



Legislation Review Committee

LEGISLATION REVIEW DIGEST

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

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Membership

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Guide to the Digest

COMMENT ON BILLS

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

COMMENT ON REGULATIONS

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. CHILDREN (EDUCATION AND CARE SERVICES) SUPPLEMENTARY PROVISIONS AMENDMENT BILL 2018

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

Commencement by proclamation

The Committee notes that the Act is to commence on a day or days appointed by proclamation. The Committee generally prefers that legislation commence on a fixed date or upon assent so as to afford certainty to those affected by the provisions contained in the Act. However, the Committee notes that the Act contains changes to the structure of education and care services in alignment with the National Law. In these circumstances, the Committee recognises the administrative convenience of a flexible date and makes no further comment.

2. CRIMINAL PROCEDURE AMENDMENT (PRE-TRIAL DISCLOSURE) BILL 2018

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

Right to silence

The Bill makes amendments to the types of evidence and other matters that are subject to mandatory pre-trial disclosures in criminal trials. The Committee recognises that these amendments are in the interest of reducing court delays and increased costs. However, the Committee notes the concerns that non-compliance with the pre-trial disclosures, in particular the requirement to disclose any relevant expert report, may allow a negative inference to be drawn by the courts against the accused, potentially impacting an accused's right to silence.

While the Committee notes that the court has discretion as to whether to impose any sanctions for non-compliance with pre-trial disclosure requirements, the Committee draws this issue to the attention of the Parliament for it to consider whether the amendments unduly trespass on an accused's personal rights and liberties.

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

Commencement by proclamation

This Bill provides that the Act is to commence by proclamation. The Committee generally prefers legislation to commence on assent or a fixed date to afford certainty to those affected by provisions in the Act. Given that the Bill contains provisions that related to mandatory pre-trial disclosures, it is important that the prosecution and defence parties have certainty when these provisions commence. However, the Committee also notes that providing for a flexible commencement date allows time for relevant stakeholders and parties to be informed of the changes. In these circumstances, the Committee makes no further comment.

3. EMERGENCY SERVICES LEGISLATION AMENDMENT BILL 2018

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

4. RSL NSW BILL 2018

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

The Committee notes that the Bill permits RSL NSW to delegate the exercise of any of its functions to a director, an employee, committee, or any other person. In particular, the Committee questions whether it is appropriate that the functions of RSL NSW under the Act can be delegated to 'any other person'. The Committee draws this issue to the attention of the Parliament.

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

The Bill is to commence by proclamation. The Committee generally prefers that legislation commence on a fixed date or by assent to afford certainty to those affected by the legislation. However, the Committee acknowledges that the Bill amends the governance structure of RSL NSW and a flexible date may afford administrative convenience for these changes to occur. The Committee makes no further comment on this issue.

5. STRATA SCHEMES MANAGEMENT AMENDMENT (BUILDING DEFECTS SCHEME) BILL 2018

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

Under the Bill, an authorised person may require any person to produce information or records, by way of notice or in the context of inspections which occur without a warrant. Failure to comply with such a request, without reasonable excuse, is an offence.

The Committee notes that this may be seen to trespass on the confidentiality of certain types of communication, including communications protected by client legal privilege.

That said, it is a defence that the person had a 'reasonable excuse' for not providing the requested information. As privilege may be a reasonable excuse for not providing such documents, and noting the public interest in protecting owners corporations, the Committee makes no further comment

Privilege against self-incrimination

The Bill enables authorised officers to require a person to answer questions in certain circumstances, and failing to comply with such a requirement without reasonable excuse is an offence.

In the case of individuals, the Committee notes that this provision may be seen to trespass on the privilege against self-incrimination. However, the Committee considers that the privilege against self-incrimination may be a reasonable excuse within the meaning of the offence provision, and as such makes no further comment.

Unreasonable interference with property rights

The Bill gives authorised officers a number of search and seizure powers that can be exercised for certain purposes under the Bill, including for investigating, monitoring and enforcing

compliance with Part 11. Notably, authorised officers appear to be able to enter a premises without a warrant.

Authorised officers may exercise a wide range of powers in respect of premises that they enter lawfully, including the power to make any examinations or enquiries, and to examine, inspect, copy and seize records.

The Committee notes that such powers trespass on various private property rights, particularly given that a search warrant may not be required. While these powers may be in the public interest because they assist authorised officers in enforcing compliance with Part 11, the Committee refers to Parliament for its further consideration the question of whether the trespasses are reasonable in the circumstances.

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

Matters deferred to the regulations

Several matters in the Bill are deferred to the regulations. In particular, the Bill enables the regulations to create offences not exceeding 200 penalty units, which corresponds to approximately \$22,000. The Committee generally prefers that substantive matters, including offences attracting significant penalties, are set out in the principal legislation so as to be subject to a higher level of parliamentary scrutiny. The Committee refers to Parliament for its further consideration the question of whether it is appropriate that offences with such penalties are contained in the regulations.

Commencement by proclamation

The Bill commences on a day or days to be appointed by proclamation. The Committee generally prefers that legislation commence on assent or a fixed date so that the commencement is subject to an appropriate level of parliamentary scrutiny and to afford certainty to affected parties. While the Committee notes that Part 11 appeared to commence two years after receiving assent, the Committee also acknowledges that the second reading speech notes that the amendments to Part 11 will commence once the regulations are operational.

6. WASTE AVOIDANCE AND RESOURCE RECOVERY AMENDMENT (MARINE PLASTICS REDUCTION) BILL 2018*

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

No cap on offences in regulations

Under the Bill, the regulations can create offences relating to contraventions of a threat abatement plan. The Committee generally prefers that offences which may have substantial penalties are set out in principal rather than subordinate legislation, so as to provide a greater level of parliamentary scrutiny. The Committee refers to Parliament for its further consideration the question of whether it is appropriate that the regulations can create offences, particularly offences with uncapped penalties.

Part One – Bills

1. Children (Education and Care Services) Supplementary Provisions Amendment Bill 2018

Date introduced	15 August 2018
House introduced	Legislative Council
Minister responsible	The Hon. Sarah Mitchell MLC
Portfolio	Early Childhood Education

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Children (Education and Care Services) Supplementary Provisions Act 2011* (the NSW Act) as follows:

- (a) to more closely align the regulation of mobile and occasional education and care services, which do not fall within the scope of the Children (Education and Care Services) National Law (the National Law), with the regulation of other education and care services under that Law, including by:
 - (i) applying the objectives and guiding principles of the National Law to the NSW Act, and
 - (ii) providing for NSW mobile and occasional education and care services to be assessed and rated in the same way as other education and care services are assessed and rated under the National Law, and
 - (iii) applying the National Quality Standard and National Quality Framework to NSW mobile and occasional education and care services, and
 - (iv) making the administrative fees payable by providers of mobile and occasional education and care services the same as those payable by providers of other education and care services under the National Law,
- (b) to discontinue State regulated home based child care so that all home based child care in NSW will be regulated as a family day care service under the National Law,
- (c) to provide that child-minding services in retail shopping centres will no longer be regulated under the NSW Act,
- (d) to make it an offence to advertise an education and care service where an application for a provider approval or service approval is pending unless it is made clear that the service will only be provided once the relevant approvals have been granted,

(e) to make other law revision and minor amendments as a consequence of changes to the National Law.

2. The Bill also makes minor, consequential amendments to the *Child Protection (Working with Children) Act 2012*, the *Child Protection (Working with Children) Regulation 2013* and various environmental planning instruments.

BACKGROUND

3. In her second reading speech, the Minister noted that the amendments contained in the Bill are intended to align the *Children (Education and Care Services) Supplementary Provisions Act 2011* with the National Law (the *Children (Education and Care Services) National Law*) and the *National Quality Framework*. The Minister outlined that the Bill aims to ensure that safeguards that are afforded to some childcare services within New South Wales will now be accessible to all children across the State – including rural and regional areas.
4. The Bill makes a number of consequential amendments arising from the alignment with the National Law.

ISSUES CONSIDERED BY COMMITTEE

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

Commencement by proclamation

5. Section 2 provides that the Act will commence on a day or days to be appointed by proclamation, except schedule 1[34]-[37] which is to commence on the day of assent to this Act.

The Committee notes that the Act is to commence on a day or days appointed by proclamation. The Committee generally prefers that legislation commence on a fixed date or upon assent so as to afford certainty to those affected by the provisions contained in the Act. However, the Committee notes that the Act contains changes to the structure of education and care services in alignment with the National Law. In these circumstances, the Committee recognises the administrative convenience of a flexible date and makes no further comment.

2. Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2018

Date introduced	15 August 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Criminal Procedure Act 1986* to give effect to recommendations of the statutory review of the Act with respect to the mandatory pre-trial disclosure by the prosecutor and the accused person of certain evidence and other matters in proceedings for indictable offences. The amendments made by this Bill:
 - a) require the prosecutor to disclose certain material relating to audio or visual evidence in the notice that the prosecutor is required to give the accused person, and
 - b) require the notice that the accused person then gives to the prosecutor:
 - i. to disclose material relating to expert evidence, and
 - ii. to give notice of any proposal to raise any issues relating to the continuity of custody of exhibits and any significant issues relating to the form of the indictment and the prosecution of the counts on the indictment, and
 - iii. to include any request to edit any audio or visual recording, or the transcript of any audio or visual recording, that the prosecutor has disclosed an intention to adduce at the trial and details of the edits required, and
 - c) require the prosecutor to respond to any request by the accused person to edit audio or visual recordings or transcripts of them.

BACKGROUND

2. This Bill implements recommendations from a statutory review of the *Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Act 2013*. In September 2013, new pre-trial disclosure provisions were inserted into the *Criminal Procedure Act 1986* with a requirement they be reviewed within three years.

ISSUES CONSIDERED BY THE COMMITTEE

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

3. The amendments require evidence and other matters to be disclosed by the defence to the prosecution before the commencement of a criminal trial. This includes:
 - any expert reports that the defence intends to rely on (s 143(1)(h)),
 - whether the defence intends to challenge the continuity of custody of a prosecution exhibit (s 143(1)(i)),
 - whether it will seek to amend the indictment or make an application for separate trials (s 143(1)(j)), and
 - whether it will seek edits to audio or video evidence that the prosecution intends to rely on (s 143(1)(k)).
4. Section 146A of the *Criminal Procedure Act 1986* provides that the court, where it appears proper, may draw unfavourable inferences against the accused if the accused fails to comply with pre-trial disclosure requirements.
5. These amendments follow a recent statutory review on the *Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Act 2013*. The review noted stakeholder submissions that opposed the mandatory disclosure requirements on the ground that it would infringe fundamental principles of the criminal justice system. Of particular concern related to the negative inferences that could be drawn from any failure of the defence to comply with the pre-trial disclosures, which could impact on principles concerning the burden of proof and an accused's right to silence. However, in recommending the amendments the Department noted that 'the fact that the judge has the discretion whether or not to impose the sanction is a sufficient safeguard'.¹

The Bill makes amendments to the types of evidence and other matters that are subject to mandatory pre-trial disclosures in criminal trials. The Committee recognises that these amendments are in the interest of reducing court delays and increased costs. However, the Committee notes the concerns that non-compliance with the pre-trial disclosures, in particular the requirement to disclose any relevant expert report, may allow a negative inference to be drawn by the courts against the accused, potentially impacting an accused's right to silence.

While the Committee notes that the court has discretion as to whether to impose any sanctions for non-compliance with pre-trial disclosure requirements, the Committee draws this issue to the attention of the Parliament for it to consider whether the amendments unduly trespass on an accused's personal rights and liberties.

¹ Department of Justice NSW, Statutory Review: *Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Act 2013*, August 2018, p 16

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

Commencement by proclamation

6. Section 2 of the Bill states that the Act commences on a day or days to be appointed by proclamation.

This Bill provides that the Act is to commence by proclamation. The Committee generally prefers legislation to commence on assent or a fixed date to afford certainty to those affected by provisions in the Act. Given that the Bill contains provisions that related to mandatory pre-trial disclosures, it is important that the prosecution and defence parties have certainty when these provisions commence. However, the Committee also notes that providing for a flexible commencement date allows time for relevant stakeholders and parties to be informed of the changes. In these circumstances, the Committee makes no further comment.

3. Emergency Services Legislation Amendment Bill 2018

Date introduced	15 August 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Troy Grant MP
Portfolio	Emergency Services

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

- a) to protect employees who take part in emergency operations from victimisation,
- b) to expand the class of persons who can give directions to take safety measures,
- c) to abolish the State Disasters Council and transfer its functions to the State Emergency Management Committee and to decorporatise the State Rescue Board,
- d) to update the membership of the State Emergency Management Committee,
- e) to provide for the publishing of “state of emergency” orders on the internet,
- f) to protect from personal liability certain persons executing the *State Emergency and Rescue Management Act 1989*,
- g) to update requirements concerning the accreditation and reporting of rescue units,
- h) to broaden the emergencies and emergency services organisations to which the *State Emergency and Rescue Management Act 1989* applies,
- i) to update the functions of the NSW Rural Fire Service and the Commissioner of Fire and Rescue NSW to recognise their role in respect of emergencies other than fires,
- j) to update a provision relating to the imposition of total fire bans to permit a ban to apply to part of a local government area and to provide a discretion as to how notice of a ban is to occur in order to take account of new forms of communication (including social media),
- k) to provide a similar discretion in relation to notices that amend, cancel or suspend bush fire danger periods or fire permits,
- l) to permit the Commissioner of the NSW Rural Fire Service to appoint the officers of rural fire brigades in certain circumstances,
- m) to require bush fires to be reported to 000 rather than to local fire brigades,
- n) to permit the taking of water without charge from any water source for certain purposes including fighting fires,
- o) to permit the Commissioner of Fire and Rescue NSW to determine fees for the provision of non-core services where those fees are not otherwise prescribed,
- p) to make further provision for the delegation of functions,
- q) to update terminology, including renaming volunteer fire brigades as retained fire brigades and renaming controllers as commanders,
- r) to rename the *Fire Brigades Act 1989* as the *Fire and Rescue NSW Act 1989*,

- s) to make a number of minor statute law amendments.

BACKGROUND

2. The *Emergency Services Legislation Amendment Bill 2018* amends a number of emergency management legislation, including the *State Emergency and Rescue Management Act 1989*, the *Rural Fires Act 1997*, the *Fire Brigades Act 1989*, and the *State Emergency Service Act 1989*.
3. In the second reading speech, the Hon. Troy Grant MP noted that the Bill modernises disaster response and recovery arrangements and makes miscellaneous amendments to reflect operational practices and terminology.

ISSUES CONSIDERED BY COMMITTEE

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

4. RSL NSW Bill 2018

Date introduced	15 August 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. David Elliott MP
Portfolio	Veterans Affairs

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
 - (a) to constitute a corporation with the name of the Returned and Services League of Australia (New South Wales Branch) which may also be called RSL NSW and to provide that RSL NSW is a continuation of the corporation constituted by the Returned and Services League of Australia (New South Wales Branch) Incorporation Act 1935,
 - (b) to establish a board of directors (the Board) to govern and act for RSL NSW,
 - (c) to provide that the directors of the Board are to be elected by RSL NSW service members and will include at least 1 independent director,
 - (d) to require RSL NSW to provide an annual report to the Minister to be tabled in Parliament,
 - (e) to require the directors of the Board to disclose any pecuniary interests in matters being considered by the Board,
 - (f) to provide for the remuneration by RSL NSW of the directors of the Board.

BACKGROUND

2. In May 2017, the Minister for Innovation and Better Regulation launched an Inquiry under the *Charitable Fundraising Act 1991* ('the Inquiry'), led by the Hon. Patricia Bergin SC, to investigate the fundraising activities of RSL NSW following allegations of financial misconduct. In its report published in February 2018, the Inquiry found that the corporate governance framework of RSL NSW was not sufficient to ensure the organisation is accountable to its members.
3. In his second reading speech, the Minister noted that the reforms in the *RSL NSW Bill 2018* aim to assist RSL NSW to reform and to support changes that RSL NSW is making internally.
4. The Minister also noted that the Bill does not directly address recommendations of the Inquiry regarding the charitable fundraising activities of RSL NSW more generally, as these activities are regulated by the *Charitable Fundraising Act 1991* and administered by the Minister for Innovation and Better Regulation. The Government response to the recommendations of the Inquiry is currently being considered.

ISSUES CONSIDERED BY COMMITTEE

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

5. Section 11 permits RSL NSW to delegate the exercise of any of its functions, other than this power of delegation) to a director, an employee of RSL NSW, or a committee comprised of, or a combination of those persons, or any other person. 'Any other person' is not defined further in the Act.

The Committee notes that the Bill permits RSL NSW to delegate the exercise of any of its functions to a director, an employee, committee, or any other person. In particular, the Committee questions whether it is appropriate that the functions of RSL NSW under the Act can be delegated to 'any other person'. The Committee draws this issue to the attention of the Parliament.

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

6. Section 2 states that the Act is to commence on a day or days to be appointed by proclamation.

The Bill is to commence by proclamation. The Committee generally prefers that legislation commence on a fixed date or by assent to afford certainty to those affected by the legislation. However, the Committee acknowledges that the Bill amends the governance structure of RSL NSW and a flexible date may afford administrative convenience for these changes to occur. The Committee makes no further comment on this issue.

5. Strata Schemes Management Amendment (Building Defects Scheme) Bill 2018

Date introduced	5 September 2018
House introduced	Legislative Assembly
Minister responsible	The Hon Matt Kean MP
Portfolio	Innovation and Better Regulation

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Strata Schemes Management Act 2015* (the SSM Act) in relation to the scheme for rectifying building defects in new strata schemes, as follows:
 - a) to increase the maximum penalty that a developer of a strata scheme may be liable to pay for the offence of failing to provide the security (building bond) that is required by the SSM Act to secure payment for defective building work,
 - b) to make it an offence for a developer to knowingly give false or misleading information to the Commissioner for Fair Trading (the Secretary) in relation to the amount required to be secured by a building bond,
 - c) to provide that, in cases where the developer and owners corporation fail to agree on the amount secured by a building bond that may be claimed for payment to meet the costs of rectifying defective building work, the Secretary is to determine the amount to be claimed,
 - d) to enable the Secretary, for the purposes of determining the amount to be claimed in those cases, to arrange for an appropriately qualified person to provide the Secretary with a report (paid for by the owners corporation and developer) on the work required or costs involved in rectifying the defective building work,
 - e) to enable an amount secured by a building bond to be claimed to meet certain unpaid costs that would otherwise be payable under the building defects scheme by a developer, but only if the developer has died or ceased to exist, is bankrupt or insolvent or (after due search and inquiry) cannot be found in Australia,
 - f) to extend the period within which a building bond may be claimed,
 - g) to enable the cancellation of a building bond in certain circumstances, including if an interim report on the building work concerned does not identify any defective building work,
 - h) to limit the circumstances in which a developer may apply to the Civil and Administrative Tribunal for an order specifying the amount of the contract price of building work (for the purposes of determining the amount required to be secured by a building bond) to the circumstances specified in the regulations,

- i) to enable the Secretary to recover from a developer any amount required to be secured by a building bond if the developer fails to give the Secretary a building bond or gives a building bond that secures a lesser amount than is required,
 - j) to confer investigative and enforcement powers on authorised officers who are appointed by the Secretary,
 - k) to protect building inspectors, professional associations and others from liability for acts or omissions done in good faith,
 - l) to protect the Secretary and others from personal liability for acts or omissions done in good faith,
 - m) to extend the regulation-making power, including by enabling regulations to be made dealing with conditions that may be imposed on building inspectors, and with the functions of professional associations with respect to determining whether persons are qualified to carry out functions as building inspectors,
 - n) to make amendments in the nature of statute law revision, and other minor and consequential amendments.
2. The Bill also provides for a consequential amendment to the *Law Enforcement (Powers and Responsibilities) Act 2002*.

BACKGROUND

- 3. According to the second reading speech, the Bill amends Part 11 of the SSM Act, which commenced operation in January 2018. The SSM Act was assented to in November 2015.
- 4. In his speech, Minister Kean stated that Part 11 of the SSM Act introduced the first strata building bond and inspections scheme in Australia. The Bill is designed to strengthen the operation of the Part 11 scheme.
- 5. Under Part 11, developers lodge a bond of 2% of the total contract price with the Secretary of the Department of Finance, Services and Innovation. The purpose of the bond is to enable owners corporations to use this money to rectify any identified defects. Part 11 only applies to multi-unit dwelling strata schemes of four or more storeys.
- 6. Minister Kean indicated in his second reading speech that the Bill will be supported by regulations, which are currently being drafted.

ISSUES CONSIDERED BY COMMITTEE

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

Client legal privilege

- 7. Proposed section 211D allows authorised officers to require a person to furnish that officer with any information or records that may be required for an authorised purpose under proposed section 211C.
- 8. The notice must include certain particulars, including a reasonable time by which such information or records are to be furnished. The notice may also only require the person

to furnish existing records that are in the person's possession or that are within the person's power to obtain lawfully.

9. The power to direct a person to produce records for inspection, and to examine, inspect and copy any records, is also a power that can be exercised after entering a premises pursuant to proposed section 211J. In such circumstances, there appears to be no requirement to issue a notice which provides the person with a reasonable time to comply.
10. A failure to comply with a requirement under the Division, without reasonable excuse, is an offence under proposed section 211L.

Under the Bill, an authorised person may require any person to produce information or records, by way of notice or in the context of inspections which occur without a warrant. Failure to comply with such a request, without reasonable excuse, is an offence.

The Committee notes that this may be seen to trespass on the confidentiality of certain types of communication, including communications protected by client legal privilege.

That said, it is a defence that the person had a 'reasonable excuse' for not providing the requested information. As privilege may be a reasonable excuse for not providing such documents, and noting the public interest in protecting owners corporations, the Committee makes no further comment

Privilege against self-incrimination

11. Proposed section 211E of the Bill empowers an authorised officer to require a person to whom the authorised officer suspects on reasonable grounds to have knowledge of matters in respect of which information is reasonably required for an authorised purpose.
12. Proposed subsection (2) allows the authorised officer to require a corporation to nominate a director or officer of the corporation to answer questions on behalf of the corporation. Such answers bind the corporation.
13. Failing to comply with this requirement, without reasonable excuse, is an offence under proposed section 211L.

The Bill enables authorised officers to require a person to answer questions in certain circumstances, and failing to comply with such a requirement without reasonable excuse is an offence.

In the case of individuals, the Committee notes that this provision may be seen to trespass on the privilege against self-incrimination. However, the Committee considers that the privilege against self-incrimination may be a reasonable excuse within the meaning of the offence provision, and as such makes no further comment.

Unreasonable interference with property rights

14. Proposed section 211G allows authorised officers to enter any premises at any reasonable time, with or without a search warrant. Proposed section 211H then permits an

authorised officer to apply for a search warrant if the applicant believes on reasonable grounds that a provision of Part 11 or the regulations is being contravened.

15. Without a warrant, authorised officers may not enter residential premises without the consent of the occupier: proposed section 211G(3).
16. Proposed section 211J provides that for premises which are entered lawfully, the authorised officer can do anything that is reasonably necessary for an authorised purpose, including:
 - a) make any examinations and inquiries considered necessary
 - b) direct a person to produce records for inspection
 - c) examine and inspect any records
 - d) copy any records
 - e) seize anything that the authorised officer has reasonable grounds for believing is connected with an offence (including an offence that the authorised officer has reasonable grounds for believing has been committed)
 - f) do anything the authorised officer is empowered to do under the Division.
17. A power to do something under this section may be exercised without the consent of the owner of the thing: proposed subsection (5).

The Bill gives authorised officers a number of search and seizure powers that can be exercised for certain purposes under the Bill, including for investigating, monitoring and enforcing compliance with Part 11. Notably, authorised officers appear to be able to enter a premises without a warrant.

Authorised officers may exercise a wide range of powers in respect of premises that they enter lawfully, including the power to make any examinations or enquiries, and to examine, inspect, copy and seize records.

The Committee notes that such powers trespass on various private property rights, particularly given that a search warrant may not be required. While these powers may be in the public interest because they assist authorised officers in enforcing compliance with Part 11, the Committee refers to Parliament for its further consideration the question of whether the trespasses are reasonable in the circumstances.

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

Matters deferred to the regulations

18. Many matters in the Bill are deferred to the regulations. In particular, proposed section 271(3) states that a regulation may create an offence punishable by a penalty not exceeding 200 penalty units.

Several matters in the Bill are deferred to the regulations. In particular, the Bill enables the regulations to create offences not exceeding 200 penalty units, which corresponds to approximately \$22,000. The Committee generally prefers that substantive matters, including offences attracting significant penalties, are set out in the principal legislation so as to be subject to a higher level of parliamentary scrutiny. The Committee refers to Parliament for its further consideration the question of whether it is appropriate that offences with such penalties are contained in the regulations.

Commencement by proclamation

19. Section 2 of the Bill provides that the SSM Act will commence 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 commence on assent or a fixed date so that the commencement is subject to an appropriate level of parliamentary scrutiny and to afford certainty to affected parties. While the Committee notes that Part 11 appeared to commence two years after receiving assent, the Committee also acknowledges that the second reading speech notes that the amendments to Part 11 will commence once the regulations are operational.

6. Waste Avoidance and Resource Recovery Amendment (Marine Plastics Reduction) Bill 2018*

Date introduced	16 August 2018
House introduced	Legislative Council
Member responsible	Mr Justin Field MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to provide for the phasing out of single-use plastics, polystyrene packaging, products containing plastic microbeads and other harmful plastic products, so as to reduce the threat to the survival of marine animals and ecosystems caused by the amount of plastic flowing into the marine environment.
2. The Bill amends the *Waste and Resource Recovery Act 2001* to establish the Marine Plastics Reduction Commission, require that Commission to develop reports, liaise with industry and government to plan for measures to meet certain targets, and to require the Premier to ensure that these targets are met.
3. The marine plastics elimination targets are as follows:
 - a) a 90% reduction in the amount of plastic waste that enters the ocean by the end of 2020
 - b) "zero pellet loss" in industrial processes, so that no plastic resin pellets used in industrial processes enter the marine environment, by the end of 2020,
 - c) all new washing machines being fitted with a lint filter that is capable of trapping any microplastics (including microfibers) by the end of 2023,
 - d) all packaging used in the State being recyclable, compostable or reusable by the end of 2023,
 - e) the elimination of petroleum-based single-use plastics from entering the marine environment before 2023 (through a staggered process involving the elimination of specific types of plastic waste by the end of 2018, 2020 and then 2023).
4. The marine plastics elimination targets are subject to any legitimate reason for manufacturing, selling or distributing single-use plastics to meet the access needs of those who, because of a physical or other condition, need those items to be able to eat or drink safely, independently and in comfort or are required for medical, therapeutic or health-related purposes. This Bill requires the Commission to be involved in developing affordable, effective non-plastic alternatives to single-use plastic items for that purpose.

BACKGROUND

5. In his second reading speech, Mr Justin Field MLC indicated that in April 2018, all State and Commonwealth Environment Ministers agreed to two targets enshrined in the Bill:
 - a) that plastic waste entering the marine environment is reduced by 90% by 2020; and
 - b) that all packaging in New South Wales is to be either recyclable, compostable or reusable by 2023.
6. Against this backdrop, the Bill proposes an immediate ban on single-use plastic bags, plastic straws, microbeads and polystyrene takeaway food containers. According to the second reading speech, plastic cutlery, plastic takeaway food containers, non-compostable cigarettes and plastic cotton buds will be banned by 2020.
7. Mr Field MLC also indicated that the European Union has already banned plastic cotton buds, cutlery, plates and straws, and that France had legislated so that by 2020 all plastic cups, cutlery and plates be compostable and made of biologically sourced materials. The United Kingdom has also introduced a target of eliminating all plastic waste by 2042, and single-use plastics earlier.

ISSUES CONSIDERED BY COMMITTEE

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

No cap on offences in regulations

8. Section 48J(2) of the Bill allows regulations to create offences relating to carrying out activities in contravention of a threat abatement plan.

Under the Bill, the regulations can create offences relating to contraventions of a threat abatement plan. The Committee generally prefers that offences which may have substantial penalties are set out in principal rather than subordinate legislation, so as to provide a greater level of parliamentary scrutiny. The Committee refers to Parliament for its further consideration the question of whether it is appropriate that the regulations can create offences, particularly offences with uncapped penalties.

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.