



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. BETTING TAX AMENDMENT (POINT OF CONSUMPTION) BILL 2018

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

Matters delegated to the regulations

The Bill defers some matters to the regulations, including further definitions of what constitutes a bet. Given that the Bill pertains to the collection of a consumption betting tax, the Committee considers that the definition of 'bet' is a substantive matter of this Bill. The Committee generally prefers that substantive matters are dealt with in the principal legislation, rather than being deferred to the regulations. The Committee refers this issue to the Parliament for its consideration of whether it insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

2. BUILDING AND DEVELOPMENT CERTIFIERS BILL 2018

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

Search and seizure /Right to privacy

Given the broad powers for authorised officers to search and seize, the Committee is concerned that the broad powers that allow authorised officers to 'seize anything connected with an offence' or 'seize anything that an authorised officer has reasonable ground for believing is connected with an offence' may infringe on an individual's right to privacy as the officers are not required to specify the evidence which they are looking for. The Committee refers the matter to Parliament for its consideration of whether these provisions may unduly infringe on a person's right to privacy.

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

Ill and wide defined power

Proposed section 47(7) provides that the Secretary may take immediate disciplinary action without taking any steps to provide notice to show cause for the affected individual if the Secretary determines that it is in the public interest to take immediate action. The Committee is concerned that the Bill doesn't provide an explanation as to what matters may be considered to be within the public's interest. However, the Committee also notes the policy considerations of implementing a regulatory framework to provide safer buildings and a legal safeguard that a person aggrieved by the decision may apply to the Civil and Administrative Tribunal for an administrative review. As such, the Committee considers the matter to be reasonable under the circumstances.

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

Matters deferred to the regulations

Given the impact that suspending or cancelling a registration or refusing an application for registration may have on an individual, the Committee considers that it would be more appropriate for the grounds for refusing, suspending or cancelling a registration be specified in the principal legislation rather than deferred to the regulations.

Commencement by proclamation

The Committee prefers legislation to commence on assent or a fixed date. However, given the Bill implements a new regulatory framework the Committee considers commencement by proclamation of the Bill is reasonable under the circumstances.

3. COMBAT SPORTS AMENDMENT BILL 2018

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

Procedural Fairness

The Bill provides that where a person applies to the Tribunal for administrative review of a registration decision made under the Act, and the Tribunal's decision is made on the basis of a criminal intelligence report or other criminal information disclosed by the Police Commissioner, the Tribunal must ensure that it does not disclose the existence or content of that report or information without approval of the Police Commissioner. This may affect a person's rights to procedural fairness, in particular, their ability to respond to information being used to deny them registration under the Act and the right to be given full and complete reasons for a decision that affects them. This consideration must of course be balanced with security considerations. The Committee refers the issue to Parliament for further consideration.

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

Non-reviewable Decisions

By failing to provide for certain decisions around holding or participating in a combat sport contest to be reviewable, the Bill excludes a right to the independent review of such decisions. The Committee refers the matter to Parliament for further consideration.

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

Commencement by proclamation

The Committee prefers legislation to commence on a fixed date or on assent, not by proclamation.

4. CONVEYANCING LEGISLATION AMENDMENT BILL 2018

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

Commencement by proclamation

The Committee generally prefers legislation to commence on assent or a specified date. Commencement by proclamation delegates to the executive the power to commence an Act on a day, or days, of its choosing.

The Committee notes that most of the provisions in the Bill commence on assent except for those concerning the requirements to attach disclosure statements to off-the-plan contracts. The Committee considers that commencement by proclamation is reasonable in these

circumstances as these provisions place new obligations on parties to a contract and time may be required to ensure all persons affected are adequately informed. The Committee makes no further comment.

5. CRIMES (ADMINISTRATION OF SENTENCES) LEGISLATION AMENDMENT BILL 2018

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

Retrospectivity

The Committee notes that although the Bill contains a retrospective provision, the provision does not create new offences or impose criminal liability on a person for conduct which was legal at the time it was committed. Rather, it relates to the administration of sentences, retrospectively validating the incarceration of persons who have been found guilty of criminal offences and who have had their reintegration home detention orders validly revoked. It therefore does not fall within the most concerning category of retrospectivity cases. For these reasons, the Committee makes no further comment.

Reversal of the onus of proof

The Committee notes that the Bill contains provisions reversing the onus of proof. However, the reversed onus of proof does not relate to all elements of the subject offences. It applies only for the purposes of establishing a defence, knowledge about which may lie entirely with the defendant. Similarly, the provisions seek to promote security and good order within the potentially volatile correctional environment. In the circumstances, the Committee makes no further comment.

Right to personal physical integrity

The Committee notes that by authorising the use of force by correctional officers against visitors, the Bill impacts on the right to personal physical integrity. However, the force can only be used in prescribed circumstances that relate to security and good order within correctional facilities. Similarly, the Bill contains a number of safeguards around the use of this power. These include that the force must not exceed the force that is reasonably necessary for protection, or to maintain the good order and security of a place of detention; and where force is used, a written report about it must be supplied to the governor of the place of detention. In the circumstances, the Committee makes no further comment.

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

Matters which should be set by Parliament

The Committee notes that the Bill provides that a person will not be guilty of certain offences created by the Bill if the person has acted because of a purpose prescribed by the regulations, or with the authorisation of a person prescribed by the regulations, or for a reason prescribed by the regulations. The Committee considers that, to foster appropriate parliamentary oversight, matters such as these – the details of the defences to offences that attract significant maximum penalties – should be contained in primary, not subordinate legislation. However, regulations are subject to disallowance by Parliament under section 41 of the *Interpretation Act 1987*. Given this safeguard, the Committee makes no further comment.

6. CRIMES LEGISLATION AMENDMENT BILL 2018; CRIMES (DOMESTIC AND PERSONAL VIOLENCE) AMENDMENT BILL 2018; MENTAL HEALTH (FORENSIC PROVISIONS) AMENDMENT (VICTIMS) BILL 2018; VICTIM RIGHTS AND SUPPORT AMENDMENT (MOTOR VEHICLES) BILL 2018

Trespasses unduly on personal rights and liberties: s 8A(1)(b)(i) of the LRA*Limits on judicial discretion - Crimes Legislation Amendment Bill 2018*

The Bill provides for default periods for apprehended violence orders. This limits the court's discretion to impose a period of time suitable to individual cases and without reference to a minimum standard. However, the Committee notes that the court maintains a discretion to depart from the default period where it considers a different period is sufficient to ensure the safety of the protected person. The Committee makes no further comment.

Freedom of movement/excessive punishment - Crimes Legislation Amendment Bill 2018

The Bill provides that certain apprehended domestic violence orders may be made for an indefinite period. Such orders would restrict the movement and freedoms of a person against whom such an order is made for an uncertain amount of time and with no requirement to periodically assess whether there has been any significant change in circumstances since the order was made.

However, the Committee notes the serious circumstances which are required to be present before an indefinite order may be made, including a significant and ongoing risk of death or serious physical or psychological harm to a protected person or any dependants of the protected person. The Committee also notes the rights of individuals to be protected against violence and abuse. In these circumstances, the Committee makes no further comment.

Access to appropriate review - Crimes Legislation Amendment Bill 2018

The Bill allows the police to vary the conditions of an apprehended domestic violence order in circumstances requiring an urgent response. Currently, such conditions may only be varied by a court where the individual circumstances of the case can be measured and assessed by judicial review. While the variations must go before a court within 28 days, and by the earliest date a hearing can be listed, there is a period of time where a person is subject to conditions that have not been imposed by a court of law.

However, the Committee notes the safeguards that operate before a variation may be made, including that the circumstances must require an urgent response and that any variation must be approved by a senior police officer. The Committee also notes the rights of individuals to be protected against violence and abuse and acknowledges that the nature of domestic violence often requires urgent interventions to be made to support victims. The Committee makes no further comment.

Freedom of movement - one – Mental Health (Forensic Provisions) Amendment (Victims) Bill 2018

The Committee notes the Bill provides the Mental Health Tribunal the power to impose monitoring conditions, including by electronic means, upon a forensic patient on release or who has been granted a leave of absence. Imposing monitoring conditions may operate to restrict an individual's right to free movement and privacy. However, the Committee notes that the amendment flows from an independent review of the Mental Health Tribunal and is aimed at increasing community safety. The Committee makes no further comment.

Freedom of movement – two – Mental Health (Forensic Provisions) Amendment (Victims) Bill 2018

The Committee notes that the Bill extends a person's status as a forensic patient under an interim order from 28 days to 3 months. This extends the period of time that a person may be subject to detention or conditions under an order which has not been assessed or finally determined by the Supreme Court.

However, the Committee notes that before an interim order is made, the Supreme Court must have regard to whether there are matters that would, if proved, justify the making of an extension order at any subsequent hearing, and the appropriate term of such an order. The Committee makes no further comment.

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

Commencement by proclamation – Crimes Legislation Amendment Bill 2018; Victims Rights and Support Amendment (Motor Vehicles) Bill 2018; Mental Health (Forensic Provisions) Amendment (Victims) Act 2018

The Committee prefers legislation to commence on a fixed date or on assent, rather than by proclamation. However, the Committee notes the number of reforms to numerous Acts and the changes to court procedures and legal processes that may require time to implement. The Committee makes no further comment.

7. FAIR TRADING LEGISLATION AMENDMENT (REFORM) BILL 2018; CHARITABLE FUNDRAISING AMENDMENT BILL 2018

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

Significant increase in penalties – Charitable Fundraising Amendment Bill 2018

The Committee notes that the Bill increases the maximum penalties for several offences contained in the Act, some up to two to four times as much for the maximum amount of penalty units or imprisonment. The Committee acknowledges that the Bill follows the recommendations of the *Public Inquiry under the Charitable Fundraising Act 1991*, which included a recommendation that 'consideration be given to increasing maximum penalties in the Act to a level that may engender more respect for and compliance with the statutory regulation of charitable fundraising'. In light of the recommendations of the public inquiry and the purpose of deterring charitable fraud the Committee makes no further comment.

Right to privacy – Fair Trading Legislation Amendment (Reform) Bill 2018

The Bill amends the *Tow Truck Industry Act 1998* to permit the Secretary, for the purposes of the administration of the Act, to enter into arrangements with the Commissioner of Police for the supply to the Secretary of information contained in records of the NSW Police Force and for the for the supply to the Commissioner of Police of information contained in the register kept under section 39 of this Act. The Committee notes that disclosure of this information is done under good faith and does not constitute a contravention of the *Privacy and Personal Information Protection Act 1998*. However, given that this information can be supplied without the consent of the information's owner (in this case tow truck operator licensees and drivers) the Committee draws this provision to the attention of the parliament as to whether it unduly encroaches on the right to privacy of these persons.

The Bill also amends the *Associations Incorporations Act 2009* to permit information sharing between the Secretary and the relevant agency, which may include an agency of the State, Commonwealth, or another State or Territory. The Committee notes that this provision relates to information regarding the registration of associations that are constituted for the purpose of engaging in small-scale, non-profit and non-commercial activities. The Committee draws this to the attention of the Parliament as to whether the provision unduly encroaches on the right to privacy or confidential information for persons and organisations operating under the Act.

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

Wide powers of investigation and enforcement – Charitable Fundraising Amendment Bill 2018

The Committee notes that the Bill contains a number of enforcement and investigative powers that may be authorised by the Secretary or an authorised officer. These include powers of entry, powers to do things at the premises, and provision of information and documents. The Committee refers the issue to Parliament for its consideration of whether these provisions are unduly wide and may potentially encroach on personal rights and liberties.

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

Commencement by proclamation – Charitable Fundraising Bill 2018 and Fair Trading Legislation Amendment (Reform) Bill 2018

The Committee notes that the cognate Bills commence by proclamation. The Committee generally prefers that Acts commence on a particular date or by assent to afford certainty of the commencement of the provisions. However, as the Bills implement a number of provisions over several Act and industries, including a new framework for oversight and enforcement of the *Charitable Fundraising Act 1991*, a flexible start date may afford more time to implement these changes. 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 delegated to the regulations/Offences created by the regulations – Charitable Fundraising Amendment Bill 2018

The Committee notes that the Bill contains several provisions that delegate matters to the regulations, including provisions relating to appeals conducted by persons engaged in business or otherwise deriving benefit, conditions of authority, suspension or cancellation or authority, and annual returns and audit matters.

The Bill also contains a provision that permits the regulations to create offences punishable by a maximum penalty of 50 penalty units regarding conditions of the authority.

The Committee generally prefers that substantive matters are dealt with in the principal Act to afford parliamentary scrutiny. Given that these matters deal with requirements that must be complied with by persons operating under the Act and may create offences, the Committee considers that these may involve substantive matters. The Committee refers these issues to the Parliament for their consideration of whether the bill insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

8. GAMBLING ADVERTISING PROHIBITION BILL 2018*

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

Right to freedom of expression

In creating several offences relating to the use or display of gambling advertising, the Bill may be seen to trespass on the right to freedom of expression, which is a right that can extend to commercial advertising. However, the right is not absolute and can be limited if for a legitimate objective in a way that is reasonable, necessary and proportionate.

Given that other activities which may be perceived by some to be socially harmful, such as smoking, have been subject to restrictions on advertising, and that the proposed maximum penalties may not be excessive, the Committee makes no further comment.

Right to property

The Bill allows an authorised officer to enter a premises to remove or obscure a gambling advertisement pursuant to an order of the court. The Committee notes this may be seen to trespass on the right to property. However, given that there may be a public interest in restricting gambling advertising on certain premises (particularly some commercial premises), and noting that the power of entry is supervised by a court, the Committee makes no further comment.

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

Elements of offences deferred to regulations

The Bill creates several offences relating to gambling advertising. Some of the elements of these offences appear to be deferred to the regulations. The Committee prefers that all the elements of an offence are outlined in principal legislation and refers this matter to Parliament for its further consideration.

9. GOVERNMENT TELECOMMUNICATIONS BILL 2018

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

Commencement by proclamation

The Committee generally prefers Acts to commence on assent or a specified date. Commencement by proclamation delegates to the Executive the power to commence an Act on a day, or days, of its choosing. However, the Committee notes that the Bill creates a new Authority to manage the Government Radio Network and commencement by proclamation may assist with any necessary administrative arrangements that may be involved in that process. The Committee makes no further comment.

10. NATIONAL PARKS AND WILDLIFE AMENDMENT (TREE THINNING OPERATIONS) BILL 2018*

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

Ill-defined powers

Under the Bill, the Chief Executive of the Office of Environment and Heritage has the power to grant an authority to a person to undertake tree thinning operations in the Murray Valley and Pilliga national parks, and to remove and sell any timber or timber products obtained from those operations.

The provision does not identify matters that the Chief Executive should be satisfied of before granting an authority, and also does not contain an express power to impose conditions on the authority.

In circumstances where national parks are ordinarily subject to extensive protections, including in relation to forestry operations, the Committee notes that the provision may constitute an ill-defined administrative power. As such the Committee refers to Parliament the question of whether the provision and its drafting is appropriate in the circumstances.

11. PLANNING LEGISLATION AMENDMENT (GREATER SYDNEY COMMISSION) BILL 2018

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

The Bill commences on a day or days to be appointed by proclamation. The Committee generally prefers that Acts commence on assent or a fixed date given that to do otherwise may not afford an appropriate level of parliamentary scrutiny. Although it may be administratively convenient that some sections of the Bill commence on proclamation, the Committee refers to Parliament the question of which parts of the Bill may be suitable to commence on proclamation.

Henry VIII clause

The Bill contains a Henry VIII clause that allows the regulation to amend the *Greater Sydney Commission Act 2015* to alter the functions of the Greater Sydney Commission in relation to certain areas.

The Committee regularly comments on the use of Henry VIII clauses, which are clauses that enable regulations to amend principal legislation. The Committee prefers that amendments to principal legislation are made by way of amending Acts, which are subject to a greater degree of parliamentary scrutiny. As such, the Committee draws this provision to the attention of the Parliament.

12. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (NO 2) 2018

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

13. SURVEILLANCE DEVICES AMENDMENT (STATUTORY REVIEW) BILL 2018; TERRORISM (POLICE POWERS) AMENDMENT (STATUTORY REVIEW) BILL 2018; ROAD TRANSPORT AMENDMENT (NATIONAL FACIAL BIOMETRIC MATCHING CAPABILITY) BILL 2018

Trespasses unduly on personal rights and liberties: s 8A(b)(i) of the LRA*Right to humane treatment in detention - Terrorism (Police Powers) Amendment (Statutory Review) Bill 2018*

The TPP Bill allows strip searches to be conducted in public places in certain circumstances. The Committee understands that this would align the strip search provisions in the TPP Act with existing provisions in LEPR in accordance with a recommendation of the statutory review.

Noting the safeguards in place and the higher threshold which applies to strip searches not conducted at a police station, the Committee makes no further comment.

Right to privacy - Terrorism (Police Powers) Amendment (Statutory Review) Bill 2018

The TPP Bill proposes that a police officer can take photograph or video recordings of terrorism suspects if the officer believes on reasonable grounds that it is necessary to do so for the purpose of documenting an illness or injury suffered while under investigative detention. A similar provision would apply to preventative detention.

The proposed amendment appears to implement a recommendation of the statutory review, which suggested that a similar provision would help ensure the welfare of detainees, ensure police are accountable for any injuries in custody and help protect police officers from false accusations. While the Committee acknowledges that the provision may breach a detainee's

right to privacy, the Committee notes the policy reasons for the amendment and makes no further comment.

Right to access legal representation/right to fair trial - Terrorism (Police Powers) Amendment (Statutory Review) Bill 2018

The TPP Bill regulates the circumstances in which a person in investigative detention is able to contact a lawyer. Such contact is limited to visits and telephone calls, which may be monitored by the Police.

The Committee notes that the proposed restrictions may trespass on a person's right to access legal representation by limiting contact with their lawyer, including by not allowing written communication.

In addition, the ability to monitor a person's communications with their lawyer may prejudice their right to a fair trial, including through potentially assisting the prosecution or defendant (depending on the nature of proceedings) to build its case. However, the statutory review suggests that a number of prominent stakeholders, including the Bar Association, supported the amendments that required detainees to be informed that their interactions with legal representatives were being monitored.

Although the proposed amendments are part of a suite of potential safeguards relating to legal representation, they still include restrictions on access to such representation and it is incumbent upon the Committee to note provisions which compromise the ability of detainees to access legal representation and receive a fair trial. The Committee therefore refers the appropriateness of these provisions to the Parliament for its further consideration.

Use of surveillance devices without a warrant - Surveillance Devices Amendment (Statutory Review) Bill 2018

The SD Bill proposes that optical surveillance devices may be used without a warrant in the context of an 'authorised operation' where a law enforcement officer is acting under an assumed identity. Generally, an 'authorised operation' does not require a warrant to be issued by a court but instead requires permission from the head of the relevant law enforcement agency.

The Committee notes that the amendment appears to mirror an existing exception to the requirement that listening devices require a warrant. The amendment also seeks to implement a recommendation of the statutory review.

While the Committee understands that the amendment extends an exception that currently applies to listening devices to optical surveillance devices, the Committee notes that the use of surveillance devices without a warrant can impact on an individual's right to privacy and is not subject to judicial oversight. The Committee therefore refers this issue to Parliament.

Right to privacy - Surveillance Devices Amendment (Statutory Review) Bill 2018

The SD Bill proposes that a law enforcement agency will no longer be required to obtain a revocation of a surveillance device warrant if that warrant will cease to be in force within 5 days after the day on which the chief executive officer is satisfied that the use of a surveillance device was no longer necessary.

The Committee notes that the proposed amendment may be seen to impact on the right to privacy by allowing a warrant to continue in circumstances where the relevant agency is satisfied that the device authorised by the warrant is no longer actually required.

However, the Committee understands that a law enforcement agency will still be required to discontinue use of a surveillance device authorised by a warrant if satisfied that the use of that device is no longer necessary. Noting also that the amendment will only apply to warrants that are about to expire, the Committee makes no further comment.

Right to privacy - Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018

The Face Matching Bill enables 'authorised government agencies' to download photographs and associated personal information from the National Facial Biometric Matching Capability, a national database of photographs, names, addresses and other personal information. Legislative privacy protections which would normally apply to the collection of such information will not apply, including the usual requirement that a government agency inform individuals of matters such as why their personal information is being collected, and whether the supply of that information is voluntary.

Authorised government agencies are able to keep and use the collected information for any lawful purpose in connection with the exercise of their functions.

Although the second reading speech notes that the Capability has inbuilt safeguards and has been subject to privacy assessments, the Committee notes that the proposed amendments trespass on an individual's privacy and refers the question of whether this is appropriate to Parliament.

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

Ill-defined terms and powers - Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018

The Face Matching Bill empowers an 'authorised government agency' to access and use information from the Capability for 'any lawful purpose in connection with the exercise of its functions.'

'Authorised government agency' is broadly defined and may extend to any government agency nominated in the Intergovernmental Agreement (IGA), as well as agents of the roads authority, which could potentially include private contractors. It is noted that the IGA will not be subject to parliamentary scrutiny as it is not a document which is tabled in Parliament and in any event it can be varied from time to time by the parties to the IGA.

Under the Bill, an authorised government agency may keep and use photographs and associated personal information 'for any lawful purpose in connection with the exercise of its functions.' There is no guidance as to what constitutes a lawful purpose or what functions of an agency may be relevant to the use of the information.

The Committee notes that the Face Matching Bill does not clearly identify which government agencies will be able to access the Capability, and also suggests that the information obtained can be used for a broad array of functions.

The Committee acknowledges that the Face Matching Bill may assist government agencies to help prevent crime and identity theft and assist in law enforcement investigations. However, given that the Bill trespasses on an individual's right to privacy, the Committee refers to Parliament the question of whether the identified terms and phrases require further legislative clarification.

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

Commencement by proclamation - Surveillance Devices Amendment (Statutory Review) Bill 2018

The SD Bill commences on a day or days to be appointed by proclamation. The Committee generally prefers that Acts commence on assent or a fixed date given that to do otherwise may not afford an appropriate level of parliamentary scrutiny. However, the Committee notes that the administrative changes associated with establishing a new Surveillance Devices Commissioner may require the Act to commence by proclamation. As such the Committee makes no further comment.

Part One – Bills

1. Betting Tax Amendment (Point of Consumption) Bill 2018

Date introduced	17 October 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 provide for the imposition of a point of consumption betting tax, being a tax imposed on the wagering revenue of betting operators calculated by reference to bets placed by persons who are located in NSW.

BACKGROUND

2. The Bill introduces a 10 per cent point of consumption tax on betting in New South Wales, effective from 1 January 2019.
3. In the second reading speech, the Treasurer noted that the nature of online gambling had displaced the need for wagers to be placed in person and is not captured by the current tax framework, which places a tax on those wagers located in New South Wales.
4. The Treasurer noted that the Bill follows a public consultation process conducted by NSW Treasury and extensive consultation with the three peak bodies in the NSW Racing Industry – Racing NSW, Harness Racing NSW, and Greyhound Racing NSW.

ISSUES CONSIDERED BY COMMITTEE

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

Matters delegated to the regulations

5. The Bill amends the definitions contained in section 13 of the *Betting Tax Act 2001* to note that a bet includes a number of items, including 'any other similar agreement or arrangement prescribed by the regulations'.

The Bill defers some matters to the regulations, including further definitions of what constitutes a bet. Given that the Bill pertains to the collection of a consumption betting tax, the Committee considers that the definition of 'bet' is a substantive matter of this Bill. The Committee generally prefers that substantive matters are dealt with in the principal legislation, rather than being deferred to the regulations. The Committee refers this issue to the Parliament for its consideration of whether it insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

2. Building and Development Certifiers Bill 2018

Date introduced	17 October 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Portfolio	Innovation and Better Regulation

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

- a) to provide for the registration of persons to carry out certification work,
- b) to place certain obligations on persons who are registered (registered certifiers) including with regard to indemnity and avoiding conflicts of interest,
- c) to permit the Secretary of the Department of Finance, Services and Innovation (the Secretary) to take disciplinary action against registered certifiers,
- d) to provide for the accreditation of persons to carry out regulated work,
- e) to provide for the approval of certain bodies corporate as accreditation authorities to exercise accreditation functions with respect to those persons,
- f) to provide for the authorisation of persons as authorised officers and to set out the functions of authorised officers,
- g) to set out the functions of the Secretary under the proposed Act,
- h) to repeal the Building Professionals Act 2005, the Building Professionals Amendment Act 2008 and the Building Professionals Regulation 2007,
- i) to amend the Home Building Act 1989 to require consumers to be given information about the role of registered certifiers before entering certain contracts and to prevent consumers being unduly influenced in the selection of a registered certifier with respect to work carried out under those contracts,
- j) to make consequential amendments to other Acts and instruments.

BACKGROUND

2. *The Building and Development Certifiers Bill 2018* formed part of the Government's response to the independent review of *the Building Professionals Act 2005*.
3. In his second reading speech, the Minister noted the importance of certifiers in ensuring the safety of construction and building works and to act in the best interests of the public. The Bill introduces a new regulatory framework that requires certifiers and body

corporates who wish to undertake certification work to be 'registered' by the Secretary of the Department of Finance, Services and Innovation.

4. In addition, the Bill provides the Secretary with powers to take disciplinary action against registered certifiers and provides authorised officers, that have lawfully entered a premise, with powers to search and seize.

ISSUES CONSIDERED BY COMMITTEE

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

Search and seizure /Right to privacy

5. Part 7, Division 4 of the Bill provides authorised officers with powers that may be exercised on any premises that are lawfully entered 'to do anything that in the opinion of the authorised officer is necessary to be done for an authorised purpose', including but not limited to:

- take and remove samples of a thing;
- examine, inspect and copy any records;
- seize anything that the authorised officer has reasonable grounds for believing is connected with an offence against the certification legislation;
- the power to use reasonable force to break open or otherwise access anything, including a floor or wall containing the thing;
- the power to seize anything connected with an offence including a thing to which an offence has been committed, and a thing that will afford evidence of the commission of the offence, a thing that was used for the purpose of committing the offence.

Given the broad powers for authorised officers to search and seize, the Committee is concerned that the broad powers that allow authorised officers to 'seize anything connected with an offence' or 'seize anything that an authorised officer has reasonable ground for believing is connected with an offence' may infringe on an individual's right to privacy as the officers are not required to specify the evidence which they are looking for. The Committee refers the matter to Parliament for its consideration of whether these provisions may unduly infringe on a person's right to privacy.

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

Ill and wide defined power

6. Division 5, Part 4 of the Bill provides the grounds on which the Secretary may take disciplinary action against a registered certifier. Before the Secretary can take disciplinary action against a registered certifier, proposed section 47 requires the Secretary to give the registered certifier an opportunity to show cause as to why disciplinary action should not be taken.

7. However, proposed section 47(7) provides that the Secretary may take immediate disciplinary action without taking any steps under this section if the Secretary is of the opinion that it is in the public interest to do so.

Proposed section 47(7) provides that the Secretary may take immediate disciplinary action without taking any steps to provide notice to show cause for the affected individual if the Secretary determines that it is in the public interest to take immediate action. The Committee is concerned that the Bill doesn't provide an explanation as to what matters may be considered to be within the public's interest. However, the Committee also notes the policy considerations of implementing a regulatory framework to provide safer buildings and a legal safeguard that a person aggrieved by the decision may apply to the Civil and Administrative Tribunal for an administrative review. As such, the Committee considers the matter to be reasonable under the circumstances.

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

Matters deferred to the regulations

8. There are a number of clauses in the Bill that leave matters to be determined by the regulations. These include provisions 10(3), which provides grounds for the Secretary to refuse an application for registration, and 16(g), which provides grounds for the Secretary to suspend or cancel a registration.

Given the impact that suspending or cancelling a registration or refusing an application for registration may have on an individual, the Committee considers that it would be more appropriate for the grounds for refusing, suspending or cancelling a registration be specified in the principal legislation rather than deferred to the regulations.

Commencement by proclamation

9. Part 1 of the Bill provides that the Act commences on a day or days to be appointed by proclamation.

The Committee prefers legislation to commence on assent or a fixed date. However, given the Bill implements a new regulatory framework the Committee considers commencement by proclamation of the Bill is reasonable under the circumstances.

3. Combat Sports Amendment Bill 2018

Date introduced	17 October 2018
House introduced	Legislative Council
Minister responsible	The Hon. Stuart Ayres MP
Portfolio	Sport

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

- a) to create a new object of the *Combat Sports Act 2013* (the principal Act),
- b) to provide that a registration under the principal Act may be renewed,
- c) to clarify which combat sport contests are professional combat sport contests,
- d) to remove a waiting period for registration as a combatant,
- e) to provide for the automatic imposition of prescribed conditions on a person's registration,
- f) to remove gender specific language,
- g) to rename cautions as warnings,
- h) to require risks of harm to be serious in order to prevent or stop combat sport contests,
- i) to make provision with respect to medical examinations of combatants,
- j) to provide for the giving of directions by the Combat Sports Authority of New South Wales (the Authority), combat sport inspectors and police officers,
- k) to permit a combatant's trainer or second to require a referee to stop a combat sport contest if the trainer or second is concerned for the combatant's health or safety,
- l) to prevent the disclosure of criminal information when decisions based on the information are administratively reviewed,
- m) to extend information sharing provisions in the principal Act to information about promoters.

BACKGROUND

2. In his Second Reading Speech to *Parliament*, the Hon Scott Farlow MLC on behalf of the Hon Don Harwin MLC stated that the *Combat Sports Amendment Bill 2018* amends the *Combat Sports Act 2013* to make improvements to the regulation of combat sports in New

South Wales. Earlier in 2018, the Minister for Sport asked the Combat Sports Authority to undertake a comprehensive review of the Act.

3. The Minister requested that the authority particularly examine recommendations of the Deputy State Coroner following the inquest into the tragic death in 2015 of professional boxer David Browne. To inform its review, the Authority released a consultation paper and undertook widespread public consultation across New South Wales. It also established a medical advisory committee made up of doctors and industry representatives to provide advice to the Authority on the Deputy State Coroner's recommendations from a medical expert perspective.
4. The Authority identified legislative changes that can be made immediately to improve the regulation of combat sports in New South Wales. Mr Farlow stated that those legislative changes are supported by the Government and are the subject of the *Combat Sports Amendment Bill 2018*.

ISSUES CONSIDERED BY COMMITTEE

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

Procedural Fairness

5. Under section 77 of the *Combat Sports Act 2013* (the Act), a person may apply to the Civil and Administrative Tribunal for an administrative review of certain decisions made under the Act. Section 78(1) of the Act currently provides that in determining such an application, where its decision is made on the basis of Police advice, the Tribunal is to ensure that it does not disclose the existence or content of any criminal intelligence report or other criminal information in its reasons for decision, or otherwise, without the approval of the Commissioner of Police.
6. Similarly, Schedule 1, Clauses 28-30 of the Bill, provide that a criminal intelligence report or other criminal information disclosed by the Commissioner of Police to the Combat Sports Authority about an applicant for registration under the Act is protected from disclosure when a decision about the application is administratively reviewed.

The Bill provides that where a person applies to the Tribunal for administrative review of a registration decision made under the Act, and the Tribunal's decision is made on the basis of a criminal intelligence report or other criminal information disclosed by the Police Commissioner, the Tribunal must ensure that it does not disclose the existence or content of that report or information without approval of the Police Commissioner. This may affect a person's rights to procedural fairness, in particular, their ability to respond to information being used to deny them registration under the Act and the right to be given full and complete reasons for a decision that affects them. This consideration must of course be balanced with security considerations. The Committee refers the issue to Parliament for further consideration.

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

Non-reviewable Decisions

7. Under Schedule 1, Clause 21 of the Bill, the Combat Sports Authority, a combat sport inspector, or a police officer may issue a direction not to hold or participate in a combat sport contest. Such decisions do not appear to fall into the category of decisions made under the *Combat Sports Act 2013* that are reviewable by the Civil and Administrative Tribunal (see section 77 of the Act).

By failing to provide for certain decisions around holding or participating in a combat sport contest to be reviewable, the Bill excludes a right to the independent review of such decisions. The Committee refers the matter to Parliament for further consideration.

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

Commencement by proclamation

8. Clause 2 of the Bill provides that the proposed Act is to commence on a day or days to be appointed by proclamation.

The Committee prefers legislation to commence on a fixed date or on assent, not by proclamation.

4. Conveyancing Legislation Amendment Bill 2018

Date introduced	17 October 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 *Conveyancing Act 1919* and the *Real Property Act 1900*:
 - a) to introduce vendor disclosure requirements in relation to off-the-plan contracts to provide purchasers with additional information and give purchasers access to remedies and relief where disclosure is ineffective, and
 - b) to support the transition to paperless conveyancing by removing impediments to electronic land transactions, and
 - c) to make other miscellaneous and consequential amendments.

BACKGROUND

2. This Bill introduces protections for purchases of residential properties off-the-plan with the main reform being a requirement for a disclosure statement containing a copy of the draft plan to be attached to an off-the-plan contract before being signed by the purchaser. The Bill also extends a purchaser's cooling off period from five days to ten days after contracts have been exchanged.
3. In addition, the Bill introduces amendments to facilitate land transactions to be dealt with electronically.

Issues considered by the Committee

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

Commencement by proclamation

4. The provisions in this Bill commences on assent, however the provisions requiring disclosure statements being attached to off-the plan contracts commence by proclamation.

The Committee generally prefers legislation to commence on assent or a specified date. Commencement by proclamation delegates to the executive the power to commence an Act on a day, or days, of its choosing.

The Committee notes that most of the provisions in the Bill commence on assent except for those concerning the requirements to attach disclosure statements to off-the-plan contracts. The Committee considers that commencement by proclamation is reasonable in these circumstances as these provisions place new obligations on parties to a contract and time may be required to ensure all persons affected are adequately informed. The Committee makes no further comment.

5. Crimes (Administration of Sentences) Legislation Amendment Bill 2018

Date introduced	17 October 2018
House introduced	Legislative Council
Minister responsible	The Hon. David Elliott MP
Portfolio	Corrections

PURPOSE AND DESCRIPTION

1. The objects of this Bill are to amend the *Crimes (Administration of Sentences) Act 1999*, the *Children (Detention Centres) Act 1987* and regulations made under those Acts as follows:
 - (a) to prohibit sexual conduct or intimate relationships between correctional and other officers who work with inmates or persons on parole or serving sentences in the community and which result in security issues or compromise the administration of sentences,
 - (b) to prohibit the possession of remotely piloted aircraft in correctional centres, correctional complexes and certain facilities within those complexes and children's detention centres,
 - (c) to prohibit the possession and operation or attempted operation of remotely piloted aircraft in certain airspace above those places and above land in the vicinity of those places in a manner that is likely to threaten the good order or security of those places,
 - (d) to provide for exceptions to the proposed offences involving remotely piloted aircraft and to enable a 2 year period in which to commence proceedings for an offence relating to remotely piloted aircraft involving correctional centres, correctional complexes and certain facilities within those complexes,
 - (e) to provide for circumstances in which force may be used by correctional officers against visitors,
 - (f) to make other minor and consequential amendments.

BACKGROUND

2. In his Second Reading Speech to Parliament, the Hon Scott Farlow MLC, on behalf of the Hon Niall Blair MLC, stated that the Bill amends the *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987* to improve security in correctional centres and juvenile justice centres by prohibiting drones from being flown above places of detention; prohibiting Corrective Services employees engaging in sexual and intimate relationships with sentenced and unsentenced inmates and offenders; and providing clarity on when correctional officers may use reasonable force against visitors.

ISSUES CONSIDERED BY COMMITTEE

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

3. Schedule 1, Clause 1 of the Bill re-inserts a reference to re-integration home detention orders in section 181 of the *Crimes (Administration of Sentences) Act 1999*, which enables warrants committing an offender to a correctional centre to be issued when community-based sentencing orders are revoked. This reference was inadvertently omitted from section 181 when the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* came into force on 24 September 2018.
4. The amendment will apply retrospectively from 24 September 2018 and provide that any warrant issued by the Parole Authority in relation to the revocation of a reintegration home detention order will be retrospectively validated.
5. The Committee will always comment where legislative provisions are drafted to have retrospective effect. Retrospectivity is contrary to the rule of law which allows citizens knowledge of what the law is at any given time, so they might order their conduct accordingly. It is of particular concern if legislative provisions are drafted to impose criminal liability on a person for conduct which, at the time it was done, was legal.

The Committee notes that although the Bill contains a retrospective provision, the provision does not create new offences or impose criminal liability on a person for conduct which was legal at the time it was committed. Rather, it relates to the administration of sentences, retrospectively validating the incarceration of persons who have been found guilty of criminal offences and who have had their reintegration home detention orders validly revoked. It therefore does not fall within the most concerning category of retrospectivity cases. For these reasons, the Committee makes no further comment.

Reversal of the onus of proof

6. Schedule 1, Clause 4 of the Bill provides that in any proceedings for an offence against a provision of Part 13A of the *Crimes (Administration of Sentences) Act 1999*, the onus of proving that a person had lawful excuse (as referred to in the provision) lies with the defendant. Similarly, Schedule 1, Clause 5 of the Bill provides that if a person is prosecuted for possessing a remotely piloted aircraft in a correctional centre, it is a defence if the defendant establishes that the possession was not for the purpose of threatening the good order or security of detention premises.
7. By reversing the onus of proof which traditionally requires the prosecution to prove the accused person is guilty of the prescribed conduct before imposing a punishment, the Bill may impact on the presumption of innocence.

The Committee notes that the Bill contains provisions reversing the onus of proof. However, the reversed onus of proof does not relate to all elements of the subject offences. It applies only for the purposes of establishing a defence, knowledge about which may lie entirely with the defendant. Similarly, the provisions seek to promote security and good order within the potentially volatile correctional environment. In the circumstances, the Committee makes no further comment.

Right to personal physical integrity

8. Schedule 1, Clause 7 of the Bill authorises the use of force by correctional officers against visitors to protect the officers or other persons from attack or harm, to prevent damage to a place of detention, to prevent unlawful entry or attempts to free an inmate, to remove a visitor who has not complied with a request to leave a place of detention and for the purpose of exercising existing powers (including powers of search, arrest and detention). The amendment also authorises correctional officers to use handcuffs or other equipment prescribed by the regulations for the purpose of restraining a visitor.
9. The Committee notes that the provisions will impact on the right to personal physical integrity. However, Schedule 1, Clause 7 of the Bill also contains a number of safeguards. First, the nature and extent of the force that may be used in relation to a visitor are to be dictated by the circumstances and:
 - The force used must not exceed the force that is reasonably necessary for protection, or to maintain the good order and security of a place of detention, having due regard to the personal safety of correctional officers and others.
 - The infliction of injury on a visitor is to be avoided if at all possible.
 - If a visitor is restrained, once the visitor is satisfactorily restrained, no further force must be used on the visitor other than the force reasonably necessary to maintain that restraint.
10. Similarly, any correctional officer who uses force on a visitor must, as soon as reasonably practicable, give a written report about the use of force to the governor of the place of detention.

The Committee notes that by authorising the use of force by correctional officers against visitors, the Bill impacts on the right to personal physical integrity. However, the force can only be used in prescribed circumstances that relate to security and good order within correctional facilities. Similarly, the Bill contains a number of safeguards around the use of this power. These include that the force must not exceed the force that is reasonably necessary for protection, or to maintain the good order and security of a place of detention; and where force is used, a written report about it must be supplied to the governor of the place of detention. In the circumstances, the Committee makes no further comment.

Inappropriately delegates legislative powers: s 8A(b)(iv) of the LRA*Matters which should be set by Parliament*

11. Schedule 1, Clause 5 of the Bill makes it an offence, without lawful excuse, to have a remotely piloted aircraft in or near a correctional centre or correctional complex. It also makes it an offence to possess or operate a remotely piloted aircraft within the airspace at or below 400 feet above a correctional centre or complex, or above land in the vicinity of those places. These offences attract a maximum penalty of a \$2,200 fine, or 2 years' imprisonment, or both.
12. However, it will not be an offence if the person does the acts prohibited for a purpose prescribed by the regulations, with the authorisation of a person, or a member of a class of persons, prescribed by the regulations, or for a reason prescribed by the regulations.

The Committee notes that the Bill provides that a person will not be guilty of certain offences created by the Bill if the person has acted because of a purpose prescribed by the regulations, or with the authorisation of a person prescribed by the regulations, or for a reason prescribed by the regulations. The Committee considers that, to foster appropriate parliamentary oversight, matters such as these – the details of the defences to offences that attract significant maximum penalties – should be contained in primary, not subordinate legislation. However, regulations are subject to disallowance by Parliament under section 41 of the *Interpretation Act 1987*. Given this safeguard, the Committee makes no further comment.

6. Crimes Legislation Amendment Bill 2018; Crimes (Domestic and Personal Violence) Amendment Bill 2018; Mental Health (Forensic Provisions) Amendment (Victims) Bill 2018; Victim Rights and Support Amendment (Motor Vehicles) Bill 2018

Date introduced	17 October 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

Crimes Legislation Amendment Bill 2018

1. The objects of this Bill are as follows:

- a) to amend the *Crimes (Domestic and Personal Violence) Act 2007* to make further provision for the period for which apprehended domestic violence orders remain in force,
- b) to authorise senior police officers to provisionally vary the conditions of apprehended domestic violence orders made under the *Crimes (Domestic and Personal Violence) Act 2007* to address an increased risk of domestic violence against a protected person,
- c) to provide that a person is not ineligible to receive victims support under the *Victims Rights and Support Act 2013* in respect of a terrorist act involving the use of a motor vehicle,
- d) to extend the types of agencies that may provide documentary evidence to support applications for victims support under the *Victims Rights and Support Act 2013* to include non-government agencies funded by the Commonwealth,
- e) to include in the *Crimes Act 1900* an indictable offence of intentionally choking, suffocating or strangling another person without the other person's consent and provide for the offence to be dealt with summarily in accordance with *Criminal Procedure Act 1986* unless the prosecutor or person charged elects otherwise.

Crimes (Domestic and Personal Violence) Amendment Bill 2018

2. The objects of this Bill are:

- a) to make it clear that cyberbullying is a form of intimidation, and
- b) to provide that stalking may include conduct that involves contacting or otherwise approaching another person using the internet or any other technologically assisted means.

Mental Health (Forensic Provisions) Amendment (Victims) Bill 2018

3. The object of this Bill is to amend the *Mental Health (Forensic Provisions) Act 1990* (the Principal Act) and other legislation as follows:

- a) to enable a court to obtain a report by a psychiatrist about an accused person before determining what orders to make about the accused person following a verdict about the accused person at a special hearing or a verdict of not guilty by reason of mental illness,
- b) to provide that periods of unlawful absences by forensic patients from mental health or other facilities are not to be included when determining whether a limiting term has expired,
- c) to enable the Mental Health Review Tribunal (the Tribunal) to make an order for the temporary detention of a person who has been apprehended after breaching a condition of release or leave,
- d) to provide for submissions to be made by a victim of a forensic patient to the Tribunal when the release of or a grant of leave to the patient is being considered,
- e) to establish a Victims Register of victims of certain forensic patients,
- f) to provide for information to be given to registered victims,
- g) to extend the maximum period for an interim order extending a person's status as a forensic patient,
- h) to prevent the destruction of forensic material taken from a suspect if the person is found not guilty by reason of mental illness or a limited finding of guilt has been made at a special hearing following a finding that the person is unfit to be tried for an offence,
- i) to provide for victim impact statements and submissions by designated carers and principal care providers in proceedings where an accused person is found not guilty by reason of mental illness or a verdict has been reached at a special hearing following a finding that an accused person is unfit to be tried for an offence,
- j) to prevent disclosure under access to government information legislation of certain information relating to functions of the Commissioner of Victims Rights, to set out matters comprising the Charter of rights of victims of forensic patients,
- k) to make other minor amendments and to enact provisions of a savings nature consequent on the enactment of the proposed Act.

Victims Rights and Support Amendment (Motor Vehicles) Bill 2018

4. The object of this Bill is to ensure that if a person is intentionally killed in a crime involving a motor vehicle and another person has been charged with the murder of that person, a member of the immediate family of the deceased person will be eligible (if otherwise qualified) to receive victims support under the *Victims Rights and Support Act 2013* despite the general rule that victims are not eligible for support under that Act in relation to violence or injuries involving motor accidents.

BACKGROUND

5. These Bills introduce a number of reforms aimed at improving protections for victims of crime.
6. The *Crimes Legislation Amendment Bill 2018* introduces reforms to the offences of choking, suffocating and strangulation to capture a broader range of behaviour. The Bill also introduces reforms to the apprehended domestic violence order regime, including introducing default periods and enabling police officers to provisionally vary conditions of an order in urgent circumstances. In the second reading speech, the Attorney General indicated that the reforms to the apprehended domestic violence order regime will be monitored by the Department of Justice to ensure they are meeting their policy objectives.
7. The *Victims Rights and Support Amendment (Motor Vehicle) Bill 2018* extends access to the Victims Support Scheme to family members of victims of vehicular homicide and the *Crimes (Domestic and Personal Violence) Amendment Bill 2018* clarifies that the offences of stalking and intimidation can be committed by using the internet.
8. The *Mental Health (Forensic Provisions) Amendment (Victims) Bill 2018* gives effect to the findings and recommendations from the review of the Mental Health Tribunal by the Hon Anthony Whealy QC published in June 2018.

ISSUES CONSIDERED BY THE COMMITTEE

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

Limits on judicial discretion - Crimes Legislation Amendment Bill 2018

9. Proposed section 79A provides that the default period for an apprehended domestic violence order is 2 years for a defendant who is 18 years of age or older and 1 year for a defendant who is under 18 years.
10. A court may specify a different period than the default period if it is of the opinion that a different period is sufficient to ensure the safety and protection of the protected person. In assessing whether to specify a different period than the default period the court may have regard to factors including: the period sought by the applicant; the nature, history and seriousness of the domestic violence; and any relevant circumstances of the defendant.

The Bill provides for default periods for apprehended violence orders. This limits the court's discretion to impose a period of time suitable to individual cases and without reference to a minimum standard. However, the Committee notes that the court maintains a discretion to depart from the default period where it considers a different period is sufficient to ensure the safety of the protected person. The Committee makes no further comment.

Freedom of movement/excessive punishment - Crimes Legislation Amendment Bill 2018

11. Proposed section 79B provides that a court, when determining the period of an apprehended domestic violence order, may determine that an order remain in force indefinitely.
12. Before determining an order remain in force indefinitely, a court must be satisfied that:
 - the applicant has sought an indefinite order;
 - the order relates to a defendant who is 18 years of age or older;
 - there are circumstances giving rise to a significant and ongoing risk of death or serious physical or psychological harm to the protected person or any dependants of the protected person; and
 - that risk cannot be adequately mitigated by an order of limited duration.
13. A person against whom an indefinite order is made may make an application for the variation or revocation of the order but only by leave of the court.

The Bill provides that certain apprehended domestic violence orders violence may be made for an indefinite period. Such orders would restrict the movement and freedoms of a person against whom such an order is made for an uncertain amount of time and with no requirement to periodically assess whether there has been any significant change in circumstances since the order was made.

However, the Committee notes the serious circumstances which are required to be present before an indefinite order may be made, including a significant and ongoing risk of death or serious physical or psychological harm to a protected person or any dependants of the protected person. The Committee also notes the rights of individuals to be protected against violence and abuse. In these circumstances, the Committee makes no further comment.

Access to appropriate review - Crimes Legislation Amendment Bill 2018

14. Proposed section 73A enables police to provisionally vary the conditions of an apprehended violence order in circumstances requiring an urgent response. At present, the conditions of an apprehended violence order may only be varied by a court.
15. A police officer must not make a variation unless a police officer has had regard to any views of the protected person and the circumstances of the defendant. The variation must also be approved by a senior police officer.
16. A police officer may only make a variation if there has been a change in circumstances and there is an increased risk to the protected person that requires an urgent response.
17. Notice of the police variation served on a defendant is to contain a direction for the appearance of the defendant at a court hearing on a day no later than 28 days after the variation takes effect. The specified day must also be the earliest date on which the matter can be listed at an appropriate court.

The Bill allows the police to vary the conditions of an apprehended domestic violence order in circumstances requiring an urgent response. Currently, such conditions may only be varied by a court where the individual circumstances of the case can be measured and assessed by judicial review. While the variations must go before a court within 28 days, and by the earliest date a hearing can be listed, there is a period of time where a person is subject to conditions that have not been imposed by a court of law.

However, the Committee notes the safeguards that operate before a variation may be made, including that the circumstances must require an urgent response and that any variation must be approved by a senior police officer. The Committee also notes the rights of individuals to be protected against violence and abuse and acknowledges that the nature of domestic violence often requires urgent interventions to be made to support victims. The Committee makes no further comment.

Freedom of movement - one – Mental Health (Forensic Provisions) Amendment (Victims) Bill 2018

18. Proposed section 75(1)(l) provides that the Mental Health Tribunal may impose monitoring conditions, including by electronic means, upon a forensic patient who is to be released or granted a leave of absence.
19. Under section 75 of the *Mental Health (Forensic Provisions) Act 1990* the Tribunal may impose conditions ranging from accommodation and living conditions to prohibitions or restrictions on frequenting or visiting places.
20. This amendment follows a recommendation from the Whealy Review which highlighted concern that some forensics patients may be granted release without appropriate supervision in some cases. The Review noted that it did not support the permanent use of ankle bracelets or other types of resource intensive monitoring available in the criminal justice system. Rather, the Review acknowledged advancements in mobile technology and considered treatment teams could be given the power to use GPS monitoring to monitor patients.

The Committee notes the Bill provides the Mental Health Tribunal the power to impose monitoring conditions, including by electronic means, upon a forensic patient on release or who has been granted a leave of absence. Imposing monitoring conditions may operate to restrict an individual's right to free movement and privacy. However, the Committee notes that the amendment flows from an independent review of the Mental Health Tribunal and is aimed at increasing community safety. The Committee makes no further comment.

Freedom of movement – two – Mental Health (Forensic Provisions) Amendment (Victims) Bill 2018

21. The Bill amends Schedule 1 of the *Mental Health (Forensic Provisions) Act 1990* to extend the period of time that an interim extension order can be made from 28 days to 3 months.
22. An interim extension order is an order extending a person's status as a forensic patient if, in proceedings on an application for an extension order, it appears to the Court:

- a) that the limiting term or existing extension order to which the forensic patient is subject will expire before the proceedings are determined, and
 - b) that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order.
23. Forensic patients can be persons who are detained in a mental health facility, correctional centre or other place, or released from custody subject to conditions.

The Committee notes that the Bill extends a person's status as a forensic patient under an interim order from 28 days to 3 months. This extends the period of time that a person may be subject to detention or conditions under an order which has not been assessed or finally determined by the Supreme Court.

However, the Committee notes that before an interim order is made, the Supreme Court must have regard to whether there are matters that would, if proved, justify the making of an extension order at any subsequent hearing, and the appropriate term of such an order. The Committee makes no further comment.

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

Commencement by proclamation – Crimes Legislation Amendment Bill 2018; Victims Rights and Support Amendment (Motor Vehicles) Bill 2018; Mental Health (Forensic Provisions) Amendment (Victims) Act 2018

24. Some provisions in the *Crimes Legislation Amendment Bill 2018* and cognate Bills commence by proclamation. Commencement by proclamation permits the Executive to commence an Act on a day, or days, of its choosing.
25. The Committee notes that in the Second Reading Speech, the Attorney General noted that for some provision in the Bills commencement by proclamation will ensure that all necessary system changes and training for courts and police have taken place before the provisions commence.

The Committee prefers legislation to commence on a fixed date or on assent, rather than by proclamation. However, the Committee notes the number of reforms to numerous Acts and the changes to court procedures and legal processes that may require time to implement. The Committee makes no further comment.

7. Fair Trading Legislation Amendment (Reform) Bill 2018; Charitable Fundraising Amendment Bill 2018

Date introduced	17 October 2018
House introduced	Legislative Council
Minister responsible	The Hon. Matt Kean MP
Portfolio	Innovation and Better Regulation

PURPOSE AND DESCRIPTION

Fair Trading Legislation Amendment (Reform) Bill 2018

1. The objects of this Bill are as follows:
 - a) to amend the *Fair Trading Act 1987* and the regulations made under that Act to do the following:
 - i. to enable the Commissioner for Fair Trading (the Commissioner) to publish certain information about licence holders and traders on the internet for free public access,
 - ii. to require suppliers to notify consumers about substantially prejudicial terms relating to the supply of goods or services and to disclose the existence of commissions and referral fees,
 - iii. to enable the regulations to prescribe information standards for the supply of goods or services and to create an offence for non-compliance with any such standard,
 - iv. to prevent non-disclosure agreements from limiting the information that may be provided to the Commissioner about complaints relating to the supply of goods or services,
 - b) to amend various Acts and regulations to provide for 1, 3 and 5 year licence terms and to allow a licence to be restored if an application for restoration is made within 3 months of the licence expiring,
 - c) to amend various Acts to allow the Commissioner to ignore the fact that a corporation is the subject of a winding up order or is in external administration when deciding whether the corporation (or a person managing the corporation) should hold a licence or other authority,
 - d) to make other miscellaneous amendments to various Acts and regulations relating to licensing and service agreements as follows:

- i. to amend the Home Building Act 1989 and the regulations made under that Act to provide that an authority for a special trade category continues in force until it is surrendered, suspended or cancelled and that it is a condition of the authority that the holder provides certain information to the Commissioner every 5 years and to include certain electrical and liquefied petroleum gas work in a caravan or recreational vehicle as specialist work,
 - ii. to amend the Motor Dealers and Repairers Act 2013 and the regulations made under that Act to allow licence holders to trade at premises that have been notified to the Commissioner and to allow the Commissioner to grant a specialised authority for certain work prescribed by the regulations,
 - iii. to amend the Strata Schemes Management Act 2015 to provide for the expiry of utility agreements with owners corporations,
 - iv. to amend the Tow Truck Industry Act 1998 to enable the Commissioner to exempt a person from the requirement to hold a licence or a drivers certificate under that Act and to enter into arrangements to supply the Commissioner of Police with information kept on the register of licences, drivers certificates and exemptions,
- e) to amend the Conveyancers Licensing Act 2003 and the Property, Stock and Business Agents Act 2002 to remove redundant provisions relating to record keeping and to streamline duplicative reporting requirements in those Acts,
- f) to dissolve certain advisory bodies established by the Fair Trading Act 1987 and the Home Building Act 1989,
- g) to amend various Acts to provide for modern methods of electronic service of documents and to authorise documents to be served by ordinary post instead of registered post,
- h) to provide for the use of approved forms under various Acts (instead of forms prescribed by regulations under those Acts),
- i) to remove provisions of Acts relating to false and misleading advertising that are also provided for by the Australian Consumer Law (NSW) and the Competition and Consumer Act 2010 of the Commonwealth,
- j) to remove redundant provisions of various Acts relating to the use of seals for the authentication of documents,
- k) to amend the Associations Incorporation Act 2009 to allow the Commissioner to exempt an association from financial reporting requirements,
- l) to repeal the Regulatory and Other Legislation (Amendments and Repeals) Act 2016 and the Workers Compensation Legislation Amendment Act 2000.

Charitable Fundraising Amendment Bill 2018

2. The object of this Bill is to amend the *Charitable Fundraising Act 1991* (the Principal Act) to give effect to certain recommendations contained in the Report of the Inquiry under

the *Charitable Fundraising Act 1991* undertaken by Justice Patricia Bergin and published in January 2018.

BACKGROUND

3. In the second reading speech, it was noted that the *Fair Trading Legislation Amendment (Reform) Bill 2018* intends to increase transparency and competition and help inform consumers of key information about goods and services they are looking to purchase. The amendments, the 'Better Business reforms', follow a consultation paper entitled 'Easy and Transparent Trading – Empowering Consumers and Small Business' released in July 2018.
4. In cognate with this Bill, the *Charitable Fundraising Amendment Bill 2018* implements recommendations arising from the *Public Inquiry under the Charitable Fundraising Act 1991*. The Bill contains amendments to ensure that NSW Fair Trading has sufficient oversight and powers to enforce the Act, to simplify the provisions and resolve inconsistencies with other State and Federal laws, and aims to maintain public confidence in donating to charities.

ISSUES CONSIDERED BY COMMITTEE

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

Significant increase in penalties – Charitable Fundraising Amendment Bill 2018

5. The Committee notes that the Bill increases the maximum penalty for conducting unlawful fundraising from 50 penalty units to 200 penalty units (s 9(1)).
6. The Bill introduces new offences that attract a maximum penalty of 200 penalty units, including offences related to the requirement for authority holders to notify the Secretary of certain matters (s 24A(4)) and offences relating to the remuneration of board members of charitable fundraising organisations (s 48(1)).
7. The Committee also notes that the Bill significantly increases the maximum term of imprisonment for some offences. For example, from 6 months to 12 months for false representations in the conduct of a fundraising appeal (s 13), and from 6 months to 2 years for offences in relation to proceeds of appeal (s 20(7)).

The Committee notes that the Bill increases the maximum penalties for several offences contained in the Act, some up to two to four times as much for the maximum amount of penalty units or imprisonment. The Committee acknowledges that the Bill follows the recommendations of the *Public Inquiry under the Charitable Fundraising Act 1991*, which included a recommendation that 'consideration be given to increasing maximum penalties in the Act to a level that may engender more respect for and compliance with the statutory regulation of charitable fundraising'.¹ In light of the recommendations of the public inquiry and the purpose of deterring charitable fraud the Committee makes no further comment.

¹ [Report of the Public Inquiry under the Charitable Fundraising Act 1991](#), p 546.

Right to privacy – Fair Trading Legislation Amendment (Reform) Bill 2018

8. Schedule 4 of the Bill contains miscellaneous amendments relating to licensing and service agreements in various Acts. Schedule 4.6 amends the *Tow Truck Industry Act 1998* and inserts new sections 95(1) and 95(1A) as follows:

(1) The Secretary may, for the purposes of the administration of this Act, enter into arrangements with the Commissioner of Police:

(a) for the supply to the Secretary of information contained in the records of the NSW Police Force, and

(b) for the supply to the Commissioner of Police of information contained in the register kept under section 39 of this Act.

(1A) A disclosure of information made in good faith under the arrangements does not constitute a contravention of any provision as to confidentiality in this Act and does not constitute a contravention of the *Privacy and Personal Information Protection Act 1998*.

The Bill amends the *Tow Truck Industry Act 1998* to permit the Secretary, for the purposes of the administration of the Act, to enter into arrangements with the Commissioner of Police for the supply to the Secretary of information contained in records of the NSW Police Force and for the supply to the Commissioner of Police of information contained in the register kept under section 39 of this Act. The Committee notes that disclosure of this information is done under good faith and does not constitute a contravention of the *Privacy and Personal Information Protection Act 1998*. However, given that this information can be supplied without the consent of the information's owner (in this case tow truck operator licensees and drivers) the Committee draws this provision to the attention of the parliament as to whether it unduly encroaches on the right to privacy of these persons.

9. Schedule 11 amends the *Associations Incorporation Act 2009* regarding information sharing agreement between the Secretary and the relevant agency. 'Relevant agency' is defined as 'an agency of the State, or of the Commonwealth or another State or a Territory, that exercises functions under an enactment with respect to associations registered under this Act or a corresponding law, or a person or body prescribed by the regulations.'

The Bill also amends the *Associations Incorporations Act 2009* to permit information sharing between the Secretary and the relevant agency, which may include an agency of the State, Commonwealth, or another State or Territory. The Committee notes that this provision relates to information regarding the registration of associations that are constituted for the purpose of engaging in small-scale, non-profit and non-commercial activities. The Committee draws this to the attention of the Parliament as to whether the provision unduly encroaches on the right to privacy or confidential information for persons and organisations operating under the Act.

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

Wide powers of investigation and enforcement – Charitable Fundraising Amendment Bill 2018

10. The Bill inserts Part 2A, which contains provisions relating to powers of enforcement and investigation. This includes the power of entry (section 25E), powers to do things at premises (section 25G), and provision of information and documents (section 25H).

The Committee notes that the Bill contains a number of enforcement and investigative powers that may be authorised by the Secretary or an authorised officer. These include powers of entry, powers to do things at the premises, and provision of information and documents. The Committee refers the issue to Parliament for its consideration of whether these provisions are unduly wide and may potentially encroach on personal rights and liberties.

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

Commencement by proclamation – Charitable Fundraising Bill 2018 and Fair Trading Legislation Amendment (Reform) Bill 2018

11. Section 2 of the *Charitable Fundraising Amendment Bill 2018* states that the bill is to commence on a day or days to be appointed by proclamation.
12. Section 2 of the *Fair Trading Legislation Amendment (Reform) Bill 2018* states that amendments contained in Schedule 1-5, 8 and 11 (other (other than Schedule 2.7 [2])) commence on 1 July 2020 or on an earlier day or days to be appointed by proclamation.

The Committee notes that the cognate Bills commence by proclamation. The Committee generally prefers that Acts commence on a particular date or by assent to afford certainty of the commencement of the provisions. However, as the Bills implement a number of provisions over several Act and industries, including a new framework for oversight and enforcement of the *Charitable Fundraising Act 1991*, a flexible start date may afford more time to implement these changes. 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 delegated to the regulations/Offences created by the regulations – Charitable Fundraising Amendment Bill 2018

13. The *Charitable Fundraising Amendment Bill 2018* includes several provisions that delegate matters to the regulations. These provisions include matters relating to: appeals conducted by persons engaged in business or otherwise deriving benefit (s 11(2)(a)); conditions of authority (s 19(3)); suspension or cancellation of authority (s 19A(2)); proceeds of appeal (s 20(10)); keeping of records (s 22(2A)); annual returns (s 23(1)(c)); audits (s 24(1)); authority holders to notify secretary of certain matters (s 24A(1)(j)); and authorised officers (s 25A(2)).
14. The Bill also contains a provision that permits the regulations to create offences under Section 19(3), which states that the regulations may provide that a contravention of a specified condition is an offence punishable by a penalty not exceeding 50 penalty units.

The Committee notes that the Bill contains several provisions that delegate matters to the regulations, including provisions relating to appeals conducted by persons engaged in business or otherwise deriving benefit, conditions of authority, suspension or cancellation or authority, and annual returns and audit matters.

The Bill also contains a provision that permits the regulations to create offences punishable by a maximum penalty of 50 penalty units regarding conditions of the authority.

The Committee generally prefers that substantive matters are dealt with in the principal Act to afford parliamentary scrutiny. Given that these matters deal with requirements that must be complied with by persons operating under the Act and may create offences, the Committee considers that these may involve substantive matters. The Committee refers these issues to the Parliament for their consideration of whether the bill insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

8. Gambling Advertising Prohibition Bill 2018*

Date introduced	18 October 2018
House introduced	Legislative Council
Member responsible	Rev. the Hon. Fred Nile MLC
	*Private member's Bill

PURPOSE AND DESCRIPTION

1. The object of the Bill is to discourage the proliferation of all forms of gambling:
 - a) by prohibiting advertising of existing forms of gambling and gambling facilities, and
 - b) by prohibiting advertising and other promotional activities aimed at publicising new forms of gambling and new gambling facilities, and
 - c) by prohibiting the use of any form of gambling to support the sponsorship of any government or community activities, including (but not limited to) sporting activities, and
 - d) by requiring studies and assessments to be made of the impact of existing gambling legislation on families and the community.

BACKGROUND

9. The second reading speech details the prevalence of gambling facilities in New South Wales and across Australia. For example, Rev. the Hon. Fred Nile MLC referred to a 2010 Productivity Commission inquiry which found that there were gambling facilities in approximately 6,800 hotels, pubs and clubs and 4,700 lottery outlets across Australia.

ISSUES CONSIDERED BY COMMITTEE

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

Right to freedom of expression

10. The Bill creates several offences relating to the use or display of gambling advertising or other promotional activities concerning gambling.

In creating several offences relating to the use or display of gambling advertising, the Bill may be seen to trespass on the right to freedom of expression, which is a right that can extend to commercial advertising. However, the right is not absolute and can be limited if for a legitimate objective in a way that is reasonable, necessary and proportionate.

Given that other activities which may be perceived by some to be socially harmful, such as smoking, have been subject to restrictions on advertising, and that the proposed maximum penalties may not be excessive, the Committee makes no further comment.

Right to property

11. Under the Bill, an authorised officer may enter premises to remove or obscure a gambling advertisement under the authority of an order made by the local court: proposed section 14.

The Bill allows an authorised officer to enter a premises to remove or obscure a gambling advertisement pursuant to an order of the court. The Committee notes this may be seen to trespass on the right to property. However, given that there may be a public interest in restricting gambling advertising on certain premises (particularly some commercial premises), and noting that the power of entry is supervised by a court, the Committee makes no further comment.

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

12. The Bill creates a number of offences relating to gambling advertising and other promotional activities which may publicise gambling. Some of the elements of these offences are deferred to the regulations, for example:
 - a) proposed section 7 creates an offence for displaying a gambling advertisement not in accordance with conditions, some of which will be prescribed in the regulations
 - b) proposed section 8(2) creates the offence of conducting a scheme 'prescribed by regulations' that promotes gambling, the whole or any part of which is implemented in New South Wales.

The Bill creates several offences relating to gambling advertising. Some of the elements of these offences appear to be deferred to the regulations. The Committee prefers that all the elements of an offence are outlined in principal legislation and refers this matter to Parliament for its further consideration.

9. Government Telecommunications Bill 2018

Date introduced	18 October 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Finance, Services and Property

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
 - a) to establish the New South Wales Government Telecommunications Authority (the Authority) to provide a network for operational communications services for government sector agencies,
 - b) to require government sector agencies to use that network for operational communications,
 - c) to provide for the networks of government sector agencies to be consolidated into the network provided by the Authority,
 - d) to create the offence of damaging or interfering with the network provided by the Authority.

BACKGROUND

2. This Bill repeals the current *Government Telecommunications Act 1991* after a review of the Act was conducted in 2017. Reasons for the Review included the age of the Act and the changes in technology since the Acts enactment.
3. In the Second Reading Speech, the Minister indicated that the Bill provides a legislative basis for the Critical Communications Enhancement Program (CCEP). The CCEP is a program to increase the coverage and capacity for the Government Radio Network for critical operational communications which support public agencies provide services across New South Wales.
4. In the Second Reading Speech, the Minister indicated that over the past 20 years some government agencies have operated separate networks in addition to the Government Radio Network. This Bill aims to bring all agency radio networks under one authority in order to improve the management of resources and provide better public safety outcomes.

ISSUES CONSIDERED BY THE COMMITTEE

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

Commencement by proclamation

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

The Committee generally prefers Acts to commence on assent or a specified date. Commencement by proclamation delegates to the Executive the power to commence an Act on a day, or days, of its choosing. However, the Committee notes that the Bill creates a new Authority to manage the Government Radio Network and commencement by proclamation may assist with any necessary administrative arrangements that may be involved in that process. The Committee makes no further comment.

10. National Parks and Wildlife Amendment (Tree Thinning Operations) Bill 2018*

Date introduced	18 October 2018
House introduced	Legislative Council
Member responsible	The Hon. Robert Brown MLC
	*Private member's Bill

PURPOSE AND DESCRIPTION

1. The object of the Bill is to authorise tree thinning operations to be carried out in the Murray Valley and Pilliga national parks, including the removal and sale of timber obtained from the carrying out of those operations.

BACKGROUND

2. The second reading speech indicates that tree thinning operations in the abovementioned national parks currently occurs 'but under difficult circumstances that cause cost to the taxpayer and is a problem for the Government and residents in the area.'
3. Mr Brown also referred to a three-year study undertaken by the Department of Primary Industries which finds that thinning cypress pine regrowth in the Pilliga national park improved biodiversity and helped restore native habitats.

ISSUES CONSIDERED BY COMMITTEE

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

Ill-defined powers

4. The Bill provides that the Chief Executive of the Office of Environment and Heritage may authorise a person to carry out tree thinning operations in the Murray Valley national park or the Pilliga national park and remove and sell any timber or timber products obtained from those operations.
5. The Bill does not identify matters that the Chief Executive should be satisfied of before granting an authority to undertake such operations.
6. Although the Chief Executive may limit the kinds of trees or timber with respect to which the authority has effect, the relevant section does not appear to expressly allow the imposition of other conditions on the authority (for example, the volume of timber that can be removed).
7. It is a defence to a prosecution for an offence under the Act or the Biodiversity Conservation Act 2016 if the person charged establishes that they acted in accordance with an authority under the section.

8. The provision appears similar to existing section 171 of the Act, which allows the Chief Executive to authorise a person to harm animals, including within a national park, or to pick native plants within nature reserves.

Under the Bill, the Chief Executive of the Office of Environment and Heritage has the power to grant an authority to a person to undertake tree thinning operations in the Murray Valley and Pilliga national parks, and to remove and sell any timber or timber products obtained from those operations.

The provision does not identify matters that the Chief Executive should be satisfied of before granting an authority, and also does not contain an express power to impose conditions on the authority.

In circumstances where national parks are ordinarily subject to extensive protections, including in relation to forestry operations, the Committee notes that the provision may constitute an ill-defined administrative power. As such the Committee refers to Parliament the question of whether the provision and its drafting is appropriate in the circumstances.

11.Planning Legislation Amendment (Greater Sydney Commission) Bill 2018

Date introduced	17 October 2018
House introduced	Legislative Council
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Planning

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

- a) to enable the Independent Planning Commission to appoint additional members from subcommittees of the IPC and enable terms of members to be extended to complete work
- b) to extend by 12 months the second review of the Greater Sydney regional strategic plan
- c) to require the support of the Greater Sydney Commission (the GSC) before local strategic planning statements of councils can be made,
- d) to require the Minister for Planning (the Minister) to consult with the GSC about a proposed State environmental planning policy (a SEPP) relating to land within the Greater Sydney Region if the SEPP is likely to significant affect the implementation of a strategic plan
- e) to require the Minister to refer a planning proposal for a local environmental planning instrument (an LEP) to the GSC if it relates to land within the Greater Sydney Region and the proposal is likely to significant affect the implementation of a strategic plan
- f) to remove from the GSC the function of making LEPs
- g) to appoint additional ex-officio members to the GSC and to provide that up to 3 persons are to be appointed as Greater Sydney Commissioners in addition to the Chief Commissioner
- h) to confer on the GSC additional advisory and assurance functions and to enable the GSC to obtain information from government agencies (including councils)
- i) to update the functions of the Natural Resources Commission (the NRC) and to clarify certain auditing functions of that Commission
- j) to make other minor and consequential amendments and amendments of a savings or transitional nature.

BACKGROUND

2. The second reading speech indicates that the main purpose of the Bill is to clarify the powers and functions of the GSC. The amendments are said to enable the GSC to focus on independent advice, strategic oversight and coordination between agencies.
3. The Bill also makes minor changes to the operation of the IPC and clarifies the functions of the NRC.

ISSUES CONSIDERED BY COMMITTEE

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

Commencement by proclamation

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

The Bill commences on a day or days to be appointed by proclamation. The Committee generally prefers that Acts commence on assent or a fixed date given that to do otherwise may not afford an appropriate level of parliamentary scrutiny. Although it may be administratively convenient that some sections of the Bill commence on proclamation, the Committee refers to Parliament the question of which parts of the Bill may be suitable to commence on proclamation.

Henry VIII clause

5. Section 4(1) of the *Greater Sydney Commission Act 2015* (the Act) enables a regulation to amend Schedule 1 to the Act to replace the map in that Schedule so as to extend or reduce the Greater Sydney Region.
6. Proposed section 4(2) of the Act then allows a regulation that extends the Greater Sydney Region to a local government area to also limit the functions of the GSC in respect of that area.

The Bill contains a Henry VIII clause that allows the regulation to amend the *Greater Sydney Commission Act 2015* to alter the functions of the Greater Sydney Commission in relation to certain areas.

The Committee regularly comments on the use of Henry VIII clauses, which are clauses that enable regulations to amend principal legislation. The Committee prefers that amendments to principal legislation are made by way of amending Acts, which are subject to a greater degree of parliamentary scrutiny. As such, the Committee draws this provision to the attention of the Parliament.

12. Statute Law (Miscellaneous Provisions) Bill (No 2) 2018

Date introduced	17 October 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 make minor amendments to various Acts and an instrument (Schedule 1), and
 - b) to amend certain other Acts and instruments for the purpose of effecting statute law revision (Schedule 2), and
 - c) to repeal various Acts and provisions of Acts and instruments (Schedule 3), and
 - d) to make other provisions of a consequential or ancillary nature (Schedule 4).

BACKGROUND

2. In the second reading speech, the Minister noted that the Bill contains amendments to 21 Acts that effect policy changes that are of a minor and non-controversial nature that do not warrant the introduction of a separate amending Bill.

ISSUES CONSIDERED BY COMMITTEE

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

13. Surveillance Devices Amendment (Statutory Review) Bill 2018; Terrorism (Police Powers) Amendment (Statutory Review) Bill 2018; Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018

Date introduced	17 October 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The above bills are cognate, which means that they will be considered together by the Parliament.

Surveillance Devices Amendment (Statutory Review) Bill 2018

2. The objects of the Surveillance Devices Amendment (Statutory Review) Bill 2018 (SDA Bill) are to:
 - a) to provide for the appointment of a Surveillance Devices Commissioner
 - b) to include an objects provision in the *Surveillance Devices Act 2007* (the SD Act)
 - c) to permit the use of an optical surveillance device without a warrant if the use is as part of a controlled operation
 - d) to make consistent the information that is required to be in a warrant (being either a surveillance device warrant or a retrieval warrant), the information that is required to be in the application for the warrant and the information that is required to be provided to the Attorney General about the application for the warrant
 - e) to remove a requirement for an application to revoke a warrant that is no longer needed if the warrant will cease to be in force within 5 days
 - f) to require an applicant for a warrant to include in the application any information known to the applicant that may be adverse to the warrant application
 - g) to require an applicant for a surveillance device warrant to identify persons who may be incidentally recorded by the surveillance device

- h) to require the annual report of the Department of Justice to include information about applications for warrants
- i) to require an application for an authority to conduct a controlled operation to include details of the proposed use of a listening device or optical surveillance device without a warrant

Terrorism (Police Powers) Amendment (Statutory Review) Bill 2018

- 2. The object of the *Terrorism (Police Powers) Amendment (Statutory Review) Bill 2018* (the TPP Bill) is to amend the *Terrorism (Police Powers) Act 2002* (the TPP Act) to give effect to the recommendations arising from a statutory review of the Act (the TPP review) that was tabled in Parliament on 7 June 2018.²

Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018

- 3. The object of the *Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018* (the Face Matching Bill) is to amend the *Road Transport Act 2013* to authorise RMS and certain other NSW government agencies:
 - a) to release photographs and associated personal information to the National Facial Biometric Matching Capability (the Capability)
 - b) to collect photographs and associated personal information from the Capability and to keep and use those photographs or that information for any lawful purpose in connection with the exercise of the agency's functions.
- 4. The Capability is the service for facial biometric matching that is administered by the Commonwealth in accordance with the Intergovernmental Agreement on Identity Matching Services entered into by the Commonwealth, the States and the Territories in October 2017 (the IGA).

BACKGROUND

Surveillance Devices Amendment (Statutory Review) Bill 2018

- 5. The SD Act regulates the installation, use, maintenance and retrieval of surveillance devices by police and other officers when investigating suspected criminal activity.
- 6. According to the second reading speech, the SD Bill implements some recommendations arising from the Acting Ombudsman's Operation Prospect report in relation to the use of surveillance devices (the Prospect Report)³, as well as recommendations from the recent statutory review of the SD Act tabled on 16 October 2018 (the SD Review).⁴ The Attorney General further indicated that the SD review was not finalised until the final Operation Prospect report had been tabled in order to avoid inconsistency between the recommendations.

² NSW Department of Justice, [Statutory Review: Terrorism \(Police Powers\) Act 2002](#), June 2018

³ Acting NSW Ombudsman, [Operation Prospect: A special report to Parliament under s. 31 of the Ombudsman Act 1974 and s. 161 of the Police Act 1900](#), December 2016

⁴ NSW Department of Justice, [Report of the Statutory Review of the Surveillance Devices Act 2007](#), October 2018

7. The second reading speech does not identify which recommendations of either the Prospect Report or SD Review are being implemented.
8. However, recommendations 25 – 38 of the Prospect Report appear to relate to the use of surveillance devices. These recommendations canvassed a wide range of matters, notably the establishment of a Public Interest Monitor and the provision of additional information, including through affidavit evidence, to eligible judges or magistrates when deciding an application under the SD Act.⁵
9. The SD Review made a total of 6 recommendations as set out below:
 - a) allow for a warrant to be issued to commence on a future date, but no more than 10 days from date of issue, where there are reasonable grounds for suspicion or belief founding the application of the warrant
 - b) provide that an application to revoke a surveillance device warrant is not required if the circumstances that prompt revocation occur within five days of the expiry of the warrant
 - c) exempt optical surveillance devices from the prohibition on their use where they are used in an authorised operation (subject to conditions).
 - d) amend section 5 of the *Law Enforcement (Controlled Operations) Act 1997* to provide that particulars of the proposed use of any listening device and optical surveillance device be included in the controlled operation application
 - e) the form of warrants and other significant forms should be prescribed in the *Surveillance Devices Regulation 2014* following consultation with relevant agencies
 - f) require protected information obtained by use of a surveillance device in a controlled operation to be destroyed when it is no longer required

Terrorism (Police Powers) Amendment (Statutory Review) Bill 2018

10. The TPP Act governs the use of force by police when responding to a terrorist act, provides for the investigative and preventative detention of terrorism suspects and regulates covert search warrants.
11. While the recent TPP Review concluded that the policy objectives and terms of the TPP Act remained valid, it made 13 recommendations relating to special police powers, use of force, investigative and preventative detention and covert search warrants.⁶
12. The Ombudsman conducted a separate review of Parts 2A (preventative detention orders) and 3 (covert search warrants) of the TPP Act in June 2017.⁷ The TPP Review states that it has considered the four recommendations from the Ombudsman's Review. These recommendations included that:

⁵ See [Prospect Report, Volume 1: Introduction and background](#), pp 29 - 30

⁶ [TPP Review](#), pp 11 - 12

⁷ NSW Ombudsman, [Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism \(Police Powers\) Act 2002](#), 14 June 2017

- a) Part 2A of the TPP Act should be allowed to expire on 16 December 2018
- b) amend the TPP Act so that the Law Enforcement Conduct Commission (the LECC) is not subject to claims of public interest immunity when requiring information from police or other relevant agencies
- c) amend the TPP Act so that the LECC must oversight the exercise of police powers under Part 2AA (investigative detention powers) in the same way it oversights powers under Parts 2A and 3
- d) the Attorney General should make representations to COAG and relevant Commonwealth Ministers and agencies to seek amendments to various commonwealth Acts.

13. In summary, the TPP review recommended that:

- a) the definition of 'terrorist act' should remain
- b) Part 2 warning requirements and strip search requirements should align with *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA)
- c) The number of Part 2 and Part 2AA authorisations be reported annually
- d) the Supreme Court should be able to order legal aid for the making or revocation of an investigative detention order and the Act should require such persons to be treated with humanity and respect for human dignity
- e) the NSW Police Force (the Police) should be required to inform a person subject to a Part 2AA order of their right to contact the LECC, a lawyer, and to receive a copy of the order
- f) Part 2A be extended for a further 3 years
- g) the Police be able to record any illness or injury suffered by a person while being detained
- h) the Police must advise detainees and their lawyer that any conversation may only take place if able to monitored by the Police and that the Police intend to monitor the conversation
- i) Part 2A of the TPP Act should afford greater protections to those under 18 or with impaired intellectual functioning
- j) the Police should provide certain information requested by the LECC for the purpose of its monitoring functions under Part 2A and Part 3 of the TPP Act, on specified conditions

14. The explanatory note indicates that the TPP Bill gives effect to all of these recommendations.

Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018

15. In October 2017, at the Special Meeting of the Council of Australian Governments on Counter-Terrorism, the Commonwealth, States and Territories entered into an Intergovernmental Agreement, or IGA, 'committing to establish and participate in the National Facial Biometric Matching Capability' (known as the 'Capability'). According to the second reading speech, the purpose of the Capability is to 'help deter crime, prevent identify theft and provide law enforcement agencies with a powerful investigative tool to identify people who may be associated with criminal activities.'
16. The Attorney General noted that the IGA agreed that authorised government agencies that hold facial images and associated personal information (which includes names, addresses, dates of birth and gender) will allow access to that information by other authorised agencies through the Capability. The Capability will have a verification service, which enables a person's identity to be matched with his or her photo.

ISSUES CONSIDERED BY COMMITTEE

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

Right to humane treatment in detention - Terrorism (Police Powers) Amendment (Statutory Review) Bill 2018

17. The TPP Bill replaces existing section 17(2) of the TPP Act, which allows strip searches on conditions set out in Schedule 1. The proposed amendments would remove Schedule 1 and align the power to conduct strip searches with Division 4 of Part 4 of LEPR. However, the proposed subsection also provides that a police officer may only strip search a person under the section if the police officer 'suspects on reasonable grounds that the person is the target of an authorisation.'
18. Currently, strip searches can only be conducted in accordance with Schedule 1. Schedule 1 provides, for example, that strip searches:
 - a) can be conducted only if the person is suspected of being the target of an authorisation under the TPP Act
 - b) can be conducted only if the police officer suspects on reasonable grounds that it is necessary to conduct a strip search of the person for the purposes of the search and that the seriousness and urgency of the circumstances require the search.
 - c) preserve the privacy and dignity of the person as far as is practicable
19. These requirements appear to also exist in Division 4 of Part 4 of LEPR, or are otherwise incorporated into the new subsection.
20. The TPP Review indicated that the purpose of the proposed amendments is to align strip search requirements between LEPR and the TPP Act. At present, unlike LEPR, the TPP Act only allows searches to occur in a private area.⁸ In contrast, LEPR contemplates that searches can be conducted at a police station or in any other place, but the threshold for being able to conduct a search in any other place is higher.

⁸ [TPP Review](#), p 51

21. For completeness, it is noted that a similar provision is proposed in relation to the power to search persons for seizable items: see proposed subsection 26V(5).

The TPP Bill allows strip searches to be conducted in public places in certain circumstances. The Committee understands that this would align the strip search provisions in the TPP Act with existing provisions in LEPR in accordance with a recommendation of the statutory review.

Noting the safeguards in place and the higher threshold which applies to strip searches not conducted at a police station, the Committee makes no further comment.

Right to privacy - Terrorism (Police Powers) Amendment (Statutory Review) Bill 2018

22. Proposed section 25GA would allow police officers to take a photograph or video recording of a terrorism suspect if the police officer believes on reasonable grounds that it is necessary to do so for the purpose of documenting an illness or injury suffered while under investigative detention. A similar provision is proposed in relation to preventative detention orders: see proposed section 26ZLA
23. The explanatory note indicates that the proposed amendments implement recommendation 9 of the TPP Review. While the LECC and the Police supported the proposal, Legal Aid opposed the proposal on the basis that photographs of detainees may already be taken with consent and if no consent is provided, the Police are able to take contemporaneous notes.⁹
24. The documentary evidence is to be destroyed within 12 months of the taking of the photograph or video recording, if proceedings regarding the investigative detention or in connection with that detention have not been brought, or have been brought and discontinued or completed. For completeness, it is noted that it is possible that proceedings which are lawfully brought after the 12 month period will not have the benefit of the photographic or video evidence.

The TPP Bill proposes that a police officer can take photograph or video recordings of terrorism suspects if the officer believes on reasonable grounds that it is necessary to do so for the purpose of documenting an illness or injury suffered while under investigative detention. A similar provision would apply to preventative detention.

The proposed amendment appears to implement a recommendation of the statutory review, which suggested that a similar provision would help ensure the welfare of detainees, ensure police are accountable for any injuries in custody and help protect police officers from false accusations. While the Committee acknowledges that the provision may breach a detainee's right to privacy, the Committee notes the policy reasons for the amendment and makes no further comment.

⁹ [TP Review](#), p 47

Right to access legal representation/right to fair trial - Terrorism (Police Powers) Amendment (Statutory Review) Bill 2018

25. Proposed section 25MD regulates the circumstances in which a person in investigative detention is able to contact a lawyer. Subsection (2) limits the contact to visits and telephone calls with the lawyer.
26. The provision suggests that police officers are able to monitor a person's contact with their lawyer but must inform the person and lawyer that the contact will be monitored.
27. A person in investigative detention may also not be able to contact a lawyer if that lawyer is subject to a prohibited contact direction. However, it is understood that such directions are issued by the Court under section 25M of the TPP Act.

The TPP Bill regulates the circumstances in which a person in investigative detention is able to contact a lawyer. Such contact is limited to visits and telephone calls, which may be monitored by the Police.

The Committee notes that the proposed restrictions may trespass on a person's right to access legal representation by limiting contact with their lawyer, including by not allowing written communication.

In addition, the ability to monitor a person's communications with their lawyer may prejudice their right to a fair trial, including through potentially assisting the prosecution or defendant (depending on the nature of proceedings) to build its case. However, the statutory review suggests that a number of prominent stakeholders, including the Bar Association, supported the amendments that required detainees to be informed that their interactions with legal representatives were being monitored.

Although the proposed amendments are part of a suite of potential safeguards relating to legal representation, they still include restrictions on access to such representation and it is incumbent upon the Committee to note provisions which compromise the ability of detainees to access legal representation and receive a fair trial. The Committee therefore refers the appropriateness of these provisions to the Parliament for its further consideration.

Use of surveillance devices without a warrant - Surveillance Devices Amendment (Statutory Review) Bill 2018

28. Proposed section 8(2) of the SD Bill creates an exemption for the use of optical surveillance devices in the case of certain 'authorised operation[s]' where a participating law enforcement officer is using an assumed name or identity. This implements a recommendation of the SD Review and appears to mirror an existing exception in the SD Act in relation to listening devices: see section 7(4) of the SD Act.
29. It is noted that the Police, the ICAC, the NSW Crime Commission and the LECC are examples of law enforcement agencies that may conduct authorised operations.
30. An 'authorised operation' has the same meaning as in the *Law Enforcement (Controlled Operations) Act 1997* (the LECO Act). Under the LECO Act, an authorised operation is generally a controlled operation that the chief executive officer of a law enforcement

agency has authorised. A controlled operation is an operation for the purpose of, for example, obtaining evidence of or frustrating criminal activity or corrupt conduct or arresting any person for such activity or conduct.

31. Currently, in most circumstances it is an offence to knowingly install, use or maintain an optical surveillance device. However, section 8 of the SD Act creates certain exemptions, including if the device is used:
 - a) in accordance with a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation
 - b) by a law enforcement officer in the execution of a search warrant or crime scene warrant
 - c) by a law enforcement officer in the conduct of a search or inspection that is permitted without a warrant under one of four acts relating to child protection, firearms, restricted premises and terrorism
 - d) as a body-worn video by a police officer
32. Generally, the use of listening devices without a warrant is prohibited under the SD Act. However, section 7(4) of the SD Act creates an exception in the case of listening devices if a party to the conversation being recorded is a law enforcement officer using an assumed identity as part of an authorised operation. Such information is classed as 'protected information' under section 39 and penalties apply to unauthorised publication.
33. The proposed amendment relating to optical surveillance devices appears to mirror this exception, and implements recommendation 3 of the SD Review. That review noted that the Police proposed that all types of surveillance devices – not just listening devices – should be exempted from the requirement to obtain a warrant for their use in controlled operations given the operational advantages and more advanced technology now available.¹⁰
34. Legal Aid opposed the proposal on the basis that the court should continue to act as a safeguard of the right to privacy given that they supervise the issue of warrants. Legal Aid observed that this was particularly important in the case of controlled operations which are not authorised or supervised by a court. Moreover, it noted that there are existing provisions in the SD Act which allowed for the issue of emergency authorisations without a warrant and remote warrant applications to a court.¹¹
35. Recommendation 3 of the SD review also stated that the same restrictions applying to the use of listening devices under section 7(4) of the SD Act should apply to optical surveillance devices, and information obtained through optical surveillance should similarly be deemed 'protected information.'

The SD Bill proposes that optical surveillance devices may be used without a warrant in the context of an 'authorised operation' where a law enforcement officer is acting under an assumed identity. Generally, an 'authorised operation'

¹⁰ SD Act statutory review, pp 14 - 15

¹¹ SD statutory review, p 15

does not require a warrant to be issued by a court but instead requires permission from the head of the relevant law enforcement agency.

The Committee notes that the amendment appears to mirror an existing exception to the requirement that listening devices require a warrant. The amendment also seeks to implement a recommendation of the statutory review.

While the Committee understands that the amendment extends an exception that currently applies to listening devices to optical surveillance devices, the Committee notes that the use of surveillance devices without a warrant can impact on an individual's right to privacy and is not subject to judicial oversight. The Committee therefore refers this issue to Parliament.

Right to privacy - Surveillance Devices Amendment (Statutory Review) Bill 2018

36. Proposed section 24(2) in the SD Bill provides that the chief officer of a law enforcement agency is not required to obtain a revocation of a warrant if that warrant will cease to be in force within 5 days after the day on which that officer became satisfied that the use of a surveillance device under the warrant was no longer necessary.
37. Under section 24(2) of the SD Act, if a chief officer is satisfied that a surveillance device under the warrant is no longer necessary, they must take the steps necessary to discontinue use of the device as soon as practicable. They must also apply to the Court for the warrant to be revoked.

The SD Bill proposes that a law enforcement agency will no longer be required to obtain a revocation of a surveillance device warrant if that warrant will cease to be in force within 5 days after the day on which the chief executive officer is satisfied that the use of a surveillance device was no longer necessary.

The Committee notes that the proposed amendment may be seen to impact on the right to privacy by allowing a warrant to continue in circumstances where the relevant agency is satisfied that the device authorised by the warrant is no longer actually required.

However, the Committee understands that a law enforcement agency will still be required to discontinue use of a surveillance device authorised by a warrant if satisfied that the use of that device is no longer necessary. Noting also that the amendment will only apply to warrants that are about to expire, the Committee makes no further comment.

Right to privacy - Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018

38. The Face Matching Bill amends the *Road Transport Act 2013* (the Road Act) so that an 'authorised government agency' may download photographs and associated personal information from the Capability, being a database and facial verification service run by the Commonwealth under the IGA.
39. Sections 9 and 10 of the *Privacy and Personal Information Protection Act 1998* will not apply in relation to any of the photographs and personal information downloaded by the agency: proposed section 271A(3). Section 9 provides that a public sector agency must collect personal information directly from the relevant individual, with exceptions.

Section 10 then provides that the agency must take certain steps when collecting personal information, including making the individual in question aware: that the information is being collected, the reasons for the collection of the information, that the supply of the information is voluntary or otherwise, and who the intended recipients are.

40. Proposed section 271A(4) then provides that an authorised government agency may then, for 'any lawful purpose in the connection with the exercise of its functions' keep and use photographs and associated personal information sourced from or disclosed to the Capability.

The Face Matching Bill enables 'authorised government agencies' to download photographs and associated personal information from the National Facial Biometric Matching Capability, a national database of photographs, names, addresses and other personal information. Legislative privacy protections which would normally apply to the collection of such information will not apply, including the usual requirement that a government agency inform individuals of matters such as why their personal information is being collected, and whether the supply of that information is voluntary.

Authorised government agencies are able to keep and use the collected information for any lawful purpose in connection with the exercise of their functions.

Although the second reading speech notes that the Capability has inbuilt safeguards and has been subject to privacy assessments, the Committee notes that the proposed amendments trespass on an individual's privacy and refers the question of whether this is appropriate to Parliament.

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

Ill-defined terms and powers - Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018

41. As noted above, the Face Matching Bill enables authorised government agencies to collect and use photographic data and personal information from a national database in order to discharge their functions. The second reading speech suggests that agencies will be required to execute agreements with the host agency, currently the Commonwealth Department of Home Affairs, setting out conditions of use and access.
42. An 'authorised government agency' is defined to mean the Authority (presumably being Roads and Maritime Services), or 'any agent of the Authority' (which could potentially include private contractors) and 'any other government agency participating in the Capability in accordance with the National Agreement'.
43. The Face Matching Bill also enables such agencies to keep and use photographs and personal information obtained from the Capability 'for any lawful purpose in connection with the exercise of its functions.' There is no further detail about what constitutes a lawful purpose or what functions may be relevant.

The Face Matching Bill empowers an 'authorised government agency' to access and use information from the Capability for 'any lawful purpose in connection with the exercise of its functions.'

'Authorised government agency' is broadly defined and may extend to any government agency nominated in the Intergovernmental Agreement (IGA), as well as agents of the roads authority, which could potentially include private contractors. It is noted that the IGA will not be subject to parliamentary scrutiny as it is not a document which is tabled in Parliament and in any event it can be varied from time to time by the parties to the IGA.

Under the Bill, an authorised government agency may keep and use photographs and associated personal information 'for any lawful purpose in connection with the exercise of its functions.' There is no guidance as to what constitutes a lawful purpose or what functions of an agency may be relevant to the use of the information.

The Committee notes that the Face Matching Bill does not clearly identify which government agencies will be able to access the Capability, and also suggests that the information obtained can be used for a broad array of functions.

The Committee acknowledges that the Face Matching Bill may assist government agencies to help prevent crime and identity theft and assist in law enforcement investigations. However, given that the Bill trespasses on an individual's right to privacy, the Committee refers to Parliament the question of whether the identified terms and phrases require further legislative clarification.

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

Commencement by proclamation - Surveillance Devices Amendment (Statutory Review) Bill 2018

44. Proposed section 2 of the SD Bill provides that the Act is to commence on a day or days to be appointed by proclamation.

The SD Bill commences on a day or days to be appointed by proclamation. The Committee generally prefers that Acts commence on assent or a fixed date given that to do otherwise may not afford an appropriate level of parliamentary scrutiny. However, the Committee notes that the administrative changes associated with establishing a new Surveillance Devices Commissioner may require the Act to commence by proclamation. As such the Committee makes no further comment.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

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

9 Functions with respect to Regulations

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

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

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