



Legislation Review Committee

LEGISLATION REVIEW DIGEST

NO. 61/56 – 25 SEPTEMBER 2018



New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Assembly.

Legislation Review Committee Legislation Review Digest, Legislation Review Committee, Parliament NSW [Sydney, NSW]: The Committee, 2018, 42p 30cm

Chair: Ms Felicity Wilson MP

25 September 2018

ISSN 1448-6954

1. Legislation Review Committee – New South Wales

2. Legislation Review Digest No. 61 of 56

I Title.

II Series: New South Wales. Parliament. Legislation Review Committee Digest; No. 61 of 56

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

Contents

Membership	ii
Guide to the Digest	iii
Conclusions	iv
PART ONE – BILLS	10
1. CRIMES (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2018	10
2. CRIMINAL LEGISLATION AMENDMENT (CONSORTING AND RESTRICTED PREMISES) BILL 2018	13
3. COMMUNITY GAMING BILL 2018	17
4. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (SHORT-TERM RENTAL ACCOMMODATION) BILL 2018*	20
5. IMPOUNDING AMENDMENT (SHARED BICYCLES AND OTHER DEVICES BILL) 2018	21
6. MARINE PARKS AMENDMENT (MORATORIUM) BILL 2018	23
7. PARLIAMENTARY BUDGET OFFICER AMENDMENT BILL 2018	24
8. RESIDENTIAL TENANCIES AMENDMENT (REVIEW) BILL 2018	26
9. WATER NSW AMENDMENT (WARRAGAMBA DAM) BILL 2018	29
10. WESTERN CITY AND AEROTROPOLIS AUTHORITY BILL 2018	31
11. WORKERS COMPENSATION LEGISLATION AMENDMENT BILL 2018	33
APPENDIX ONE – FUNCTIONS OF THE COMMITTEE	39

Membership

CHAIR	Ms Felicity Wilson MP, Member for North Shore
DEPUTY CHAIR	Mr Lee Evans MP, Member for Heathcote
MEMBERS	Ms Melanie Gibbons MP, Member for Holsworthy Mr Michael Johnsen MP, Member for Upper Hunter Mr David Mehan MP, Member for The Entrance The Hon Natasha Maclaren-Jones MLC The Hon Shaoquett Moselmane MLC Mr David Shoebridge MLC
CONTACT DETAILS	Legislation Review Committee Parliament of New South Wales Macquarie Street Sydney NSW 2000
TELEPHONE	02 9230 2226 / 02 9230 3382
FACSIMILE	02 9230 3309
E-MAIL	legislation.review@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au/lrc

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 (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2018

Trespasses unduly on personal rights and liberties: s8A(1)(b)(i) of the LRA

Double jeopardy

The Committee notes that the Bill seeks to expand the definition of fresh evidence in the *Crimes (Appeal and Review) Act 2001*, potentially widening the circumstances under which a person may be retried for offences he or she has been acquitted of. This impacts on the double jeopardy rule. The double jeopardy rule prevents a person from being retried for conduct they have been acquitted of. It is based on the principle that acquittal of a criminal offence should be treated as final.

The Committee notes the checks and balances contained in the *Crimes (Appeal and Review) Act 2001* that must be satisfied before a retrial can be ordered. However, the Committee refers the issue to parliament for it to consider whether there is an undue trespass against personal rights and liberties.

Retrospectivity

The Committee notes that the Bill, as does the existing double jeopardy regime, is drafted to have retrospective effect. Retrospectivity is contrary to the rule of law which allows people knowledge of the laws that they are subject to at any given time. This consideration must be balanced against the intended effect of the law to right past potential injustices in the legal system. The Committee refers the matter to Parliament for consideration.

2. CRIMINAL LEGISLATION AMENDMENT (CONSORTING AND RESTRICTED PREMISES) BILL 2018

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

Freedom of association

The Committee notes that the consorting law makes it an offence for a person to habitually consort with at least two convicted offenders after an official warning has been given in relation to each of those convicted offenders. This offence may impact on the ability of people to freely associate and communicate with each other and has the potential of criminalising innocent communications.

While the Committee notes that this Bill introduces measures to increase the fairness of the operation of the provisions, the Committee considers it suitable to reiterate its previous concerns on the consorting law more generally.

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

Commencement by proclamation

The Committee prefers legislation to commence on assent or a specified day. However, the Committee notes that commencing the amending provisions by proclamation will allow time for

those affected by the amendments to be advised. In these circumstances, the Committee does not consider there to be an inappropriate delegation of legislative powers.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s8A(1)(b)(v) of the LRA

Review not required to be tabled in Parliament

The Committee notes that the Bill requires the Law Enforcement Conduct Commission to undertake a review of the amending provisions within three years after their commencement. Unlike similar provisions when the new consorting laws were first introduced, there is no requirement to table any such review in Parliament.

The Committee notes that this Bill is only introducing amendments to existing provisions. However, given the concerns raised about the operation of the provisions, especially in relation to disadvantaged and vulnerable people, the Committee considers that the absence of any requirement to table the findings from the review does not provide an appropriate level of scrutiny. The Committee refers this issue to Parliament for further consideration.

3. COMMUNITY GAMING BILL 2018

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

Privilege against self-incrimination

The Committee notes that the Bill contains offences relating to inquiries and inspections, including that a person must not fail to answer questions or provide information when required to do so by an authorised officer in the exercise of the authorised officer's functions under the Act or regulations. The Committee notes that these provisions may potentially encroach on the privilege against self-incrimination, which allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime. The Committee refers this to Parliament for consideration of whether this provision would encroach on the privilege against self-incrimination.

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

Powers of enforcement – Right to refuse entry

Under the enforcement powers contained in the Bill, an authorised officer may enter a premises without a warrant and without consent of the occupier, provided the officer reasonably believes that it is necessary to determine whether there has been a contravention of the Act. We note that these powers cannot be used unless the occupier has been given reasonable notice and only at certain times of the day.

The Committee notes that these powers of entry have been expanded from the previous *Lotteries and Art Unions Act 1901* ('the Lotteries Act'), which required under section 21D(4) that 'a person exercising a power to enter premises must produce his or her certificate to the occupier of the premises'. The Committee also notes that the Bill does not contain the provision from section 21D of the Lotteries Act that powers of entry and inspection may not be exercised in relation to any premises used as a dwelling, or in relation to a part of any premises so used, except with the consent of the occupier of the premises or part or by the authority of a search warrant.'

The Committee notes that the expansion of powers of entry may be used at the discretion of the authorised officer based on the belief of the authorised officer, and no longer prohibits authorised officers from entering dwellings without occupier consent or a search warrant. The Committee refers these provisions to Parliament for its consideration on whether the expansion of powers to entry, including the power to enter dwellings without occupier consent or warrant, encroaches on the right to refuse entry to private property.

Powers to create offences in the regulations

The Committee notes that the regulations may create offences that are punishable by up to 50 penalty points, provided that the regulations are consistent and necessary or convenient to give effect to the Act. The Committee generally prefers that provisions that attract penalties be contained in the substantive legislation so as to afford parliamentary scrutiny. The Committee refers this to the Parliament for its consideration on whether offences are more appropriately set out in the principal legislation.

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

Commencement by proclamation

The Committee generally prefers that legislation commence on assent or a fixed date so as to provide certainty to those affected by the provisions contained in the Act. However, the Committee notes that the Second Reading Speech outlined that the responsible Minister intends to undertake further community consultation and distribute educational and informative information concerning the changes in the Bill. In these circumstances, a more flexible start date allows stakeholders time to adjust to the new requirements before their commencement. The Committee makes no further comment on this issue.

4. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (SHORT-TERM RENTAL ACCOMMODATION) BILL 2018*

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

5. IMPOUNDING AMENDMENT (SHARED BICYCLES AND OTHER DEVICES BILL) 2018

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

Commencement by proclamation

The Committee prefers legislation to commence on assent or a specified date. However, the Committee notes that the Bill implements a new regulatory framework for the management of shared bike service and commencement by proclamation may assist in ensuring all affected parties are advised of the changes and their obligations. In these circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

The Committee notes that the Bill permits the regulations to prescribe a code of practice setting out enforceable obligations upon operators of shared services, including the creation of offences. The Committee generally prefers that substantive matters, such as offences, are provided for in principal legislation. However, the Committee notes that the penalties for any

offence are capped at 5 penalty units and the code of practice is to provide for matters such as managing the risks and safety of shared bike services. In these circumstances, the Committee makes no further comment.

6. MARINE PARKS AMENDMENT (MORATORIUM) BILL 2018*

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

7. PARLIAMENTARY BUDGET OFFICER 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*.

8. RESIDENTIAL TENANCIES AMENDMENT (REVIEW) BILL 2018

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

Commencement by proclamation

The Committee prefers legislation to commence on assent or on a specified date. However, given the Bill contains a number of amendments relating to the rights and obligations of tenants and landlords, commencement by proclamation would assist in ensuring all parties are advised of the changes. In these circumstances the Committee makes no further comment.

9. WATER NSW AMENDMENT (WARRAGAMBA DAM) BILL 2018

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

10. WESTERN CITY AND AEROTROPOLIS AUTHORITY BILL 2018

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

Henry VIII clause

The Committee notes that the Bill enables the regulations to amend the Schedules in the Act. Provisions of this nature, which permit regulations to amend principal legislation, are generally discouraged as they provide the Executive the power to override principal legislation by way of delegated legislation. This permits principal legislation to be amended without an appropriate level of parliamentary scrutiny applied. The Committee refers this issue to Parliament for its further consideration.

Commencement by proclamation

The Committee prefers legislation to commence on assent or a specified date. However, as the Bill is establishing a new Authority, commencement by proclamation will allow time for any necessary administrative arrangements to be made before the Act commences. In these circumstances the Committee makes no further comment.

11. WORKERS COMPENSATION LEGISLATION AMENDMENT BILL 2018

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

Right to privacy

The Bill provides new information collection and sharing powers to the State Insurance Regulatory Authority. These powers are expressed to apply to data that is personal or health information about an individual despite anything in the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*.

The Committee acknowledges that such expansive information collection and sharing powers may assist the Authority to perform its regulatory function, and have been introduced in response to a 2017 recommendation of the Legislative Council's Standing Committee on Law and Justice.

However, the Committee considers that the provisions may nonetheless unduly trespass on the right to privacy given that there appear to be few limitations on the use or collection of personal or health information that would have otherwise been protected under privacy legislation. Accordingly, the Committee refers to Parliament the question of whether the provisions are appropriate in the circumstances.

Retrospectivity

The Bill is drafted to apply retrospectively in some cases. The Committee considers that in general retrospectivity is contrary to the rule of law which allows people knowledge of the laws that they are subject to at any given time. However, the Committee notes that the second reading speech suggests that the retrospectivity is designed to ensure that individuals, particularly workers involved in motor accidents, are not disadvantaged. The Committee makes no further comment.

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

Nature of disputes subject to mandatory medical assessment

Schedule 2 of the Bill amends the existing workers compensation regime so that there will be no longer be a requirement that all permanent impairment disputes be referred to an approved medical specialist for assessment. In the absence of a referral, the Workers Compensation Commission can still determine compensation.

Proposed section 321A allows the regulations to provide for circumstances where such disputes must, may or may not be referred for medical assessment.

The Committee considers that fair compensation determinations relating to personal injury are assisted by expert evidence from an approved medical specialist. In circumstances where the Bill is modifying the requirement for medical assessment, the Committee notes that the Bill does not articulate in what circumstances such disputes may still proceed to medical assessment. Instead, these matters are deferred to the regulations.

There may be good policy reasons for the proposed amendment. However, given that the changes may impact on the right to fair assessment of compensation, the Committee considers that the Bill should clearly set out the circumstances in which referral for medical assessment must, may, or cannot occur. The Committee refers this matter to Parliament for its further consideration.

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

Commencement by proclamation

The Committee notes that the Bill commences significant parts of the Act on a day or days to be appointed by proclamation. The Committee generally prefers that legislation commences on assent or a fixed date. To do otherwise may be an inappropriate delegation of legislative power given that the Parliament does not have scrutiny over the commencement of legislation and there is less certainty for affected parties.

Much of the Act will commence on a certain date. Although some parts of the Act will be subject to commencement by proclamation, the Committee understands from the second reading speech that this may be to facilitate further consultation that informs the regulations, which are necessary to effect the reforms. As such, the Committee makes no further comment.

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

Indexation to occur by way of order

Under the Bill, the indexation of certain fixed amounts under the workers compensation legislation will now occur by way of order issued by the Authority. The Committee understands from the second reading speech that currently some indexation occurs by way of regulation.

Although such an order will be published on the NSW legislation website, the indexation figures may not be subject to the disallowance processes that usually apply to regulations and some other instruments. Also, such figures will now be issued by the Authority rather than the Minister.

For these reasons, some of these indexed figures may be subject to a lower degree of Parliamentary scrutiny. The Committee draws this to the attention of the Parliament.

Matters deferred to regulations

Many matters in the Bill are deferred to regulations. To the extent that these relate to substantive matters, the Committee considers that such matters should be covered in the principal Act. The Committee refers the question of whether it is appropriate to defer consideration of these and other matters to the Parliament for its further consideration.

Part One – Bills

1. Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2018

Date introduced	19 September 2018
House introduced	Legislative Council
Member responsible	The Hon. David Shoebridge MLC*
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Crimes (Appeal and Review) Act 2001* to extend an exception to the rule against double jeopardy in relation to an acquitted person where previously inadmissible evidence becomes admissible.
2. The Bill provides that, when the Director of Public Prosecutions applies to the Court of Criminal Appeal for an order that an acquitted person be retried for an offence punishable by life imprisonment, evidence against the acquitted person is to be considered fresh (for the purpose of determining whether it is “fresh and compelling” in the sense required for a retrial) if it was inadmissible in the proceedings in which the person was acquitted but, as a result of a substantive legislative change in the law of evidence since the acquittal, would now be admissible if the acquitted person were to be retried.
3. The Bill also amends the *Crimes (Appeal and Review) Act 2001* to allow for a second application for the retrial of an acquitted person to be made in exceptional circumstances.

BACKGROUND

4. A similar Bill was introduced in the NSW Legislative Council by Mr David Shoebridge MLC in June 2015. The Legislation Review Committee commented on the provisions of that Bill in its [Legislation Review Digest 1/56](#). That report provides a background to the introduction of the 2015 Bill.
5. In 2015, following a recommendation from the Standing Committee on Law and Justice's *Inquiry into the Family response to the murders in Bowraville*, a review of double jeopardy laws in New South Wales was undertaken by the Hon James Wood AO QC.¹ In that review Justice Wood considered, amongst other things, the proposals in the 2015 Bill and concluded that such proposals should not be adopted.
6. This Bill follows a recent decision of the Court of Criminal Appeal to refuse an application under the exceptions of double jeopardy in the case of *Attorney General for New South Wales v XX*, which was the Bowraville case and the application for the retrials of Clinton Speedy-Duroux and Evelyn Greenup's murder prosecutions.

¹ The Hon James Wood AO QC, *Review of section 102 of the Crimes (Appeal and Review) Act 2001 (NSW)*

ISSUES CONSIDERED BY THE COMMITTEE

Trespasses unduly on personal rights and liberties: s8A(1)(b)(i) of the LRA

Double jeopardy

7. Section 100 of the *Crimes (Appeal and Review) Act 2001* (the Act) provides that the Court of Criminal Appeal may, on application of the Director of Public Prosecutions, order an acquitted person to be retried for a life sentence if satisfied that:
 - a) there is fresh and compelling evidence against the acquitted person in relation to the offence, and
 - b) in all circumstances it is in the interests of justice for the order to be made.
8. Section 102(2) of the Act provides that evidence is fresh if:
 - a) it was not adduced in the proceedings in which the person was acquitted, and
 - b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.
9. Section 102(3) of the Act provides that evidence is compelling if:
 - a) it is reliable, and
 - b) it is substantial, and
 - c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.
10. This Bill seeks to expand the definition of fresh evidence in section 102(2) to include that evidence is also fresh if it was inadmissible in the proceedings in which the person was acquitted, and as a result of substantive legislative change in the law of evidence since the acquittal, it would now be admissible if the acquitted person were to be retried.
11. Justice Wood, in his review of section 102 of the Act, considered that expanding the definition of fresh evidence in a similar manner proposed by this Bill may potentially lead to the revival of a number of acquittals where similar fact evidence was rejected. Justice Wood also commented that the perception of finality for a person acquitted of a life sentence offence may also be affected by this amendment. Justice Wood commented:

I am alert to the Bowraville situation and the potential impact that an amendment in accordance with option 2 may have on considering an application for a retrial under s 102. However, the term “fresh” was carefully considered and intentionally inserted into the provision because of its restrictions. An amendment would have ramifications beyond Bowraville, as it potentially paves the way to revive a number of acquittals where similar fact evidence was rejected. Accordingly, I cannot recommend that s 102 of CARA be amended in accordance with option 2.²

² The Hon James Wood AO QC, *Review of section 102 of the Crimes (Appeal and Review) Act 2001 (NSW)*, September 2015, p 67

12. In the Second Reading Speech to the Bill, Mr Shoebridge noted that Part 8 Division 2 of the Act contains a system of essential checks and balances before a retrial can be ordered. Such checks include that an application must have the consent of the Attorney General and it only applies to serious crimes that carry a life sentence. Additionally, the application must be heard by the senior criminal court in New South Wales, and the evidence must not only be fresh but also compelling. Finally, the court must only grant the application if it also finds that it is in the interests of justice to do so and that it believes an accused can be granted a fair trial.³

The Committee notes that the Bill seeks to expand the definition of fresh evidence in the *Crimes (Appeal and Review) Act 2001*, potentially widening the circumstances under which a person may be retried for offences he or she has been acquitted of. This impacts on the double jeopardy rule. The double jeopardy rule prevents a person from being retried for conduct they have been acquitted of. It is based on the principle that acquittal of a criminal offence should be treated as final.

The Committee notes the checks and balances contained in the *Crimes (Appeal and Review) Act 2001* that must be satisfied before a retrial can be ordered. However, the Committee refers the issue to parliament for it to consider whether there is an undue trespass against personal rights and liberties.

Retrospectivity

13. Proposed section 102 (2B) extends the amendments to fresh evidence to persons acquitted before the commencement of the proposed Act.

The Committee notes that the Bill, as does the existing double jeopardy regime, is drafted to have retrospective effect. Retrospectivity is contrary to the rule of law which allows people knowledge of the laws that they are subject to at any given time. This consideration must be balanced against the intended effect of the law to right past potential injustices in the legal system. The Committee refers the matter to Parliament for consideration.

³ New South Wales, *Parliamentary Debates*, Legislative Council, 20 September 2018, pp 4-5

2. Criminal Legislation Amendment (Consorting and Restricted Premises) Bill 2018

Date introduced	19 September 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
 - a) to amend the *Crimes Act 1900* in response to the Ombudsman's report tabled in the Legislative Assembly on 17 June 2016 relating to the operation of Division 7 (Consorting) of Part 3A of that Act, and
 - b) to amend the *Restricted Premises Act 1943* in response to the Ombudsman's report tabled in the Legislative Assembly on 3 November 2016 relating to certain police powers and offence provisions under that Act.

BACKGROUND

2. In 2012, the *Crimes Amendment (Consorting and Organised Crime) 2012* introduced a number of amendments aimed at addressing organised crime. One such amendment was a new consorting law and a requirement that the operation of the consorting law be reviewed by the NSW Ombudsman.
3. In April 2016, the NSW Ombudsman completed its review⁴ and made a number of recommendations 'designed to increase the fairness of the operation of the consorting law for those directly affected and to reduce the risk of negative consequences that may arise from lawful but inappropriate use.'⁵
4. The review by the NSW Ombudsman noted concerns raised about the operation of the consorting law and its impact on disadvantaged and vulnerable groups such as Aboriginal people, the homeless and children and young people.⁶

⁴ NSW Ombudsman, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016

⁵ NSW Ombudsman, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016 at p 5

⁶ NSW Ombudsman, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016 at p 61

ISSUES CONSIDERED BY THE COMMITTEE

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

5. Section 93X of the *Crimes Act 1900* (the Act) makes it an offence for a person to habitually consort with at least two convicted offenders after an official warning has been given in relation to each of those convicted offenders.
6. Section 93Y of the Act provides that it is a defence to a charge of consorting if the defendant can satisfy the court that the consorting was reasonable in the circumstances and was in one of the following forms:
 - consorting with family members,
 - consorting that occurs in the course of lawful employment or the lawful operation of a business,
 - consorting that occurs in the course of training or education,
 - consorting that occurs in the course of the provision of a health service,
 - consorting that occurs in the course of the provision of legal advice,
 - consorting that occurs in lawful custody or in the course of complying with a court order.
7. As mentioned above, the current consorting law provisions were introduced in 2012. At that time this Committee commented on the provisions and their potential to limit the freedom of association between people.⁷ In 2012, the validity of the consorting law was subject to constitutional challenge, with the High Court, by majority, finding the law valid.⁸
8. The Committee notes that in the NSW Ombudsman's report on the operation of the consorting law, most of the submissions expressed concern with the consorting law with the majority calling for its repeal.⁹ The NSW Ombudsman noted that the concerns were generally raised in the context of Australia's human rights obligations under the International Covenant on Civil and Political Rights, namely article 22.¹⁰

⁷ Legislation Review Committee, *Legislation Review Digest No 10/55*, 21 February 2012, pp 7 - 8

⁸ *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35. On the issue of freedom of association the High Court found it unnecessary to answer whether the consorting law contravened any implied freedom of association as there is no freestanding right to association implied in the Constitution.

⁹ NSW Ombudsman, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016 at p 2

¹⁰ Article 22 of the ICCPR provides: 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests; 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right; 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of

9. While this Bill introduces measures to increase the fairness of the operation of the consorting law provisions, in light of the Committee's past comments and the concerns raised in submissions to the review, the Committee considers it suitable to reiterate its prior comments on the consorting law more generally.

The Committee notes that the consorting law makes it an offence for a person to habitually consort with at least two convicted offenders after an official warning has been given in relation to each of those convicted offenders. This offence may impact on the ability of people to freely associate and communicate with each other and has the potential of criminalising innocent communications.

While the Committee notes that this Bill introduces measures to increase the fairness of the operation of the provisions, the Committee considers it suitable to reiterate its previous concerns on the consorting law more generally.

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

Commencement by proclamation

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

The Committee prefers legislation to commence on assent or a specified day. However, the Committee notes that commencing the amending provisions by proclamation will allow time for those affected by the amendments to be advised. In these circumstances, the Committee does not consider there to be an inappropriate delegation of legislative powers.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s8A(1)(b)(v) of the LRA

Review not required to be tabled in Parliament

11. The Bill requires the Law Enforcement Conduct Commission (the LECC) to undertake a review of the amendments introduced by this Bill within 3 years of their commencement. The LECC is to report to the Attorney General and the Minister for Police. There is no requirement for the Attorney General or the Minister for Police to lay a copy of the report received from the LECC before both Houses of Parliament.
12. This is distinct from the requirements when the new consorting laws were introduced in 2012, which required the NSW Ombudsman's report into the operation of the provisions to be tabled in parliament by the Attorney General.
13. As noted above, the 2016 review conducted by the NSW Ombudsman noted concerns raised about the operation of the consorting law and its impact on disadvantaged and vulnerable groups such as Aboriginal people, the homeless and children and young people.¹¹

Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

¹¹ NSW Ombudsman, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016 at p 61

The Committee notes that the Bill requires the Law Enforcement Conduct Commission to undertake a review of the amending provisions within three years after their commencement. Unlike similar provisions when the new consorting laws were first introduced, there is no requirement to table any such review in Parliament.

The Committee notes that this Bill is only introducing amendments to existing provisions. However, given the concerns raised about the operation of the provisions, especially in relation to disadvantaged and vulnerable people, the Committee considers that the absence of any requirement to table the findings from the review does not provide an appropriate level of scrutiny. The Committee refers this issue to Parliament for further consideration.

3. Community Gaming Bill 2018

Date introduced	19 September 2018
House introduced	Legislative Council
Minister responsible	The Hon. Matt Kean MP
Portfolio	Innovation and Better Regulation

PURPOSE AND DESCRIPTION

1. The object of this Bill is to provide a framework for the regulation of gaming activities for community or charitable purposes and trade promotion purposes.

BACKGROUND

2. The *Community Gaming Bill 2018* replaces the *Lotteries and Art Unions Act 1901* and implements the recommendations of the statutory review of the Act, released in September 2017.¹²
3. The administrative responsibility for the *Lotteries and Art Unions Act 1901* was transferred to the Minister for Innovation and Better Regulation on 1 January 2018.

ISSUES CONSIDERED BY THE COMMITTEE

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

Privilege against self-incrimination

4. Section 29 contains offences relating to inquiries and inspection, and outlines that a person may incur a maximum penalty of 50 penalty units or imprisonment for 6 months for the following actions:
 - (a) hinder or obstruct an authorised officer in the exercise of functions under this Act or the regulations, or
 - (b) fail to comply with a requirement made by a notice given under this Division within the period specified by the notice, or
 - (c) fail to answer questions or provide information when required to do so by an authorised officer in the exercise of the authorised officer's functions under this Act or the regulations, or
 - (d) fail to produce for inspection any document or other thing when required to do so by an authorised officer in the exercise of the authorised officer's functions under this Act or the regulations, or

¹² Department of Industry, Review of the Lotteries and Art Unions Act 1901: Final Report September 2017, <https://www.liquorandgaming.nsw.gov.au/Documents/public-consultation/Final-report-Review%20of%20the%20Lotteries%20and%20Art%20Unions%20Act%201901.pdf>

- (e) alter, conceal or destroy any document required to be produced under a notice given under this Division, or
 - (f) refuse to take an oath, or make an affirmation, required to be taken or made under this Division.
5. The Committee notes that these provisions may impact upon the privilege against self-incrimination, which allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime.

The Committee notes that the Bill contains offences relating to inquiries and inspections, including that a person must not fail to answer questions or provide information when required to do so by an authorised officer in the exercise of the authorised officer's functions under the Act or regulations. The Committee notes that these provisions may potentially encroach on the privilege against self-incrimination, which allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime. The Committee refers this to Parliament for consideration of whether this provision would encroach on the privilege against self-incrimination.

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

Powers of enforcement – Right to refuse entry

6. Part 3 of the Bill outlines provisions containing enforcement powers of the Secretary and authorised officers. Section 22(1) of Part 3 outlines the power of entry, including section 22(1) that an authorised officer may enter premises (other than premises or any part of premises used only for residential purposes) without the occupier's consent and without obtaining a search warrant.
7. This power is qualified by section 21 which provides that an authorised officer may exercise a power conferred by this Division if the authorised officer reasonably believes that it is necessary to determine whether there has been a contravention of this Act, the regulations or an authority.
8. Section 23 also outlines that these powers of entry may only be used after giving the occupier reasonable notice at any reasonable time during the day, at any time at which a gaming activity is being conducted on the premises, at any time the premises are open for entry, or at any time permitted by the occupier or a search warrant authorising the entry.

Under the enforcement powers contained in the Bill, an authorised officer may enter a premises without a warrant and without consent of the occupier, provided the officer reasonably believes that it is necessary to determine whether there has been a contravention of the Act. We note that these powers cannot be used unless the occupier has been given reasonable notice and only at certain times of the day.

The Committee notes that these powers of entry have been expanded from the previous *Lotteries and Art Unions Act 1901* ('the Lotteries Act'), which required under section 21D(4) that 'a person exercising a power to enter premises must produce his or her certificate to the occupier of the premises'. The Committee

also notes that the Bill does not contain the provision from section 21D of the Lotteries Act that powers of entry and inspection may not be exercised in relation to any premises used as a dwelling, or in relation to a part of any premises so used, except with the consent of the occupier of the premises or part or by the authority of a search warrant.'

The Committee notes that the expansion of powers of entry may be used at the discretion of the authorised officer based on the belief of the authorised officer, and no longer prohibits authorised officers from entering dwellings without occupier consent or a search warrant. The Committee refers these provisions to Parliament for its consideration on whether the expansion of powers to entry, including the power to enter dwellings without occupier consent or warrant, encroaches on the right to refuse entry to private property.

Powers to create offences in the regulations

9. Section 49(1) permits the Governor to make regulations, not inconsistent with this Act, for or with respect to any matter that this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
10. Section 49(3) provides that regulations may create an offence punishable by a penalty not exceeding 50 penalty points.

The Committee notes that the regulations may create offences that are punishable by up to 50 penalty points, provided that the regulations are consistent and necessary or convenient to give effect to the Act. The Committee generally prefers that provisions that attract penalties be contained in the substantive legislation so as to afford parliamentary scrutiny. The Committee refers this to the Parliament for its consideration on whether offences are more appropriately set out in the principal legislation.

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

Commencement by proclamation

11. Section 2 of the Bill states that the Act 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 as to provide certainty to those affected by the provisions contained in the Act. However, the Committee notes that the Second Reading Speech outlined that the responsible Minister intends to undertake further community consultation and distribute educational and informative information concerning the changes in the Bill. In these circumstances, a more flexible start date allows stakeholders time to adjust to the new requirements before their commencement. The Committee makes no further comment on this issue.

4. Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Bill 2018*

Date introduced	20 September 2018
House introduced	Legislative Assembly
Member responsible	Ms Tamara Smith MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Environmental Planning and Assessment Act 1979* to ensure that the provisions of local environmental plans relating to short-term rental accommodation prevail over the provisions of any State environmental planning policy.

BACKGROUND

2. In the Second Reading Speech, Ms Tamara Smith MP commented that this Bill proposes that councils be permitted to set the maximum number of days for short term rental accommodation in their local government area without development consent, as opposed to the number of days proposed by recent Government legislation. Ms Smith indicated that local councils are governed by elected officials and are appropriately placed to make decisions on behalf of the residents in their area. Ms Smith stated:

This legislation will give flexibility to those local government areas where short-term holiday accommodation is welcomed and encouraged by tourism and for tourism, and to those areas like Byron Bay where unfettered holiday letting is killing community.

ISSUES CONSIDERED BY THE COMMITTEE

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

5. Impounding Amendment (Shared Bicycles and other Devices Bill) 2018

Date introduced	19 September 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Andrew Constance MP
Portfolio	Transport and Infrastructure

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Impounding Act 1993*:
 - a) to give impounding officers appointed by local councils or by other public authorities additional power to move or impound shared bicycles and other devices that are provided for hire as part of a sharing service and that have been left in a public place, and
 - b) to authorise the regulations to prescribe a code of practice for sharing services that imposes enforceable obligations or restrictions on operators and former operators of sharing services.
2. This is achieved by making amendments that add to the circumstances in which a shared device can be immediately impounded or is taken to have been abandoned in a public place by the operator of the service (whether the shared device was left there by the operator, by a user of the operator's sharing service or by any other person), as follows:
 - a) devices that are causing an obstruction or safety risk can be impounded immediately, or moved to another location, by an impounding officer,
 - b) devices that are causing an obstruction or safety risk are taken to have been abandoned by the operator if they are not moved within 3 hours of the operator being notified of their location by an impounding officer, by a user of the sharing service or by any other person (who may give that notice by email or SMS text message),
 - c) devices that have been left in the same place for 7 days or more are taken to have been abandoned if they are not moved within 4 days of the operator being notified of their location by an impounding officer, a user or any other person.
3. The amendments also confer power on impounding officers to issue removal notices for shared devices that are left in a public place, or are otherwise provided by an operator of a sharing service, in contravention of the requirements specified in the proposed amendments, the regulations or a code of practice. If the operator fails to comply with the notice, the operator is taken to have abandoned the shared device.
4. It is an offence to abandon an article in a public place. The amendments increase the maximum penalty that applies if an operator of a sharing service abandons a shared

device in a public place in contravention of some of the new requirements from 5 penalty units (\$550) to 25 penalty units (\$2,750). If the offence is dealt with by penalty notice, the fine is \$500.

BACKGROUND

5. This bill seeks to regulate the share bike industry by providing impounding officers additional powers to impound or move shared bikes that cause an obstruction or pose a safety risk. The Bill also authorises the regulations to prescribe a code of practice that imposes enforceable obligations on shared bike providers.

6. In the Second Reading Speech, the Minister commented that:

... communities, particularly those in the inner-city areas, have been enormously frustrated by a lot of shared bikes being inappropriately left across the landscape – on footpaths, in parks, in people's front yards. ... As a result of that, local governments have brought forward their concerns about the way in which these bicycles should be regulated.¹³

ISSUES CONSIDERED BY THE COMMITTEE

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

Commencement by proclamation

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

The Committee prefers legislation to commence on assent or a specified date. However, the Committee notes that the Bill implements a new regulatory framework for the management of shared bike service and commencement by proclamation may assist in ensuring all affected parties are advised of the changes and their obligations. In these circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

8. The Bill permits the regulations to prescribe a code of practice setting out enforceable obligations imposed on operators of sharing services, including the creation of offences with a penalty not exceeding 5 penalty units.

The Committee notes that the Bill permits the regulations to prescribe a code of practice setting out enforceable obligations upon operators of shared services, including the creation of offences. The Committee generally prefers that substantive matters, such as offences, are provided for in principal legislation. However, the Committee notes that the penalties for any offence are capped at 5 penalty units and the code of practice is to provide for matters such as managing the risks and safety of shared bike services. In these circumstances, the Committee makes no further comment.

¹³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 September 2018, p 8, the Hon Andrew Constance MP (Minister for Transport)

6. Marine Parks Amendment (Moratorium) Bill 2018*

Date introduced	20 September 2018
House introduced	Legislative Council
Member responsible	The Hon. Robert Borsak MLC*
	Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to impose a 10-year moratorium on the creation of any new marine parks under the *Marine Estate Management Act 2014*.

BACKGROUND

2. This Bill imposes a 10 year moratorium on the creation of new marine parks. In the Second Reading Speech, the Hon Robert Borsak MLC commented:

I express my utmost dismay at the neglect and dereliction visited upon our coastline and the cynical attempt by this Government to somehow scapegoat anglers and lock them out of the best fishing spots in the State.¹⁴

ISSUES CONSIDERED BY THE COMMITTEE

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

¹⁴ New South Wales, *Parliamentary Debates*, Legislative Council, 20 September 2018, the Hon Robert Borsak MLC

7. Parliamentary Budget Officer Amendment Bill 2018

Date introduced	19 September 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasury

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Parliamentary Budget Officer Act 2010* as follows:
 - a) to require a draft operational plan to be prepared by the Parliamentary Budget Officer within 1 month of appointment,
 - b) to reduce the period within which the head of a Government agency must respond to a request for information by the Parliamentary Budget Officer from 10 business days to 6 business days if the request is made after the commencement of the caretaker period,
 - c) to enable an election costing request to be withdrawn at any time before the election policy costing is publicly released,
 - d) to revise the matters to be included in budget impact statements prepared by the Parliamentary Budget Officer for costed election policies and to extend those statements to include budgetary impacts on other Government sectors if there is an impact on those sectors,
 - e) to extend the period within which the final list of costed policies for inclusion in the budget impact statement is to be provided to the Parliamentary Budget Officer,
 - f) to provide for information to be provided by the Parliamentary Budget Officer to the Secretary of the Department of Premier and Cabinet for the purposes of preparing information for the incoming Government, while retaining the confidentiality of information provided about another party's policies,
 - g) to require the Secretary of the Treasury to publicly release a pre-election budget update statement on or as soon as reasonably practicable after the commencement of the caretaker period before a State general election.

BACKGROUND

2. The *Parliamentary Budget Officer Act 2010* requires the Parliamentary Budget Officer (the PBO) to report to the Public Accounts Committee after the holding of the State general election for which he or she was appointed. The report can include recommendations on operational arrangements and activities for the PBO in respect of future elections.

3. After the 2015 State general election the PBO provided a report to the Public Accounts Committee containing 13 recommendations of which all were supported by the Public Accounts Committee. This Bill seeks to implement those recommendations.

ISSUES CONSIDERED BY THE 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*.

8. Residential Tenancies Amendment (Review) Bill 2018

Date introduced	20 September 2018
House introduced	Legislative Council
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 *Residential Tenancies Act 2010* (the Act) to give effect to recommendations of the statutory review of the Act contained in the report, *Residential Tenancies Act 2010—Statutory Review*, dated 17 June 2016. The amendments made by this Bill relate to the following matters that were the subject of the recommendations:
 - a) the application of termination notice provisions to employee or caretaker residential tenancy agreements,
 - b) disclosure obligations imposed on landlords in relation to strata schemes,
 - c) obligations imposed on landlords in relation to information statements,
 - d) interest on rental bonds and the purposes for which grants or loans can be made from Rental Bond Interest Account moneys,
 - e) taking photographs or making videos of residential premises,
 - f) condition reports,
 - g) the concept of “separately metered” premises,
 - h) notice requirements for rent increases,
 - i) obligations imposed on landlords in relation to repairs,
 - j) compensation payable for abandonment of residential premises,
 - k) the termination of residential tenancy agreements by landlords on the grounds of non-payment of rent, water usage charges or charges for the supply of electricity, gas or oil,
 - l) the termination of residential tenancy agreements by tenants or co-tenants in circumstances of domestic violence,
 - m) the liability of tenants or co-tenants for damage to residential premises caused by another person in circumstances of domestic violence,

- n) the protection of personal information of tenants and co-tenants in circumstances of domestic violence,
 - o) fees charged by residential tenancy database operators.
2. The further objects of this Bill are to make certain other amendments to the Act, in addition to those recommended in the statutory review:
- a) to limit the frequency of increases in rent payable under a periodic agreement to no more than once in any 12-month period, and
 - b) to specify the minimum requirements that must be met for residential premises to be fit for habitation, and
 - c) to allow landlords and tenants to request that the Commissioner for Fair Trading carry out investigations into damage to premises or breaches of obligations to repair premises, to allow the Commissioner to issue rectification orders and to give the Civil and Administrative Tribunal (the Tribunal) the power to issue termination notices for breaches of rectification orders, and
 - d) to provide a regulation-making power to prescribe the kinds of alterations of a minor nature in relation to which it would be unreasonable for a landlord to withhold consent, and
 - e) to give the Tribunal the power to issue termination notices for non-payment of rent or water usage charges, and
 - f) to apply different requirements for the termination of employee or caretaker tenancies, and
 - g) to allow early termination of fixed term agreements by tenants if the residential premises are placed on the Loose-fill Asbestos Insulation Register (the LFAI Register).

BACKGROUND

3. In the Second Reading Speech, the Minister commented that approximately one-third of New South Wales householders rent their homes and acknowledged the increasing importance of residential tenancies law.
4. This Bill follows a statutory review of the *Residential Tenancies Act 2010* and further public consultation following that review process. Reforms in the Bill include:
- enhanced protection for domestic violence victims;
 - restrictions on rent increases for periodic leases to once every 12 months; and
 - a requirement to provide a minimum standard for properties.

ISSUES CONSIDERED BY THE COMMITTEE

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

Commencement by proclamation

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

The Committee prefers legislation to commence on assent or on a specified date. However, given the Bill contains a number of amendments relating to the rights and obligations of tenants and landlords, commencement by proclamation would assist in ensuring all parties are advised of the changes. In these circumstances the Committee makes no further comment.

9. Water NSW Amendment (Warragamba Dam) Bill 2018

Date introduced	19 September 2018
House introduced	Legislative Council
Minister responsible	The Hon. Niall Blair MLC
Portfolio	Regional Water

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Water NSW Act 2014* (the *principal Act*) to provide:
 - a) that a lease, licence, easement or right of way under the *National Parks and Wildlife Act 1974* (the *NPW Act*) is not required for or in respect of the temporary inundation of national park land resulting from the Warragamba Dam project, and
 - b) that the temporary inundation of national park land resulting from the Warragamba Dam project is not subject to any plan of management under the *NPW Act*.
2. The relevant provisions will apply in relation to the temporary inundation of national park land resulting from the Warragamba Dam project only if an environmental management plan, prepared by Water NSW and approved by the Minister administering the *NPW Act* with the concurrence of the Minister administering the *principal Act*, is in force.
3. The *Warragamba Dam project* is defined as development that is approved under the *Environmental Planning and Assessment Act 1979* to raise the wall of Warragamba Dam and to operate the dam for the purposes of facilitating flood mitigation downstream of the dam.

BACKGROUND

4. This Bill relates to the proposal currently being assessed to raise Warragamba Dam for flood mitigation purposes. The Bill seeks to overcome the provision in the *National Parks and Wildlife Act 1974* (the *NPW Act*) which prevents the Minister for the Environment from granting a lease, licence, easement or right of way in relation to the impoundment of water.
5. The Bill inserts provisions in the *Water NSW Act 2014*, which removes the requirements to obtain a lease, licence, easement or right of way for the purposes of any temporary inundation of national park land resulting from the Warragamba Dam project.
6. In the Second Reading Speech, the Hon Niall Blair MLC commented that this Bill is not an approval for the raising of the dam. Minister Blair stated:

The environmental impact statement and the required State Government and Australian Government planning approvals will still be necessary.¹⁵

ISSUES CONSIDERED BY THE COMMITTEE

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

¹⁵ New South Wales, Parliamentary Debates, Legislative Council, 19 September 2018, p 73, the Hon Niall Blair MLC

10. Western City and Aerotropolis Authority Bill 2018

Date introduced	19 September 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Stuart Ayres MP
Portfolio	Western Sydney

PURPOSE AND DESCRIPTION

1. This Bill:
 - a) constitutes the Western City and Aerotropolis Authority (the Authority) as a statutory corporation subject to the control and direction of the Minister, and
 - b) provides for the Authority to have a governing Board comprising 7 members appointed by the Minister, and
 - c) confers functions on the Authority in relation to the development of land in its operational area which will include the area identified in the proposed Act as the Western Sydney Aerotropolis.

BACKGROUND

2. This Bill establishes a new government agency to develop and plan the aerotropolis precinct in Western Sydney. Establishing the authority was a commitment made under the Western City deal which is an agreement between the New South Wales and Commonwealth Governments and eight local councils.

ISSUES CONSIDERED BY THE COMMITTEE

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

Henry VIII clause

3. Proposed section 5 of the Act permits the regulations to amend Schedules 1, 2 and 3 of the Act. Specifically, the regulations may amend Schedule 1 to replace the map in that Schedule so as to extend or reduce the area comprising the Western Sydney Aerotropolis.
4. The regulations may also amend Schedule 2 of the Act by: inserting the description of any area, or a map of any area, within the Western City; and by amending or omitting the description or map of any area specified in Schedule 2.
5. With regard to Schedule 3 the regulations may amend Schedule 3 by: inserting the description of any area, or a map of any area, specified by a local council; and by amending or omitting the description or map of any area specified in Schedule 3.

6. The Committee notes that proposed Schedules 1, 2 and 3 define the operational area of the Western City and Aerotropolis Authority. Schedules 2 and 3 currently do not provide any detail on the areas covered by those Schedules.

The Committee notes that the Bill enables the regulations to amend the Schedules in the Act. Provisions of this nature, which permit regulations to amend principal legislation, are generally discouraged as they provide the Executive the power to override principal legislation by way of delegated legislation. This permits principal legislation to be amended without an appropriate level of parliamentary scrutiny applied. The Committee refers this issue to Parliament for its further consideration.

Commencement by proclamation

7. Section 2 of the Bill provides that the majority of the Act commences on a day or days to be appointed by proclamation.

The Committee prefers legislation to commence on assent or a specified date. However, as the Bill is establishing a new Authority, commencement by proclamation will allow time for any necessary administrative arrangements to be made before the Act commences. In these circumstances the Committee makes no further comment.

11. Workers Compensation Legislation Amendment Bill 2018

Date introduced	19 September 2018
House introduced	Legislative Council
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Finance, Services and Property

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Workers Compensation Act 1987* (the 1987 Act) and the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) for the following purposes:
 - a) to reform dispute resolution processes relating to work capacity decisions as follows:
 - i. by abolishing the existing system review (involving internal review, merit review and procedural review) and restoring the jurisdiction of the Workers Compensation Commission (the Commission) to determine disputes,
 - ii. by consolidating notice requirements to enable insurers to combine notice of liability disputes and the discontinuation or reduction of weekly payments of compensation into a single notice,
 - b) to enable regulations under the 1987 Act and the 1998 Act (the Workers Compensation Acts) to provide for circumstances in which medical disputes concerning the degree of permanent impairment resulting from an injury are authorised or required to be determined by the Commission instead of by an approved medical specialist,
 - c) to make changes with respect to the calculation of the pre-injury average weekly earnings of a worker for the purpose of determining the worker's entitlement to weekly payments of compensation,
 - d) to provide for enhanced information collection and sharing powers of the State Insurance Regulatory Authority (the Authority) (in line with the powers of the Authority as regulator under the *Motor Accident Injuries Act 2017*) and a scheme for the mandatory notification of contraventions of the Workers Compensation Acts,
 - e) to standardise provisions dealing with the notification of increases in indexation for the purposes of the Workers Compensation Acts by requiring all notifications to be made by the Authority by order published on the NSW legislation website,
 - f) to increase, from 3 to 5, the number of members of the Board of the Authority who may be appointed by the Minister for Finance, Services and Property,

- g) to prohibit commutation to a lump sum of a liability to pay medical expenses compensation in respect of an injury that satisfies the criteria of a catastrophic injury specified in the Workers Compensation Guidelines,
 - h) to enable an employer to provide information to workers relating to various procedural matters under the Act by publication on a website, or by any other method authorised by regulations, instead of by posting the information at the place of work,
 - i) to make provisions of a savings or transitional nature consequent on the enactment of the proposed Act.
2. The Bill also makes amendments consequent on the enactment of the *Motor Accident Injuries Act 2017* to align entitlements to compensation and damages under the 1987 Act for workers injured in a motor accident with the entitlements applicable to all other injured workers.

BACKGROUND

3. In 2017, the Legislative Council's Standing Committee on Law and Justice published its first review into the workers compensation scheme (the First Review).¹⁶ The amendments referred to in paragraphs a), c) and d) implement recommendations of the First Review
4. The First Review arose in the context of the enactment of the *State Insurance and Care Governance Act 2015*. In his second reading speech, Mr Scot MacDonald MLC observed that a key theme which emerged during the First Review was that dispute resolution was too complex due to overlapping responsibilities between the Workers Compensation Independent Review Office, the State Insurance Regulatory Authority, and the Workers Compensation Commission.
5. The second reading speech then indicates that the Bill seeks to 'simplify the dispute resolution process, establish the Workers Compensation Commission as the central dispute resolution body in the scheme, improve and clarify key legislative provisions to reduce and prevent disputes, modernise the operation of the workers compensation legislation, and allow SIRA ... to more effectively undertake its regulatory and oversight functions'.
6. The Standing Committee on Law and Justice is also undertaking a 2018 Review of the Workers Compensation scheme.¹⁷ However, this inquiry is focused on recommendation 16 of the Standing Committee's First Review, regarding 'the feasibility of a consolidated personal injury tribunal for Compulsory Third Party and workers compensation dispute resolution'.¹⁸

¹⁶ Standing Committee on Law and Justice of the Legislative Council, [Report on the First Review of the Workers Compensation Scheme](#), March 2017

¹⁷ See [2018 Review of the workers compensation scheme](#) on the Parliament's website.

¹⁸ See the inquiry's [terms of reference](#) on the Parliament's website.

ISSUES CONSIDERED BY THE COMMITTEE

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

7. Schedule 4 of the Bill inserts a new Part 7: Information collection and sharing into the *Workplace Injury Management and Workers Compensation Act 1998*.
8. Proposed section 40B provides the State Insurance Regulatory Authority (the Authority) with powers to collect, use and exchange data in relation to policies of insurance, claims for compensation, the provision of services to workers, and complaints. Proposed section 40C also empowers the Authority to require an insurer to disclose data relating to insurance policies, claims and related matters under the workers compensation legislation.
9. Both these proposed provisions are expressed to apply to 'data that is personal information or health information about an individual despite anything to the contrary in the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*.'
10. The second reading speech notes that these amendments 'respond to recommendation 4 of the Legislative Council's Standing Committee on Law and Justice in its 2017 report on the statutory review of the *State Insurance and Care Governance Act 2015*.' The recommendation was:

That the NSW Government introduce legislative amendments to give SIRA statutory information collection and sharing powers in the area of workers compensation, modelled on the equivalent provisions in the Motor Accident Injuries Act 2017 for compulsory third-party insurance.

11. According to the second reading speech, the amendments align with the provisions under the *Motor Accident Injuries Act 2017* as recommended by the Committee.

The Bill provides new information collection and sharing powers to the State Insurance Regulatory Authority. These powers are expressed to apply to data that is personal or health information about an individual despite anything in the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*.

The Committee acknowledges that such expansive information collection and sharing powers may assist the Authority to perform its regulatory function, and have been introduced in response to a 2017 recommendation of the Legislative Council's Standing Committee on Law and Justice.

However, the Committee considers that the provisions may nonetheless unduly trespass on the right to privacy given that there appear to be few limitations on the use or collection of personal or health information that would have otherwise been protected under privacy legislation. Accordingly, the Committee refers to Parliament the question of whether the provisions are appropriate in the circumstances.

Retrospectivity

12. Schedule 6 of the Bill provides that, 'except as provided by this Part or the regulations', amendments made by the amending Act will apply retrospectively to an injury received or a claim for compensation made before the commencement of the amendment. It will also apply the provisions to proceedings which were pending in the Commission or a court immediately before the commencement of the amending Act.

The Bill is drafted to apply retrospectively in some cases. The Committee considers that in general retrospectivity is contrary to the rule of law which allows people knowledge of the laws that they are subject to at any given time. However, the Committee notes that the second reading speech suggests that the retrospectivity is designed to ensure that individuals, particularly workers involved in motor accidents, are not disadvantaged. The Committee makes no further comment.

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

Nature of disputes subject to mandatory medical assessment

13. The Bill omits section 65(3) from the *Workplace Injury Management and Workers Compensation Act 1998*.
14. According to the second reading speech, this has the effect of reversing the existing requirement for all permanent impairment disputes to be referred to an approved medical specialist prior to the Workers Compensation Commission awarding permanent compensation. This means that the Workers Compensation Commission can award permanent impairment compensation without referral to an approved medical specialist.
15. In his speech, Mr MacDonald MLC stated that 'this amendment recognises that, in certain circumstances, the requirement to refer all permanent impairment disputes to an approved medical specialist was unduly delaying proceedings in the Workers Compensation Commission.'
16. To ensure that 'disputes are managed appropriately...', the second reading speech further indicated that the Bill also allows the regulations to prescribe circumstances where disputes must or may require referral to an approved medical specialist, and those disputes which cannot (see proposed section 321A of the *Workplace Injury Management and Workers Compensation Act 1998*).

Schedule 2 of the Bill amends the existing workers compensation regime so that there will be no longer be a requirement that all permanent impairment disputes be referred to an approved medical specialist for assessment. In the absence of a referral, the Workers Compensation Commission can still determine compensation.

Proposed section 321A allows the regulations to provide for circumstances where such disputes must, may or may not be referred for medical assessment.

The Committee considers that fair compensation determinations relating to personal injury are assisted by expert evidence from an approved medical specialist. In circumstances where the Bill is modifying the requirement for

medical assessment, the Committee notes that the Bill does not articulate in what circumstances such disputes may still proceed to medical assessment. Instead, these matters are deferred to the regulations.

There may be good policy reasons for the proposed amendment. However, given that the changes may impact on the right to fair assessment of compensation, the Committee considers that the Bill should clearly set out the circumstances in which referral for medical assessment must, may, or cannot occur. The Committee refers this matter to Parliament for its further consideration.

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

Commencement by proclamation

17. Section 2 of the Bill states that the Act commences on a day or days to be appointed by proclamation, except for Schedule 6, 7.1., 8, and certain parts of Schedule 4.
18. The following aspects of the Bill commence on proclamation: Schedule 1 (dispute resolution), Schedule 2 (medical assessments for permanent impairment), Schedule 3 (pre-injury average weekly earnings) and most of Schedule 7 (miscellaneous amendments).

The Committee notes that the Bill commences significant parts of the Act on a day or days to be appointed by proclamation. The Committee generally prefers that legislation commences on assent or a fixed date. To do otherwise may be an inappropriate delegation of legislative power given that the Parliament does not have scrutiny over the commencement of legislation and there is less certainty for affected parties.

Much of the Act will commence on a certain date. Although some parts of the Act will be subject to commencement by proclamation, the Committee understands from the second reading speech that this may be to facilitate further consultation that informs the regulations, which are necessary to effect the reforms. As such, the Committee makes no further comment.

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

Indexation to occur by way of order

19. Schedule 5 of the Bill amends the *Workers Compensation Act 1987* to provide for amounts under the Act to be indexed by way of order rather than through other mechanisms, including regulation.
20. The second reading speech states:

Currently, any indexation adjustment to fixed amounts under the legislation requires a lengthy process of approval by either the Governor, the Minister, or SIRA through a range of instruments including: a regulation, order and notices published in the NSW Government Gazette. The bill will allow SIRA to prescribe the latest index numbers to weekly payments, death benefits and lump sum payments by an order published on the New South Wales legislation website.

21. These provisions may not engage the usual disallowance processes that apply to regulations and some other instruments, as set out in section 41 of the *Interpretation Act 1987*. Also, the Authority will issue indexed amounts in place of the Minister.

Under the Bill, the indexation of certain fixed amounts under the workers compensation legislation will now occur by way of order issued by the Authority. The Committee understands from the second reading speech that currently some indexation occurs by way of regulation.

Although such an order will be published on the NSW legislation website, the indexation figures may not be subject to the disallowance processes that usually apply to regulations and some other instruments. Also, such figures will now be issued by the Authority rather than the Minister.

For these reasons, some of these indexed figures may be subject to a lower degree of Parliamentary scrutiny. The Committee draws this to the attention of the Parliament.

Matters deferred to regulations

22. The Bill defers numerous matters to the regulations and also makes a number of provisions in the Bill 'subject to the regulations'. For example:

- a) Proposed section 321A of the *Workplace Injury Management and Workers Compensation Act 1998* allows the regulations to provide for the circumstances in which a medical dispute concerning permanent impairment of an injured worker is authorised, required or not permitted to be referred for assessment, among other things.
- b) Proposed clause 3 of Schedule 3 to the *Workers Compensation Act 1987* makes certain matters concerning the agreed amount of pre-injury average weekly earnings 'subject to the regulations'. That clause also clarifies that certain insurer decisions made before an agreement with an injured worker are not work capacity decisions, but makes this 'subject to the regulations'.
- c) Proposed section 40D of the *Workplace Injury Management and Workers Compensation Act 1998* enables the regulations to provide for when an insurer must notify the Authority of a contravention of the Act.

Many matters in the Bill are deferred to regulations. To the extent that these relate to substantive matters, the Committee considers that such matters should be covered in the principal Act. The Committee refers the question of whether it is appropriate to defer consideration of these and other matters to the Parliament for its further consideration.

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.