and consolidating minimum public exhibition requirements;
 - (c) require councils to prepare local strategic planning statements to inform future planning proposals;
 - (d) amend provisions relating to State infrastructure contributions and planning agreements relating to complying development;
 - (e) revise and consolidate provisions relating to reviews of planning decisions and appeals to the Land and Environment Court;
 - (f) strengthen enforcement of complying development requirements by giving greater powers to Councils and enabling Courts to invalidate certificates in certain circumstances;
 - (g) revise provisions relating to development control orders, including by creating enforceable undertakings;
 - (h) make a number of miscellaneous amendments, including to simplify the Act and to end the transitional arrangements that have applied to transitional Part 3A projects for several years.

BACKGROUND

2. The Bill is the product of lengthy consultation, including with stakeholders such as Councils, planners, industry and community groups when the Bill was being prepared in 2016.

3. The Bill was released in January 2017 for public consultation. Approximately 470 submissions were received.
4. The Bill is substantially similar to the consultation draft released in January, with some amendments in response to concerns raised in the consultation process. One of the amendments that has been abandoned is the banning of retrospective modifications to development, which had been used to regularise unauthorised works.
5. The Committee notes that many of the provisions of the Bill are substantially similar to ones which exist in the current Act. The Committee has therefore attempted to focus on provisions that appear to raise new issues.

ISSUES CONSIDERED BY COMMITTEE

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

Right to a fair hearing

6. The Bill renames the Planning Assessment Commission (PAC) as the Independent Planning Commission (IPC). Section 2.10 provides that the Minister can direct the IPC as to the specified members that should hear a particular matter or class of matters. Under the current Act, a similar (but not identical) power exists, whereby the Minister can direct that specified members undertake the Commission's functions.

The Bill renames the Planning Assessment Commission (PAC) as the Independent Planning Commission (IPC). It allows the Minister to direct the IPC as to the members that should hear a particular matter or class of matters. This power is similar, but not identical, to an existing power in the Act. The Committee is concerned that the ability of the Minister to direct the IPC as to the specific members that should decide a particular matter may, or may be seen to, offend the independence of the IPC. The existing PAC often decides high-profile, controversial matters in which the community has a significant interest. Given that Government may also have a vested interest in the outcome of a particular matter, the Committee draws the existence of this power to Parliament's attention.

7. Clause 25 in Schedule 2 in the Bill allows the IPC the option of conducting its meetings in public, unless the Minister requires that particular business be conducted in public. A similar provision currently exists in the *Environmental Planning & Assessment Regulation 2000*. However, a planning body other than the IPC is required to conduct all its meetings in public.

Under the Bill, it is generally optional for the IPC to conduct its meetings in public. However, the Bill provides that all other planning bodies are to conduct their meetings in public. The Committee is unaware of the policy rationale for the IPC being able to choose for a meeting to be held in private. Given that the IPC is likely to assess and decide high-profile, controversial developments, the Committee notes that the ability to hold meetings in private (for example, to meet with a particular interested party) may deny other interested parties, such as the community, the right to a fair hearing. The Committee draws this to Parliament's attention.

Right to legal representation

8. Section 2.20(3)(b) and 2.16(3)(b) in the Bill provide that the regulations may prescribe whether parties to matters being determined by a local, district or regional planning panel can be represented by lawyers. Clause 8(b) in Schedule 2 in the Bill is a similar provision applying to the IPC.

A number of provisions in the Bill allow the regulations to prescribe whether parties to matters being determined by the IPC or local, district or regional planning panels can be represented lawyers.

In some circumstances, these consent authorities decide development applications of a substantial monetary value with potentially significant environmental impacts. Accordingly, the Committee notes that this section may be seen to trespass on the right to be legally represented, particularly in relation to complex planning matters, which may often involve mixed questions of fact and law. However, the Committee makes no further comment, including because similar provisions already exist in the current Act and noting the Bill's aim of increasing the efficiency of the approval process.

Right to information

9. Section 18 in the Bill proposes that a public authority is not required to make available for public inspection any part of an environmental impact statement if, in the opinion of the public authority, publication would be contrary to the public interest because of the confidential nature of the document, or for any other reason.
10. Under Part 5 of the Act, public authorities have the power to assess and approve development or 'activities' which they will undertake themselves or contract someone to undertake on their behalf. Such authorities are only required to prepare an environmental impact statement under Part 5 in a limited set of circumstances, including if the authority believes that the activity is likely to significantly affect the environment.
11. Currently section 113 of the Act also allows an authority to withhold publication of part of the environmental impact statement because it is confidential in nature or for any other reason.

Under the Act, public authorities have the power to assess and approve development or 'activities' which they wish to undertake themselves, or which they wish to engage a contractor to undertake on their behalf. Such public authorities are required to prepare an environmental impact statement in a limited set of circumstances, including if an activity is likely to significantly affect the environment. The Bill provides that a public authority is not required to publish any part of an environmental impact statement if publication would, in the opinion of the authority, be contrary to the public interest because of its confidential nature or for any other reason. The Committee notes the broad exception to the requirement to publish may unduly trespass on the right of the community to have a say in relation to development which affects them. However, given a similar provision exists in the current Act, the Committee makes no further comment.

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

No appeal rights if public hearing

12. Section 8.6 in the Bill provides that there is no right of appeal for a decision of the IPC that is made after a public hearing. A substantially similar provision currently exists in section 23F of the Act.

The Bill prohibits appeals of decisions of the IPC if the development concerned was approved following a public hearing. Although this restricts the ability of applicants to appeal a decision of the IPC in certain circumstances, it is noted that a substantially similar provision already exists in the Act. The Committee also notes that there may also be other appeal mechanisms available, such as judicial review. Accordingly, the Committee makes no further comment.

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

Inappropriate use of regulations

13. The Bill refers a number of matters to the regulations, many of which are administrative in nature. However, some of the more substantive matters which are left to the regulations include:

- (a) The functions, members and procedure of any panel established by the Minister or Planning Secretary for the purposes of the Act: section 2.3(7);
- (b) The exact circumstances in which the Planning Secretary can ‘step-in’ to the role of the approval body and issue general terms of approval: section 91A(4); and
- (c) The creation of offences which are punishable by a monetary penalty of up to \$110,000: section 157(1A).

A number of substantive matters are referred to the regulations, including the exact circumstances in which a Planning Secretary can ‘step-in’ to the role of an approval body and issue general terms of approval. The regulations are also able to create offences which are punishable by a monetary penalty of up to \$110,000.

The Committee prefers that regulations are used for matters which are generally administrative in nature, given that they may be subject to a lower degree of Parliamentary scrutiny. In particular, the Committee is concerned that the Bill allows the regulations to create offences with a monetary penalty of up to \$110,000. This is a significant monetary penalty and accordingly the Committee draws this to Parliament’s attention.

Henry VIII clause

14. The Bill contains a Henry VIII clause at section 9.34(2). That section provides that the tables setting out different types of development control orders can be amended by regulation.

The Bill allows the tables in the Act setting out different types of development control orders to be amended by way of regulation. This is known as a Henry VIII clause. The Committee generally prefers that such clauses are not used because it undermines the primacy of Parliament by allowing regulations, a subordinate instrument made by the executive, to amend principal legislation. However, the Committee notes that regulations are subject to the disallowance processes in section 41 of the *Interpretation Act 1987* and makes no further comment.

Exclusion of certain provisions relating to the new regulation

15. Schedule 10 of the Bill gives effect to the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017*.
16. Schedule 10 excludes the application of Part 2 and 3 of the *Subordinate Legislation Act 1989*. Part 2 requires the making of regulations to be in accordance with guidelines and generally requires a Regulatory Impact Statement to be published, with exceptions. Part 3 relates to the staged repeal of regulations.
17. The Schedule also excludes the application of sections 39 – 41 of the *Interpretation Act 1987*, which provide for the making and disallowance of regulations.

The Bill creates the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* by transferring provisions in Schedule 13 of the Bill (i.e. the amending Act) to the new regulation. In doing so, the Bill excludes the application of various provisions of the *Subordinate Legislation Act 1981* and the *Interpretation Act 1987* relating to the making, disallowance and staged repeal of regulations. While the Committee generally discourages departure from the usual procedures which apply to the making and existence of regulations, the Committee notes that the changes have been effected by way of an Act, promoting a relatively high level of Parliamentary scrutiny. The Committee also notes that the transferred provisions relate primarily to longstanding savings and transitional arrangements, and therefore makes no further comment.

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

Commencement by Proclamation

18. The Act commences on a day or days to be appointed by proclamation. The Bill extensively amends the Act, and so it is preferable that certainty is provided regarding the commencement of the new provisions.

The Act commences on a day or days to be appointed by proclamation. The Committee generally prefers that bills nominate a date for proclamation, so the commencement of the Act is subject to an appropriate level of parliamentary scrutiny. Given that the Bill extensively amends the Act following a long consultation process, and the importance of certainty for the community, Councils and industry, the Committee draws this to Parliament's attention.

5. Forestry Amendment (Public Enforcement Rights) Bill 2017*

Date introduced	19 October 2017
House introduced	Legislative Council
Member responsible	Ms. Dawn Walker
	*Private Members Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to enable certain civil and criminal enforcement proceedings by third parties under environment protection legislation and other legislation for breaches of the *Forestry Act 2012* or breaches related to that Act.

BACKGROUND

2. In her second reading speech, Ms Walker stated that the current legislation only permits a 'relevant Minister or the NSW Environment Protection Agency may bring proceedings against, or issue fines to, the Forestry Corporation for breaches of environmental protection law.
3. This Bill is intended to allow third parties to bring legal proceedings against Forestry Corporation and broaden the community's ability to report and pursue breaches of environmental laws and forestry agreements.

ISSUES CONSIDERED BY COMMITTEE

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

6. Natural Resources Access Regulator Bill 2017

Date introduced	18 October 2017
House introduced	Legislative Council
Minister responsible	The Hon. Niall Blair MLC
Portfolio	Regional Water

PURPOSE AND DESCRIPTION

1. The objects of the Bill are as follows:
 - to constitute the Natural Resources Access Regulator (the Regulator) as a statutory corporation having functions relating to the enforcement of natural resources management legislation (including determining whether proceedings for offences under that legislation should be instituted),
 - to authorise the exchange of information and records relating to the administration of natural resources management legislation between the Regulator and other agencies or persons (including Water NSW) responsible for the administration of that legislation,
 - to provide for the transfer of compliance and enforcement staff in Water NSW to any Public Service agency in which the staff of the Regulator are employed or in which persons are employed in connection with the administration of natural resources management legislation.

BACKGROUND

2. In his second reading speech, the Minister noted the Bill is in response to the findings of the Matthews report. The Matthews interim report is an independent investigation into NSW Water Management and Compliance. The report focused on whether the Department's policies, procedures and actions were appropriate and whether further actions should be taken.
3. The Minister advised the House that the report highlighted 'the urgent need to address a number of issues to improve accountability, transparency and performance of the compliance and enforcement framework and operations.'
4. The Bill establishes the Natural Resources Access Regulator (the Regulator) in response. The role of the Regulator will be to prepare strategies and provide oversight for water compliance and provide advice to the Minister. The Regulator will be led by an independent board.
5. The Minister advised there would be further legislation in 2018 to make additional changes to water administration.

ISSUES CONSIDERED BY COMMITTEE

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

7. Road Transport and Related Legislation Amendment Bill 2017

Date introduced	18 October 2017
House introduced	Legislative Council
Minister responsible	The Hon. Melinda Pavey MP
Portfolio	Roads, Maritime and Freight

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

(a) to amend the Road Transport Act 2013:

- (i) to increase the maximum penalty that can be prescribed for offences in the statutory rules under that Act, and
- (ii) to allow for the use of traffic enforcement devices under that Act for detecting vehicles in contravention of dimension requirements, and
- (iii) to establish the NSW written-off heavy vehicles register,

(b) to amend the Driving Instructors Act 1992:

- (i) to include testers and assessors as kinds of driving instructors for the purposes of that Act, and
- (ii) to make further provisions concerning the eligibility of applicants to apply for driving instructor licences, and
- (iii) to enable the regulations under that Act to prescribe classes or types of driving instructor licences, and
- (iv) to make further provisions concerning the grounds for suspending or cancelling driving instructor licences and to enable a caution to be given as an alternative, and
- (v) to increase the period within which appeals under that Act may be brought, and
- (vi) to enable the Local Court to make prohibition orders on additional grounds, and
- (vii) to make further provision concerning the service of documents under that Act,

(c) to amend the Point to Point Transport (Taxis and Hire Vehicles) Act 2016:

- (i) to allow notifiable occurrences to be prescribed by the regulations alone, and
- (ii) to allow holders of authorisations and taxi licences to surrender them, and

- (iii) to enable authorised officers to be accompanied by assistants when entering premises, and
 - (iv) to alter requirements concerning the return of authorisations and taxi number-plates, and
 - (v) to give the Point to Point Transport Commissioner additional powers to obtain information from persons, and
 - (vi) to alter certain notification requirements, and
 - (vii) to alter the limitation period for the commencement of proceedings for offences,
- (d) to make consequential amendments to the *Driving Instructors Regulation 2016*, *Point to Point Transport (Taxis and Hire Vehicles) Regulation 2017* and *Road Transport (General) Regulation 2013*.

BACKGROUND

2. This Bill amends the *Road Transport Act 2013* (the ‘principal Act’) to allow for the creation of the NSW written-off heavy vehicle register, which will allow camera technology to be used for the enforcement of vehicle dimension offences and increase the maximum penalty that a court may impose for road transport offences under the statutory notes.
3. The Bill also amends the *Driving Instructors Act 1992* to require Working with Children Check clearances and introduces ‘good repute’ requirements for driving instructors. These provisions are intended to modernise the Act, protect consumers and give Roads and Maritime Services greater power to deal with allegations of malpractice, bribery, fraud and incompetence of driving instructors.
4. The final schedule of the Bill contains amendments to the new *Point to Point Transport (Taxis and Hire Vehicles) Act 2016*, which will commence on 1 November 2017. Since the Bill passed in June 2016, the new Point to Point Transport Commissioner has engaged with industry and existing service providers to ensure compliance. The changes contained in this Bill aim to further refine the new regulatory regime.

ISSUES CONSIDERED BY COMMITTEE

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

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

Offences in statutory rules

5. Schedule 1.1 amends the *Road Transport Act 2013* to permit the statutory rules to create offences that may be punishable by a penalty of up to 50 penalty points.

The Bill amends the *Road Transport Act 2013* so that statutory rules may create offences punishable up to 50 penalty points. This means offences that incur a heavy fine are set out in the delegated legislation and not subject to

parliamentary scrutiny. However, the Committee notes that the Act already permits the statutory rules to create punishable offences, and the amendment only increases the maximum amount from 34 to 50 penalty units. The Committee also acknowledges that the Bill intends for these large fines to be a deterrence measure for certain heavy vehicle offences. Even so, the Committee notes that this provisions increases the punishable scope for *any* road transport offence created by the statutory rule in the future, outside of the immediate goal of deterring certain heavy vehicle offences.

Certain decisions not reviewable by NCAT

6. Schedule 3 makes amendments to the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016*. Schedule 3[11] amends section 145 of the Act to prevent a review of a decision to cancel a surrendered authorisation or taxi license.
7. A surrendered authorisation or taxi license occurs when a provider or license holder gives the Commissioner notice that they wish to surrender such an authorisation or taxi license, under the new provisions section 46A and section 69A.

The Bill prevents a review of a decision to cancel a surrendered authorisation or license. The provider or license holder may surrender authorisations or taxi license by giving notice to the Commissioner in an approved form. Given that this action is instigated by the provider or license holders themselves, it is unlikely to give rise to a review of the decision. In these circumstances, the Committee makes no further comment on the issue.

8. Rural Crime Legislation Amendment Bill 2017

Date introduced	18 October 2017
House introduced	Legislative Council
Minister responsible	The Hon. Niall Blair MLC
Portfolio	Trade and Industry

PURPOSE AND DESCRIPTION

1. The Bill amends various Acts into laws relating to stock theft and trespass to allow owners of stock, and police officer, the power to apply to the Local Court for a stock mustering order. This would allow an owner or officer to enter onto property owned by another person to muster and recover cattle.
2. The Bill also extends existing powers of inspectors and police officers to stop, search and detain vehicles and vessels with respect to hunting offences.
3. The Bill creates a new aggravated offence for trespass on inclosed lands where a biosecurity risk is introduced or increased by the trespass, where the offender intends to engage in stock theft, or where the offender is in possession of hunting equipment or accompanied by a hunting dog.
4. Lastly, the Bill includes the vulnerability of the victim as a result arising from the victim's geographical isolation as an aggravating factor for all crimes.

BACKGROUND

5. In his second reading speech, the Minister noted the *Rural Crimes Legislation Amendment Bill 2017* follows a review into stock theft and trespass (the Bradshaw report). The Bill implements a number of recommendations from the Bradshaw Report.
6. The Minister noted that 'unlike other crimes, rural crime was not trending down and was likely to be significantly under-reported'. The review was 'in response from many rural landholders for greater legislative recognition of the impact of trespass onto rural properties which is often accompanied by other crimes such as property theft'.
7. The Minister notes that policing in rural areas poses a different challenge than in suburban Sydney however the residence still expect the police officers to understand the issues and provide 'an effective and proportionate response when those who break the law are caught'.

ISSUES CONSIDERED BY COMMITTEE

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

8. Section 4 of the *Inclosed Land Protection Act 1901* provides an offence for the unlawful entry of inclosed lands.
9. Schedule 1.4[1] of the Bill seeks to amend section 4B to include aggravating factors where an offender without reasonable excuse:
 1. Possesses, places or uses any net, trap, snare, poison, explosive, ammunition, knife, hunting device or hunting equipment, or
 2. Possesses, or discharges a firearm or prohibited weapon.
10. Further, schedule 1.4[2] proposes to insert a new section 4B(3) into the *Inclosed Lands Protection Act 1901* to provide that the onus of proof falls on the accused person for the offence of aggravated unlawful entry of inclosed lands.

The Committee notes the effect of schedule 1.4[2] would be to reverse the onus of proof onto the accused. This is contrary to evidentiary principles that the burden to demonstrate the elements of an offence rests entirely with the prosecution. In the absence of clear policy reasons why the onus to disprove an aggravating factor rests on the accused, the Committee refers this to Parliament for its further consideration.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA*Matters left to regulations – Impacts on the right to property*

11. Schedule 1.5 seeks to amend the *Law Enforcement (Powers and Responsibilities Act 2002)* to provide that the owner of stock or a police officer may make an application to the Local Court to obtain a stock mustering order ('an order').
12. The order could allow an individual to, enter the land specified in the order to locate, muster and remove the stock identified in the order.
13. In addition, the order could allow for the search and possession of stock that matches the stock described in the order.
14. A further proposes amendment at section 210M(2) provides that the grounds for an application of a stock mustering order are prescribed by the regulations.

The Committee notes that the Bill will enable person to apply to the Local Court to obtain a stock mustering order which in turn authorises that person to enter onto private property for the purposes of stock recovery. This may constitute a trespass on the affected landholder's property. However, given the clear policy reasons central to this Bill – as well as the requirement for approval to be first obtained from a court – the Committee does not consider this provision unreasonable in the circumstances.

The Committee also notes that the grounds for a stock mustering order application are prescribed in the regulations. Given the importance of granting of an order which authorises the lawful entry onto personal property, the Committee notes it may be more suitable for the grounds to be specified in an Act rather than in the regulations. The Committee makes no further comment.

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

Commencement by proclamation

15. Subclause 2.2 of the Bill provides that schedule 1.5 is to commence on a day or days to be appointed by proclamation.

The Committee generally prefers legislation to commence on assent or a fixed date. However, given the amount of administrative changes required to implement stock mustering orders, the Committee makes no further comment.

9. State Revenue Legislation Amendment (Surcharge) Bill 2017

Date introduced	17 October 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Finance, Services and Property

PURPOSE AND DESCRIPTION

- The object of the Bill is to amend the *Duties Acts 1997*, the *Land Tax Act 1956* and the *Land Tax Management Act 1956* for the following purposes:
 - to provide exemptions from and refunds for surcharge purchaser duty and surcharge land tax payable in respect to residential land by a foreign person that is an Australian corporation when the land is used for the construction of new homes or is subdivided and sold for the purposes for the construction of new homes;
 - to provide exemptions from duty on an insurance policies to small businesses in a manner approved by the Chief Commissioner and;
 - to enact consequential savings and transitional provisions.

BACKGROUND

- The *State Revenue Legislation Amendment (Surcharge) Bill 2017* amends a number of Acts. The Minister noted the amendments are part of the Government's Housing Affordability Strategy announced in the 2017-2018 NSW State Budget.
- The 2016 NSW State Budget introduced a 4 per cent surcharge purchaser duty (surcharge) on the purchase of residential real estate by a foreign person [Chapter 2A, *Duties Act 1997*]. The surcharge is in addition to the duty payable on the purchase of a residential property.
- The 2017 NSW State Budget increased the surcharge rate to 8 per cent for agreements on or after 1 July 2017. The surcharge is also applicable for landholder transactions, if the landholder is a foreign person.
- In his second reading speech, the Minister noted the amendments' additional flexibility 'would be beneficial, without encouraging land banking or weakening incentives for timely development'.
- The Minister also noted that the amendments were designed to avoid purchaser duty surcharges for Australian-based, foreign-owned developers which placed them at 'a competitive disadvantage relative to Australian-owned developers.'

7. The Bill provides that the Chief Commissioner of State Revenue may permit duty exemptions to Australian-based corporations or corporations that subdivide land for the purposes of the construction of new homes.

ISSUES CONSIDERED BY COMMITTEE

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

10. Statute Law (Miscellaneous Provisions) Bill (No 2) 2017

Date introduced	18 October 2017
House introduced	Legislative Council
Member responsible	The Hon. Don Harwin MLC
Portfolio	Resources, Energy and Utilities, the Arts

PURPOSE AND DESCRIPTION

1. The objects of the Bill are:
 - (a) To make minor amendments to various Acts and instruments (Schedules 1 and 2); and
 - (b) To amend certain other Acts and instruments for the purpose of effecting statute law revision (Schedule 4); and
 - (c) To repeal various Acts and an instrument, and provisions of Acts and an instrument (Schedule 5); and
 - (d) To make other provisions of a consequential or ancillary nature (Schedules 3 and 6).

BACKGROUND

2. There is a longstanding practice of similar bills being introduced into Parliament to make minor amendments to a number of Acts.
3. According to the second reading speech, Schedule 1 to the Bill amends the *Ombudsman Act 1974*, specifically in relation to the Ombudsman's complaints management practices and the resignation processes applying to Deputy Ombudsman or Assistant Ombudsman, among other things.
4. The Bill also amends the *National Parks and Wildlife Act 1974* to dissolve the Audit and Compliance Committee established under that Act and to expand the circumstances in which proceedings can be instituted in the Land and Environment Court in its summary jurisdiction.
5. Other amendments include changes made to the *Residential Tenancies Act 2010* regarding the matters to be considered by the Civil and Administrative Tribunal when deciding whether to terminate a social housing tenancy agreement.

ISSUES CONSIDERED BY COMMITTEE

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

6. Under the *Residential Tenancies Act 2010*, the NSW Civil and Administrative Tribunal must currently take into account certain factors under section 154E when deciding whether to make a termination order in respect of a social housing tenancy. These factors including the effect of the tenant on other residents, the history of previous social housing tenancies, and whether the tenant was wilfully in breach of a tenancy order. The Bill proposes to amend this section by clarifying that these factors need only be considered when the Tribunal is considering whether to terminate an agreement on the ground of a breach of an agreement by the tenant.
7. Meanwhile, section 154D of the current Act provides that termination orders must be made in certain circumstances, including if the premises is being used for certain illegal purposes. However, the Tribunal retains the discretion to refrain from making such an order if the order would cause undue hardship to a child or if there are other exceptional circumstances which justify the order not being made. The Bill also proposes to amend this section to clarify that, when making such an order, the Tribunal does not need to consider the factors outlined in section 154E.

Section 154E of the *Residential Tenancies Act 2010* lists certain factors that can inform a Tribunal's discretion when deciding whether to terminate a social housing agreement. These factors include the social housing history of the tenant and the effect of the tenant on other residents. However, under section 154D of the Act, the Tribunal must make a termination order in certain circumstances. For example, if the property is being used for illegal purposes. That said, the Tribunal still retains the discretion to refrain from issuing an order if to make the order would inflict undue hardship on a child, or if there are other exceptional circumstances.

The Bill proposes to amend the relevant provisions by making clear that the factors in section 154E informing the exercise of a Tribunal's discretion to terminate an order should ordinarily not be taken into account when the Tribunal is otherwise bound to make an order.

The Committee notes that this may restrict the circumstances in which a Tribunal can decide not to make a termination order. This has potential to trespass on the right to housing, because it may mean that more social housing agreements are terminated in circumstances where the tenant otherwise has a good history.

Despite this, the Committee acknowledges the policy reasons for the mandatory termination provision. Moreover, the Tribunal still retains a discretion not to make a termination order if there are exceptional circumstances. Accordingly, the Committee makes no further comment.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

- 1 The functions of the Committee with respect to Bills are:
 - (a) to consider any Bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - i trespasses unduly on personal rights and liberties, or
 - ii makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - iii makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - iv inappropriately delegates legislative powers, or
 - v insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- 2 A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations

- 1 The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - i that the regulation trespasses unduly on personal rights and liberties,
 - ii that the regulation may have an adverse impact on the business community,
 - iii that the regulation may not have been within the general objects of the legislation under which it was made,
 - iv that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

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

2 Further functions of the Committee are:

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

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