



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. CRIMES AMENDMENT (PUBLICLY THREATENING AND INCITING VIOLENCE) BILL 2018

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

Freedom of speech

The Bill introduces a new serious vilification offence in the Crimes Act. This consolidates, updates and clarifies a number of serious vilification offences which already exist in the Anti-Discrimination Act.

The proposed section makes it an offence for a person, by a public act, to intentionally or recklessly threaten or incite violence towards another person or a group of persons on any number of grounds including race, religious belief or affiliation, sexual orientation, gender identity, intersex status or HIV/AIDS. A public act is defined broadly to include any form of communication to the public (including speaking, writing, or displaying notices), and any conduct observable to the public.

The Committee notes that the Bill may be seen to trespass on the right to freedom of speech or expression. However, the right to freedom of speech is not absolute and can be limited to achieve a desired purpose (such as public order), provided that the limitation is proportionate in the circumstances. The *International Covenant on Civil and Political Rights* also contains express limitations on the right to freedom of expression in the context of incitement to violence.

For these reasons, and particularly given that the offence is a proportionate limitation on free speech, the Committee makes no further comment.

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

Commencement by proclamation

The Bill commences on a day or days to be appointed by proclamation. The Committee generally prefers that legislation commences on assent or a fixed date. The Bill does not appear to involve changes that are administratively complex. As such the Committee draws this matter to the attention of Parliament.

2. CRIMINAL LEGISLATION AMENDMENT (CHILD SEXUAL ABUSE) BILL 2018

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

Retrospectivity

The Committee notes the changes to the offence of persistent sexual abuse of a child including the increase in the maximum penalty from 25 years to life imprisonment, and the retrospective operation of the offence. The Committee notes that the retrospective operation of the offence may expose some offenders to a considerably higher maximum penalty than that which would have otherwise been applied. This may result in unfairness and offend principles concerning

retrospectivity in criminal law. Most notably, that laws should not impose a heavier penalty than the one that was applicable at the time the criminal offence was committed.

However, the Committee notes that where the offence is being used retrospectively, the sentencing court must take into account the maximum penalty that applied to the unlawful sexual acts during the period the unlawful sexual relationship existed. In light of this provision, and the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse, the Committee makes no further comment.

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

Commencement by proclamation

The Act commences on a day or days to be appointed by proclamation. The Committee generally prefers Acts to commence on assent or a specified date. However, given that the Act introduces new offences and significantly restructures current offences, the Committee acknowledges that a flexible commencement date may be required in order to ensure the reforms are properly implemented.

3. FAIR TRADING AMENDMENT (SHORT-TERM RENTAL ACCOMMODATION) BILL 2018

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

Commencement by proclamation

The Act commences on a day or days to be appointed by proclamation. The Committee generally prefers Acts to commence on assent or a specified date. However, the Committee notes that the Bill introduces measures which may affect a number of parties. For example, the Bill provides for a code of conduct to apply to participants in the short-term rental accommodation industry. In these circumstances the Committee considers a flexible commencement date is reasonable to ensure that those affected are informed of the changes.

4. UNEXPLAINED WEALTH (COMMONWEALTH POWERS) BILL 2018

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

Referral of powers

The Bill refers powers of the State Parliament to the Commonwealth Parliament in order to allow the Commonwealth to extend the Commonwealth *Proceeds of Crime Act 2002* to specific New South Wales offences. This referral of power includes the ability of the Commonwealth to make amendments.

There are some protections included in the Bill and in an intergovernmental agreement aimed at ensuring New South Wales is consulted on any proposed amendments. However, as mentioned on previous occasions for Bills of this nature, it is incumbent upon the Committee to note that the referral of powers insufficiently subjects the exercise of legislative power to scrutiny by the NSW Parliament.

However, the Committee notes the purpose of the Bill is to create a national cooperative scheme on unexplained wealth. In addition, the general nature of federalism itself, sometimes requires the State to refer its powers to the Commonwealth to ensure national collaboration on particular matters. As such, the Committee makes no further comment.

Commencement by proclamation

The Act commences on a day or days to be appointed by proclamation. The Committee generally prefers Acts to commence on assent or a specified date. However, given the coordination required between different jurisdictions for the purpose of the Bill to be realised, the Committee notes that flexibility with regard to commencement is reasonable.

5. VICTIMS RIGHTS AND SUPPORT AMENDMENT (STATUTORY REVIEW) BILL 2018

Inappropriately delegates legislative powers: s8A(1)(b)(iv) of the LRA*Commencement by proclamation*

The Act commences on a day or days to be appointed by proclamation. The Committee generally prefers Acts to commence on assent or a specified date. However, the Committee notes the Bill implements a number of reforms to the Victims Support Scheme and considers that a flexible commencement date may be required to ensure all parties affected are informed of the changes. The Committee makes no further comment.

6. WATER MANAGEMENT AMENDMENT BILL 2018

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

According to the Second Reading Speech, the Bill amends several regulated river orders in response to a recent Court of Appeal decision. These amendments, which alter river boundaries, apply retrospectively in relation to a number of different dates, as far back as 2004.

The Committee often discourages the use of retrospective provisions, particularly in relation to criminal matters. However, given the nature of the amendments and the recent Court of Appeal decision, the Committee makes no further comment.

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

Under the Bill, the Minister may make orders in relation to a wide variety of matters. These include orders to repeal or suspend certain water management plans (including to suspend Basin management plans). This can be done by way of order published on the NSW legislation website or in the Gazette. The Committee notes that such orders may not be a statutory rule for the purposes of section 21 of the *Interpretation Act 1987* and may therefore not be subject to the usual tabling and disallowance requirements which enable the Parliament to scrutinise actions of the Executive.

Matters deferred to regulations

The detail of many parts of the Bill is deferred to the regulations. The Committee prefers that substantive matters are addressed in principal legislation. Unlike regulations, principal legislation is subject to a higher degree of parliamentary scrutiny and may be amended.

While some administrative matters may be appropriately deferred to the regulations, the Bill also defers some more substantive matters. These include matters which may be relevant to the commission of various offences attracting significant penalties (for example, up to 2,250 penalty

units for an individual.) The Committee draws the large number of matters deferred to the regulations, and in particular the substantive nature of some of those deferred matters, to the attention of Parliament.

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

Commencement by proclamation

Parts of the Bill commence on a day or days to be appointed by proclamation. The Committee generally prefers that legislation commences on assent or a fixed date. However, the majority of the Bill appears to commence on the date of assent and the sections that are deferred appear to involve some degree of administrative complexity. As such the Committee makes no further comment.

PART TWO - REGULATIONS

1. CRIMES (HIGH RISK OFFENDERS) REGULATION 2018

The Regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made: s 9(1)(b)(iv) of the LRA

Membership of the Committee when exercising terrorism offender functions

The Regulation provides for different membership of the High Risk Offenders Assessment Committee when exercising functions under the *Terrorism (High Risk Offenders) Act 2017*.

The *Crimes (High Risk Offenders) Act 2016* currently provides that the Assessment Committee should consist of certain members, including representatives from a wide variety of government bodies, which have been nominated by Secretary or Commissioner of the relevant agency, as the case may be. In contrast, the Regulation provides for a narrower range of representatives when the Committee exercises functions in relation to terrorism offenders, and does not include a requirement that these are persons nominated by the relevant agency head.

Although section 24AB(3) of the *Crimes (High Risk Offenders) Act 2016* provides that the regulations 'may make provision for or with respect to the constitution and procedure of the Assessment Committee', the reason for the differences between the ordinary composition of the Assessment Committee and what is proposed by the Regulation in relation to terrorism offenders is unclear. As such, the Committee draws the Regulation to the attention of Parliament.

Part One – Bills

1. Crimes Amendment (Publicly Threatening and Inciting Violence) Bill 2018

Date introduced	5 June 2018
House introduced	Legislative Assembly
Member responsible	The Hon Mark Speakman SC MP
Portfolio	Attorney-General

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Crimes Act 1900* (the Crimes Act) to create an offence of publicly threatening or inciting violence on the grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.

BACKGROUND

2. The Bill replaces the existing serious vilification offences with a single indictable offence, broadens the grounds of protections, and increases the maximum penalty. By moving all serious vilification offences from the *Anti-Discrimination Act 1977* into the Crimes Act, the Police will have the lead role in investigating such offences.
3. There have been no prosecutions brought under the existing offence provisions. According to the Second Reading Speech, a 2013 report of the Legislative Council Standing Committee on Law and Justice found that the effectiveness of the serious vilification offences in the Anti-Discrimination Act had been hindered due to a number of procedural impediments.
4. Under the proposed amendments, evidence as to the state of mind of any other person apart from the accused will not need to be adduced. It will also not be necessary to prove that another person acted as a result of the accused's alleged act.
5. The Attorney General has indicated that the Bill addresses some of the recommendations of the Law and Justice Committee's 2013 report and is also informed by community consultation subsequently undertaken in late 2016 and 2017.¹

ISSUES CONSIDERED BY COMMITTEE

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

Freedom of speech

6. The Bill makes it an offence for a person to, by a public act, intentionally or recklessly threaten or incite violence towards another person or a group of persons on diverse

¹ [Letter from The Hon Mark Speakman SC MP, Attorney-General, to Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, dated 5 June 2018.](#)

grounds including race, religious belief or affiliation, sexual orientation, gender identity, intersex status, or on the basis of HIV or AIDS: proposed section 93Z of the *Crimes Act 1900*.

7. This offence is similar in wording to a number of separate offences which currently exist in the Anti-Discrimination Act, including sections 20D (offence of serious racial vilification), 38T (offence of serious transgender vilification), 49ZTA (offence of serious homosexual vilification), and 49ZXC (offence of serious HIV/AIDS vilification). The Bill removes these offences from the Anti-Discrimination Act but consolidates them into a single offence in the Crimes Act, imposing a higher maximum penalty.
8. The new offence also contains updated terminology and clarifies what the prosecution does and does not have to prove: see, for example, subsections (2) and (3).

The Bill introduces a new serious vilification offence in the Crimes Act. This consolidates, updates and clarifies a number of serious vilification offences which already exist in the Anti-Discrimination Act.

The proposed section makes it an offence for a person, by a public act, to intentionally or recklessly threaten or incite violence towards another person or a group of persons on any number of grounds including race, religious belief or affiliation, sexual orientation, gender identity, intersex status or HIV/AIDS. A public act is defined broadly to include any form of communication to the public (including speaking, writing, or displaying notices), and any conduct observable to the public.

The Committee notes that the Bill may be seen to trespass on the right to freedom of speech or expression. However, the right to freedom of speech is not absolute and can be limited to achieve a desired purpose (such as public order), provided that the limitation is proportionate in the circumstances. The *International Covenant on Civil and Political Rights* also contains express limitations on the right to freedom of expression in the context of incitement to violence.

For these reasons, and particularly given that the offence is a proportionate limitation on free speech, the Committee makes no further comment.

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

Commencement by proclamation

9. Clause 2 provides that the Act commences on a day or days to be appointed by proclamation.

The Bill commences on a day or days to be appointed by proclamation. The Committee generally prefers that legislation commences on assent or a fixed date. The Bill does not appear to involve changes that are administratively complex. As such the Committee draws this matter to the attention of Parliament.

2. Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018

Date introduced	5 June 2018
House introduced	Legislative Assembly
Member responsible	The Hon Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

- a) to create an offence of failing to reduce or remove the risk of child abuse,
- b) to replace offences of indecent assault and act of indecency with offences of sexual touching and sexual act and to create a new offence of sexually touching where the alleged victim is a young person under the special care of the accused person,
- c) to increase the penalty for persistent sexual abuse of a child to imprisonment for life and to provide that the offence occurs if there is an unlawful sexual relationship between the accused person and a child,
- d) to introduce a new offence of grooming an adult to procure a child under his or her care for an unlawful sexual activity and to extend an existing offence of grooming a child,
- e) to permit the prosecution of a child sexual offence where the exact date on which it occurred is uncertain and a change in the law or the age of the child makes it difficult to determine which offence to prosecute,
- f) to require proceedings against children or young persons for offences relating to the production, dissemination or possession of child abuse material to be approved by the Director of Public Prosecutions and to provide exceptions and defences to those offences where the material depicts only the accused person or where the accused person is under the age of 18 years and a reasonable person would consider that its possession by the accused person is acceptable,
- g) to create an offence of failing to report a child abuse offence,
- h) to give retrospective effect to the repeal of a provision that prevents the prosecution of certain historical child abuse offences,
- i) to permit a court when sentencing a person for a sexual offence that was committed when the person was a child to order that the person is not to be treated as a registrable person in respect of that offence,

- j) to provide that in sentencing for historical child sexual offences the sentencing is to be in accordance with current sentencing patterns and practices,
- k) to permit a Judge in a trial for a prescribed sexual offence to inform the jury as to certain matters relating to the reasons why there may be differences in a complainant's account,
- l) to make a number of statute law amendments.

BACKGROUND

2. This Bill makes a number of reforms to child sexual abuse laws in response to the criminal justice recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. In the Second Reading Speech the Attorney General commented:

This bill makes a suite of reforms, including new offences, improved offences and procedural amendments. Many are based on specific recommendations of the royal commission. Others have been developed through the Child Sexual Offences Review, and aim to rationalise and consolidate our offence framework and improve the chances of successful prosecution of child sexual offences, while reducing criminalisation of children.²

ISSUES CONSIDERED BY COMMITTEE

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

Retrospectivity

3. Schedule 1, clause 20 of the Bill replaces the existing offence of persistent sexual abuse of a child with a new offence of the same name. Changes to the offence include:

In respect of the increased maximum penalty, the Attorney General commented:

- Increasing the maximum penalty from 25 years imprisonment to life imprisonment; and
- extending the offence to a sexual relationship that existed before the commencement of the relevant amendment, if the sexual acts engaged in by the accused were unlawful acts during the period in which the relationship existed.

4. In respect of the retrospective operation of the offence, the Attorney General commented:

The offence will apply retrospectively as long as the sexual acts that make up the unlawful sexual relationship were illegal at the time they were committed. This was a key part of the royal commission's recommendation. It will ensure that the new provision can be used from the time of its commencement to prosecute long-term ongoing abuse.³

² New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 June 2018, p 3 (Mark Speakman SC, Attorney-General)

³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 June 2018, p 6 (Mark Speakman SC, Attorney-General)

5. In its Criminal Justice Report, the Royal Commission into Institutional Responses to Child Sexual Abuse commented that the retrospective operation of this offence is likely to be important given the evidence received concerning delays in reporting child sexual abuse. In particular, the Commission highlighted that delays for reporting abuse by a person in authority are particularly lengthy. Therefore, the retrospective operation of the offence may be most important for institutional child sexual abuse.⁴
6. The Commission also acknowledged concerns raised by the retrospective operation of the offence, particularly given the high maximum penalties that accompany persistent child sexual abuse offences. The Commission noted that the retrospective operation may have the effect of exposing the offender to a much higher penalty than applied to the individual acts of abuse at the time they were committed.⁵
7. To address this concern, the Commission recommended that the sentencing court be required to have regard to the maximum penalties that applied to the individual acts at the time they were committed.
8. The Bill provides for this by inserting into the new offence a requirement that when imposing sentence for an offence constituted by an unlawful sexual relationship that existed wholly or partly before the commencement of the amendments, a court must take into account the maximum penalty for the unlawful sexual acts engaged in by the accused during the period in which the unlawful sexual relationship existed.

The Committee notes the changes to the offence of persistent sexual abuse of a child including the increase in the maximum penalty from 25 years to life imprisonment, and the retrospective operation of the offence. The Committee notes that the retrospective operation of the offence may expose some offenders to a considerably higher maximum penalty than that which would have otherwise been applied. This may result in unfairness and offend principles concerning retrospectivity in criminal law. Most notably, that laws should not impose a heavier penalty than the one that was applicable at the time the criminal offence was committed.

However, the Committee notes that where the offence is being used retrospectively, the sentencing court must take into account the maximum penalty that applied to the unlawful sexual acts during the period the unlawful sexual relationship existed. In light of this provision, and the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse, the Committee makes no further comment.

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

Commencement by proclamation

9. The Bill provides that the Act is to commence on a day or days appointed by proclamation.

The Act commences on a day or days to be appointed by proclamation. The Committee generally prefers Acts to commence on assent or a specified date.

⁴ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, Parts III – VI, 2017, p 69

⁵ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, Parts III – VI, 2017, p 69

However, given that the Act introduces new offences and significantly restructures current offences, the Committee acknowledges that a flexible commencement date may be required in order to ensure the reforms are properly implemented.

3. Fair Trading Amendment (Short-term Rental Accommodation) Bill 2018

Date introduced	6 June 2018
House introduced	Legislative Assembly
Member responsible	The Hon. Matt Kean MP
Portfolio	Innovation and Better Regulation

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
 - a) to amend the *Fair Trading Act 1987* to authorise the regulations to declare a code of conduct applying to participants in the short-term rental accommodation industry,
 - b) to amend the *Strata Schemes Management Act 2015* to allow the by-laws for a strata scheme to prohibit short-term rental accommodation in the case of premises that are not the principal place of residence of the person who is giving the right of occupation.

BACKGROUND

2. This Bill introduces measures to regulate the short-term rental accommodation industry. In the Second Reading Speech, the Minister noted that the measures have been informed by the 2015 parliamentary inquiry of the Legislative Assembly Committee on Environment and Planning and a public consultation process conducted in 2017.
3. The Minister noted that the Bill aims to balance the rights of individuals to use their homes within reasonable limits, with the need to protect the interests of neighbours.

ISSUES CONSIDERED BY COMMITTEE

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

Commencement by proclamation

4. The Bill provides that the Act is to commence on a day or days appointed by proclamation.

The Act commences on a day or days to be appointed by proclamation. The Committee generally prefers Acts to commence on assent or a specified date. However, the Committee notes that the Bill introduces measures which may affect a number of parties. For example, the Bill provides for a code of conduct to apply to participants in the short-term rental accommodation industry. In these circumstances the Committee considers a flexible commencement date is reasonable to ensure that those affected are informed of the changes.

4. Unexplained Wealth (Commonwealth Powers) Bill 2018

Date introduced	6 June 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Troy Grant MP
Portfolio	Police

PURPOSE AND DESCRIPTION

1. The object of this Bill is to refer certain matters relating to unexplained wealth and information gathering to the Commonwealth Parliament so as to enable the Commonwealth Parliament to make laws about those matters. The proposed Act will be enacted for the purposes of section 51 (xxvii) of the Constitution of the Commonwealth, which enables State Parliaments to refer matters to the Commonwealth Parliament.

BACKGROUND

2. The Bill refers certain matters relating to unexplained wealth and information gathering to the Commonwealth Parliament for the purpose of section 51 of the Australian Constitution. In the Second Reading Speech, the Minister commented:

Commonwealth confiscations are currently constrained by the requirements of the Commonwealth *Proceeds of Crime Act 2002* which provides that it can only obtain and unexplained wealth order where a court with proceeds jurisdiction has made a preliminary unexplained wealth order and is satisfied that the whole, or any part, of the relevant person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence, or a State offence that has a Federal aspect. This limitation reflects Australia's constitutional arrangements.⁶

3. The Minister noted that in 2013 a panel on national unexplained wealth laws was established to work with Federal, State and Territory governments to develop a national approach to unexplained wealth legislation which includes an intergovernmental agreement on how the national approach will operate. The Panel recommended a referral of powers to the Commonwealth in order to overcome the constitutional restriction on using State offences as a basis for Commonwealth confiscation action.

ISSUES CONSIDERED BY COMMITTEE

Inappropriately delegates legislative powers: s8A(1)(b)(iv) of the LRA

Referral of powers

4. The purpose of the Bill is to refer certain matters relating to unexplained wealth and information gathering to the Commonwealth Parliament, so that the Commonwealth can

⁶ New South Wales, Parliamentary Debates, Legislative Assembly, 6 June 2018, p 62, Troy Grant MP, Minister for Police

use specified New South Wales offences as a basis for confiscation action under the Commonwealth *Proceeds of Crime Act 2002*.

5. The Bill includes an amendment referral which enables the Commonwealth Parliament to amend the Commonwealth *Proceeds of Crimes Act 2002* as it applies to relevant states offences. Any such amendments will not be subject to scrutiny of the NSW Parliament. In the Second Reading Speech to the Bill the Minister noted that an intergovernmental agreement will commit the Commonwealth to consulting with participating States before any amendments are made that relate to the referred parts of State Acts.⁷
6. The Bill also contains some protections should New South Wales not approve of any amendments made by the Commonwealth. Clause 12 of the Bill provides that the Governor may at any time terminate the referral powers. In addition, the Bill provides that the Governor may rollback particular amendments made by the Commonwealth.

The Bill refers powers of the State Parliament to the Commonwealth Parliament in order to allow the Commonwealth to extend the Commonwealth *Proceeds of Crime Act 2002* to specific New South Wales offences. This referral of power includes the ability of the Commonwealth to make amendments.

There are some protections included in the Bill and in an intergovernmental agreement aimed at ensuring New South Wales is consulted on any proposed amendments. However, as mentioned on previous occasions for Bills of this nature, it is incumbent upon the Committee to note that the referral of powers insufficiently subjects the exercise of legislative power to scrutiny by the NSW Parliament.

However, the Committee notes the purpose of the Bill is to create a national cooperative scheme on unexplained wealth. In addition, the general nature of federalism itself, sometimes requires the State to refer its powers to the Commonwealth to ensure national collaboration on particular matters. As such, the Committee makes no further comment.

Commencement by proclamation

7. The Bill provides that the Act is to commence on a day or days appointed by proclamation.

The Act commences on a day or days to be appointed by proclamation. The Committee generally prefers Acts to commence on assent or a specified date. However, given the coordination required between different jurisdictions for the purpose of the Bill to be realised, the Committee notes that flexibility with regard to commencement is reasonable.

⁷ New South Wales, Parliamentary Debates, Legislative Assembly, 6 June 2018, p 62, Troy Grant MP, Minister for Police

5. Victims Rights and Support Amendment (Statutory Review) Bill 2018

Date introduced	5 June 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney-General

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Victims Rights and Support Act 2013* and the *Victims Rights and Support Regulation 2013* as follows:
 - a) to allow reports that have been prepared by agencies that provide support services to victims of crime to be used as documentary evidence in applications for victims support,
 - b) to vary the time during which an application for a recognition payment can be made by a family victim where the primary victim dies as a result of an act of violence,
 - c) to extend eligibility for recognition payments to a child, spouse or de facto partner of a homicide victim even though the child or person was not financially dependent on the victim,
 - d) to provide that, in review proceedings before the NSW Civil and Administrative Tribunal, a victim is a competent but non-compellable witness and medical reports supporting the victim's application for support are not to be provided to the offender concerned,
 - e) to increase the initial limit of approved counselling services for family victims from 20 to 22 hours,
 - f) to enable the Commissioner of Victims Rights (the Commissioner) to approve persons who are not otherwise qualified in accordance with the regulations to provide approved counselling services in any part of the State where there is a shortage of qualified counsellors to provide those services,
 - g) to increase the maximum amount payable as financial assistance to family victims for funeral expenses from \$8,000 to \$9,500,
 - h) to make other amendments of an administrative, minor or technical nature.
2. This Bill also:
 - a) amends other legislation to extend the time for bringing proceedings for offences involving the publication or broadcasting of the names of children involved in

criminal proceedings and their siblings, or victims of sexual assaults, from 6 months to 2 years, and

- b) makes a consequential amendment to the *Civil and Administrative Tribunal Act 2013*.

BACKGROUND

3. This Bill implements recommendations from the statutory review of the *Victims Rights and Support Act 2013*. Some reforms contained in the Bill include:
- providing that any child of a homicide victim who was under the age of 18 immediately before the death of the primary victim is automatically eligible for a recognition payment without needing to prove financial dependence;
 - amending the documentary evidence requirements to allow evidence from an agency that provided support services to victims of crime to be accepted in support of an application under the Victims Support Scheme;
 - providing the Commissioner the ability to approve suitably qualified people as counsellors in areas where there is a shortage of counsellors who meet the eligibility requirements under the Act; and
 - increasing the period for approved counselling services for a victim who is a family victim or relevant family members from 20 hours to 22 hours; and
 - enabling the Commissioner to authorise payments for approved counselling services on an ongoing basis to victims of child sexual assault or physical abuse.

ISSUES CONSIDERED BY COMMITTEE

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

Commencement by proclamation

4. The Bill provides that the Act is to commence on a day or days appointed by proclamation.

The Act commences on a day or days to be appointed by proclamation. The Committee generally prefers Acts to commence on assent or a specified date. However, the Committee notes the Bill implements a number of reforms to the Victims Support Scheme and considers that a flexible commencement date may be required to ensure all parties affected are informed of the changes. The Committee makes no further comment.

6. Water Management Amendment Bill 2018

Date introduced	6 June 2018
House introduced	Legislative Council
Minister responsible	The Hon. Niall Blair MLC
Portfolio	Primary Industries, Regional Water, Trade and Industry

PURPOSE AND DESCRIPTION

1. The objects of this Bill are to amend the *Water Management Act 2000* and other Acts and instruments as follows:
 - a) To enable management plans for water management areas or water sources (management plans) to include measures that are necessary because of the *Water Act 2007* of the Commonwealth and to provide for other matters relating to any such requirements, including enabling the amendment or repeal of plans and other consequential matters,
 - b) To update the matters to be considered in a report on whether to extend a management plan that deals with water sharing and to make other amendments relating to management plans,
 - c) To confer on the Natural Resources Commission the function of carrying out an audit of a management plan within the first 5 years of the plan,
 - d) To enable a management plan that applies to part of the Murray-Darling basin area covered by the Commonwealth Act to be suspended if there is an extreme event and to provide for the rules of water distribution while a suspension is in force,
 - e) To provide for a methodology for determining the quantity of water taken illegally,
 - f) To enable mandatory conditions to be imposed by regulations on access licences and approvals,
 - g) To enable specific purpose access licences to be amended where they no longer reflect the circumstances in which they operate,
 - h) To provide for the publication of authoritative information about rights to take water at particular times and for that information to be able to be relied on,
 - i) To allow holders of access licences to assign rights to daily extraction components and to provide for the keeping of records of those transactions,
 - j) To provide for matters relating to the use of and requirements for metering equipment including a mandatory condition for holders of approvals for water management works to install, use and maintain metering equipment for use in connection with the works and additional offences relating to metering equipment,

- k) To enable the Minister for Regional Water (the Minister) to make a direction prohibiting or restricting the taking of water from a specified water source if satisfied that it is necessary to do so for managing water for environmental purposes,
- l) To provide for additional enforcement mechanisms, including compliance audits and enforceable undertakings,
- m) To increase penalties for offences,
- n) To enable the Minister to delegate functions conferred on the Minister under other legislation in the Minister's capacity as the Minister administering the principal Act,
- o) To provide for one public register for all information required to be kept in a register under the principal Act,
- p) To exclude the Crown from liability for things arising from the release in good faith of water for environmental purposes, the publication of information in the public register and the exercise of functions in relation to flood work approvals,
- q) To provide for a mechanism to enable provisions of the Commonwealth Act to be displaced in New South Wales,
- r) To amend management plans and regulated river orders in various respects,
- s) To enable the Natural Resources Access Regulator to publish information about the exercise of its enforcement powers and to enable the exchange of other information,
- t) To facilitate the regulation of bore drillers under the principal Act,
- u) To enable a scheme for the transfer by Water NSW and the Water Administration Ministerial Corporation of the ownership of metering equipment to be prescribed by regulations, and
- v) To make other minor and consequential amendments and savings and transitional provisions.

BACKGROUND

2. According to the Second Reading Speech, the Bill implements reforms introduced as part of the Water Reform Action Plan in December 2017. This Plan was released in the context of a preliminary report by Ken Matthews on water compliance which was published in September 2017.
3. A public consultation draft of the Bill was released prior to its introduction.
4. According to Minister Blair, the Bill does three main things:
 - a) Implements proposed water reforms for metering, transparency measures (including a single public register) and better outcomes for environmental water
 - b) Streamlines, clarifies and provides certainty around water management in NSW

- c) Ensures that NSW can meet its obligations under the Basin Plan and intergovernmental agreements, including the delivery of NSW water resource plans.
5. The Bill also provides the new Natural Resources Access Regulator, which commenced in April 2018, with compliance and enforcement powers.

ISSUES CONSIDERED BY COMMITTEE

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

Retrospectivity

6. The Bill amends several regulated river orders in response to a recent Court of Appeal decision. These amendments are expressed to have retrospective effect in relation to a number of different dates: see, for example, proposed clause 46 of Part 4 in Schedule 12 to the Bill.
7. According to the Second Reading Speech, that decision found that the relevant regulated river boundary was further upstream from where the department had taken it to be. The effect of that decision was said to be that the licence holder's unregulated river access licence had been replaced by a regulated river access licence.
8. The Second Reading Speech indicates that the aim of these amendments is to clarify the location of these boundaries so that there are no unintended consequences for water users.

According to the Second Reading Speech, the Bill amends several regulated river orders in response to a recent Court of Appeal decision. These amendments, which alter river boundaries, apply retrospectively in relation to a number of different dates, as far back as 2004.

The Committee often discourages the use of retrospective provisions, particularly in relation to criminal matters. However, given the nature of the amendments and the recent Court of Appeal decision, the Committee makes no further comment.

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

Powers of Minister to issue orders

9. The Minister is able to issue orders in relation to many matters, including those listed below. Relevantly, the existing Act provides that the Minister can delegate any of his functions under the Act: section 389.
10. Proposed section 45(5A) would enable the Minister to, at any time, repeal a management plan that deals with water sharing by order published on the NSW legislation website. However, the Minister would need to be satisfied that it is necessary to do so because of requirements arising under the Commonwealth Water Act.
11. Under the Bill, the Minister can suspend Basin management plans during 'extreme events' by way of order in the Gazette, which must be published in an authorised manner or on a publicly accessible website: new section 49B. While 'extreme events' is not defined, the

explanatory note suggests that this may occur in an extreme dry period or an event that renders water acutely toxic or unusable for local uses.

12. Other proposed sections involving the use of orders are sections 324 (temporary water restrictions) and 326A (compliance audits).

Under the Bill, the Minister may make orders in relation to a wide variety of matters. These include orders to repeal or suspend certain water management plans (including to suspend Basin management plans). This can be done by way of order published on the NSW legislation website or in the Gazette. The Committee notes that such orders may not be a statutory rule for the purposes of section 21 of the *Interpretation Act 1987* and may therefore not be subject to the usual tabling and disallowance requirements which enable the Parliament to scrutinise actions of the Executive.

Matters deferred to regulations

13. The Bill defers many matters to the regulations including in relation to the following:
- a) Methodology for estimating the quantity of water illegally taken: proposed section 60G(3)
 - b) Mandatory conditions for water access licences: proposed section 66 (1AA)
 - c) Offence of failure to install, use or maintain metering equipment that a person is required to by a regulation made under the Act: proposed section 91H(1)(c). Such an offence has a Tier 2 penalty corresponding to 2,250 penalty units for an individual (and 600 penalty units for each day the offence continues).
 - d) Offence of failing to comply with any regulation setting out a standard or requirement for the installation or location of metering equipment (among other matters): proposed section 91H(3). This offence also attracts a Tier 2 penalty.
 - e) Defence for the Tier 2 offence of taking water when metering equipment is not working. That is, the offence provisions do not apply if the person complies with any requirements set out in the regulations for the purpose of the subsection: proposed section 91I(3).
 - f) Failure to give notice, in accordance with regulations, that metering equipment is not operating properly within 24 hours of that fact is a Tier 2 offence: proposed section 91IA.
 - g) Approvals subject to mandatory conditions imposed by regulations: proposed section 100 (1AA).
 - h) Establishment of a water information register. However, the form, manner and content of the register will be determined by the Minister and the regulations: proposed section 391B
 - i) Consultation and negotiations with owners and occupiers of land and other persons who may be affected by proposed releases of water for environmental purposes: proposed section 399B.

- j) Declaration of matters under the Act or regulations to be an excluded or displaced matter for the purposes of sections 250C or 250D of the Commonwealth Water Act: proposed sections 400A and 400B.
14. Proposed Parts 5 and 6 of the Bill also enable regulations to be made in respect of a wide variety of matters, such as metering equipment and mandatory conditions.
15. The Bill also amends a number of management plans and regulated river orders. However, the Bill also introduces provisions which enable these to be further amended by the regulations for the purposes of specifying river limits: proposed sections 47 and 48 of Part 4 of Schedule 12 to the Act.

The detail of many parts of the Bill is deferred to the regulations. The Committee prefers that substantive matters are addressed in principal legislation. Unlike regulations, principal legislation is subject to a higher degree of parliamentary scrutiny and may be amended.

While some administrative matters may be appropriately deferred to the regulations, the Bill also defers some more substantive matters. These include matters which may be relevant to the commission of various offences attracting significant penalties (for example, up to 2,250 penalty units for an individual.) The Committee draws the large number of matters deferred to the regulations, and in particular the substantive nature of some of those deferred matters, to the attention of Parliament.

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

Commencement by proclamation

16. Clause 2 provides that the Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2). That subsection then details many parts of the Bill which commence on the date of assent to the Act.

Parts of the Bill commence on a day or days to be appointed by proclamation. The Committee generally prefers that legislation commences on assent or a fixed date. However, the majority of the Bill appears to commence on the date of assent and the sections that are deferred appear to involve some degree of administrative complexity. As such the Committee makes no further comment.

Part Two - Regulations

1. Crimes (High Risk Offenders) Regulation 2018

Date published	13 April 2018
Date Tabled	1 May 2018
Disallowance Date	7 August 2018

PURPOSE AND DESCRIPTION

1. The object of the Regulation is to make provision with respect to the constitution and procedure of the High Risk Offenders Assessment Committee when it exercises functions under the *Terrorism (High Risk Offenders) Act 2017*.
2. The Regulation is expressed to be made under the *Crimes (High Risk Offenders) Act 2006*, including sections 24AB(3) and 30 (the general regulation-making power).
3. The Explanatory Note to the Regulation also states that it comprises or relates to matters set out in Schedule 3 to the *Subordinate Legislation Act 1989*, namely matters of a machinery nature and matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

ISSUES CONSIDERED BY COMMITTEE

The Regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made: s9(1)(b)(iv) of the LRA

Membership of the Committee when exercising terrorism offender functions

3. The Regulation provides that the High Risk Offenders Assessment Committee is to consist only of the following members when exercising a function that is conferred or imposed on the Assessment Committee by or under the *Terrorism (High Risk Offenders) Act 2017*:
 - a) the Chairperson of the Committee
 - b) the other representative of Corrective Services NSW
 - c) the representative of the Justice Health and Forensic Mental Health Network
 - d) the representative of the Department of Justice
 - e) the representative of the NSW Police Force
 - f) any member appointed by the Minister under section 24AB of the Act who is designated by the Minister, in the member's instrument of appointment, as having expertise in the assessment and management of terrorism risks.

4. Section 24AB of the *Crimes (High Risk Offenders) Act 2006* provides that the Assessment Committee is to consist of a greater and more diverse selection of people. These include the persons nominated in the Regulation but also a representative of the Department of Family and Community Services, a representative of Housing NSW, a representative of Ageing, Disability and Home Care and a representative of the Ministry of Health. The Minister may also appoint other members that he or she considers have relevant expertise, including to represent public sector agencies or other organisations.
5. In addition, the representatives of Corrective Services, NSW Police Force and Department of Justice (and so on) who form part of the Committee under the Act are to be nominated by the Secretary or the Commissioner of the relevant agency, as the case may be. The Regulation does not include such a requirement.
6. For completeness, it is noted that section 24AB(3) of the Act provides that the regulations 'may make provision for or with respect to the constitution and procedure of the Assessment Committee.'

The Regulation provides for different membership of the High Risk Offenders Assessment Committee when exercising functions under the *Terrorism (High Risk Offenders) Act 2017*.

The *Crimes (High Risk Offenders) Act 2016* currently provides that the Assessment Committee should consist of certain members, including representatives from a wide variety of government bodies, which have been nominated by Secretary or Commissioner of the relevant agency, as the case may be. In contrast, the Regulation provides for a narrower range of representatives when the Committee exercises functions in relation to terrorism offenders, and does not include a requirement that these are persons nominated by the relevant agency head.

Although section 24AB(3) of the *Crimes (High Risk Offenders) Act 2016* provides that the regulations 'may make provision for or with respect to the constitution and procedure of the Assessment Committee', the reason for the differences between the ordinary composition of the Assessment Committee and what is proposed by the Regulation in relation to terrorism offenders is unclear. As such, the Committee draws the Regulation to the attention of Parliament.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

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

9 Functions with respect to Regulations

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

- v that the objective of the regulation could have been achieved by alternative and more effective means,
 - vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - vii that the form or intention of the regulation calls for elucidation, or
 - viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- 2 Further functions of the Committee are:
- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
 - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

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