



## Legislation Review Committee

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

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# 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**

This section contains the Legislation Review Committee's reports on Regulations in accordance with section 9 of the *Legislation Review Act 1987*.

# Conclusions

## PART ONE – BILLS

### 1. DEFEND TAFE BILL 2018\*

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

### 2. ELECTORAL FUNDING BILL 2018

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

##### *Implied freedom of political communication – issue one*

The Committee notes that the Bill preserves the existing caps on electoral expenditure for election campaigns by political parties and candidates, and reduces the amount of the current cap on electoral expenditure by third party campaigners by half of what it currently is. The Committee acknowledges the burden expenditure caps place on the implied freedom of political communication. The Committee notes the recommendations of the Expert Panel and the JCEM 2016 Report and refers to Parliament whether the burden is reasonable and proportionate.

##### *Implied freedom of political communication – issue two*

The Committee notes the Bill preserves the existing bans on certain political donations and introduces a provision to recover donations from those who made a donation within 12 months of becoming a property developer. The Committee notes the impact these provisions have on those affected from participating in political debate. However, the Committee notes the purposes of the provisions are to prevent corruption and promote the actual and perceived integrity of government. The Committee makes no further comment.

##### *Implied freedom of political communication – issue three*

The Committee acknowledges the burden expenditure caps place on the implied freedom of political communication and refers to Parliament the question of whether it is reasonable and proportionate.

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

##### *Commencement by proclamation*

The Committee generally prefers Acts to commence on assent or a specific date. However, the Committee notes that the Bill will replace the *Election Funding, Expenditure and Disclosures Act 1981* and involve some administrative complexity. The Committee makes no further comment.

### 3. ELECTRICITY SUPPLY AMENDMENT (FAIR PRICE FOR SOLAR AND OTHER RENEWABLE SOURCES OF ELECTRICITY) BILL 2018\*

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

## 4. FORESTRY LEGISLATION AMENDMENT BILL 2018

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

Under the Forestry Act, the public received 6 months' notice of a proposed five yearly review of a forest agreement. The public then had 28 days to comment on proposed changes to the forest agreement. The Bill removes the requirement to provide 6 months' notice of a proposed five yearly review, but retains the requirement that proposed changes are available for public comment for 28 days.

This reduction in the notice period may operate to make it more difficult for the public to participate in the review of forest agreements, without appropriate justification. The Committee draws this to the attention of Parliament.

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

Generally, the relevant Minister must consult the public in relation to proposed amendments or repeals of a private native forestry code of practice and proposed amendments to an integrated forestry operations approval. However, the Minister may dispense with the requirement for public consultation if the matter is of a 'minor nature' or, in the case of codes of practice, has 'urgency'. These terms are not defined.

The Committee notes that this may trespass on the right of the public to be consulted. In circumstances where the Minister may also dispense with the need to seek concurrence of other Ministers, including the Minister for the Environment, on the amendment of a code if the matter is of a 'minor nature', the Committee draws this to the attention of Parliament.

*Method of publication not defined*

The Bill removes the requirement to publish notice of certain proposed forest agreements and approvals (or amendments and revocations to same) under the Forestry Act in a newspaper. While such documents need to be publically accessible, it appears that no method of publication is identified. However, the explanatory note indicates that the intention is that such documents are published on the relevant government website.

Although section 69I in the existing Act already provides for online publication of certain agreements, approvals and reviews, this section does not appear to extend to a requirement to publish proposed agreements and approvals (or amendments and revocations to same) online. This may impact on the ability of the public to participate in these reviews. The Committee draws this to the attention of Parliament.

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

A number of matters in the Bill are deferred to the regulations. Some of these matters, including those which relate to whether timber or forest products can be taken from 'environmentally significant areas,' are expressed to be 'subject to the regulations'.

Although regulations are subject to the disallowance processes in the *Interpretation Act 1987*, the Committee generally prefers that substantive matters are dealt with in the principal Act so as to be afforded a greater level of parliamentary scrutiny. In particular, the Committee notes that expressing matters in the Act to be ‘subject to the regulations’ may be an inappropriate delegation of legislative power because it may allow the regulations to substantively alter the effect of the relevant provision in the Act.

**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 so that the start date is subject to parliamentary scrutiny, and affected persons have certainty regarding legislative change. However, given that the Bill reforms the regulation of forests in NSW, it involves some administrative complexity. The Committee therefore makes no further comment.

5. HEALTH LEGISLATION AMENDMENT BILL (NO 2) 2018

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

*Elements of offences provided for in regulations*

The Bill provides for the creation of offences that involve contravening the regulations. The penalties for these offences range from \$5,500 and 6 months imprisonment in one case and \$55 000 in another. The Committee is concerned that where there is the capacity for significant maximum penalties to be imposed, such as a period of imprisonment, the elements of the offence should be in the principal legislation. The Committee draws this matter to the attention of Parliament.

6. PUBLIC HEALTH AMENDMENT (SAFE ACCESS TO REPRODUCTIVE HEALTH CLINICS) BILL 2018\*

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

*Freedom of movement*

The Bill makes it an offence for persons in a safe access zone to obstruct or block a footpath or road leading to a reproductive clinic at which abortions are provided. A ‘safe access zone’ includes a reproductive health clinic at which abortions are provided or an area within 150 metres of that clinic.

While this may trespass on an individual’s freedom of movement, this right must be balanced against other rights. Given that the provision is designed to protect the safety, well-being and dignity of patients, and the person may be able to prove a ‘reasonable excuse’, the restriction is proportionate in the circumstances. As such, the Committee makes no further comment.

*Implied freedom of political communication*

The Bill imposes some limits on certain behaviour of persons in a safe access zone.

The Bill makes it an offence to ‘interfere with’ persons accessing, leaving, or attempting to access or leave, such clinics. To ‘interfere with’ includes to ‘harass, intimidate...[or] obstruct’.



The Bill also makes it an offence for persons within the safe access zone to make certain communications relating to abortions.

The Committee notes that these provisions may be seen to trespass on the implied freedom of political communication. However, the Committee notes the trespass is for the legitimate purpose of protecting women from harassment and is proportionate to the need to protect women in safe access zones. The Committee also notes the implied freedom of political communication must be balanced against other rights, freedoms, and policy objectives. Given that the Bill is designed to protect the safety, well-being and dignity of patients, and only applies the provisions to reproductive health clinics and a small surrounding area, the Committee makes no further comment.

7. ROAD TRANSPORT AND OTHER LEGISLATION AMENDMENT (DIGITAL DRIVER LICENCES AND PHOTO CARDS) BILL 2018

**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 so that those affected by its provisions can have the certainty of its commencement date. We acknowledge that the Bill is introducing a digital driver licence scheme that will be managed by Service NSW centres across the state and involves administrative coordination. In this case, the Committee notes the administrative benefits that a flexible commencement date may afford and makes no further comment.

8. ROAD TRANSPORT LEGISLATION MISCELLANEOUS AMENDMENTS BILL 2018

**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 as stated in the second reading speech, the Committee also notes that the commencement of Schedule 1.1 is contingent on the proposed amendments to the *Heavy Vehicle National Law* which will be progressively implemented throughout 2018. Given the circumstances and the administrative nature of the amendments in Schedule 1.1 of the *Roads Transport Legislation Miscellaneous Amendments Bill 2018*, the Committee makes no further comment.

## Part One – Bills

### 1. Defend TAFE Bill 2018\*

Date introduced	17 May 2018
House introduced	Legislative Council
Member responsible	The Hon. Dawn Walker MLC
	*Private Member's Bill

#### PURPOSE AND DESCRIPTION

1. The object of this Bill is to preserve TAFE campuses and assets in public ownership and to ensure that funding for vocational education and training is allocated to the TAFE Commission.

#### BACKGROUND

2. In her second reading speech, the Hon. Dawn Walker noted the importance of vocational training and education for skilled employment in NSW.
3. The *Defend TAFE Bill 2018* would 'ensure that TAFE campuses would stay in public hands' and that '100 per cent of the public vocational education and training [VET] funding would go to TAFE.'

#### 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.**

## 2. Electoral Funding Bill 2018

Date introduced	17 May 2018
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 disclosure, capping and prohibition of certain political donations and electoral expenditure for State Parliamentary and local government election campaigns and for the public funding of State Parliamentary election campaigns.
2. This Bill has been prepared in response to the Final Report on Political Donations by the Panel of Experts (known as the Schott Report) dated December 2014, the Report on the Inquiry into the Final Report of the Expert Panel - Political Donations and the Government's Response dated June 2016 and the Report on the Administration of the 2015 NSW Election and Related Matters dated November 2016 both by the Joint Standing Committee on Electoral Matters.
3. This Bill repeals and replaces the Election Funding, Expenditure and Disclosures Act 1981 (the 1981 Act). In particular, this Bill:
  - (a) sets out and clarifies certain definitions and key terms used in the legislation, including the definition of political donation, and
  - (b) requires a disclosure of a reportable political donation as follows:
    - i. in general in relation to reportable political donation received or made during the 6-month period preceding a State general election, by the relevant recipient and donor within 14 days of its being received or made,
    - ii. in general in relation to reportable political donation received or made at any other time, by the relevant recipient and donor within 4 weeks of the end of the quarter in which it was received or made,
    - iii. in relation to a disclosure of a reportable political donation made by a major political donor:
      - (A) by the relevant recipient within the periods required by subparagraphs (i) and (ii) above, and
      - (B) by the donor within 4 weeks of the end of the financial year in which it was made,

- iv. in relation to a disclosure of a reportable political donation for a local government election, by the relevant recipient and donor within 4 weeks of the end of the quarter in which it was received or made, and
- (c) provides that independent elected members, candidates and groups of candidates are personally responsible for making disclosures of political donations and electoral expenditure as required by the proposed Act (rather than the official agent of those persons), and
- (d) provides that the relevant party agents of elected members, candidates and groups that are endorsed by registered political parties are responsible for making such disclosures of political donations and electoral expenditure as required by the proposed Act (except in certain circumstances), and
- (e) extends provisions relating to the disclosure of political donations and electoral expenditure to associated entities of political parties (associated entities), being corporations or entities that operate solely for the benefit of one or more registered parties or elected members, and
- (f) makes it clear that, for the purposes of the proposed Act, things done by (or on behalf of) a body or organisation that is controlled by a political party are deemed to be have been done by the political party, and
- (g) removes the concept of associated political parties that was used in the 1981 Act to determine reportable political donations and the caps on electoral communication expenditure for State election campaigns, and
- (h) provides for the disclosure of further information relating to political donations and electoral expenditure, such as the terms and conditions and total loan repayments of reportable loans and the identification of electoral expenditure aimed at influencing the voting in a particular electoral district, and
- (i) provides that the Electoral Commission is to publish on its website an explanation and analysis of the sources and amounts of reportable political donations (subject to an obligation on the Electoral Commission to first consult with parties and candidates concerned regarding such publications), and
- (j) requires that political donations, self-financing contributions and electoral expenditure for the benefit of elected members, candidates and groups that are endorsed by registered political parties are to be made through the parties' campaign accounts, and
- (k) increases the cap on indirect campaign contributions to match the cap on other political donations, and
- (l) provides that certain, specified amounts paid by State parliamentary election candidates to their own political party or group are to be exempted from the applicable caps on political donations, and
- (m) decreases the applicable cap on electoral expenditure for a third-party campaigner for a State general election to:

- i. \$500,000 if the third-party campaigner was registered before the commencement of the capped State expenditure period for the election (rather than indexing the \$1,288,500 amount that applied for the 2015 general election), or
  - ii. \$250,000 in any other case (rather than indexing the \$644,300 amount that applied for the 2015 general election), and
- (n) provides for the capping of electoral expenditure for local government election campaigns during a capped local government expenditure period in a similar manner to the current capping of electoral expenditure on State election campaigns during the capped State expenditure period, and
- (o) provides that the electoral expenditure incurred by an associated entity of a party is to be aggregated with the electoral expenditure incurred by the party for the purposes of the caps on electoral expenditure, and
- (p) clarifies and modifies the definition of property developer for the purpose of the prohibition on political donations by property developers as follows:
  - i. by expanding the definition to include individuals as well as corporations,
  - ii. by providing that such an individual or a corporation is a property developer if:
    - (A) the person or corporation carries on a business mainly concerned with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit, and
    - (B) in the course of that business:
      - a. 1 relevant planning application has been made by or on behalf of the individual or corporation and is pending, or
      - b. 3 or more relevant planning applications made by or on behalf of the individual or corporation have been determined within the preceding 7 years,
  - iii. by expanding the definition of a close associate of such an individual or corporation to include a person in a joint venture or partnership with a property developer in connection with a relevant planning application made by or on behalf of the property developer who is likely to obtain a financial gain if development that would be or is authorised by the application is authorised or carried out, and
- (q) provides that if a person makes a political donation and, within 12 months of making that donation becomes a property developer, then the person must pay an amount that is double the amount or value of the donation to the State, and

- (r) provides that provisions of the proposed Act that aggregate political donations are not to apply in relation to the acceptance of certain small political donations of \$50 or less made at fundraising ventures and functions (but will apply in relation to the making of those donations), and
- (s) removes the distinction between electoral expenditure and electoral communication expenditure to provide that all electoral expenditure (and not only electoral communication expenditure) is covered by the caps on electoral expenditure and can be the basis of a claim for public funding from the Election Campaigns Fund, and
- (t) prohibits third-party campaigners from acting in concert with other persons to incur electoral expenditure that exceeds the cap on electoral expenditure for the third-party campaigner, and
- (u) provides for a “dollar-per-vote” model of public funding for State election campaigns (being the model that was used at the 2015 State general election) and provides for such funding to be indexed for inflation, and
- (v) increases advance payments of public funding available to parties from the Election Campaigns Fund from 30% to 50% of the amount to which the party was entitled to in relation to the previous general election, and
- (w) increases the preliminary payment amount that may be made by the Electoral Commission to a party in relation to a claim for public funding that it is unable to finalise within 14 days from 70% of the total amount estimated by the Electoral Commission to be payable to the party to 90% of that amount, and
- (x) renames the Policy Development Fund as the New Parties Fund to better reflect the aims of that Fund, and
- (y) expands the items of policy development expenditure claimable from the New Parties Fund to include electoral expenditure in the calendar year in which an Assembly general election is held, and
- (z) provides that entitlement to payment from the Administration Fund is to be determined as at the end of each quarter (rather than each calendar year) for which the payment is to be made, and
- (aa) introduces and defines a new defined term of a senior office holder of a registered political party and imposes duties and obligations on those senior office holders, including:
  - i. a duty of care and diligence, and
  - ii. a duty to act in good faith, and
  - iii. a duty to report alleged contraventions of the proposed Act to the Electoral Commission, and
- (ab) requires that only a senior office holder of a registered political party may be a party agent for the party, and

- (ac) requires registered political parties to notify the Electoral Commission of the names of all senior office holders and requires the Electoral Commission to publish those names and a summary of the role and responsibilities of a senior office holder under the proposed Act, and
  - (ad) requires registered political parties to provide the Electoral Commission with audited annual financial statements, and
  - (ae) clarifies other auditing requirements placed on registered political parties, by removing the requirement that declarations of disclosures under the proposed Act must be accompanied by an auditor's certificate, but retains a discretion of the Electoral Commission to audit those declarations of disclosures (other than declarations lodged by major political donors), and
  - (af) clarifies and modifies the offences under the proposed Act, including the maximum penalties for breaches of those offences, and
  - (ag) enables certain civil and criminal proceedings to be brought against parties that are unincorporated associations as if the parties were corporations, and
  - (ah) confers a specific function on the Electoral Commission to undertake educational and information programs to educate and inform elected members, candidates, groups, third-party campaigners and associated entities of their obligations under the proposed Act.
4. The Bill also makes a number of miscellaneous law revision amendments to the *Electoral Act 2017*.
5. The Bill also makes a number of amendments to the *Lobbying of Government Officials Act 2011* in response to the Statutory Review of the *Lobbying of Government Officials Act 2011* published in June 2017. Those amendments:
- (a) provide for an objects provision for that Act, and
  - (b) clarify that the 18-month prohibition against lobbying Government officials (the cooling-off period) for former Ministers and Parliamentary Secretaries does not apply to lobbying by a former Minister or Parliamentary Secretary who is lobbying as a Commonwealth public official or as a member of the Commonwealth Parliament, and
  - (c) empower the Electoral Commission to cancel or suspend the registration of a third-party lobbyist (or any individual engaged to undertake lobbying for a third-party lobbyist) if the lobbyist (or the individual) ceases to be eligible to be registered, and
  - (d) provide that a person is taken not to be a fit and proper person to be registered in the Lobbyists Register if the person has been sentenced to a term of imprisonment of 30 months or more or has been convicted, within the previous 10 years, of an offence committed as an adult involving fraud or dishonesty, and

- (e) require the Electoral Commission to give notice and reasons for certain decisions it makes.

## BACKGROUND

6. This Bill repeals and replaces the *Election Funding, Expenditure and Disclosures Act 1981*. It implements a number of recommendations and reforms arising from the 2014 report of the independent panel of experts on political donations (Expert Panel Report) and the 2016 report of the Joint Standing Committee on Electoral Matters (JSCEM 2016 Report).

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Implied freedom of political communication – issue one*

7. Division 4 of Part 3 of the proposed Act preserves the existing caps on electoral expenditure for election campaigns. Proposed section 29(10) of the Act reduces the amount of the current cap on electoral expenditure by third party campaigners from \$1,050,000 to \$500,000.
8. On previous occasions the Committee has noted the burden electoral expenditure caps place on the implied freedom of political communication. Expenditure caps can be viewed as restricting people's ability to have a voice in election campaigns and participate in political debate. However, they can also be viewed as being a reasonable measure to prevent some political participants having a significant advantage over others.
9. With regard to third party campaigners, the Committee notes that both the Expert Panel Report and the JSCEM 2016 Report recommended that the expenditure cap be reduced, commenting that third party campaigners should be able to spend a reasonable amount to voice their concerns but not to the same extent as candidates and parties.

**The Committee notes that the Bill preserves the existing caps on electoral expenditure for election campaigns by political parties and candidates, and reduces the amount of the current cap on electoral expenditure by third party campaigners by half of what it currently is. The Committee acknowledges the burden expenditure caps place on the implied freedom of political communication. The Committee notes the recommendations of the Expert Panel and the JSCEM 2016 Report and refers to Parliament whether the burden is reasonable and proportionate.**

#### *Implied freedom of political communication – issue two*

10. Division 7 of Part 3 of the proposed Act preserves the existing prohibition on certain political donations, including donations from property developers, and tobacco, liquor and gaming businesses. Proposed section 58(3) also provides that if a person makes a political donation within 12 months of becoming a property developer, as defined by the Act, they must pay double the amount of the donation to the State.
11. The Committee has noted previously the impact of the existing bans on political donations from particular individuals has on a person's ability to participate in political



affairs. However, the Committee notes the High Court decision in *McCloy v NSW*<sup>1</sup> which held that while the bans place a burden on the implied freedom of political communication, they were enacted for legitimate purposes and advance those purposes by rational means.

**The Committee notes the Bill preserves the existing bans on certain political donations and introduces a provision to recover donations from those who made a donation within 12 months of becoming a property developer. The Committee notes the impact these provisions have on those affected from participating in political debate. However, the Committee notes the purposes of the provisions are to prevent corruption and promote the actual and perceived integrity of government. The Committee makes no further comment.**

***Implied freedom of political communication – issue three***

12. The Committee notes the proposed \$2,500 cap on third party electoral expenditure for local government elections.

**The Committee acknowledges the burden expenditure caps place on the implied freedom of political communication and refers to Parliament the question of whether it is reasonable and proportionate.**

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

***Commencement by proclamation***

13. The Bill provides for the Act to commence on a day or days appointed by proclamation.

**The Committee generally prefers Acts to commence on assent or a specific date. However, the Committee notes that the Bill will replace the *Election Funding, Expenditure and Disclosures Act 1981* and involve some administrative complexity. The Committee makes no further comment.**

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<sup>1</sup> *McCloy v New South Wales* [2015] HCA 34

### 3. Electricity Supply Amendment (Fair Price for Solar and Other Renewable Sources of Electricity) Bill 2018\*

Date introduced	17 May 2018
House introduced	Legislative Assembly
Member responsible	Ms Tamara Smith MP
	*Private Member's Bill

#### PURPOSE AND DESCRIPTION

1. The object of this Bill is to provide for the determination by IPART of the minimum rate that an electricity retailer must pay for electricity generated from certain renewable sources that is supplied to the distribution system by customers.

#### BACKGROUND

2. In her second reading speech, Ms Smith noted the *Electricity Supply Amendment (Fair Price for Solar and Other Renewable Sources of Electricity) Bill 2018* would introduce a 'fair solar minimum rate payable to support New South Wales households who choose to invest in solar photovoltaic systems.'
3. Ms Smith also notes that the bill would provide a wider range of factors for the Independent Pricing and Regulatory Tribunal (IPART) to consider when determining the minimum rate for complying generator and require retailers to keep and maintain records of each respective customer's amount of electricity used and the amounts paid to the retailer for the electricity used.

#### 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. Forestry Legislation Amendment Bill 2018

Date introduced	16 May 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Toole MP
Portfolio	Lands and Forestry

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
  - (a) To amend the *Local Land Services Act 2013* (the LLS Act) and other Acts to transfer responsibility for the regulation of private native forestry to Local Land Services, with the Environment Protection Authority (the EPA) maintaining its enforcement role,
  - (b) To amend the *Forestry Act 2012* (the Forestry Act), the *Biodiversity Conservation Act 2016* and other Acts to update the regulatory framework for public native forestry and the enforcement role of the EPA.
  - (c) To make minor, related and consequential amendments to the LLS Act, the Forestry Act and other Acts and instruments.

### BACKGROUND

2. According to the second reading speech, the Bill consolidates five separate legislative frameworks into two in order to streamline the regulation of forestry operations in private forests (under the LLS Act) and public forests (under the Forestry Act).
3. In particular, the Bill amends the LLS Act to formally transfer responsibility for private native forestry plans to Local Land Services, creating a new Part 5B. This occurs in a context where responsibility for approving private native forestry plans was transferred from the EPA to Local Land Services on 30 April 2018. While Local Land Services will be responsible for approving such plans, the EPA will still have a role in ensuring compliance.
4. The Bill also makes changes in relation to codes of practice related to private native forestry. The Minister indicated in his second reading speech that these codes of practice will be subject to a review and public consultation later in the year. The explanatory note to the Bill also indicates that the *Constitution Act 1902* will be amended to transfer responsibility for these codes of practice to the Minister for Lands and Forestry.
5. The second reading speech also indicates that the Bill amends the Forestry Act to update provisions relating to integrated forestry operations approvals, which are issued to ForestCorp (a State-owned corporation) in respect of native forestry on public land.

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Right to consultation*

6. The Bill amends section 69G of the Forestry Act, which relates primarily to the review of forest agreements. Forest agreements are made between the Minister for Lands and Forestry and Minister for the Environment and cover matters such as forest management, sustainable timber supply and native title. The section previously provided that the public would be given 6 months' notice of a five yearly review of an agreement. The proposed amendment is that at least 28 days' public notice of the review is provided and that the public can make submissions for 28 days after the publication of proposed changes.

**Under the Forestry Act, the public received 6 months' notice of a proposed five yearly review of a forest agreement. The public then had 28 days to comment on proposed changes to the forest agreement. The Bill removes the requirement to provide 6 months' notice of a proposed five yearly review, but retains the requirement that proposed changes are available for public comment for 28 days.**

**This reduction in the notice period may operate to make it more difficult for the public to participate in the review of forest agreements, without appropriate justification. The Committee draws this to the attention of Parliament.**

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

#### *Meaning of 'minor nature' and 'urgency'*

7. The Bill enables the public to be consulted in relation to proposed private native forestry codes of practice: proposed sections 60ZU and 60ZV. Such codes regulate the carrying out of forestry operations on land subject to a private native forestry plan. They can cover matters relating to biodiversity, water pollution and threatened species, among others.
8. The Minister has to consult the public in relation to proposed codes of practice; however, a failure to comply with a requirement under this section in relation to a proposed code of practice does not prevent the code being made or invalidate that code: proposed section 60ZU(5).
9. However, the Minister does not need to consult the public in relation to proposed amendments to a code if the matter is of a minor nature or is urgent: subsection 60ZV(3)(a). The Bill does not define what constitutes the 'minor nature' or 'urgency' of a matter.
10. Similarly, the Minister for Lands and Forestry may dispense with the requirement for concurrence or consultation with another Minister (including the Minister for the Environment) on any amendment of a code if satisfied it should be dispensed with because of the minor nature of the matter. Again, 'minor nature' is not defined.

11. A similar requirement to consult exists under the Forestry Act in relation to proposed amendments of an integrated forestry operations approval, but can be dispensed with if the amendment is of a 'minor nature': proposed section 69RA. That term is not defined.

**Generally, the relevant Minister must consult the public in relation to proposed amendments or repeals of a private native forestry code of practice and proposed amendments to an integrated forestry operations approval. However, the Minister may dispense with the requirement for public consultation if the matter is of a 'minor nature' or, in the case of codes of practice, has 'urgency'. These terms are not defined.**

**The Committee notes that this may trespass on the right of the public to be consulted. In circumstances where the Minister may also dispense with the need to seek concurrence of other Ministers, including the Minister for the Environment, on the amendment of a code if the matter is of a 'minor nature', the Committee draws this to the attention of Parliament.**

*Method of publication not defined*

12. The Bill amends the public consultation requirements in relation to a variety of matters under sections 69D, 69F, 69G, and 69NA of the Forestry Act. These include matters such as the making of proposed forest agreements, proposed amendments or revocations of agreements, reviews of agreements, and proposed integrated forestry operations approvals.
13. The Bill removes the requirement that such matters have to be published in a newspaper, and instead simply requires that the relevant document be publically accessible.
14. The explanatory notes indicate that these amendments reflect that the documents will be published on the relevant government website.
15. Section 69I(6) of the Forestry Act already provides that certain documents under the Act are to be made available online as soon as practicable, including forest agreements, assessments, assessment documents, approvals and reports. However, this requirement does not appear to presently extend to the proposed forestry agreements referred to in section 69D, proposed amendments or revocations to such agreements as set out in section 69F, and proposed integrated forestry approvals in proposed section 69NA.

**The Bill removes the requirement to publish notice of certain proposed forest agreements and approvals (or amendments and revocations to same) under the Forestry Act in a newspaper. While such documents need to be publically accessible, it appears that no method of publication is identified. However, the explanatory note indicates that the intention is that such documents are published on the relevant government website.**

**Although section 69I in the existing Act already provides for online publication of certain agreements, approvals and reviews, this section does not appear to extend to a requirement to publish proposed agreements and approvals (or amendments and revocations to same) online. This may impact on the ability of the public to participate in these reviews. The Committee draws this to the attention of Parliament.**

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

*Matters deferred to regulations*

16. A number of matters in the Bill are deferred to the regulations, including:
- (a) Proposed subsection 60ZS(2) of the LLS Act provides that regulations may amend the areas of the State to which Part 5B of that Act applies;
  - (b) Proposed section 60ZZC provides that regulations under Part 5B of the LLS Act may make provision for or with respect to the carrying out of forestry operations to which private native forestry plans apply (but such regulations are to be made on the joint recommendation of two Ministers, including the Minister for the Environment).
  - (c) Proposed section 60ZU(6) of the LLS Act provides that the regulations may make further provision for or with respect to public consultation in relation to proposed codes of practice;
  - (d) Proposed subsections 39(4) and 45(4) of the Forestry Act express matters to be 'subject to the regulations'. These matters relate to whether a licence or small quantity authorisation permits the taking of timber or forest products from areas classed as environmentally significant under an integrated forestry operations approval.

**A number of matters in the Bill are deferred to the regulations. Some of these matters, including those which relate to whether timber or forest products can be taken from 'environmentally significant areas,' are expressed to be 'subject to the regulations'.**

**Although regulations are subject to the disallowance processes in the *Interpretation Act 1987*, the Committee generally prefers that substantive matters are dealt with in the principal Act so as to be afforded a greater level of parliamentary scrutiny. In particular, the Committee notes that expressing matters in the Act to be 'subject to the regulations' may be an inappropriate delegation of legislative power because it may allow the regulations to substantively alter the effect of the relevant provision in the Act.**

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

*Commencement by proclamation*

17. The Bill provides that the Act commences on a day or days to be appointed by proclamation.

**The Committee generally prefers legislation to commence on assent or a fixed date so that the start date is subject to parliamentary scrutiny, and affected persons have certainty regarding legislative change. However, given that the Bill reforms the regulation of forests in NSW, it involves some administrative complexity. The Committee therefore makes no further comment.**

## 5. Health Legislation Amendment Bill (No 2) 2018

Date introduced	16 May 2018
House introduced	Legislative Council
Minister responsible	The Hon Brad Hazzard MP
Portfolio	Health

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

- (a) to amend the Health Care Complaints Act 1993 to require certain information about a person whose registration as a registered health practitioner is cancelled or suspended as a result of disciplinary proceedings to be made publicly available,
- (b) to make miscellaneous amendments to the *Health Practitioner Regulation (Adoption of National Law) Act 2009* with respect to reviews and appeals, the powers of authorised persons, suspension of registration and the membership of an Assessment Committee of a Council for a health profession,
- (c) to amend the *Poisons and Therapeutic Goods Act 1966* to impose requirements in respect of certain substances and goods that may be used for cosmetic and other purposes,
- (d) to amend the *Private Health Facilities Act 2007* to create an offence of performing certain services or treatments at certain private health facilities, and to provide authorised officers with the power to require a person to answer questions or provide information and documents,
- (e) to amend the *Public Health Act 2010* to permit the Chief Health Officer to make public a statement identifying and giving warnings or information about a risk to health or safety, to exclude compensation for defamation for statements made under that Act and to clarify the meaning of de-registered health practitioner.

### BACKGROUND

2. In the Second Reading Speech to the Bill it was noted that the Bill makes a range of amendments to health legislation. The amendments follow a review by the Ministry of Health into the regulation of cosmetic procedures and its regular review of legislation to ensure it remains up to date.

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Elements of offences provided for in regulations*

3. The Bill amends the *Poisons and Therapeutic Goods Act 1966* to provide that the regulations may prescribe requirements in respect of the possession, manufacture, supply, use, prescription, administration, storage and disposal of any substance or goods subject to the Division.
4. The proposed substances and goods to which the Division applies include:
  - botulinum toxins for human use,
  - hyaluronic acid and its polymers in preparations for injection or implantation,
  - any other substance specified in Schedule 2, Schedule 3, Schedule 4 or Schedule 8 of the Poisons List that is prescribed by the regulations, and
  - any therapeutic goods prescribed by the regulations.
5. The Bill further amends the *Poisons and Therapeutic Goods Act 1966* to make it an offence to contravene a requirement of the above regulations with penalties ranging from \$5,500 to 6 months imprisonment depending on the category of the offence.
6. Similarly, the Bill amends the *Private Health Facilities Act 2007* to make it an offence for a person to perform a service or treatment at a private health facility in contravention of the regulations, of which the maximum penalty is \$55 000.

**The Bill provides for the creation of offences that involve contravening the regulations. The penalties for these offences range from \$5,500 and 6 months imprisonment in one case and \$55 000 in another. The Committee is concerned that where there is the capacity for significant maximum penalties to be imposed, such as a period of imprisonment, the elements of the offence should be in the principal legislation. The Committee draws this matter to the attention of Parliament.**



## 6. Public Health Amendment (Safe Access to Reproductive Health Clinics) Bill 2018\*

Date introduced	17 May 2018
House introduced	Legislative Council
Member responsible	The Hon Penny Sharpe MLC
	Private Member's Bill*

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to provide for safe access zones around reproductive health clinics at which abortions are provided so as to protect the safety and wellbeing of, and respect the privacy and dignity of, those accessing the services provided at those premises as well as those who need to access those premises in the course of their employment.

### BACKGROUND

2. The Bill is co-sponsored by the Hon Penny Sharpe MLC and the Hon Trevor Khan MLC.
3. A similar Bill was introduced by Ms Sharpe on 30 March 2017 and was reported on in Legislation Review Digest No. 34/56, dated 4 April 2017.
4. In her second reading speech, Ms Sharpe stated that the Bill had been drafted so as to ensure that the right to protest or campaign on the issue of abortion was not curtailed.

### ISSUES CONSIDERED BY THE COMMITTEE

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

##### *Freedom of movement*

5. Proposed subsection 98C(3) provides that a person who is in a safe access zone must not, without reasonable excuse, obstruct or block a footpath or road leading to any reproductive health clinic at which abortions are provided.
6. The maximum penalties are 50 penalty units or imprisonment for 6 months, or both (first offence), or 100 penalty units or imprisonment for 12 months, or both (second or subsequent offences).

**The Bill makes it an offence for persons in a safe access zone to obstruct or block a footpath or road leading to a reproductive clinic at which abortions are provided. A 'safe access zone' includes a reproductive health clinic at which abortions are provided or an area within 150 metres of that clinic.**

**While this may trespass on an individual's freedom of movement, this right must be balanced against other rights. Given that the provision is designed to protect the safety, well-being and dignity of patients, and the person may be**

**able to prove a 'reasonable excuse', the restriction is proportionate in the circumstances. As such, the Committee makes no further comment.**

*Implied freedom of political communication*

7. Proposed subsection 98C(2) provides that a person in a safe access zone must not interfere with any person accessing, leaving or attempting to access or leave, any reproductive health clinics at which abortions are provided.
8. Proposed section 98D then provides that a person who is in a safe access zone must not make a communication that relates to abortion, by any means in a manner:
  - (a) that is able to be seen or heard by a person accessing, leaving, attempting to access or leave, or inside, a reproductive health clinic at which abortions are provided, and
  - (b) that is reasonably likely to cause distress or anxiety to any such person.
9. First offences under these provisions attract a maximum penalty of 50 penalty units or imprisonment for 6 months, or both. The maximum penalty applying to second or subsequent offences is double this amount.

**The Bill imposes some limits on certain behaviour of persons in a safe access zone.**

**The Bill makes it an offence to 'interfere with' persons accessing, leaving, or attempting to access or leave, such clinics. To 'interfere with' includes to 'harass, intimidate...[or] obstruct'. The Bill also makes it an offence for persons within the safe access zone to make certain communications relating to abortions.**

**The Committee notes that these provisions may be seen to trespass on the implied freedom of political communication. However, the Committee notes the trespass is for the legitimate purpose of protecting women from harassment and is proportionate to the need to protect women in safe access zones. The Committee also notes the implied freedom of political communication must be balanced against other rights, freedoms, and policy objectives. Given that the Bill is designed to protect the safety, well-being and dignity of patients, and only applies the provisions to reproductive health clinics and a small surrounding area, the Committee makes no further comment.**

## 7. Road Transport and Other Legislation Amendment (Digital Driver Licences and Photo Cards) Bill 2018

Date introduced	16 May 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Finance, Services and Property

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
  - (a) to amend the *Road Transport Act 2013* to provide for the issue and use of digital driver licences,
  - (b) to amend the *Photo Card Act 2005* to provide for the issue and use of digital Photo Cards,
  - (c) to make other amendments of a minor or consequential nature.

### BACKGROUND

2. In the Bill's second reading speech, the Minister noted that this Bill is intended to support the Government's digital strategy and uphold the Government's commitment to transition to digital driver licenses by 2019. This follows the digitisation of the responsible service of alcohol and responsible conduct of gambling competency cards, the recreational fishing fee, boat driver licences and recreational vessel registrations.
3. The Minister also noted that the introduction of the scheme followed a successful digital driver licence trial in Dubbo in November 2017. The scheme will be available to NSW drivers on an opt-in basis.

### ISSUES CONSIDERED BY THE COMMITTEE

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

##### *Commencement by proclamation*

4. Section 2(1) of the Bill provides that, except as provided by subsection (2), this Act commences on a day or days to be appointed by proclamation. We note that subsection 2(2) provides that section 3 commences on the date of assent to this Act.

**The Committee generally prefers legislation to commence on assent or a fixed date so that those affected by its provisions can have the certainty of its commencement date. We acknowledge that the Bill is introducing a digital driver licence scheme that will be managed by Service NSW centres across the**

**state and involves administrative coordination. In this case, the Committee notes the administrative benefits that a flexible commencement date may afford and makes no further comment.**

## 8. Road Transport Legislation Miscellaneous Amendments Bill 2018

Date introduced	16 May 2018
House introduced	Legislative Council
Minister responsible	The Hon Melinda Pavey MP
Portfolio	Roads

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
  - (a) to amend the *Road Transport Act 2013* and the *Road Transport (Vehicle Registration) Regulation 2017* to recognise national number plates for heavy vehicles, and
  - (b) to increase the maximum penalties for certain parking offences under the *Local Government Act 1993*, and
  - (c) to increase the maximum penalties for certain offences relating to the use of motor vehicles that are unregistered or on which tax has not been paid under the *Motor Vehicles Taxation Act 1988*, and
  - (d) to make minor amendments to the *Heavy Vehicle (Adoption of National Law) Act 2013* in anticipation of proposed amendments to the Heavy Vehicle National Law set out in the Schedule to the *Heavy Vehicle National Law Act 2012* of Queensland in relation to the national scheme for the registration of heavy vehicles.

### BACKGROUND

2. In his second reading speech, it was noted that the purpose of the *Roads Transport Legislation Miscellaneous Amendments Bill 2018* is to amend road and transport legislation to give effect to national road reforms relating to the ‘harmonisation of heavy vehicle numberplates, registration and enforcement, and to improve existing policies and administrative arrangements.’ In addition, the bill also includes reforms to align with the *Heavy Vehicle National Law*.
3. The *Heavy Vehicle National Law* is a consistent set of laws and requirements across State borders for heavy vehicles and is a result of the collaboration between New South Wales and other States and Territories. The member noted that changes to the *Heavy Vehicle National Law* would be progressively implemented throughout 2018.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Commencement by proclamation*

4. Clause 2 of the Bill provides that Schedule 1.1 would 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 as stated in the second reading speech, the Committee also notes that the commencement of Schedule 1.1 is contingent on the proposed amendments to the *Heavy Vehicle National Law* which will be progressively implemented throughout 2018. Given the circumstances and the administrative nature of the amendments in Schedule 1.1 of the *Roads Transport Legislation Miscellaneous Amendments Bill 2018*, 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.