



Legislation Review Committee

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

Contents

Membership	ii
Guide to the Digest	iii
Conclusions	iv
PART ONE – BILLS	9
1. BUILDING PRODUCTS (SAFETY) BILL 2017	9
2. LOCAL GOVERNMENT AMENDMENT (REGIONAL JOINT ORGANISATIONS) BILL 2017	12
3. PRIVACY AND PERSONAL INFORMATION PROTECTION AMENDMENT (NOTIFICATION OF SERIOUS VIOLATIONS OF PRIVACY BY PUBLIC SECTOR AGENCIES) BILL 2017*	13
4. SNOWY HYDRO CORPORATISATION AMENDMENT (RESTRICTION ON SALE) BILL 2017*	14
5. TERRORISM (HIGH RISK OFFENDERS) BILL 2017	15
APPENDIX ONE – FUNCTIONS OF THE COMMITTEE	22

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. BUILDING PRODUCTS (SAFETY) BILL 2017

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

Procedural fairness in relation to notice of building product use ban

The Committee notes the Bill will enable the Secretary to impose a building product use ban without the requirement to give prior notice of the decision, if satisfied on reasonable grounds that the nature of the safety risk is so serious that in the interest of public safety, the publication of the ban should not be delayed. [Subsection 14(4)].

This is contrary to the principle of procedural fairness to provide notice of a decision made and provide opportunities for individuals to make submissions in relation to the imposition of a building product ban. However, given the clear policy reasons and safeguards provided the appeal the decision in Part 10, the Committee does not consider this provision to be unreasonable under the circumstances.

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

Broad powers to enter private premises

The Committee is concerned the effect of clause 47(3) may permit the trespass of private premises without the authority of a search warrant. While the Committee notes safeguards, in the absence of clear policy reasons why authorised officers would be permitted to enter a premise without a search warrant or consent, the Committee refers the matter to Parliament for its further consideration.

Broad powers to search and seize

The Committee is concerned the broad ambit of the search and seizure powers set out in the Bill may infringe on an individual's right to privacy and personal property. While the Committee notes the policy reasons to obtain information in relation to the safety of building products and the safeguards provided, the Committee remains concerned by the broad nature of the powers given to authorised officers and refers the matter 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. The Committee notes that Schedule 2(1) of the Bill provides that the Act will commence by proclamation. However, given the amount of regulatory and administrative changes, the Committee makes no further comment.

2. LOCAL GOVERNMENT AMENDMENT (REGIONAL JOINT ORGANISATIONS) BILL 2017

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

3. PRIVACY AND PERSONAL INFORMATION PROTECTION AMENDMENT (NOTIFICATION OF SERIOUS VIOLATIONS OF PRIVACY BY PUBLIC SECTOR AGENCIES) 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. SNOWY HYDRO CORPORATISATION AMENDMENT (RESTRICTION ON SALE) BILL 2017*

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

5. TERRORISM (HIGH RISK OFFENDERS) BILL 2017

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

Retrospectivity

The Bill permits the application of the Act to apply to offences that were committed, and sentences of imprisonment that commence, before the date of assent. The Committee notes that the offences contained in the Bill have a wide scope, are broadly defined, and can result in serious criminal penalties. The Committee also acknowledges the policy considerations regarding public safety and unacceptable risks of serious terrorism offences. However, the Committee must comment where provisions are drafted to have retrospective effect as it is contrary to the rule of law, which permits a person to know what the law is at any given time.

Procedural fairness to the accused

The Bill provides that the State must disclose to the eligible offender all documents, report or other information that is relevant to the proceedings, whether or not it is intended to be tendered in evidence. However, the State is not required to disclose any information that has been determined as 'terrorism intelligence', which encompasses a broad range of information relating to actual or suspected terrorism activity that may endanger a person or the public or compromise any terrorism or criminal investigation. This is a very broad exception and may mean that key evidence pertaining to the prosecution's case is not disclosed to the accused and may not afford procedural fairness to the accused. However, the Committee recognises that this provision is intended to protect the public from an actual or suspected terrorism threat and must be given due consideration when determining whether to disclose such information.

Division 3.6 outlines provisions for emergency detention orders if the offender poses an unacceptable and imminent risk of committing a serious terrorism offence. This order may be made without the offender being present at a hearing for the application, and documents provided to any Legal Aid NSW representative of the offender may be redacted if there is a risk that the information could be used as terrorism intelligence. These provisions may encroach on the right of the accused to procedural fairness and a fair hearing, particularly as the offender is not required to be present at the application hearing. However, the Committee recognises that this provision is intended to protect the public from an imminent terrorism threat, and does require the State to notify Legal Aid NSW of any such application so as to provide the accused with professional legal representation.

Standard of proof (Civil proceedings for criminal offences/Determination of risk)

The Bill provides that all proceedings under the Act, including any appeal proceedings, are civil proceedings. This means that while the offences are of a serious criminal nature, the prosecution is only required to meet the lower standard of proof for civil proceedings which is on the ‘balance of probabilities’, rather than the higher standard of proof held for criminal proceedings that requires the elements be proved ‘beyond all reasonable doubt’. Given that the Bill allows wide-ranging powers to order documents and has broad definitions of offences of a serious nature, the lower standard of proof places a higher onus on the accused to rebut this.

The Bill provides that the Supreme Court is not required to determine whether the risk of the offender committing a serious terrorism offence is more likely than not. The Committee notes that in determining whether to make either an extended supervision order or a continuing detention order, the safety of the community must be the paramount consideration of the Supreme Court and that the Court may also have regard to additional matters including criminal history, mental health assessments and terrorism intelligence. However, if the unacceptable risk may also be an unlikely risk, this is a lower threshold that the prosecution needs to prove and places a higher onus on the offender to refute.

In determining whether to make an extended supervision order or continuing detention order, the Court must have regard to a number of factors, including the offender’s conduct and their participation in rehabilitation programs and the likelihood of committing a serious terrorism offence. Under the Bill, the paramount consideration for the Court is the safety of the community. The Committee notes that this broadly-worded requirement may be seen to trespass on the rights of the offender to a fair hearing and the procedure by which the decision is made, as it elevates the consideration of one factor above many.

However, the Committee is of the view that the provision does not unduly trespass on the rights of an offender as the Court is still required to take into account a broad range of factors. Additionally, in the case of serious offenders, there may be good policy reasons as to why community safety should be prioritised.

Right to liberty

The Bill allows the Court to defer the operation of an interim supervision order by up to 7 days and then order the detainment of the offender for this period to facilitate arrangements for supervision in the community. It also allows interim detention orders to be granted for offenders whose current custody expires before the proceedings are determined.

While this trespasses on an offender’s right to liberty following the granting of parole or the conclusion of their sentence, the Committee notes that the period is relatively short and intended to make either practical arrangements for supervision in the community or await the conclusion of proceedings assessing the offender’s risk to the community.

Right to privacy/confidentiality

The Bill contains a number of provisions that permit the Attorney-General to make an order that a person provide ‘offender information’, which includes an extensive list of information that relates to ‘the behaviour, beliefs, financial circumstances, or physical or mental condition’ of an eligible offender. This power to order the provision of offender documents extends to any person in another Australian jurisdiction and may include information held by a court. Additionally, this information may be dealt with as terrorism intelligence that may be used to

determine whether a person is a convicted NSW underlying terrorism offender or convicted NSW terrorism activity offender.

The Committee notes that this may unduly trespass on an offender's right to privacy. While there may be good policy reasons why this information is required, the Committee notes that information as to a person's 'behaviour, beliefs, financial circumstances or physical or mental condition' may be unnecessarily broad. The Committee would prefer that the Bill articulated the scope of the information required and circumstances in which such information can be required. The Committee draws this issue to the attention of the Parliament.

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

Broad-ranging definitions for offences of a serious criminal nature

The Bill creates a new category for a 'convicted NSW underlying terrorism offender' and may be applied to any eligible offender who has been convicted for a *serious offence* (including serious physical harm to a person or serious property damage) in a terrorism context (including the intent to advance a political, religious or ideological cause by coercing or influencing the government of an Australian jurisdiction or foreign country). This is quite broad-ranging and may apply to a range of offences that were serious and intended to influence a government. This is extremely broad and doesn't appear to include exemptions for political protests intended to influence government policy that resulted in physical harm or property damage that, while an offence in itself, may not necessarily constitute the ordinary person's understanding of a terrorism offence.

The Bill creates new categories of terrorism-related offences that are eligible for extended supervision orders or continued detention orders. The provisions capture a broad number of factors that a court may consider when determining whether to grant such an order, including prior convictions inside or outside of Australia, statements or conduct that were involved in advocating any terrorist acts, and whether they are associated or affiliated with any other person or organisations advocating support for engaging in terrorist acts. These considerations are extremely broad and may mean that a person is an eligible offender if any relative or associated person (within or outside of Australia) is in connection with a terrorist act or terrorism organisation – even if the eligible offender themselves is convicted for an indictable offence that is not necessarily a terrorism-related offence.

Section 11 outlines factors that the Court may take into account when determining whether an eligible offender is either a convicted NSW underlying terrorism offender or a convicted NSW terrorism activity offender. This includes allowing the Court to take into account the views of the sentencing court at the time the offender was sentenced. This may safeguard against certain offences being classed as a terrorism offence. However, this is a discretion only and includes 'any other information that the Court considers relevant', which is an extremely broad discretion.

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

Commencement by proclamation

The Committee generally prefers that legislation commences on a particular date or on assent. As the provisions contained in the Bill relate to the treatment of persons subject to continued detention and extended supervision orders, it is particularly important to those directly affected by the legislation are afforded certainty of when these provisions commence.

Part One – Bills

1. Building Products (Safety) Bill 2017

Date introduced	16 November 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Portfolio	Innovation and Better Regulation

PURPOSE AND DESCRIPTION

1. The purpose of the Bill is to prevent the use of unsafe building products in buildings and provide for the rectification of affected buildings.

BACKGROUND

2. In his Second Reading Speech, the Minister noted the *Buildings Products (Safety) Bill 2017* is in response to the Grenfell Tower fire in London where ‘the external cladding attached to the building is believed to have accelerated the spread of fire in the building’.
3. The Minister noted the Bill would provide safeguards and assurances to consumers, homeowners, builders and the public to prevent the use of unsafe building products and provide avenues for the rectification of affected buildings.
4. The Bill provides for the Commissioner for Fair Trading (the Secretary) to prohibit the use of building products if the Secretary is satisfied on reasonable grounds that the use is unsafe.
5. The Secretary can also confer powers to authorised officers in connection with the investigation and assessment of building products so that unsafe uses of building products can be identified and prevented.

ISSUES CONSIDERED BY COMMITTEE

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

Procedural fairness in relation to notice of building product use ban

6. Part 3, Clause 9 of the Bill provides that the Secretary may impose a building product use ban on a specific building product, if satisfied on reasonable grounds that the use is unsafe.
7. Further, subsection 14(4) provides that the Secretary is not required to give prior notice of a building product use ban if the Secretary believes on reasonable grounds that the nature of the safety risk is so serious that the publication of the product use ban should not be delayed.

8. The Committee notes the clear policy reasons to protect the public. The Committee also notes safeguards provided in the Bill for an aggrieved person to appeal the decision under the *Administrative Decisions Review Act 1997* [Part 10, section 81].

The Committee notes the Bill will enable the Secretary to impose a building product use ban without the requirement to give prior notice of the decision, if satisfied on reasonable grounds that the nature of the safety risk is so serious that in the interest of public safety, the publication of the ban should not be delayed. [Subsection 14(4)].

This is contrary to the principle of procedural fairness to provide notice of a decision made and provide opportunities for individuals to make submissions in relation to the imposition of a building product ban. However, given the clear policy reasons and safeguards provided the appeal the decision in Part 10, the Committee does not consider this provision to be unreasonable under the circumstances.

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

Broad powers to enter private premises

9. Part 7, Division 3 of the Bill sets out powers for authorised officers to enter premises at any reasonable time, or at any time, if the authorised officer reasonably believes it is necessary to do so as a matter of urgency.
10. Further, subclause 47(3) provides that entry into any premise may be affected with or without a search warrant, subject to subsection 47(4). Subsection 47(4) does not empower an authorised officer to enter residential premises unless it has the consent of the occupier or with the authority of a search warrant.
11. The Committee notes that an authorised officer may apply for a search warrant to an eligible issuing officer, if an authorised officer believes on reasonable grounds that the requirement imposed under this Act is being or has been contravened.

The Committee is concerned the effect of clause 47(3) may permit the trespass of private premises without the authority of a search warrant. While the Committee notes safeguards, in the absence of clear policy reasons why authorised officers would be permitted to enter a premise without a search warrant or consent, the Committee refers the matter to Parliament for its further consideration.

Broad powers to search and seize

12. Part 7, Division 4 of the Bill provides that authorised officers may, at any premises lawfully entered, do anything that in the opinion is necessary to be done for an authorised purpose. Under section 49, the authorised officer may take and remove samples of a thing, take any photographs, film or other recording and copy any documents.
13. Subsection 49(3) also provides the power to examine and inspect anything, including the use reasonable force to break open or otherwise access a container.

14. The Committee notes that there are certain safeguards to protect against undue trespasses. Under Part 7, Divisions 3 and 4, this includes that an authorised officer must either first obtain the permission of the owner or a search warrant before entering a premises, that care is to be taken during the search, and that compensation must be paid for any damage caused during the search.

The Committee is concerned the broad ambit of the search and seizure powers set out in the Bill may infringe on an individual's right to privacy and personal property. While the Committee notes the policy reasons to obtain information in relation to the safety of building products and the safeguards provided, the Committee remains concerned by the broad nature of the powers given to authorised officers and refers the matter to Parliament for its further consideration.

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

Commencement by proclamation

15. Part 2(1) provides that this Act would commence on a day or days to be appointed by proclamation, except as provided by subsections (2)-(5).

The Committee generally prefers legislation to commence on assent or a fixed date. The Committee notes that Schedule 2(1) of the Bill provides that the Act will commence by proclamation. However, given the amount of regulatory and administrative changes, the Committee makes no further comment.

2. Local Government Amendment (Regional Joint Organisations) Bill 2017

Date introduced	15 November 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Gabrielle Upton MP
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The objects of this Bill are to amend the *Local Government Act 1993* and other legislation as follows:
 - (a) to provide for the constitution of joint organisations of councils, if the councils concerned resolve to be included in the joint organisations,
 - (b) to provide for the functions and operation of joint organisations,
 - (c) to make consequential amendments as a result of the provision for joint organisations.

BACKGROUND

2. This Bill implements an Australian-first reform to allow local government to voluntarily create a network of regional joint organisations, which will provide a forum for councils, the State Government, and other partners to work collaboratively.
3. According to the Parliamentary Secretary responsible, the Hon. Bronnie Taylor MLC, the establishment of joint organisations forms part of the Government's commitment to 'both strengthen local government and improve service delivery and infrastructure across rural and regional NSW'.

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.

3. Privacy and Personal Information Protection Amendment (Notification of Serious Violations of Privacy by Public Sector Agencies) Bill 2017*

Date introduced	16 November 2017
House introduced	Legislative Assembly
Member responsible	Mr. Paul Lynch MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of the Bill is to require a public sector agency that has caused a serious violation of the privacy of an individual by contravening an information protection principle or privacy code of practice, or disclosing personal information kept in a public register, to notify the individual concerned, and the Privacy Commissioner, of the contravention or disclosure.

BACKGROUND

2. The Bill is designed to build on privacy legislation first passed in NSW more than 20 years ago. In his Second Reading Speech, Mr Lynch informed the House that 'the significant developments in technology in recent years have increased dramatically the issues and challenges surrounding privacy and the protection of privacy'. He further advised that 'the bill that I introduce today is another to deal with the ongoing challenges around privacy in a technologically changing world...'
3. This is the third bill introduced by the Opposition with respect to privacy, following on from its introduction of the Civil Remedies for Serious Invasions of Privacy Bill 2017 and the Privacy and Personal Information Protection Amendment (State Owned Corporations) Bill 2016.

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. Snowy Hydro Corporatisation Amendment (Restriction on Sale) Bill 2017*

Date introduced	17 October 2017
House introduced	Legislative Assembly
Member responsible	Mr Luke Foley, MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to ensure that the proceeds of any sale or disposal of shares in the Snowy Hydro Company held by the State of New South Wales are invested in infrastructure in regional areas of the State.

BACKGROUND

2. In the recent budget, the Commonwealth Government proposed to acquire complete ownership of Snowy Hydro Limited, to progress an expansion of the scheme.
3. The Second Reading Speech states that conditions for the acquisition included that all funds received by the States would be reinvested in priority infrastructure projects and that the Snowy Hydro would remain in public ownership.
4. The Bill seeks to ensure that those funds are reinvested in infrastructure projects in regional and rural NSW.

ISSUES CONSIDERED BY COMMITTEE

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

5. Terrorism (High Risk Offenders) Bill 2017

Date introduced	15 November 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney-General

PURPOSE AND DESCRIPTION

1. The objects of this Bill are:

(a) to enable the Supreme Court to make orders for the supervision or detention of certain offenders after they serve their sentences of imprisonment if satisfied that they pose an unacceptable risk of committing serious terrorism offences if not kept under supervision or in detention, and

(b) to make consequential and related amendments to certain legislation.

BACKGROUND

2. The Bill provides for the continued supervision and detention orders of offenders who pose an unacceptable risk of committing serious terrorism offences at the end of their sentence.

3. In the second reading speech, the Attorney-General referred to the 2014 Lindt Café siege, and that the Bill was a part of the powers and legal frameworks aimed at combating terrorism and protecting the public.

4. In particular, this Bill is intended to complement the Commonwealth's post-sentence detention scheme for Commonwealth offenders (under the Commonwealth *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016*) and builds on the existing legal frameworks for high-risk offenders for serious sex and violent offences. The Bill also makes provisions offenders that subject to the Commonwealth post-sentence detention scheme and are able to be housed and managed in NSW correctional centres.

ISSUES CONSIDERED BY COMMITTEE

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

Retrospectivity

5. Section 13 permits the application of the Act to apply to and in respect of offence committed before the date of assent.

6. Section 14 also permits the application of the Act to and in respect of an eligible offender who is serving a sentence of imprisonment that commenced before the date of assent.

The Bill permits the application of the Act to apply to offences that were committed, and sentences of imprisonment that commence, before the date of assent. The Committee notes that the offences contained in the Bill have a wide scope, are broadly defined, and can result in serious criminal penalties. The Committee also acknowledges the policy considerations regarding public safety and unacceptable risks of serious terrorism offences. However, the Committee must comment where provisions are drafted to have retrospective effect as it is contrary to the rule of law, which permits a person to know what the law is at any given time.

Procedural fairness to the accused

7. In relation to both extended supervision orders and continuing detention orders, the Bill outlines pre-trial procedures (under Division 2.3 and Division 3.3 respectively) requiring the State to disclose to the eligible offender 'such documents, reports and other information as are relevant to the proceedings on the applications (whether or not intended to be tendered in evidence) in the case of anything that is available when the application is made and in the case of anything that subsequently becomes available.
8. However, the State is not required to disclose to the eligible offender any document report or other information if the prosecution intends to make an application that it be dealt with as terrorism intelligence. Terrorism intelligence is defined as 'information relating to actual or suspected terrorism activity (whether in the State or elsewhere) the disclosure of which could reasonably be expected (a) to adversely affect the capacity of persons or bodies involved in the prevention of terrorist acts, or (b) to prejudice criminal investigations, or (c) to enable the discovery of the existence of identity of a confidential source of information relevant to law enforcement, or (d) to endanger a person's life or physical safety.'

The Bill provides that the State must disclose to the eligible offender all documents, report or other information that is relevant to the proceedings, whether or not it is intended to be tendered in evidence. However, the State is not required to disclose any information that has been determined as 'terrorism intelligence', which encompasses a broad range of information relating to actual or suspected terrorism activity that may endanger a person or the public or compromise any terrorism or criminal investigation. This is a very broad exception and may mean that key evidence pertaining to the prosecution's case is not disclosed to the accused and may not afford procedural fairness to the accused. However, the Committee recognises that this provision is intended to protect the public from an actual or suspected terrorism threat and must be given due consideration when determining whether to disclose such information.

9. Division 3.6 outlines provisions for emergency detention orders of eligible offenders that pose an unacceptable and imminent risk of committing a serious terrorism offence if the emergency detention order is not made. The term of an emergency detention order cannot be made for longer than is reasonably necessary to enable action to be taken under this Act to ensure that the risk of the eligible offender committing a serious terrorism offence is not unacceptable – not exceeding 120 hours from when it commences. Under this Division, the Supreme Court may hear an application for an emergency detention order in the absence of the eligible offender concerned.

10. Division 3.6 also provides that in these cases, the State must notify the Legal Aid Commission of NSW about the application for an emergency detention order and, if requested by the Commission, supply a copy of the application and supporting affidavit. However, the State may supply copies of the application and supporting affidavit that have been redacted to the extent that they prevent the disclosure of any document, report or other information it may be used as terrorism intelligence.

Division 3.6 outlines provisions for emergency detention orders if the offender poses an unacceptable and imminent risk of committing a serious terrorism offence. This order may be made without the offender being present at a hearing for the application, and documents provided to any Legal Aid NSW representative of the offender may be redacted if there is a risk that the information could be used as terrorism intelligence. These provisions may encroach on the right of the accused to procedural fairness and a fair hearing, particularly as the offender is not required to be present at the application hearing. However, the Committee recognises that this provision is intended to protect the public from an imminent terrorism threat, and does require the State to notify Legal Aid NSW of any such application so as to provide the accused with professional legal representation.

Standard of proof (Civil proceedings for criminal offences/Determination of risk)

11. Part 4 outlines provisions for Supreme Court proceedings. Under this section, section 50 states that all proceedings under this Act (including proceedings on an appeal under this Act) are civil proceedings and, to the extent to which this Act does not provide for their conduct, are to be conducted in accordance with the law (including the rules of evidence) relating to civil proceedings.

The Bill provides that all proceedings under the Act, including any appeal proceedings, are civil proceedings. This means that while the offences are of a serious criminal nature, the prosecution is only required to meet the lower standard of proof for civil proceedings which is on the 'balance of probabilities', rather than the higher standard of proof held for criminal proceedings that requires the elements be proved 'beyond all reasonable doubt'. Given that the Bill allows wide-ranging powers to order documents and has broad definitions of offences of a serious nature, the lower standard of proof places a higher onus on the accused to rebut this.

12. Section 21 (in relation to extended supervision orders) and section 35 (in relation to continuing detention orders) states that the Supreme Court is not required to determine that the risk of an eligible offender committing a serious terrorism offence is more likely than not in order to determine that there is an unacceptable risk of the offender committing such an offence.

The Bill provides that the Supreme Court is not required to determine whether the risk of the offender committing a serious terrorism offence is more likely than not. The Committee notes that in determining whether to make either an extended supervision order or a continuing detention order, the safety of the community must be the paramount consideration of the Supreme Court and that the Court may also have regard to additional matters including criminal history, mental health assessments and terrorism intelligence. However, if the

unacceptable risk may also be an unlikely risk, this is a lower threshold that the prosecution needs to prove and places a higher onus on the offender to refute.

13. In determining an application for an extended supervision order (under Division 2.4) or for a continuing detention order (under Division 3.4), the Bill provides that the safety of the community must be the paramount consideration of the Supreme Court. The Court must also have regard to other factors, including the offender's conduct, any treatment or participation in rehabilitation programs, and the results of any assessments prepared by a qualified psychiatrist, registered psychologist, registered medical practitioner of the likelihood of the offender committing a serious terrorism offence.

In determining whether to make an extended supervision order or continuing detention order, the Court must have regard to a number of factors, including the offender's conduct and their participation in rehabilitation programs and the likelihood of committing a serious terrorism offence. Under the Bill, the paramount consideration for the Court is the safety of the community. The Committee notes that this broadly-worded requirement may be seen to trespass on the rights of the offender to a fair hearing and the procedure by which the decision is made, as it elevates the consideration of one factor above many.

However, the Committee is of the view that the provision does not unduly trespass on the rights of an offender as the Court is still required to take into account a broad range of factors. Additionally, in the case of serious offenders, there may be good policy reasons as to why community safety should be prioritised.

Right to liberty

14. Division 2.5 of Part 2 sets out provisions for interim supervision orders, which allows the court to make an interim supervision order of an eligible offender for up to 28 days. The Bill also provides that the Court may defer the operation of an interim supervision order in relation to an eligible offender who is currently in custody for a period of up to 7 days if the Court considers it necessary to detain the offender to enable arrangements to be made for supervision of the offender in the community.
15. Division 3.5 of Part 3 also provides for an interim detention order to be made for eligible offenders whose current custody will expire before the proceedings are determined.

The Bill allows the Court to defer the operation of an interim supervision order by up to 7 days and then order the detainment of the offender for this period to facilitate arrangements for supervision in the community. It also allows interim detention orders to be granted for offenders whose current custody expires before the proceedings are determined.

While this trespasses on an offender's right to liberty following the granting of parole or the conclusion of their sentence, the Committee notes that the period is relatively short and intended to make either practical arrangements for supervision in the community or await the conclusion of proceedings assessing the offender's risk to the community.

Right to privacy/confidentiality

16. Part 5 outlines provisions relating to information about eligible offenders. Under these provisions, the Attorney-General may, by order in writing served on a person, require that a person provide the Attorney-General with offender information of a kind prescribed by the regulations that is in the person's possession or under the person's control (Section 58). A person who does not comply with the order may be penalised by either 100 penalty units, or 2 years imprisonment, or both (Section 58(2)).
17. Offender information is defined as any document, report or other information that relates to the behaviour, beliefs, financial circumstances, or physical or mental condition, of an eligible offender, and includes terrorism intelligence about the offender (Section 57).
18. The provisions also allows the Attorney-General to extend these requests to a court to provide any offender information held by the court or a person in another Australian jurisdiction (Section 59). Once received, the Attorney-General or a prescribed terrorism intelligence authority may make an application to the Supreme Court for particular offender information to be dealt with as terrorism intelligence in the proceedings (Section 60).
19. Section 60(3) provides a safeguard to maintain the confidentiality of such terrorism intelligence, including steps to receive evidence and hear argument about the intelligence in private. Section 60(4) allows access to the terrorism intelligence to be given to a party and a party's legal representative, having regard to what the Court considers appropriate because of the nature of the intelligence and the degree of risk of disclosure to non-parties by the party or the legal representatives. This subsection is also subject to any agreement under section 60(5), which allows the Attorney-General or prescribed terrorism intelligence authority to enter an agreement to make arrangements as to the disclosure, protection, storage, handling or destruction of the terrorism intelligence.

The Bill contains a number of provisions that permit the Attorney-General to make an order that a person provide 'offender information', which includes an extensive list of information that relates to 'the behaviour, beliefs, financial circumstances, or physical or mental condition' of an eligible offender. This power to order the provision of offender documents extends to any person in another Australian jurisdiction and may include information held by a court. Additionally, this information may be dealt with as terrorism intelligence that may be used to determine whether a person is a convicted NSW underlying terrorism offender or convicted NSW terrorism activity offender.

The Committee notes that this may unduly trespass on an offender's right to privacy. While there may be good policy reasons why this information is required, the Committee notes that information as to a person's 'behaviour, beliefs, financial circumstances or physical or mental condition' may be unnecessarily broad. The Committee would prefer that the Bill articulated the scope of the information required and circumstances in which such information can be required. The Committee draws this issue to the attention of the Parliament.

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

Broad-ranging definitions for offences of a serious criminal nature

20. The Bill enables a court to determine applications for extended supervision orders or continued detention orders for new categories of terrorism-related offenders.
21. In relation to the new category for a ‘convicted NSW underlying terrorism offender’, under section 9, a person may be an eligible offender if they have been convicted of a *serious offence* that occurred in a *terrorism context*. Serious offences include, among other offences, an offence that caused serious physical harm to a person (s 9(2)(c)); or serious damage to property (s 9(2)(d)). The offence is considered to be in a *terrorism context* if the offender committed the offence with the intention of advancing a political, religious, or ideological cause (s9(3)(a)(i)) and with the intention of coercing or influencing by intimidation the government of an Australian jurisdiction or foreign country or of intimidating the public or a section of the public.

The Bill creates a new category for a ‘convicted NSW underlying terrorism offender’ and may be applied to any eligible offender who has been convicted for a *serious offence* (including serious physical harm to a person or serious property damage) in a terrorism context (including the intent to advance a political, religious or ideological cause by coercing or influencing the government of an Australian jurisdiction or foreign country). This is quite broad-ranging and may apply to a range of offences that were serious and intended to influence a government. This is extremely broad and doesn’t appear to include exemptions for political protests intended to influence government policy that resulted in physical harm or property damage that, while an offence in itself, may not necessarily constitute the ordinary person’s understanding of a terrorism offence.

22. In relation to the new category for a ‘convicted NSW terrorism activity offender’ under section 10, a person may be an eligible offender if they are currently serving (or being supervised after serving) a sentence of imprisonment for a NSW indictable offence. In addition, a person must have either been subject to a control order, or at any time been a member of a terrorist organisation, or made statements or engaged in conduct involving advocating support for engaging in any terrorist acts, or is associated or otherwise affiliated with other persons or with organisations advocating support for engaging in any terrorist acts. This applies whether the eligible offender has been convicted of an offence that occurred in Australia or elsewhere.

The Bill creates new categories of terrorism-related offences that are eligible for extended supervision orders or continued detention orders. The provisions capture a broad number of factors that a court may consider when determining whether to grant such an order, including prior convictions inside or outside of Australia, statements or conduct that were involved in advocating any terrorist acts, and whether they are associated or affiliated with any other person or organisations advocating support for engaging in terrorist acts. These considerations are extremely broad and may mean that a person is an eligible offender if any relative or associated person (within or outside of Australia) is in connection with a terrorist act or terrorism organisation – even if the eligible

offender themselves is convicted for an indictable offence that is not necessarily a terrorism-related offence.

Section 11 outlines factors that the Court may take into account when determining whether an eligible offender is either a convicted NSW underlying terrorism offender or a convicted NSW terrorism activity offender. This includes allowing the Court to take into account the views of the sentencing court at the time the offender was sentenced. This may safeguard against certain offences being classed as a terrorism offence. However, this is a discretion only and includes 'any other information that the Court considers relevant', which is an extremely broad discretion.

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

Commencement by proclamation

23. Section 2 outlines that Schedule 2 of the Bill (other than schedule 2.10[2], 2.12 and 2.14) commences on a day or days to be appointed by proclamation. Schedule 2 contains a series of consequential amendments to other Acts as a result of definitions and section contained in this Bill. It also makes amendments to the *Crimes (Administration of Sentences) Act 1993*, including the application of the Act to persons subject to provisions under this Bill (Schedule 2.6[3]); provisions relating to regulations with respect to the treatment, accommodation and detention of Commonwealth post sentence terrorism inmates and NSW post sentence inmates (Schedule 2.6[4]); eligibility for release on parole (Schedule 2.6[5]); and the application of the Bill by the Parole Authority (Schedule 2.6[6]-[8]).

The Committee generally prefers that legislation commences on a particular date or on assent. As the provisions contained in the Bill relate to the treatment of persons subject to continued detention and extended supervision orders, it is particularly important to those directly affected by the legislation are afforded certainty of when these provisions commence.

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.