



Legislation Review Committee

LEGISLATION REVIEW DIGEST

NO. 64/56 – 13 NOVEMBER 2018



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

New South Wales. Parliament. Legislative Assembly.

Legislation Review Committee Legislation Review Digest, Legislation Review Committee, Parliament NSW [Sydney, NSW]: The Committee, 2018, 67p 30cm

Chair: Ms Felicity Wilson MP

13 November 2018

ISSN 1448-6954

1. Legislation Review Committee – New South Wales

2. Legislation Review Digest No. 64 of 56

I Title.

II Series: New South Wales. Parliament. Legislation Review Committee Digest; No. 64 of 56

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

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Membership

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

Guide to the Digest

COMMENT ON BILLS

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

COMMENT ON REGULATIONS

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

Conclusions

PART ONE – BILLS

1. CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) AMENDMENT BILL 2018; NATIONAL DISABILITY INSURANCE SCHEME (WORKER CHECKS) BILL 2018

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

Limit on judicial discretion – rights of children and families – Children and Young Persons (Care and Protection) Amendment Bill 2018

The Committee notes that the Bill restricts the Children's Court from allocating parental responsibility solely to the Minister for a period longer than 24 months unless the Children's Court finds special circumstances that warrant a longer period.

The Committee notes the intention of the provision in encouraging parties to work towards restoration, guardianship orders or adoption within a defined timeframe. However, the Committee has concerns that a mandated timeframe reduces the Children's Court's discretion and puts an arbitrary timeframe on efforts for restoration and may result in some families having inadequate time to establish a realistic possibility for restoration.

While the Children's Court may impose a longer time period where it finds special circumstances, there is no guidance in the Bill as to what may constitute special circumstances, and this may lead to an inconsistent application of the provision.

The Committee also notes Article 3 of the Convention on the Rights of the Child which provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The Committee considers that mandated timeframes on any work towards restoration, guardianship or adoption may detract from the primary consideration being the best interests of the child. The Committee refers this issue to Parliament for its consideration.

Rights of parents: issue one - Children and Young Persons (Care and Protection) Amendment Bill 2018

The Committee notes the proposed amendments to provide for a two-tiered list of considerations that the Children's Court must consider before granting leave to make an application to rescind or vary a care order.

The Committee acknowledges that primacy is given to the views of the child or young person and the intention of the amendments is to provide stability to children and young people in care arrangements. However, the Committee notes that consideration of the applicant's case is now only an additional circumstance and may lead to insufficient weight being given to that consideration. Applicants can include a person having parental responsibility for the child or young person, or a person from whom parental responsibility for the child or young person has been removed, such as birth parents or family members. The Committee refers this issue to Parliament for further consideration.

Rights of parents: issue two - Children and Young Persons (Care and Protection) Amendment Bill 2018

The Committee notes that the Bill extends the current power of the Supreme Court to dispense with obtaining consent to a child's adoption if an application has been made by a guardian. The amendment is an extension to an existing power of the Supreme Court to dispense with obtaining consent and the Committee notes the number of factors a court must be satisfied of before it can dispense with obtaining consent.

The Committee also notes that the amendment is extending the provision to guardians as they are defined under the Care and Protection Act. To be appointed as a guardian a number of circumstances need to be established including that there is no realistic possibility of restoration of the child or young person to his or her parents.

However, the provisions concern an important issue concerning consent for adoption and it is important for the Committee to note where the rights of parents and families may be impacted and draw these issues to the attention of Parliament.

Right to work – National Disability Insurance Scheme (Worker Checks) Bill 2018

The Committee notes the Bill's introduction of a requirement upon workers who deliver specified support and services to NDIS participants to obtain a clearance before they are able to work. The Committee notes this may impact on a person's right to the opportunity to gain his or her living by work which they freely choose. However, the Committee notes the purpose of the worker check scheme is to minimise the risk of harm to people with a disability. The Committee makes no further comment.

Privacy – National Disability Insurance Scheme (Worker Checks) Bill 2018

The Committee notes the provisions permitting authorised persons to obtain a range of information about a person applying for a clearance. Such provisions may trespass on a person's right to privacy. However, the Committee notes the purpose of the worker check scheme and the necessity of having certain information in order to undertake an assessment of a person's risk to NDIS participants. The Committee makes no further comment.

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

Commencement by proclamation

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

2. EXHIBITED ANIMALS PROTECTION AMENDMENT BILL 2018*

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

3. HEALTH LEGISLATION AMENDMENT BILL (NO 3) 2018

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

Privacy/Confidential information: issue one

The Bill amends the *Assisted Reproductive Technology Act 2007* to provide that the Secretary may give a written direction to require a provider to provide information about donor-conceived births, including whether a child was born as a result of ART treatment and any registrable information in connection with that child. The Bill also provides that the Secretary may disclose information held on the central register of their own initiative or to a person who made an

application to be given this information. The Bill also allows information sharing between the Secretary and the Registrar of Births Deaths and Marriages about donor-conceived births to ensure the accuracy of the central register.

These provisions permit the obtaining and sharing of personal and medical information collected by the ART provider. However, the Committee notes that the intention of this amendment is to have this information stored for the approved access of donor-conceived adults to find out information about their biological parents. In these circumstances the Committee makes no further comment.

Privacy/Confidential information: issue two

The Bill outlines amendments to the *Health Administration Act 1982* to allow the exchange of information between health officials. The Bill provides that health officials may only do this if they consider it is in the public interest to do so. The Committee notes that while this places a safeguard on the release of private or confidential information, the Bill does not outline circumstances in which the release of this information would be considered in the public interest. The Committee draws this issue to the attention of the Parliament for consideration of whether it unduly trespasses on a person's right to privacy of their personal or confidential health information.

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

Commencement by proclamation

The Committee generally prefers legislation to commence on assent or a 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 legislation implements amendments to several Acts and regulatory frameworks and a flexible start date may be preferable. In this circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

The Committee generally prefers that substantive matters be outlined in the principal legislation to allow for parliamentary scrutiny. As the Bill permits the regulations to make provisions with respect to the functions of incident reviewers and the manner in which they exercise those functions, these may be considered to be substantive matters. The Committee draws this to the attention of the Parliament for its consideration of whether the Bill insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

4. JUSTICE LEGISLATION AMENDMENT BILL (NO 3) 2018; CRIMES LEGISLATION AMENDMENT (VICTIMS) BILL 2018; GOVERNMENT INFORMATION (PUBLIC ACCESS) AMENDMENT BILL 2018

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

Right to a fair trial: issue one - Crimes Legislation Amendment (Victims) Bill 2018

Following a review by the Sentencing Council, the Victims Bill amends the *Crimes (Sentencing Procedure) Act 1999* to expand the content of and circumstances in which victims impact statements (VIS) can be used by the Court. That is, a VIS will now capture a greater range of harm and a VIS from a primary victim and a family victim will be treated in the same way.

Given that the Court must consider a VIS any time after it convicts, but before it sentences, any expansion of the content and use of a VIS may impact on an offender's right to a fair trial. However, the Victims Bill appears to retain the existing discretion of the Court in relation to the impact of a VIS on sentencing, in accordance with the Sentencing Council's report. Further, the amendments contain a provision which prevents the Court from having regard to material which is not authorised under the Act to be contained in a VIS. For these reasons, and noting the policy aims of the Victims Bill, the Committee makes no further comment.

Right to a fair trial: issue two - Crimes Legislation Amendment (Victims) Bill 2018

The Victims Bill allows complainants involved in prescribed sexual offence proceedings to have a record of their original evidence to be tendered in related or subsequent proceedings. This prevents the complainant from having to provide oral evidence twice.

The Bill also proposes amendments applying to certain child sexual assault proceedings in the Children's Court, so that evidence from the complainant may be tendered in writing. Although the Court may compel the complainant to attend to give evidence, there must be special reasons to do so.

The Committee notes that these provisions may impact on the accused right to a fair trial, including because the defence may have a reduced ability to 'test' the evidence of the complainant.

However, the Committee also acknowledges that in relation to prescribed sexual offences, the relevant sections contain numerous safeguards which allow the Court to exercise discretion as to whether the complainant should be compelled to give further evidence or otherwise as to how the recorded evidence should be treated. The Children's Court is also able to compel the complainant to give oral evidence, if there are special reasons to do so.

For these reasons, and noting the trauma that may result in complainants having to provide sensitive evidence, particularly on multiple occasions, the Committee makes no further comment.

Restriction of access to government information - Government Information (Public Access) Amendment Bill 2018

There is a conclusive presumption against disclosure for many types of Cabinet information under the GIPA Act. However, the Act currently provides that information is not Cabinet information to the extent that it consists solely of factual material, unless the information would reveal or tend to reveal information concerning a Cabinet decision or Ministerial position.

The GIPA Bill amends the GIPA Act so that information that is solely factual but which is 'contained in a document that, either entirely or in part, would' reveal or tend to reveal Cabinet decisions or Ministerial positions may not be disclosed.

The Committee notes that the explanatory note indicates that the amendment gives effect to recommendation 16 in the statutory review, which suggests that the amendment may better achieve the intended policy aim of the exemption. However, given that the provision has potential to further restrict access to some Cabinet information, the Committee draws this to the attention of Parliament.

Limiting judicial discretion - Justice Legislation Amendment Bill (No 3) 2018

The Justice Bill amends the *Children (Detention Centres) Act 1987* and the *Crimes (Administration of Sentences) Act 1999* so that the Children's Court or the State Parole Authority, as the case may be, will no longer be able to determine the period of supervision of a parole order. Rather, this will be determined by the regulations. According to the Second Reading Speech, the amendment is part of the Government's parole reforms introduced by the *Parole Legislation Amendment Act 2017*.

The Committee notes that these amendments may limit judicial discretion as to the period of supervision in circumstances where this may impact on the freedom of movement and freedom of association of offenders.

Noting also that matters in regulations are subject to a lower degree of parliamentary scrutiny, the Committee draws these amendments to the attention of the Parliament.

Procedural fairness - Justice Legislation Amendment Bill (No 3) 2018

The Justice Bill proposes that the Parole Authority may revoke an intensive correction order for reasons other than a breach of the order. This can be done in circumstances where the offender has not appeared before the Authority and where no inquiry has been held. The relevant provisions are expressed to have retrospective effect until 24 September 2018.

While the Committee notes that some of the grounds for revoking an order may be of benefit to the offender (such as if they have requested the revocation, or on compassionate grounds), the provisions may still have potential to trespass on an offender's right to procedural fairness and also their right to only be bound by the law as it stands at a given time. This is particularly important in circumstances where questions of liberty may be decided.

The Committee acknowledges that the Second Reading Speech indicates that these powers previously existed under *the Crimes (Administration of Sentences) Act 1999*, and were inadvertently not carried forward when that Act was recently amended. However, for the reasons above, the Committee draws this matter to the attention of Parliament.

Right to a fair trial: issue one - Justice Legislation Amendment Bill (No 3) 2018

The Justice Bill amends the *Criminal Procedure Act 1986* to create another exemption to the 6 month time limit that applies to summary offences. The exemption will apply where 'backup summary charges' have been laid for a matter that begins in the Children's Court or Local Court. If the District Court hears an appeal in relation to an indictable offence relating to the same facts, and finds the accused not guilty, the 6 month time limit for re-laying back up summary charges will begin from the date of the District Court's decision.

The Second Reading Speech notes that the amendment will not enable a person to be charged with new or different offences outside of the 6 month time frame. However, the Committee notes that the amendments may potentially impact on the right to a fair trial, particularly in circumstances where the amendment is expressed to have the effect of putting a person in the same position that they were in when the matter was first heard in the Local Court or Children's Court. This delay may be unfair in circumstances where a higher court has disposed with a similar matter relating to the same facts.

While acknowledging the practical purpose of the amendments, the Committee draws these provisions to the attention of the Parliament.

Right to a fair trial: issue two - Justice Legislation Amendment Bill (No 3) 2018

Under the Justice Bill, a health authority can refuse to produce 'sensitive evidence' in response to a subpoena issued by an accused person in criminal proceedings. Sensitive evidence includes obscene or indecent images or audio recordings, and images which if provided without the relevant person's consent would interfere with their privacy.

The health authority must issue a 'sensitive evidence notice' setting out alternative supervised access arrangements for the accused person and any person engaged to assist the accused in preparing their case. The Court appears to have no express discretion to uphold the subpoena or to vary the terms of access to sensitive evidence.

The Committee notes that the amendments may trespass on the right to a fair trial. For example, the provisions may impair the ability of an accused and his or her legal representatives to prepare their case in circumstances where the prosecuting authority may have unfettered access to the sensitive evidence. While the Committee acknowledges that this limitation on the right to a fair trial may be justified in order to protect the dignity of victims, in light of the apparent lack of judicial discretion, the Committee refers this matter to Parliament for its further consideration.

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

Right to privacy - Justice Legislation Amendment Bill (No 3) 2018

Currently it is a criminal offence to disclose information under the *Children (Detention Centres) Act 1987* except in limited circumstances, such as with the consent of the relevant person or in the context of legal proceedings. The Second Reading Speech indicates that the amendments will make it easier to share information where it will assist in the effective operation of the justice system.

While the proposed amendments would allow the Secretary to disclose information for a prescribed purpose, the relevant section also suggests that the Secretary can disclose information for purposes other than those that are prescribed in the regulations. Legislative privacy protections that may ordinarily apply to the disclosure and sharing of such information are expressed not to apply.

The Committee notes that the amendments may trespass on the right to privacy in circumstances where it is not clear, for example, for what purpose information may be disclosed.

In light of the removal of a criminal offence and the more expansive disclosure powers, the Committee refers this matter to the Parliament.

5. JUSTICE LEGISLATION AMENDMENT (WALAMA COURT) BILL 2018*

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

6. LIQUOR LEGISLATION BILL 2018 (REPEAL OF LOCK-OUT) LAW*

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

7. PUBLIC WORKS AND PROCUREMENT AMENDMENT (ENFORCEMENT) BILL 2018

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

Commencement by proclamation

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

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

Matters deferred to regulations

The Committee notes that as part of its obligations under the TPP-11, the Commonwealth and all States and Territories must establish an independent review mechanism for government procurements. The Bill establishes a review framework, however, it defers to the regulations the power to provide the finer details of the framework. Such details include what kinds of complaints fall within the review framework and who has standing to make a complaint.

Given that the Bill seeks to provide a right of review to certain persons, the Committee considers that the details of the review framework should be specified in the principal legislation and subject to parliamentary scrutiny. The Committee refers this issue to Parliament for its consideration.

8. RETIREMENT VILLAGES AMENDMENT BILL 2018; BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT AMENDMENT BILL 2018; FAIR TRADING LEGISLATION AMENDMENT (MISCELLANEOUS) BILL 2018; PROTECTION OF THE ENVIRONMENT OPERATIONS AMENDMENT (ASBESTOS WASTE) BILL 2018

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

Significant increase in penalties – Protection of the Environment Operation Amendment (Asbestos Waste) Bill 2018

The Committee notes that the Bill significantly increases the financial penalties for pollution involving asbestos waste to amounts up to \$2 million. However, the Committee notes the recommendations arising from the ICAC report that a serious standalone offence for the disposal of asbestos waste can act as a deterrent and emphasise the seriousness of the offence given the considerable public health risk posed by illegal dumping of asbestos. In these circumstances, the Committee makes no further comment.

Wide powers of investigation and enforcement - Building and Construction Industry Security of Payment Amendment Bill 2018

The Committee notes that the Bill contains a number of enforcement and investigative powers that may be exercised by authorised officers. These include powers of entry, powers to do things at the premises, and the power to require the provision of assistance, the power to require information and records, and the power to examine, copy, or seize things without the consent of the owner. The Committee refers this issue to Parliament for its consideration of whether these provisions may permit circumstances that encroach on personal rights and liberties, such as the right to privacy, the right to refuse entry, or the right to personal property.

Right to silence/ Privilege against self-incrimination - Building and Construction Industry Security of Payment Amendment Bill 2018

The Bill contains offences for obstructing, hindering or delaying an officer from exercising their functions under the Act, which includes the powers to require information, records and answers. The Committee notes that these provisions may potentially encroach on the privilege against self-incrimination, which allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime. The

Committee refers this to Parliament for consideration of whether this provision would encroach on the privilege against self-incrimination.

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

Commencement by proclamation – Retirement Villages Amendment Bill 2018; Protection of the Environment Operations Amendment (Asbestos Waste) Bill 2018; Building and Construction Industry Security of Payment Amendment Bill 2018; Fair Trading Legislation Amendment (Miscellaneous) Bill 2018

The Committee generally prefers that legislation commence on assent or a fixed 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 these bills implement different reforms to multiple bills and industries, which may require time to implement. However, commencing an Act earlier than the specified date (such as is permitted in the *Fair Trading Legislation Amendment (Miscellaneous) Bill 2018*) may impose obligations on parties earlier than anticipated. The Committee draws this to the attention of the Parliament.

Matters deferred to the regulations: issue one - Fair Trading Legislation Amendment (Miscellaneous) Bill 2018; Retirement Villages Amendment Bill 2018; Building and Construction Industry Security of Payment Amendment Bill 2018

The *Fair Trading Legislation Amendment (Miscellaneous) Bill 2018* permits the regulations to establish a rental bond roll-over scheme, including key parts of the scheme such as eligibility, payment, refunds, modifications, remedies, and application of the Act to the scheme. In the Second Reading Speech, it was noted that this scheme was intended to protect tenants and alleviate financial stress when moving from one rental property to another. As the scheme has been deferred to the regulations, it may be amended at any time without the scrutiny of Parliament. As the scheme is one that has been identified as one that has the 'potential to ease a significant source of financial stress for around 300,000 tenants per year', the substantial aspects of the scheme may be more appropriately contained in the principal Act. The Committee refers this issue to Parliament for consideration of whether the Bill insufficiently subjects the exercise of legislative power to Parliamentary scrutiny.

Matters deferred to the regulations: issue two - Fair Trading Legislation Amendment (Miscellaneous) Bill 2018; Retirement Villages Amendment Bill 2018; Building and Construction Industry Security of Payment Amendment Bill 2018

The Committee notes that Bill amends the *Retirement Villages Amendment Bill 2018* and *Building and Construction Industry Security of Payment Amendment Bill 2018* to defer several matters to the regulations. The Bill permits the regulations to prescribe rules of conduct under the Retirement Villages Amendment Bill 2018, contravention of which can incur a maximum penalty of 100 penalty units (in the case of a corporation) or 50 penalty units in any other case.

The Bill also permits the regulations to prescribe a code of practice under the *Building and Construction Industry Security of Payment Amendment Bill 2018*, which may create offences up to 50 penalty units. The Code of Practice commences by proclamation and may be amended at any time.

The Committee generally prefers that substantive matters, particularly the creation of offences, be contained in the principal Act so they may be afforded the scrutiny of the Parliament. The Committee refers this issue to the Parliament for further consideration.

9. SAINT PAUL'S COLLEGE BILL 2018

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

Commencement by proclamation

The Committee generally prefers legislation to commence on assent or a fixed date. Given the Bill implements new governance arrangements, including the appointment of officers, flexibility with respect to its commencement is reasonable.

10. SNOWY HYDRO CORPORATISATION AMENDMENT (SNOWY 2.0) 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

The Bill proposes to amend the *Snowy Hydro Corporatisation Act 1997* so that a lease can be granted over certain land (including national park land) for the purposes of, or in connection with, the Snowy 2.0 project.

The Bill allows the Minister to make such a grant without having to satisfy certain preconditions that would ordinarily apply before a lease could be granted under the *National Parks and Wildlife Act 1997*.

Given that national park land is ordinarily subject to extensive protections, and that the Bill does not prescribe new requirements governing the grant of a lease for the purpose of the project, the Committee notes that the relevant provision may be seen to be an ill-defined power.

However, the Committee understands that any planning approval or lease will contain conditions regulating the use and development of the relevant land, which will necessarily include environmental safeguards. Furthermore, the relevant provisions will only apply to the Snowy 2.0 project. Noting also that the Snowy 2.0 is likely to boost the capacity of New South Wales to generate renewable energy, the Committee makes no further comment.

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

Henry VIII clauses

The Bill contains Henry VIII clauses that allow the regulations to amend the NPW Act in relation to the steps that must be satisfied before a plan of management can be made, or a lease for electricity transmission can be granted, in respect of the Snowy 2.0 project.

The Committee regularly comments on the use of Henry VIII clauses, which enable the Executive to amend principal legislation but subject those amendments to a lower level of parliamentary security.

Although the Minister must first consult with the Minister administering the NPW Act about the proposed regulations, the Committee refers to Parliament the question of whether the provisions are an inappropriate delegation of legislative power.

11. WORKERS COMPENSATION LEGISLATION AMENDMENT (FIREFIGHTERS) BILL 2018

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

Retrospectivity

The Committee notes that the Bill has a narrow retrospective effect which applies to previous claims for compensation prior to the commencement of the Bill. However, the Committee also notes the policy intentions of the Bill is to benefit firefighters that have contracted specific cancers in the course of their employment and the retrospectivity acts to extend the benefit of the presumptive right. The Committee makes no further comment .

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

The Committee prefers legislation to commence on assent or a fixed date. However, given the Bill implements reforms to the worker's compensation scheme the Committee considers commencement by proclamation will assist all parties affected are made aware of the provisions. The Committee makes no further comment.

PART TWO – REGULATIONS

1. ROADS REGULATION 2018

That the regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA***Restriction of review rights***

The *Roads Regulation 2018* removes the opportunity for objectors to apply to the Minister or another assessor to have a toll decision reviewed. Under the new Regulation, those who object to the imposition or amount of a toll can only apply for an initial internal review and, if necessary, a further internal review by the toll operator. Although an objector cannot apply for a review by NCAT, if the matter proceeds to a penalty notice, a person may lodge a request for a review of the offence with Revenue NSW.

The Committee notes that the *Roads Regulation 2018* appears to restrict the review rights of objectors when compared to the *Roads Regulation 2008*. However, the Committee acknowledges that the Regulatory Impact Statement states that the motorway network is much more complex than it was ten years ago and providing an avenue for review by the Minister is overly complex and not aligned with modern administrative decision review regimes. For this reason, and noting that there are still several avenues of review available, the Committee makes no further comment.

2. SYDNEY OLYMPIC PARK AUTHORITY REGULATION 2018

That the regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA***Freedom of movement/freedom of assembly***

The Sydney Olympic Park Authority has wide powers under the Regulation to prohibit categories of persons from entering Sydney Olympic Park, direct a person to leave if the person causes inconvenience, and to ban any person from entering the Park for up to 6 months.

The above provisions may trespass on the right to freedom of movement and freedom of assembly, particularly in the context of a public place, in circumstances where, for example, there is little information provided as to what constitutes an 'inconvenience,' or when categories of persons can be prohibited from entering the Park.

While acknowledging that these provisions existed under the previous regulation, the Committee draws the nature of these powers to the attention of the Parliament.

Part One – Bills

1. Children and Young Persons (Care and Protection) Amendment Bill 2018; National Disability Insurance Scheme (Worker Checks) Bill 2018

Date introduced	24 October 2018
House introduced	Legislative Council
Minister responsible	The Hon. Pru Goward MP
Portfolio	Family and Community Services

Purpose and description

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

Children and Young Persons (Care and Protection) Amendment Bill 2018

2. The object of this Bill is to implement improvements in the NSW child protection system resulting from certain proposals contained in the discussion paper entitled *Shaping a Better Child Protection System* released by the Department of Family and Community Services in October 2017 and to make provision for other matters:
 - a) by amending the *Children and Young Persons (Care and Protection) Act 1998* (the principal Act), as follows:
 - i. to require the Secretary to offer alternative dispute resolution processes to the families of children and young persons at risk of significant harm, before seeking care orders from the Children’s Court, subject to certain exceptions,
 - ii. to extend the obligation of government agencies and government funded non-government agencies to co-operate in the delivery of services to children and young persons (where applicable), to the provision of prioritised access to services to children and young persons at risk of significant harm and their families,
 - iii. to define children’s services in relation to mandatory reporting by reference to relevant concepts in legislation governing children’s education and care services,
 - iv. to clarify that the Children’s Court may make a guardianship order by consent to give effect to a care plan allocating parental responsibility, and the circumstances in which the order may be made,

- v. to enable the Children's Court to vary an interim order on an application by a party to proceedings before the Court if satisfied it is appropriate to do so,
- vi. to limit the period for which an order of the Children's Court may allocate all aspects of parental responsibility for a child or young person solely to the Minister following its approval of a permanency plan involving restoration, guardianship or adoption,
- vii. to clarify the period within which the feasibility of restoration of a child or young person to his or her parents is to be considered, in connection with the preparation and approval of permanency plans,
- viii. to enable the Children's Court to conduct a review of progress in implementing the care plan for a child or young person if not satisfied, after considering a report under section 82 of the principal Act, that proper arrangements have been made for his or her care and protection,
- ix. to enable the Children's Court to make a contact order for the duration of a guardianship order if satisfied that it is in the best interests of the child or young person the subject of the guardianship order,
- x. to restate, as primary considerations and additional considerations, certain matters that the Children's Court must consider before granting leave to make an application to vary or rescind a care order,
- xi. to add to those primary considerations, matters concerning the views of the child or young person, the stability of present care arrangements and the least intrusive intervention into the life of the child or young person if those arrangements are stable and secure,
- xii. to enable the Children's Court to dismiss an application for leave to apply to vary or rescind a care order if satisfied that it is frivolous, vexatious, an abuse of process or one of a series made by the applicant with no reasonable prospect of success,
- xiii. to extend the period for which a child or young person who has been placed in statutory out-of-home care and is subject to a permanency plan involving restoration may live with his or her parents before the date of restoration,
- xiv. to allow supported out-of-home care (other than temporary care arrangements) only in respect of court ordered placements of children or young persons in out-of-home care with relatives or kin,
- xv. to prohibit the publishing or broadcasting of the names of children or young persons in any way that identifies them as being in out-of-home care or under the parental responsibility of the Minister,
- xvi. to create certain exceptions to the prohibition under the principal Act on publishing or broadcasting the name of a child or young person, in relation to the Coroner's Court,

- xvii. to vest the care responsibility for a child in the Secretary on the death of the child's sole or surviving guardian (or other person with full parental responsibility for the child) for up to 21 days,
 - xviii. to provide for a penalty of up to 2 years imprisonment for offences relating to the abuse or neglect of children or young persons,
 - xix. to make various other minor, ancillary or consequential amendments, and
- b) by amending the *Adoption Act 2000* to enable the Supreme Court to make an order dispensing with a requirement for the consent of a person to a child's adoption if the application for adoption is made by the child's guardian.

National Disability Insurance Scheme (Workers Checks) Bill 2018

3. The object of this Bill is to establish worker screening arrangements in NSW for the purposes of requirements under Commonwealth law for the screening of workers engaged in or associated with the provision of supports or services to people with disability under the National Disability Insurance Scheme. These arrangements are for the purposes of the State's obligations under the Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme entered into between the States, Territories and Commonwealth.

Background

4. The *Children and Young Persons (Care and Protection) Amendment Bill 2018* amends the *Children and Young Persons (Care and Protection) Act 1998* (Care and Protection Act) and the *Adoption Act 2000* (the Adoption Act). The amendments further the permanent placement principles in the 2014 Safe Home for Life Reforms. In the Second Reading Speech, the Hon. Scott Farlow stated:

The Government seeks to ensure children enter the statutory system only when it is necessary and only after alternatives have been explored, and if entry into care is required it should be only for a short period of time.¹

5. The *National Disability Insurance Scheme (Workers Checks) Bill 2018* facilitates the NDIS Worker Check which is a national worker screening scheme for the disability sector. In the Second Reading Speech the Hon. Scott Farlow noted:

The purpose of the NDIS Worker Check is to minimise the risk of harm to people with disability. It will prevent workers that pose a risk of harm from working in certain roles with NDIS participants. Commonwealth, State and Territory governments have worked collaboratively to agree on the key design, policy and operational settings for a nationally consistent approach to the screening of NDIS workers. This is set out in the Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme.²

¹ New South Wales, *Parliamentary Debates*, Legislative Council, 24 October 2018, p 53 (The Hon. Scott Farlow MLC)

² New South Wales, *Parliamentary Debates*, Legislative Council, 24 October 2018, p 57 (The Hon. Scott Farlow MLC)

Issues considered by Committee

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

Limit on judicial discretion – rights of children and families – Children and Young Persons (Care and Protection) Amendment Bill 2018

6. The Bill amends the Care and Protection Act to limit the period in which the Children's Court may allocate all aspects of parental responsibility for a child or young person solely to the Minister.
7. Section 79 of the Care and Protection Act permits the Children's Court to allocate parental responsibility for a child or young person who it finds is in need of care and protection. The order may allocate parental responsibility to:
 - one parent to the exclusion of the other, or to both parents jointly, or
 - solely to the Minister, or
 - to one or both parents and to the Minister jointly, or
 - to one or both parents and to another person or persons jointly, or
 - to the Minister and another suitable person or persons jointly, or
 - to a suitable person or persons jointly.
8. The Bill proposes that the maximum period that the Children's Court may allocate all aspects of parental responsibility to the Minister is 24 months. Currently there is no maximum period imposed.
9. The Bill does provide that the Children's Court may allocate parental responsibility solely to the Minister for a longer period if it is satisfied that there are special circumstances that warrant a longer period. The Bill does not provide any guidance on what special circumstances may warrant a longer period.
10. In the Second Reading Speech, the Hon. Scott Farlow MLC stated:

Previously, where FACS assessed that there was no realistic possibility of restoration of the child or young person to their parents, the default position was to seek a long-term order allocating parental responsibility to the minister until the child or young person reached 18 years of age. This approach took the focus away from restoration and other forms of permanency contributing to children and young people staying in care longer.

The Committee notes that the Bill restricts the Children's Court from allocating parental responsibility solely to the Minister for a period longer than 24 months unless the Children's Court finds special circumstances that warrant a longer period.

The Committee notes the intention of the provision in encouraging parties to work towards restoration, guardianship orders or adoption within a defined timeframe. However, the Committee has concerns that a mandated timeframe reduces the Children's Court's discretion and puts an arbitrary timeframe on

efforts for restoration and may result in some families having inadequate time to establish a realistic possibility for restoration.

While the Children's Court may impose a longer time period where it finds special circumstances, there is no guidance in the Bill as to what may constitute special circumstances, and this may lead to an inconsistent application of the provision.

The Committee also notes Article 3 of the Convention on the Rights of the Child which provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The Committee considers that mandated timeframes on any work towards restoration, guardianship or adoption may detract from the primary consideration being the best interests of the child. The Committee refers this issue to Parliament for its consideration.

Rights of parents: issue one - Children and Young Persons (Care and Protection) Amendment Bill 2018

11. The Bill amends section 90 of the Care and Protection Act to provide a two-tiered approach to determining whether to grant leave to make an application to vary or rescind a care order.
12. Currently, section 90 provides that leave can only be granted to make an application to rescind or vary a care order if there has been a significant change in circumstances and also consideration of a list of factors which include:
 - the nature of the application;
 - the age of the child or young person;
 - the length of time for which the child or young person has been in the care of the present carer;
 - the plans for the child;
 - whether the applicant has an arguable case; and
 - matters concerning the care and protection of the child or young person that are identified in:
 - a report under section 82, or
 - a report that has been prepared in relation to a review directed by the Children's Guardian under section 85A or in accordance with section 150.
13. The Bill proposes to amend section 90 to split the circumstances into two categories, the first being primary considerations and the second being additional circumstances. Under the Bill primary considerations will include:
 - the views of the child or young person and the weight to be given to those views having regard to the maturity and capacity of the child or young person;

- the length of time for which the child or young person has been in the care of the present carer and the stability of those arrangements;
 - if the Children’s Court considers that the present care arrangements are stable and secure, the course that would result in the least intrusive intervention into the life of the child or young person and whether that course would be in the best interests of the child or young person.
14. The additional circumstances the Children’s Court must consider include, amongst other things, whether the applicant has an arguable case.
15. In the Second Reading Speech the Hon. Scott Farlow MLC stated:

There have been times where a section 90 application has caused placement instability, uncertainty and distress for children. The child might be very well settled in a safe, loving and happy family and the child might have formed significant attachments with carers and their new foster siblings. ... Parents must always be given the opportunity to have the care orders for their children considered for variation or rescission. Let me clear, we have not resiled from the position that the first preference is to keep families together wherever possible. However, primacy must go to the child’s stability, permanency and security needs over the needs of anybody else, including a parent.

The Committee notes the proposed amendments to provide for a two-tiered list of considerations that the Children’s Court must consider before granting leave to make an application to rescind or vary a care order.

The Committee acknowledges that primacy is given to the views of the child or young person and the intention of the amendments is to provide stability to children and young people in care arrangements. However, the Committee notes that consideration of the applicant’s case is now only an additional circumstance and may lead to insufficient weight being given to that consideration. Applicants can include a person having parental responsibility for the child or young person, or a person from whom parental responsibility for the child or young person has been removed, such as birth parents or family members. The Committee refers this issue to Parliament for further consideration.

Rights of parents: issue two - Children and Young Persons (Care and Protection) Amendment Bill 2018

16. The Bill amends the Adoption Act to extend the current ability of the Supreme Court to dispense with the requirement for consent of a person to adoption to an application made for adoption by a guardian.
17. Currently, section 67 of the Adoption Act sets out a number of circumstances where the Court may dispense with the requirement to obtain consent of a person to a child’s adoption. Section 67(1)(d) currently provides that the Court may dispense with obtaining consent if an application has been made to the Court for adoption by one or more persons who are authorised carers for the child, and:
- the child has established a stable relationship with those carers;
 - the adoption of the child by those carers will promote the child’s welfare; and

- in the case of an Aboriginal child, alternatives to placement for adoption have been considered in accordance with section 36.
18. Under the Adoption Act authorised carers are any person who:
- has care and responsibility for a child under out-of-home care arrangements made under the *Care and Protection Act 1998*
 - has responsibility for the day-to-day care, welfare and development of a child under the *Family Law Act 1975* of the Commonwealth.
19. The Bill amends section 67(1)(d) to include guardians, as they are defined under the Care and Protection Act, in addition to authorised carers. Guardians under the Care and Protection Act are persons who have been allocated all aspects of parental responsibility for a child or young person until the child or young person reaches 18 years of age. Before making a guardianship order under the Care and Protection Act, the Children's Court must be satisfied that:
- there is no realistic possibility of restoration of the child or young person to his or her parents, and
 - that the prospective guardian will provide a safe, nurturing, stable and secure environment for the child or young person and will continue to do so in the future, and
 - if the child or young person is an Aboriginal or Torres Strait Islander child or young person—permanent placement of the child or young person under the guardianship order is in accordance with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles that apply to placement of such a child or young person in statutory out-of-home care under section 13, and
 - if the child or young person is 12 or more years of age and capable of giving consent—the consent of the child or young person is given in the form and manner prescribed by the regulations.

The Committee notes that the Bill extends the current power of the Supreme Court to dispense with obtaining consent to a child's adoption if an application has been made by a guardian. The amendment is an extension to an existing power of the Supreme Court to dispense with obtaining consent and the Committee notes the number of factors a court must be satisfied of before it can dispense with obtaining consent.

The Committee also notes that the amendment is extending the provision to guardians as they are defined under the Care and Protection Act. To be appointed as a guardian a number of circumstances need to be established including that there is no realistic possibility of restoration of the child or young person to his or her parents.

However, the provisions concern an important issue concerning consent for adoption and it is important for the Committee to note where the rights of

parents and families may be impacted and draw these issues to the attention of Parliament.

Right to work – National Disability Insurance Scheme (Worker Checks) Bill 2018

20. The *National Disability Insurance Scheme (Worker Checks) Bill 2018* contains provisions which introduce a requirement to obtain a clearance before being able to work in certain roles with NDIS participants.

The Committee notes the Bill's introduction of a requirement upon workers who deliver specified support and services to NDIS participants to obtain a clearance before they are able to work. The Committee notes this may impact on a person's right to the opportunity to gain his or her living by work which they freely choose. However, the Committee notes the purpose of the worker check scheme is to minimise the risk of harm to people with a disability. The Committee makes no further comment.

Privacy – National Disability Insurance Scheme (Worker Checks) Bill 2018

21. The Bill provides authorised persons to obtain information about a person applying for a clearance for the purpose of considering and determining a person's application. Such information includes, amongst other things:

- information relating to a person's criminal history;
- information about workplace misconduct, being misconduct that concerns persons to whom a relevant risk of harm relates;
- information about any order imposed by a court relating to child protection, apprehended violence or domestic family violence; and
- other information relevant to determining whether the person poses a relevant risk of harm.

22. The Bill provides that the person applying for a clearance must consent to the provision of any relevant information.

The Committee notes the provisions permitting authorised persons to obtain a range of information about a person applying for a clearance. Such provisions may trespass on a person's right to privacy. However, the Committee notes the purpose of the worker check scheme and the necessity of having certain information in order to undertake an assessment of a person's risk to NDIS participants. The Committee makes no further comment.

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

Commencement by proclamation

23. Clause 2 of the *Children and Young Persons (Care and Protection) Bill 2018* provides that the proposed Act will commence on a day or days appointed by proclamation. Clause 2 of the *National Disability Insurance Scheme (Workers Check) Bill 2018* provides that the proposed Act will commence on assent.

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

2. Exhibited Animals Protection Amendment Bill 2018*

Date introduced	25 October 2018
House introduced	Legislative Council
Member responsible	The Hon. Mark Pearson MLC
	* Private Members' Bill

Purpose and description

1. The object of this Bill is to amend the *Exhibited Animals Protection Act 1986* (the principal Act) to prohibit the exhibition of exotic animals at a circus by:
 - a) making it an offence for a person to exhibit an exotic animal at a circus, and
 - b) making it an offence to breed, keep, train or transport an exotic animal for the purpose of exhibiting the animal at a circus, whether or not the circus is located in New South Wales, and
 - c) providing that animals that are not exotic animals may continue to be exhibited at a circus if authorised under the principal Act, and
 - d) requiring exotic animals currently exhibited at circuses to be rehomed in an animal display establishment or wildlife sanctuary approved by the Secretary within 12 months.

Background

2. In his Second Reading Speech, the Hon. Mark Pearson MLC noted the welfare and wellbeing of exotic animals has been 'severely comprised by being held in captivity in travelling circuses.'
3. The Bill creates an offence to exhibit an exotic animal at a circus, and to breed, keep, train or transport an exotic animal for the purpose of exhibiting the animal at a circus, whether or not the circus is located in New South Wales.

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*.

3. Health Legislation Amendment Bill (No 3) 2018

Date introduced	24 October 2018
House introduced	Legislative Council
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

1. The objects of this Bill are as follows:
 - a) to amend the *Assisted Reproductive Technology Act 2007* (the ART Act) with respect to counselling, the provision, recording and disclosure of information, consent of gamete providers and the provision of ART treatment,
 - b) to amend the *Health Administration Act 1982* to enable regulations to be made to permit the notification of certain incidents occurring in health facilities and the exchange of information to facilitate the investigation of such incidents,
 - c) to amend the *Health Practitioner Regulation National Law (NSW)* to clarify that employers of health practitioners are not required to report the same conduct twice and to permit the Secretary of the Ministry of Health (the Health Secretary) to approve alternative reporting requirements for certain reports, notices and transcripts given under that Law,
 - d) to amend the *Health Services Act 1997* to provide for an additional member to be appointed to a Committee of Review and to specify how a Committee makes decisions and clarify that a chief executive is not required to report the same conduct twice,
 - e) to amend the *Mental Health Commission Act 2012* with respect to the objects of the Act, its governing principles, the functions of the Mental Health Commission and plans and reports prepared by the Commission (including by requiring public sector agencies to provide a response in certain circumstances to a report or matters in a report),
 - f) to amend the *Private Health Facilities Act 2007* to establish new procedures for dealing with reportable incidents and other incidents and to provide authorised officers with the power to require a person to answer questions or provide information and documents.

Background

2. This Bill is part of a regular review of health-related legislation and makes amendments to several Act that deal with health services in New South Wales, including the *Assisted Reproductive Technology Act 2007*, *Health Administration Act 1982*, *Health Practitioner*

Regulation National Law (NSW), Health Services Act 1997, Mental Health Commission Act 2012, and the Private Health Facilities Act 2007.

3. In the Second Reading Speech, it was noted that the amendments follow the Government's regular review of the legislation and the recent statutory review of the *Mental Health Commission Act 2012*.

Issues considered by committee

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

Privacy/Confidential information: issue one

4. Schedule 1 amends the *Assisted Reproductive Technology Act 2007* and inserts section 33E, which provides that the Secretary may disclose information held on the central register. The Secretary may do this of their own initiative or to a person who would be entitled, if the person made an application under this Part to be given this information.
5. The Bill amends section 34 to provide that the Secretary may give a health service provider a written direction requiring the provider to answer questions and provide information about donor-conceived births, including whether or not a child was born and obtaining any registrable information in connection with such a child.
6. The Bill also inserts section 35 which permits information sharing between Secretary and Registrar of Births, Deaths and Marriages about donor-conceived births to ensure the completion and accuracy of the central register.

The Bill amends the *Assisted Reproductive Technology Act 2007* to provide that the Secretary may give a written direction to require a provider to provide information about donor-conceived births, including whether a child was born as a result of ART treatment and any registrable information in connection with that child. The Bill also provides that the Secretary may disclose information held on the central register of their own initiative or to a person who made an application to be given this information. The Bill also allows information sharing between the Secretary and the Registrar of Births Deaths and Marriages about donor-conceived births to ensure the accuracy of the central register.

These provisions permit the obtaining and sharing of personal and medical information collected by the ART provider. However, the Committee notes that the intention of this amendment is to have this information stored for the approved access of donor-conceived adults to find out information about their biological parents. In these circumstances the Committee makes no further comment.

Privacy/Confidential information: issue two

7. Schedule 2 of the Bill inserts section 23A to the *Health Administration Act 1982*. Section 23A outlines provisions for the exchange of information between health officials. 'Health officials' is taken to mean a person or body under a number of health-related Acts, or to mean an Act or instrument prescribed by the regulations. Section 23A(2) provides that a health official may only disclose information under this section if they consider that the public interest in disclosing the information outweighs the public interest in protecting

the confidentiality of the information and the privacy of any person to whom the information relates.

The Bill outlines amendments to the *Health Administration Act 1982* to allow the exchange of information between health officials. The Bill provides that health officials may only do this if they consider it is in the public interest to do so. The Committee notes that while this places a safeguard on the release of private or confidential information, the Bill does not outline circumstances in which the release of this information would be considered in the public interest. The Committee draws this issue to the attention of the Parliament for consideration of whether it unduly trespasses on a person's right to privacy of their personal or confidential health information.

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

Commencement by proclamation

8. Section 2 provides that Schedules 2 [1], 3 [1] and [2], 4 [3] and 6 commence on a day or days to be appointed 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. However, the Committee notes that the legislation implements amendments to several Acts and regulatory frameworks and a flexible start date may be preferable. In this circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

9. The Bill amends the *Private Health Facilities Act 2007* and inserts section 49H, which outlines matters that the regulations may make provisions for, including the functions of incident reviewers and the manner in which they exercise those functions, the carrying out of reviews or audits of any preliminary risk assessments or serious adverse event review, or the exchange of information between a licensee and persons or bodies who may be required to exercise functions under this Part or Part 2A of the *Health Administration Act 1982* for the purpose of the exercise of those functions.

The Committee generally prefers that substantive matters be outlined in the principal legislation to allow for parliamentary scrutiny. As the Bill permits the regulations to make provisions with respect to the functions of incident reviewers and the manner in which they exercise those functions, these may be considered to be substantive matters. The Committee draws this to the attention of the Parliament for its consideration of whether the Bill insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

4. Justice Legislation Amendment Bill (No 3) 2018; Crimes Legislation Amendment (Victims) Bill 2018; Government Information (Public Access) Amendment Bill 2018

Date introduced	24 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.

Justice Legislation Amendment Bill (No 3) 2018

2. The objects of this Bill (the Justice Bill) are to amend various Acts and Regulations relating to courts, crimes and other matters in the Justice portfolio, including as follows:
 - a) to provide for a representative of the Australian Defence Force to be a trustee of the Anzac Memorial Building and to expand the site of the Memorial Building,
 - b) to make further provision for the disclosure of information in the administration or execution of the *Children (Detention Centres) Act 1987*,
 - c) to extend the circumstances in which a sexual assault will be treated as an aggravated sexual assault,
 - d) to enable an inmate in a correctional centre to be held for up to 4 days after the inmate's release date if there is a good reason to delay the release and the inmate requests or consents to the delay,
 - e) to enable a court to deal with an offender who has breached a community correction order or conditional release order after the order has expired in respect of matters arising during the term of the order,
 - f) to enable a community corrections officer to deal with an offender who has breached a re-integration home detention order in less formal ways before referring the breach to the State Parole Authority,
 - g) to enable the State Parole Authority to revoke an intensive correction order for reasons other than a breach,

- h) to limit the circumstances in which a relationship between a dependant and a paid carer is treated as a domestic relationship under the *Crimes (Domestic and Personal Violence) Act 2007*,
- i) to ensure that the sharing of information under an information sharing arrangement does not prevent a claim of sexual assault communications privilege in relation to that information,
- j) to clarify the circumstances in which the Crown can appeal against a sentence,
- k) to enable proceedings for back up summary offences to be brought outside the usual 6-month time limit in certain circumstances,
- l) to provide for the giving of expert evidence concurrently and consecutively in criminal proceedings,
- m) to provide that telephone numbers and addresses are not required to be disclosed in subpoenaed material, unless they are a materially relevant part of the evidence or a court orders the disclosure,
- n) to restrict access by an accused person to sensitive evidence held by a health authority,
- o) to enable interviews and recordings with children made by interstate investigating officials to be used as evidence under the special arrangements that apply to the giving of evidence by children in criminal proceedings,
- p) to clarify the jurisdiction of the District Court in relation to actions arising out of commercial transactions,
- q) to enable the Drug Court to remove any motor vehicle licence disqualifications to which a person is subject (similar to the Local Court),
- r) to provide that documents served by post are presumed to have been served on the seventh working day after being posted, instead of the fourth working day,
- s) to increase the jurisdictional limit of the Local Court's Small Claims Division from \$10,000 to \$20,000,
- t) to enable the Registrar of Births, Deaths and Marriages to provide or arrange for the provision of celebratory services in connection with the registration of a relationship,
- u) to make further provision in respect of applications to the Local Court for the removal of driver licence disqualifications and the quashing of existing habitual traffic offender declarations,
- v) to clarify the effect of same sex marriages, divorces and annulments that are now recognised in Australia on wills made before same sex marriage was recognised in Australia,
- w) to enable the Commissioner of Victims Rights to provide funding from the Victims Support Fund to organisations that support victims,

- x) to increase the retirement age for judicial officers from 72 years to 75 years and to increase the maximum age for acting judicial officers from 77 years to 78 years,
- y) to abolish the Solicitors Mutual Indemnity Fund and to distribute the monetary assets of the Fund equally to an account for community legal services that is established in the Public Purpose Fund and to the Law Society of NSW,
- z) to require the Law Society of NSW to subscribe to an amount of capital in Lawcover Insurance Pty Ltd that is not less than the amount of monetary assets transferred to the Law Society of NSW from the Solicitors Mutual Indemnity Fund,
- aa) to transfer the rights and liabilities of the manager of the Solicitors Mutual Indemnity Fund relating to indemnity insurance by the failed HIH insurance group to Lawcover Insurance Pty Ltd,
- bb) to provide that a law practice is to make deposits to the Law Society of NSW from the trust fund kept by the law practice every 3 months instead of every 12 months,
- cc) to make other minor and consequential amendments.

Crimes Legislation Amendment (Victims) Bill 2018

3. The objects of this Bill (the Victims Bill) are as follows:

- a) to amend the Children (*Criminal Proceedings*) Act 1987:
 - i. to establish a new procedure to be adopted by the Children's Court for the purpose of deciding whether proceedings in which a person is charged with a child sexual assault offence should be dealt with on indictment when the prosecution requests that the proceedings be dealt with according to law, and
 - ii. to minimise the circumstances in which a complainant or other witness can be called to give oral evidence in proceedings before the Children's Court,
- b) to amend the *Crimes (Domestic and Personal Violence) Act 2007*:
 - i. to require proceedings or parts of proceedings relating to apprehended violence orders to be closed to the public if a child aged 16 or 17 is involved (whether as a witness, as the defendant or as the person protected by the order), unless the court hearing the proceedings directs otherwise, and
 - ii. to require proceedings in relation to an application for a final apprehended violence order or an interim court order to be closed to the public if the defendant is under 18 years of age,
- c) to amend provisions of the *Crimes (Sentencing Procedure) Act 1999* relating to the preparation and reading of victim impact statements:
 - i. to allow victims of additional offences that are sexual, private or indecent in nature, and additional members of the immediate family of a primary victim who has died, to prepare and read a victim impact statement, and

- ii. to provide for victim impact statements to contain particulars of harms other than actual physical bodily harm, psychological harm or psychiatric harm, and
 - iii. to extend the right of victims to read their victim impact statements with a support person present so that it applies to all victims, and to extend protections allowing victim impact statements to be read in the absence of the public or using closed-circuit television arrangements to all victims, subject to those facilities being reasonably available, and
 - iv. to relax certain formal requirements,
- d) to amend the *Crimes (Sentencing Procedure) Regulation 2017* consequential on the amendments made to the *Crimes (Sentencing Procedure) Act 1999* to make further provision with respect to victim impact statements,
- e) to amend the *Criminal Procedure Act 1986* to extend protections available to certain witnesses, including:
- i. to extend protections that complainants in sexual offence proceedings have when giving evidence, so that they apply also to victims of female genital mutilation, and
 - ii. to extend the category of complainants who are protected from being directed to attend and give oral evidence at committal proceedings for sexual offences or offences involving violence to include complainants under certain Commonwealth offences, and
 - iii. to extend the protections that complainants in retrials and subsequent trials of sexual offence proceedings have, so that they apply to sexual offence witnesses (also known as tendency witnesses) in those proceedings and to witnesses who have a cognitive impairment or are under 18, and
 - iv. to extend the right to have a support person present when giving evidence to young persons, witnesses with a cognitive impairment and complainants in criminal proceedings for domestic violence offences, and
 - v. to allow for a record of the original evidence of sexual offence witnesses and vulnerable witnesses to be admitted in a retrial or subsequent trial with respect to prescribed sexual offence proceedings.

Government Information (Public Access) Amendment Bill 2018

4. The object of this Bill (the GIPA Bill) is to amend the *Government Information (Public Access) Act 2009* (the GIPA Act) to give effect to recommendations arising from a statutory review of the GIPA Act (the GIPA Review) tabled in Parliament on 10 August 2017.

Background

Justice Legislation Amendment Bill (No 3) 2018

5. The Justice Bill is the third bill of its kind this year which makes various amendments to several statutes in the justice portfolio.

Crimes Legislation Amendment (Victims) Bill 2018

6. The Victims Bill amends the *Crimes (Sentencing Procedure) Act 1999* and *Crimes (Sentencing Procedure) Regulation 2017*.
7. In particular, the Victims Bill makes some amendments relating to victims impact statements following a review undertaken by the NSW Sentencing Council, dated March 2018 (the Sentencing Council's report).³ According to the Second Reading Speech, the NSW Government accepted many of the Sentencing Council's recommendations, and the Bill implements amendments that:
 - a) enable victims to provide a more complete picture of the harm they have suffered,
 - b) ensure that victims have a support person when reading their statement, and
 - c) allow victims to read a victim impact statement via CCTV or in the absence of the public in appropriate circumstances.
8. The Attorney General further indicated that other recommendations were still subject to further consultation and were under consideration. The Attorney General noted the need to balance victims' rights with efficient court processes for both victims and other justice system participants.
9. The NSW Government published its response to the Sentencing Council's recommendations in October 2018.⁴

Government Information (Public Access) Amendment Bill 2018

10. The GIPA Review was completed in July 2017 and made 18 recommendations focused on modernising the GIPA Act, reducing compliance burdens for agencies, and providing more certainty for applicants about how access applications would be handled.⁵
11. The Second Reading Speech indicated that the amendments proposed in the GIPA Bill are 'the result of extensive consultations, including submissions from the public as well as meetings with key government and non-government stakeholders.'

³ NSW Sentencing Council, [Victims' involvement in sentencing: Report](#), March 2018 (Sentencing Council's report)

⁴ NSW Government, [Schedule of Government Response to Recommendations on Victims' Involvement in Sentencing](#), October 2018 (Government response)

⁵ NSW Department of Justice, [Statutory Review: Government Information \(Public Access\) Act 2009 and Government Information \(Information Commissioner\) Act 2009](#), July 2017, pp v – vi (GIPA Review)

Issues considered by committee

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

Right to a fair trial: issue one - Crimes Legislation Amendment (Victims) Bill 2018

12. The Victims Bill amends provisions in the *Crimes (Sentencing Procedure) Act 1999* relating to the content and use of victims impact statements (VIS).
13. Currently, a VIS can only address certain types of harm. The Victims Bill expands the different types of harm that can be addressed in a VIS to include matters such as psychological harm: proposed section 28.
14. The Victims Bill also amends the Act so that a VIS prepared by a primary victim will now be treated in the same way as a VIS by a family victim: proposed section 30E. That is, the Court must receive and consider a compliant VIS after conviction but before sentencing, and may make any comments that it considers appropriate. The Sentencing Council's report recommended that the Act be amended so that all VIS are treated the same.⁶
15. The Sentencing Council's Report noted that, while evidence of aggravating circumstances that are likely to increase an offender's sentence is usually adduced at trial, sometimes a VIS is the only relevant evidence of such circumstances. The Court has previously found that 'considerable caution must be exercised before a VIS can be used to establish an aggravating factor to the requisite standard.'⁷ The Sentencing Council recommended that evidence of aggravating circumstances should be adduced through evidence outside of the VIS process, and the Government has indicated that it adopted this recommendation and that this is the current practice of the DPP.⁸
16. Proposed section 30F(2) provides that the Court must not consider or take into account any material in a VIS that is not specifically authorised by the Division. The Second Reading Speech suggests that the proposed subsection is a safeguard for offenders in that, while the Court may accept a non-compliant VIS, the Court must disregard the content of the VIS to the extent of that non-compliance.

Following a review by the Sentencing Council, the Victims Bill amends the *Crimes (Sentencing Procedure) Act 1999* to expand the content of and circumstances in which victims impact statements (VIS) can be used by the Court. That is, a VIS will now capture a greater range of harm and a VIS from a primary victim and a family victim will be treated in the same way.

Given that the Court must consider a VIS any time after it convicts, but before it sentences, any expansion of the content and use of a VIS may impact on an offender's right to a fair trial. However, the Victims Bill appears to retain the existing discretion of the Court in relation to the impact of a VIS on sentencing, in accordance with the Sentencing Council's report. Further, the amendments contain a provision which prevents the Court from having regard to material which is not authorised under the Act to be contained in a VIS. For these reasons,

⁶ [Sentencing Council's report](#), pp 40 - 41

⁷ [Sentencing Council's report](#), p 43

⁸ [Government response](#), October 2018, p 10

and noting the policy aims of the Victims Bill, the Committee makes no further comment.

Right to a fair trial: issue two - Crimes Legislation Amendment (Victims) Bill 2018

17. The Victims Bill amends the admission of evidence of complainants from related or earlier proceedings for prescribed sexual offences in the context of the *Criminal Procedure Act 1986* (proposed sections 279A and 294CA).
18. Proposed sections 279A and 294CA have the effect of allowing a complainant's evidence from related or earlier proceedings involving the same accused to be tendered in recorded form in the subsequent proceedings. This prevents the complainant from having to give evidence twice.
19. However, the Court may compel the complainant to give further evidence if it feels it is necessary to clarify any matters relating to the original evidence, or to canvass new information or material, or in the interests of justice: proposed subsection (5). The Court can also decline to admit a record of the original evidence if it is of the opinion that the accused would be unfairly disadvantaged, having regard to a number of matters including the completeness of the original evidence, whether cross examination occurred, and any other matter that may be relevant: proposed subsection (8). The Court can also issue directions as to how any admitted recorded evidence should be altered or edited: proposed subsection (9).
20. It is noted that the Victims Bill also makes amendments which have a similar effect in relation to the hearing of certain child sexual assault charges in the Children's Court: proposed sections 31AA – 31B.
21. According to the Second Reading Speech, the amendments proposed to the Children (*Criminal Proceedings*) Act 1987 implement a royal commission recommendation that complainants in child sexual abuse proceedings should not be required to give evidence on more than one occasion where the accused is a young person. Currently, certain child sexual abuse offences must have a full hearing in the Children's Court before the Court determines whether the proceedings should be heard summarily or according to law in a higher court. If the proceedings are referred to a higher court, the complainant must give evidence again.
22. The amendments contain some safeguards which enable the Children's Court to direct the attendance of a complainant if there are special reasons why the complainant should, in the interests of justice, attend to give oral evidence: proposed section 31AD. The provisions also do not apply to serious indictable offences: proposed section 31AA.

The Victims Bill allows complainants involved in prescribed sexual offence proceedings to have a record of their original evidence to be tendered in related or subsequent proceedings. This prevents the complainant from having to provide oral evidence twice.

The Bill also proposes amendments applying to certain child sexual assault proceedings in the Children's Court, so that evidence from the complainant may be tendered in writing. Although the Court may compel the complainant to attend to give evidence, there must be special reasons to do so.

The Committee notes that these provisions may impact on the accused right to a fair trial, including because the defence may have a reduced ability to 'test' the evidence of the complainant.

However, the Committee also acknowledges that in relation to prescribed sexual offences, the relevant sections contain numerous safeguards which allow the Court to exercise discretion as to whether the complainant should be compelled to give further evidence or otherwise as to how the recorded evidence should be treated. The Children's Court is also able to compel the complainant to give oral evidence, if there are special reasons to do so.

For these reasons, and noting the trauma that may result in complainants having to provide sensitive evidence, particularly on multiple occasions, the Committee makes no further comment.

Restriction of access to government information - Government Information (Public Access) Amendment Bill 2018

23. Section 14 of the GIPA Act provides that there is a conclusive presumption that there is an overriding public interest against disclosure of government information listed in Schedule 1.
24. For matters not listed in Schedule 1, the usual approach is for the agency assessing a GIPA application to decide whether the public interest considerations against disclosure outweigh the public interests considerations in favour of disclosure. It is noted that in practice access to information under the GIPA Act can be granted on a partial basis; for example, a document may be redacted.
25. Clause 2 of Schedule 1 to the GIPA Act provides that there is a conclusive presumption against disclosure for certain types of Cabinet information. However, clause 2(4) currently provides that information is not Cabinet information to the extent that it consists solely of factual material, unless the information would reveal or tend to reveal information concerning a Cabinet decision or Ministerial position, as the case may be.
26. The GIPA Bill proposes to amend this clause so that there is a conclusive presumption against disclosure in relation to Cabinet information which, although solely factual, is 'contained in a document that, either entirely or in part, would' reveal or tend to reveal information concerning a Cabinet decision or Ministerial position, as the case may be.
27. The explanatory note indicates that this amendment gives effect to recommendation 16 of the GIPA Review. DPC made a submission to the GIPA Review which suggested that some applicants argued that the wording of the current clause meant that agencies should undertake a 'word-by-word, sentence-by-sentence' analysis of Cabinet documents to determine which parts of that document related to 'solely...factual information', and accordingly did not attract a conclusive presumption against disclosure.⁹

There is a conclusive presumption against disclosure for many types of Cabinet information under the GIPA Act. However, the Act currently provides that information is not Cabinet information to the extent that it consists solely of

⁹ [GIPA Review](#), pp 46 – 47

factual material, unless the information would reveal or tend to reveal information concerning a Cabinet decision or Ministerial position.

The GIPA Bill amends the GIPA Act so that information that is solely factual but which is 'contained in a document that, either entirely or in part, would' reveal or tend to reveal Cabinet decisions or Ministerial positions may not be disclosed.

The Committee notes that the explanatory note indicates that the amendment gives effect to recommendation 16 in the statutory review, which suggests that the amendment may better achieve the intended policy aim of the exemption. However, given that the provision has potential to further restrict access to some Cabinet information, the Committee draws this to the attention of Parliament.

Limiting judicial discretion - Justice Legislation Amendment Bill (No 3) 2018

28. Schedule 1.4[2] of the Justice Bill amends section 55 of the *Children (Detention Centres) Act 1987* so that the period of supervision of a parole order for a juvenile offender will be specified in the regulations. Currently the period of supervision is that which is specified by or under the parole order, or under the regulations: section 55(2).
29. At present, clause 95(2) the *Children (Detention Centres) Regulation 2015* provides that the period of supervision imposed on a parole order is:
 - a) the lesser of 3 years or the period that the parole order is in force, in the case of a classified person, or
 - b) the lesser of 2 years or the period that the parole order is in force, in any other case.
30. The explanatory note indicates that the period of supervision will no longer be set by the Children's Court in the parole order itself.
31. A similar amendment is proposed for the period of supervision of parole to which adult offenders are subject under the *Crimes (Administration of Sentences) Act 1999*: see schedule 1.9[5] of the Justice Bill.

The Justice Bill amends the *Children (Detention Centres) Act 1987* and the *Crimes (Administration of Sentences) Act 1999* so that the Children's Court or the State Parole Authority, as the case may be, will no longer be able to determine the period of supervision of a parole order. Rather, this will be determined by the regulations. According to the Second Reading Speech, the amendment is part of the Government's parole reforms introduced by the *Parole Legislation Amendment Act 2017*.

The Committee notes that these amendments may limit judicial discretion as to the period of supervision in circumstances where this may impact on the freedom of movement and freedom of association of offenders.

Noting also that matters in regulations are subject to a lower degree of parliamentary scrutiny, the Committee draws these amendments to the attention of the Parliament.

Procedural fairness - Justice Legislation Amendment Bill (No 3) 2018

32. Schedule 1.9 of the Justice Bill amends the *Crimes (Administration of Sentences) Act 1999* (the CAS Act), including in relation to the revocation of intensive correction orders.
33. The Second Reading Speech suggests that the Parole Authority previously had these powers under section 163 of the CAS Act, but 'those powers were inadvertently not carried forward when the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* amended the Act as part of the Government's sentencing reforms.'
34. An intensive correction order is an order for intensive correction in the community. Should the Parole Authority choose to revoke an intensive correction order for a serious breach, it appears that it may require the offender to serve the remainder of their sentence in custody.¹⁰
35. The amendments proposed in the Justice Bill to Division 1 of Part 7 of the CAS Act expand the circumstances in which the Parole Authority may revoke an intensive correction order (including on its own initiative): see proposed section 164AA. These circumstances include:
 - a) if the offender is unable to comply with their obligations as a result of a material change in circumstances,
 - b) if the offender fails to appear before the Parole Authority when called under section 180 of the CAS Act (offer to attend Parole Authority when called on),
 - c) if the offender has applied for the order to be revoked,
 - d) if, on the recommendation of the Commissioner, the Parole Authority is satisfied that health reasons or compassionate grounds exist that justify the revocation.
36. Such revocation orders may be made whether or not the offender has been called to appear before the Parole Authority, and whether or not the Parole Authority has held an inquiry: proposed section 164A(1A).
37. The amendments described above are expressed to apply retrospectively from 24 September 2018.

The Justice Bill proposes that the Parole Authority may revoke an intensive correction order for reasons other than a breach of the order. This can be done in circumstances where the offender has not appeared before the Authority and where no inquiry has been held. The relevant provisions are expressed to have retrospective effect until 24 September 2018.

While the Committee notes that some of the grounds for revoking an order may be of benefit to the offender (such as if they have requested the revocation, or on compassionate grounds), the provisions may still have potential to trespass on an offender's right to procedural fairness and also their right to only be bound by the law as it stands at a given time. This is particularly important in circumstances where questions of liberty may be decided.

¹⁰ NSW Department of Justice, [Intensive Correction Order](#), viewed 7 November 2018

The Committee acknowledges that the Second Reading Speech indicates that these powers previously existed under *the Crimes (Administration of Sentences) Act 1999*, and were inadvertently not carried forward when that Act was recently amended. However, for the reasons above, the Committee draws this matter to the attention of Parliament.

Right to a fair trial: issue one - Justice Legislation Amendment Bill (No 3) 2018

38. The Justice Bill proposes to amend section 179 of the *Criminal Procedure Act 1986*: see schedule 1.15 [1] and [2].
39. Section 179 currently provides that proceedings for a summary offence must be commenced not later than 6 months from when the offence was alleged to have been committed. However, the 6 month time limit does not apply to offences for which other time periods are specified, to indictable offences being dealt with summarily, or to an offence that has been the subject of a coronial inquest.
40. The Justice Bill proposes to add another exemption for 'back up summary offences'. A 'back up summary offence' is a summary offence where the charge for that offence was withdrawn or dismissed after the person was convicted or found guilty of an indictable offence by the Children's Court or Local Court on the basis of the same facts.
41. This exemption will operate 'if the District Court determines an appeal against a conviction or finding of guilt by the Children's Court or Local Court for the related indictable offence by setting aside the contravention or finding of guilt.' That is, if the District Court decides to overturn the decision of the Children's Court or Local Court that a person was guilty of an indictable offence.
42. The new period for laying back up summary charges will be 6 months from the decision of the District Court.
43. This could mean that fresh proceedings for a summary offence against an accused could be brought even after an appellate court has overturned a conviction for an indictable offence relating to the same facts.
44. The Second Reading Speech clarifies that the purpose of the amendment is to enable 'backup summary offence or offences to be re-laid':

Currently, it may be impossible for backup summary charges to be re-laid following a person appealing their finding of guilt or conviction in relation to a related indictable offence to the District Court because the appeal may not be finalised within the six-month time frame available to lay a summary charge. This amendment seeks to resolve this issue by putting a person in the same position that they were in when their matter was first heard in the Local Court or Children's Court. This amendment will not enable a person to be charged with new or different offences outside of the six-month time frame.

The Justice Bill amends the *Criminal Procedure Act 1986* to create another exemption to the 6 month time limit that applies to summary offences. The exemption will apply where 'backup summary charges' have been laid for a matter that begins in the Children's Court or Local Court. If the District Court hears an appeal in relation to an indictable offence relating to the same facts,

and finds the accused not guilty, the 6 month time limit for re-laying back up summary charges will begin from the date of the District Court's decision.

The Second Reading Speech notes that the amendment will not enable a person to be charged with new or different offences outside of the 6 month time frame. However, the Committee notes that the amendments may potentially impact on the right to a fair trial, particularly in circumstances where the amendment is expressed to have the effect of putting a person in the same position that they were in when the matter was first heard in the Local Court or Children's Court. This delay may be unfair in circumstances where a higher court has disposed with a similar matter relating to the same facts.

While acknowledging the practical purpose of the amendments, the Committee draws these provisions to the attention of the Parliament.

Right to a fair trial: issue two - Justice Legislation Amendment Bill (No 3) 2018

45. Schedule 1.15[9] of the Justice Bill amends the *Criminal Procedure Act 1986* (the CP Act) to enable a health authority to refuse to produce 'sensitive evidence' in response to a subpoena issued by an accused in criminal proceedings.
46. 'Sensitive evidence' is defined in section 281B of the CP Act to refer to anything that contains or displays an image of a person if the image is obscene or indecent; or if providing a copy of the image without the relevant person's consent would interfere with their privacy; or the image was taken after the death of a person. Some audio recordings can also be classified as 'sensitive evidence' on similar grounds.
47. Should the health authority seek to rely on the sensitive evidence exemption, it must issue a 'sensitive evidence notice': proposed section 281FB. That notice should contain information about how the accused person (including a person engaged to assist the accused) can view or listen to the sensitive evidence in accordance with supervised access arrangements, and set out the name and contact details of an 'access supervisor.'
48. It is proposed that 'the court must, on receipt of the sensitive evidence notice, set aside the subpoena (to the extent that it relates to the sensitive evidence) and order that the accused person be given access to the sensitive evidence in accordance with the notice.' It is noted that it appears that the Court has no express discretion to uphold the subpoena or vary the terms of access set out in the notice: see proposed section 281FB(3).
49. The amendments contemplate that an accused person may be given a copy of sensitive evidence by a health authority, but the health authority can require the Court to direct the accused persons to return the sensitive evidence to the authority at or before the end of each day of proceedings: see proposed section 281FE.
50. Sensitive evidence may be provided to a police officer or prosecuting authority: proposed section 281FG.
51. The explanatory note indicates that the provisions are similar to arrangements that apply to sensitive evidence that is in the custody of a prosecuting authority.

Under the Justice Bill, a health authority can refuse to produce 'sensitive evidence' in response to a subpoena issued by an accused person in criminal

proceedings. Sensitive evidence includes obscene or indecent images or audio recordings, and images which if provided without the relevant person's consent would interfere with their privacy.

The health authority must issue a 'sensitive evidence notice' setting out alternative supervised access arrangements for the accused person and any person engaged to assist the accused in preparing their case. The Court appears to have no express discretion to uphold the subpoena or to vary the terms of access to sensitive evidence.

The Committee notes that the amendments may trespass on the right to a fair trial. For example, the provisions may impair the ability of an accused and his or her legal representatives to prepare their case in circumstances where the prosecuting authority may have unfettered access to the sensitive evidence. While the Committee acknowledges that this limitation on the right to a fair trial may be justified in order to protect the dignity of victims, in light of the apparent lack of judicial discretion, the Committee refers this matter to Parliament for its further consideration.

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

Right to privacy - Justice Legislation Amendment Bill (No 3) 2018

52. Schedule 1.4[4] of the Justice Bill amends the *Children (Detention Centres) Act 1987* to facilitate greater information disclosure powers of the Secretary.
53. Currently, section 37D of the Act provides that it is an offence for a person to disclose information obtained in connection with the administration or execution of the Act, except in limited circumstances (such as with the source's consent, for the purpose of legal proceedings, or with other lawful excuse). Criminal penalties apply to disclosures of information in contravention of the section.
54. The Second Reading Speech indicates that proposed section 102 is intended to replace and amend existing section 37D to make it easier to facilitate the disclosure of information.
55. Proposed section 102A(1) enables the Secretary to disclose information in connection with the exercise of the Secretary's official functions under this or any other Act for any purpose prescribed by the regulations. Such disclosures can be made despite the *Privacy and Personal Information Protection Act 1998* (PIIP Act) and the *Health Records and Information Privacy Act 2002* (HRIP Act): proposed section 102A(4).
56. However, proposed section 102A(3) provides that 'the power to prescribe a purpose under subsection (1) does not imply that the Secretary may disclose information only for a prescribed purpose.'

Currently it is a criminal offence to disclose information under the *Children (Detention Centres) Act 1987* except in limited circumstances, such as with the consent of the relevant person or in the context of legal proceedings. The Second Reading Speech indicates that the amendments will make it easier to share information where it will assist in the effective operation of the justice system.

While the proposed amendments would allow the Secretary to disclose information for a prescribed purpose, the relevant section also suggests that the Secretary can disclose information for purposes other than those that are prescribed in the regulations. Legislative privacy protections that may ordinarily apply to the disclosure and sharing of such information are expressed not to apply.

The Committee notes that the amendments may trespass on the right to privacy in circumstances where it is not clear, for example, for what purpose information may be disclosed.

In light of the removal of a criminal offence and the more expansive disclosure powers, the Committee refers this matter to the Parliament.

5. Justice Legislation Amendment (Walama Court) Bill 2018*

Date introduced	25 October 2018
House introduced	Legislative Assembly
Member responsible	Mr Paul Lynch MP
	* Private Member's Bill

Purpose and description

1. The objects of this Bill are to amend the *District Court Act 1973* and the *Crimes (Administration of Sentences) Act 1999* as follows:
 - a) to establish the Walama Court, being the District Court exercising criminal jurisdiction by sitting as the Walama Court,
 - b) to confer jurisdiction on the Walama Court to deal with the sentencing of accused persons who are Aboriginal persons and to enable a judge to refer a person to the Walama Court for sentencing,
 - c) to enable the District Court rules to provide for additional or different procedures for the Walama Court,
 - d) to enable the Chief Judge of the District Court to make practice notes relating to the practice and procedure of the Walama Court,
 - e) to confer jurisdiction on the Walama Court (instead of the Parole Authority) to deal with offenders on whom the Court imposes intensive correction orders and who fail to comply with the orders,
 - f) to make other minor and consequential amendments.

Background

2. In the Second Reading Speech, Mr Paul Lynch MP noted that the *Justice Legislation Amendment (Walama Court) Bill 2018* would establish the Walama Court, which would be an Indigenous-specific court within the District Court.
3. Mr Lynch MP noted that the Bill confers on the Walama Court jurisdiction to deal with sentencing matters of Aboriginal persons and allow a trial judge to refer a person to the Walama Court. It also enables the District Court to issue practice notes concerning the practice or procedure of the Walama Court.

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*.

6. Liquor Legislation Bill 2018 (Repeal of Lock-Out) Law*

Date introduced	25 October 2018
House introduced	Legislative Council
Member responsible	The Hon. Robert Borsak MLC
	* Private Member's Bill

Purpose and description

1. The object of this Bill is to repeal provisions that prevent patrons from entering licensed premises in the Sydney CBD and Kings Cross precincts after 1.30 am.

Background

2. The Bill amends the *Liquor Act 2007* and the *Liquor Regulation 2018* to repeal the provisions which prohibit patrons from entering licenced premises in Sydney Central Business District and King Cross precinct.

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*.

7. Public Works and Procurement Amendment (Enforcement) Bill 2018

Date introduced	24 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 *Public Works and Procurement Act 1912* to provide for the enforcement of certain directions and policies of the New South Wales Procurement Board concerning procurements to which international procurement agreements may apply.

Background

2. In March 2018, Australia was one of 11 countries that signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11). In the Second Reading Speech, the Hon. Catherine Cusack MLC stated that for Australia to be compliant with the TPP-11 it must establish an independent review mechanism for government procurement:¹¹

This bill ensures that the New South Wales Government provides the necessary domestic review framework to ensure that agencies can undertake procurement arrangement in accordance with relevant requirements of TPP-11.

3. Elements of the review framework include:
 - a person who supplies, or could supply goods and services to a government agency and whose interests area affected by an alleges contravention can lodge a complaint with the head of the government agency;
 - on receipt of a complaint the government agency head must suspend the procurement action and investigate the complaint, except where the agency has issued a certificate stating that it is not in the public interest to suspend the procurement;
 - where attempts to resolve the complaint fails, the complainant may seek review from the Supreme Court. The Supreme Court may grant injunctions and also order a payment of compensation in certain circumstances.

¹¹ New South Wales, *Parliamentary Debates*, Legislative Council, 24 October 2018, p 52 (The Hon. Catherine Cusack MLC)

Issues considered by Committee

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

Commencement by proclamation

4. 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.

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

Matters deferred to regulations

5. The Bill provides that the regulations may make provision for or with respect to complaints concerning the conduct of government agencies in connection with enforceable procurement provisions including by providing for:
 - the persons, groups of persons or bodies who have standing to make complaints, and
 - the kinds of complaints that may be made, and
 - the manner, form and time periods for making complaints, and
 - the resolution of complaints (including the suspension of procurement pending their resolution).
6. Further, a regulation made concerning the above matters may provide for complaints to be dealt with in a way that is different to the proposed review framework

The Committee notes that as part of its obligations under the TPP-11, the Commonwealth and all States and Territories must establish an independent review mechanism for government procurements. The Bill establishes a review framework, however, it defers to the regulations the power to provide the finer details of the framework. Such details include what kinds of complaints fall within the review framework and who has standing to make a complaint.

Given that the Bill seeks to provide a right of review to certain persons, the Committee considers that the details of the review framework should be specified in the principal legislation and subject to parliamentary scrutiny. The Committee refers this issue to Parliament for its consideration.

8. Retirement Villages Amendment Bill 2018; Building and Construction Industry Security of Payment Amendment Bill 2018; Fair Trading Legislation Amendment (Miscellaneous) Bill 2018; Protection of the Environment Operations Amendment (Asbestos Waste) Bill 2018

Date introduced	24 October 2018
House introduced	Legislative Council
Minister responsible	The Hon. Matt Kean MP
Portfolio	Innovation and Better Regulation

Purpose and description

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

Retirement Villages Amendment Bill 2018

2. The objects of this Bill are:
 - a) to amend the *Retirement Villages Act 1999* (the principal Act) to give effect to some of the recommendations of the Inquiry into the NSW Retirement Village Sector concerning the following:
 - i. emergency plans and safety inspections for retirement villages,
 - ii. annual emergency evacuation exercises and the display of key safety information for retirement villages,
 - iii. operators of retirement villages explaining certain village contract information to residents if requested,
 - iv. rules of conduct for operators of retirement villages,
 - v. asset management plans for retirement villages,
 - vi. consent from residents of retirement villages to the appointment of auditors of accounts,

RETIREMENT VILLAGES AMENDMENT BILL 2018; BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT AMENDMENT BILL 2018; FAIR TRADING LEGISLATION AMENDMENT (MISCELLANEOUS) BILL 2018; PROTECTION OF THE ENVIRONMENT OPERATIONS AMENDMENT (ASBESTOS WASTE) BILL 2018

- vii. the provision, sharing and publication of certain information about retirement villages,
- viii. the mediation of disputes under the principal Act, and
- b) to make related and consequential amendments to the principal Act, and
- c) to make consequential amendments to the Retirement Villages Regulation 2017.

Building and Construction Industry Security of Payment Amendment Bill 2018

3. The object of this Bill is to amend the *Building and Construction Industry Security of Payment Act 1999* (the Principal Act) as follows:

- a) to modify provisions relating to the entitlement under the Principal Act to receive progress payments and to serve claims in respect of those payments,
- b) to provide that a progress payment to be paid to a subcontractor under a construction contract is due and payable no later than 20 (instead of the current 30) business days after the subcontractor makes a payment claim for the payment,
- c) to increase penalties for offences under the Principal Act, including offences relating to the supporting statements that are required to accompany payment claims,
- d) to make miscellaneous amendments relating to the procedure for recovering progress payments under the Principal Act, including providing for a code of practice relating to persons who are authorised to nominate adjudicators,
- e) to enable the Supreme Court to set aside (in whole or in part) an adjudicator's determination if it finds that a jurisdictional error has occurred,
- f) to enable the regulations to require information to be provided to subcontractors when entering into construction contracts,
- g) to include investigation and enforcement powers under the Principal Act,
- h) to provide for the period in which proceedings for offences against the Principal Act or the regulations may be commenced in the Local Court,
- i) to provide for the issuing of penalty notices for offences against the Principal Act or the regulations,
- j) to provide for the personal liability of directors for offences by corporations,
- k) to make other amendments of an administrative, minor or consequential nature.

Fair Trading Legislation Amendment (Miscellaneous) Bill 2018

4. The objects of this Bill are as follows:

- a) to amend the *Residential Tenancies Act 2010* to enable the regulations to establish a rental bond roll-over scheme,
- b) to amend the *Co-operative Housing and Starr-Bowkett Societies Act 1998* to prohibit the formation or registration of new co-operative housing societies and Starr-Bowkett societies,
- c) to repeal various Acts and transfer certain provisions with ongoing effect to other legislation,
- d) to amend the *Uncollected Goods Act 1995* and other Acts and regulations to bring provisions relating to the disposal of abandoned and uncollected goods into a single Act and to reform and simplify those provisions.

Protection of the Environment Operations Amendment (Asbestos Waste) Bill 2018

5. The objects of this Bill are:

- a) to amend the *Protection of the Environment Operations Act 1997* (the principal Act) as follows:
 - i. to transfer certain asbestos waste offences from the *Protection of the Environment Operations (Waste) Regulation 2014* to the principal Act and increase penalties for those offences,
 - ii. to increase penalties for other waste offences (such as land pollution) that involve asbestos waste,
 - iii. to make the presence of asbestos a sentencing consideration, and
- b) to make related and consequential amendments to the principal Act, and
- c) to make consequential amendments to the *Protection of the Environment Operations (General) Regulation 2009* and the *Protection of the Environment Operations (Waste) Regulation 2014*.

Background

6. In the Second Reading Speech, it was noted that these four cognate bills are part of the reforms within the Innovation and Better Regulation portfolio to reduce red tape and ensure that the legislation remains fit for purpose.

Issues considered by committee

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

Significant increase in penalties – Protection of the Environment Operation Amendment (Asbestos Waste) Bill 2018

7. Schedule 1 of the Bill doubles the financial penalties for pollution offences that involve asbestos waste. This results in many penalties increasing to amounts between \$500,000 and \$2,000,000.

8. As noted in the Second Reading Speech, this change is in response to an ICAC recommendation 'that the NSW Government considers enacting a specific and serious standalone offence for the disposal of asbestos waste'.¹² The report noted that, 'Given the considerable public health risk posed by the illegal disposal of asbestos there is merit in having a specific, clear and serious standalone offence for the disposal of asbestos waste to emphasise the seriousness of the offence. A serious, standalone offence for the illegal disposal of asbestos would have an immediate short-term effect on the way the waste industry perceives laws relating to asbestos waste'.¹³

The Committee notes that the Bill significantly increases the financial penalties for pollution involving asbestos waste to amounts up to \$2 million. However, the Committee notes the recommendations arising from the ICAC report that a serious standalone offence for the disposal of asbestos waste can act as a deterrent and emphasise the seriousness of the offence given the considerable public health risk posed by illegal dumping of asbestos. In these circumstances, the Committee makes no further comment.

Wide powers of investigation and enforcement - Building and Construction Industry Security of Payment Amendment Bill 2018

9. The Bill inserts Part 3A, which contains provisions relating to powers of enforcement and investigation. This includes the power to require information and records (section 32G), the power to require answers (section 32H), the power to enter premises (section 32I), the power to require owners or occupiers to provide assistance (section 32L), and powers that can be exercised on premises including examining, copying or seizing anything that the authorised officer had reasonable grounds for believing is connected with an offence against the Act (section 32M). The Bill also permits authorised officers the 'power to do something under this section in relation to a thing may be exercised without the consent of the owner of the thing' (section 32M(5)).

The Committee notes that the Bill contains a number of enforcement and investigative powers that may be exercised by authorised officers. These include powers of entry, powers to do things at the premises, and the power to require the provision of assistance, the power to require information and records, and the power to examine, copy, or seize things without the consent of the owner. The Committee refers this issue to Parliament for its consideration of whether these provisions may permit circumstances that encroach on personal rights and liberties, such as the right to privacy, the right to refuse entry, or the right to personal property.

Right to silence/ Privilege against self-incrimination - Building and Construction Industry Security of Payment Amendment Bill 2018

10. The Bill permits authorised officers the power to require information and records (section 32G) and the power to require answers (section 32H). The Bill also makes it an offence for failing to comply with requirements under this Part (section 32O) or obstructing,

¹² Independent Commission Against Corruption (ICAC), [Report: Investigation into the conduct of a Regional Illegal Dumping Squad officer and others](#), June 2017, p 8, 59.

¹³ Independent Commission Against Corruption (ICAC), [Report: Investigation into the conduct of a Regional Illegal Dumping Squad officer and others](#), June 2017, p 59.

hindering or delaying an authorised officer in the exercise of the officers functions under this Part (section 32Q).

The Bill contains offences for obstructing, hindering or delaying an officer from exercising their functions under the Act, which includes the powers to require information, records and answers. The Committee notes that these provisions may potentially encroach on the privilege against self-incrimination, which allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime. The Committee refers this to Parliament for consideration of whether this provision would encroach on the privilege against self-incrimination.

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

Commencement by proclamation – Retirement Villages Amendment Bill 2018; Protection of the Environment Operations Amendment (Asbestos Waste) Bill 2018; Building and Construction Industry Security of Payment Amendment Bill 2018; Fair Trading Legislation Amendment (Miscellaneous) Bill 2018

11. The Committee notes that the *Retirement Villages Amendment Bill 2018*, the *Protection of the Environment Operations Amendment (Asbestos Waste) Bill 2018*, and the *Building and Construction Industry Security of Payment Amendment Bill 2018* commence by proclamation.
12. The *Fair Trading Legislation Amendment (Miscellaneous) Bill 2018* is set to commence on 1 July 2020 or on an earlier day or days to be appointed by proclamation.

The Committee generally prefers that legislation commence on assent or a fixed 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 these bills implement different reforms to multiple bills and industries, which may require time to implement. However, commencing an Act earlier than the specified date (such as is permitted in the *Fair Trading Legislation Amendment (Miscellaneous) Bill 2018*) may impose obligations on parties earlier than anticipated. The Committee draws this to the attention of the Parliament.

Matters deferred to the regulations: issue one - Fair Trading Legislation Amendment (Miscellaneous) Bill 2018; Retirement Villages Amendment Bill 2018; Building and Construction Industry Security of Payment Amendment Bill 2018

13. The *Fair Trading Legislation Amendment (Miscellaneous) Bill 2018* permits the regulations to establish a rental bond roll-over scheme. The regulations would include the eligibility for participation in the scheme, circumstances in which a deposited rental bond may be treated as the rental bond for another tenancy, the payment of additional amounts or refund if the rental bond for another tenancy is more or less than that of the original tenancy, any fee or deposit that must be paid to the Secretary to enable rental bond roll-over to occur, the times or periods within which actions must be completed in relation to the payment of bonds, remedies for contraventions of the scheme, the making of claims against a deposited rental bond, and the application of provisions of this Part to the scheme (whether with or without modifications).

RETIREMENT VILLAGES AMENDMENT BILL 2018; BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT AMENDMENT BILL 2018; FAIR TRADING LEGISLATION AMENDMENT (MISCELLANEOUS) BILL 2018; PROTECTION OF THE ENVIRONMENT OPERATIONS AMENDMENT (ASBESTOS WASTE) BILL 2018

The *Fair Trading Legislation Amendment (Miscellaneous) Bill 2018* permits the regulations to establish a rental bond roll-over scheme, including key parts of the scheme such as eligibility, payment, refunds, modifications, remedies, and application of the Act to the scheme. In the Second Reading Speech, it was noted that this scheme was intended to protect tenants and alleviate financial stress when moving from one rental property to another. As the scheme has been deferred to the regulations, it may be amended at any time without the scrutiny of Parliament. As the scheme is one that has been identified as one that has the 'potential to ease a significant source of financial stress for around 300,000 tenants per year', the substantial aspects of the scheme may be more appropriately contained in the principal Act. The Committee refers this issue to Parliament for consideration of whether the Bill insufficiently subjects the exercise of legislative power to Parliamentary scrutiny.

Matters deferred to the regulations: issue two - Fair Trading Legislation Amendment (Miscellaneous) Bill 2018; Retirement Villages Amendment Bill 2018; Building and Construction Industry Security of Payment Amendment Bill 2018

14. The *Retirement Villages Amendment Bill 2018* permits a number of matters to be deferred to the regulations including section 203(3), which permits the regulations to create offences punishable by a penalty not exceeding 100 penalty units for corporations and 50 penalty units in any other case. The Bill also permits the regulations to make provisions to prescribe rules of conduct for retirement village operators for a range of matters including the professionalism, training and operation of retirement villages (section 83B(1)) and dealings with residents and internal dispute resolution measures (section 83B(2)). Section 83C provides that operators that contravene a provision of the rules of conduct can incur a maximum penalty of 100 penalty units (in the case of a corporation) or 50 penalty units (in any other case).
15. The *Building and Construction Industry Security of Payment Amendment Bill 2018* permits a number of matters to be deferred to the regulations including section 35(4), which permits the regulations to prescribe information that is required to be provided to a subcontractor when entering into a construction contract, and create offences punishable by a penalty not exceeding 100 penalty units in relation to that requirement. The Bill also permits the Minister, by order published on the NSW legislation website, to make a code of practice to be observed by an authorised nominating authority in relation to its activities under the Act (section 28A). The Code of Practice takes effect on the day on which the order is published or, if the order specifies a later date for commencement, on the later date. The Minister may, by order published on the NSW legislation website, amend or repeal the code of practice. An authorised nominating authority that contravenes a provision of the Code of Practice that is identified in the Code as an “offence provision” is guilty of an offence under this section, which has a maximum penalty of 50 penalty units.

The Committee notes that Bill amends the *Retirement Villages Amendment Bill 2018* and *Building and Construction Industry Security of Payment Amendment Bill 2018* to defer several matters to the regulations. The Bill permits the regulations to prescribe rules of conduct under the *Retirement Villages Amendment Bill 2018*, contravention of which can incur a maximum penalty of 100 penalty units (in the case of a corporation) or 50 penalty units in any other case.

The Bill also permits the regulations to prescribe a code of practice under the *Building and Construction Industry Security of Payment Amendment Bill 2018*, which may create offences up to 50 penalty units. The Code of Practice commences by proclamation and may be amended at any time.

The Committee generally prefers that substantive matters, particularly the creation of offences, be contained in the principal Act so they may be afforded the scrutiny of the Parliament. The Committee refers this issue to the Parliament for further consideration.

9. Saint Paul's College Bill 2018

Date introduced	24 October 2018
House introduced	Legislative Council
Minister responsible	The Hon. Rob Stokes MP
Portfolio	Education

Purpose and description

1. The objects of this Bill are as follows:
 - a) to constitute a corporation with the corporate name of “The Warden and Fellows of Saint Paul’s College” (referred to as Saint Paul’s College),
 - b) to provide that Saint Paul’s College is a continuation of the corporation constituted by the Act entitled “An Act to incorporate Saint Paul’s College as a College within the University of Sydney”, assented to on 1 December 1854 (the former Act),
 - c) to establish a Council to govern and manage Saint Paul’s College and to provide for the membership and procedures of the Council,
 - d) to provide for the appointment of a Warden of Saint Paul’s College to conduct the day-to-day management of the affairs of Saint Paul’s College,
 - e) to repeal the former Act.

Background

2. This Bill seeks to modernise the governance arrangements for the St Paul's residential college at the University of Sydney. The Bill repeals and replaces the *Saint Paul's College Act 1854* and the *Saint Paul's College Act 1857* which are private acts.
3. In the Second Reading Speech, the Hon. Sarah Mitchell MLC commented that the Bill follows a consultation and discussion process and will 'enable modernisation and cultural renewal at the college.'¹⁴

Issues considered by Committee

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

Commencement by proclamation

4. Clause 2 of the Bill provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

¹⁴ New South Wales, *Parliamentary Debates*, Legislative Council, 24 October 2018, p 48 (the Hon. Sarah Mitchell MLC)

The Committee generally prefers legislation to commence on assent or a fixed date. Given the Bill implements new governance arrangements, including the appointment of officers, flexibility with respect to its commencement is reasonable.

10.Snowy Hydro Corporatisation Amendment (Snowy 2.0) Bill 2018

Date introduced	24 October 2018
House introduced	Legislative Council
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Resources, Energy and Utilities

Purpose and description

1. The object of this Bill is to amend the *Snowy Hydro Corporatisation Act 1997* (the Snowy Act) to enable leases and other interests in land to be granted under the *National Parks and Wildlife Act 1974* (the NPW Act) to facilitate the Snowy 2.0 project.

Background

2. The Snowy Mountains Hydro-electric Scheme is an integrated water and hydro-electric power utility located in the Kosciuszko National Park, and is operated and maintained by Snowy Hydro Limited.
3. The Second Reading Speech states that the Bill is necessary 'if the Snowy 2.0 project is to proceed should it receive planning approval.'
4. The Snowy 2.0 project consists of infrastructure projects proposed to be implemented in five stages over six years. Minister Harwin indicated that these stages include the construction and operation of a pumped hydro storage and generation project, and major upgrades to the NSW electricity transmission system to connect the proposed power station to major load centres across the State.
5. In March, Snowy 2.0 was declared to be critical State Significant infrastructure. The Department of Planning is now assessing the Stage 1 exploratory works application.
6. The Minister stated in his Second Reading Speech that the Snowy 2.0 project includes activities not covered by the existing lease, and so Snowy Hydro requires a new lease under the NPW Act, and other approvals, before it can proceed. The specific amendments are required because the NPW Act does not currently allow leases to be granted for the purpose of power generation.
7. Further, the Bill also temporarily removes the need for Snowy 2.0 works to be consistent with two existing plans of management: the Kosciuszko National Park Plan of Management and the Snowy Management Plan Procedures Agreement. The Second Reading Speech indicates that Snowy 2.0, if approved, will require new plans of management, which will take some time to finalise and are envisaged to only apply if the Snowy 2.0 becomes operational in approximately 2024. In the meantime, if Snowy 2.0 is approved it will be regulated by conditions in the planning approval and the relevant lease.

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

8. The Bill proposes to insert section 37A in the *Snowy Hydro Corporatisation Act 1997* (Snowy Act). That section provides that a lease, licence, easement or right of way may be granted over certain land under the NPW Act for the purposes of, or in connection with, the Snowy Hydro 2.0 project.
9. The provision expressly provides that such a grant may be made despite the objects of the NPW Act and the management principles for national parks (section 30E). The Minister may also make such a grant even though power generation is not nominated as a relevant purpose for which a lease can be granted (section 151A).
10. Relevantly, the Minister can make a grant even though he or she is not satisfied of the matters set out in section 151B of the NPW Act. Section 151B provides that a Minister must not grant a lease or licence of reserved land unless the Minister is satisfied that, among other things:
 - a) the purpose for which the lease is granted is compatible with the natural and cultural values of the land and land in the vicinity, and
 - b) the lease provides for the sustainable and efficient use of natural resources, energy and water.
11. In reaching the requisite state of satisfaction under section 151B, the Minister would ordinarily have to have regard to assessment criteria adopted by the Chief Executive of the Office of Environment and Heritage and displayed on its website.
12. However, the Bill provides that the Minister is to have regard to the above matters when determining the conditions (if any) attached to a grant.

The Bill proposes to amend the *Snowy Hydro Corporatisation Act 1997* so that a lease can be granted over certain land (including national park land) for the purposes of, or in connection with, the Snowy 2.0 project.

The Bill allows the Minister to make such a grant without having to satisfy certain preconditions that would ordinarily apply before a lease could be granted under the *National Parks and Wildlife Act 1997*.

Given that national park land is ordinarily subject to extensive protections, and that the Bill does not prescribe new requirements governing the grant of a lease for the purpose of the project, the Committee notes that the relevant provision may be seen to be an ill-defined power.

However, the Committee understands that any planning approval or lease will contain conditions regulating the use and development of the relevant land, which will necessarily include environmental safeguards. Furthermore, the relevant provisions will only apply to the Snowy 2.0 project. Noting also that the

Snowy 2.0 is likely to boost the capacity of New South Wales to generate renewable energy, the Committee makes no further comment.

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

Henry VIII clauses

13. Proposed section 38(3) of the Snowy Act enables the regulations to modify the application of provisions that specify steps precedent to the making of a plan of management relating to the Snowy 2.0 project.
14. Proposed section 39A(5) of the Snowy Act also allows the regulation to modify the application of provisions of Part 12 of the NPW Act that specify steps precedent to a grant for Snowy 2.0 electricity transmission.
15. It is noted that a similar provision allows the regulations to amend the Schedule to the Snowy Act for the purpose of amending the savings and transitional provisions.

The Bill contains Henry VIII clauses that allow the regulations to amend the NPW Act in relation to the steps that must be satisfied before a plan of management can be made, or a lease for electricity transmission can be granted, in respect of the Snowy 2.0 project.

The Committee regularly comments on the use of Henry VIII clauses, which enable the Executive to amend principal legislation but subject those amendments to a lower level of parliamentary security.

Although the Minister must first consult with the Minister administering the NPW Act about the proposed regulations, the Committee refers to Parliament the question of whether the provisions are an inappropriate delegation of legislative power.

11. Workers Compensation Legislation Amendment (Firefighters) Bill 2018

Date introduced	24 October 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Finance, Services and Property

Purpose and description

1. The object of this Bill is to amend the *Workers Compensation Act 1987* and the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987* to establish presumptive rights to workers compensation for firefighters in respect of certain kinds of cancer.

Background

2. In his Second Reading Speech, the Minister noted the reforms in the *Workers Compensation Legislation Amendment (Firefighters) Bill 2018* were 'designed to simplify the process for firefighters with specified cancers to make claims for workers compensation.'
3. The Bill introduced a presumptive right in the workers' compensation scheme for firefighters who are diagnosed with one of 12 prescribed cancers and meet the minimum service period for each cancer type. The presumption reverses the onus of proof and places the onus on the worker's compensation insurer to prove that the firefighter's cancer is not work-related.

Issues considered by committee

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

Retrospectivity

4. The Bill provides that the presumptive right does not extend to a firefighter who contracted a disease before 27 September 2018 unless:
 - a claim for compensation is made under the relevant compensation Act in respect of the disease before the commencement of the eligibility provision and;
 - the liability of the claim had been denied on the grounds that the disease was not contracted in the course of the worker's employment or that the worker's employment was not a contributing or substantially contributing factor, to contracting the disease.

The Committee notes that the Bill has a narrow retrospective effect which applies to previous claims for compensation prior to the commencement of the

Bill. However, the Committee also notes the policy intentions of the Bill is to benefit firefighters that have contracted specific cancers in the course of their employment and the retrospectivity acts to extend the benefit of the presumptive right. The Committee makes no further comment .

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

Commencement by proclamation

5. Clause 2 of the Bill provides that most of the proposed Act is to commence 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 reforms to the worker's compensation scheme the Committee considers commencement by proclamation will assist all parties affected are made aware of the provisions. The Committee makes no further comment.

Part Two – Regulations

1. Roads Regulation 2018

Date published	31 August 2018
Disallowance date	20 November 2018
Minister responsible	The Hon. Melinda Pavey MP
Portfolio	Roads, Maritime and Freight

Purpose and description

1. The object of this Regulation is to remake, with some amendments, the *Roads Regulation 2008*, which is repealed on 1 September 2018 by section 10 (2) of the *Subordinate Legislation Act 1989*.
2. The Regulation provides for the following matters:
 - a) road management, including offences relating to the protection of roads, traffic and public safety,
 - b) the use of tollways, including the payment of tolls and charges,
 - c) bridges and tunnels, including offences relating to the protection of infrastructure and public safety,
 - d) road-ferries, including the conduct of passengers and safety matters,
 - e) the offences under the *Roads Act 1993* and this Regulation for which penalty notices may be issued and the amounts of the penalties payable,
 - f) the roads authorities for particular public roads in New South Wales,
 - g) the payment of the purchase price of Crown roads by instalments,
 - h) other minor and miscellaneous matters.
3. This Regulation is made under the *Roads Act 1993*, including sections 7, 32B (1) (paragraph (j) of the definition of notifiable authority), 34 (2), 152G (2), 172 (2) (f), 182 (2), 213 (3), 214 (5), 243, 248, 250A and 264 (the general regulation-making power) and the definitions of authorised officer, public authority and road event in the Dictionary.

Issues considered by Committee

That the regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Restriction of review rights

4. The *Roads Regulation 2008* enabled persons to object to the imposition or amount of a toll in certain circumstances: clause 27. An initial review would then be conducted by the

toll operator. However, the applicant could then still apply for a review by the Minister or in the case of a toll operator other than Roads and Maritime Services, to an independent assessor.

5. Under the *Roads Regulation 2018*, applicants no longer have the opportunity to apply for a review by the Minister, but instead can seek a further internal review by a person nominated by the toll operator who was not closely involved in the original review decision: clauses 21 and 22.
6. The Regulatory Impact Statement that accompanies the *Roads Regulation 2018* makes clear that under the new regime an applicant cannot apply to the New South Wales Civil and Administrative Tribunal for an external review of a toll decision. However, if a matter proceeds to the issue of a penalty notice, a person may lodge a request for a review with Revenue NSW.¹⁵

The *Roads Regulation 2018* removes the opportunity for objectors to apply to the Minister or another assessor to have a toll decision reviewed. Under the new Regulation, those who object to the imposition or amount of a toll can only apply for an initial internal review and, if necessary, a further internal review by the toll operator. Although an objector cannot apply for a review by NCAT, if the matter proceeds to a penalty notice, a person may lodge a request for a review of the offence with Revenue NSW.

The Committee notes that the *Roads Regulation 2018* appears to restrict the review rights of objectors when compared to the *Roads Regulation 2008*. However, the Committee acknowledges that the Regulatory Impact Statement states that the motorway network is much more complex than it was ten years ago and providing an avenue for review by the Minister is overly complex and not aligned with modern administrative decision review regimes. For this reason, and noting that there are still several avenues of review available, the Committee makes no further comment.

¹⁵ Transport for NSW, [Roads Regulation 2018: Regulatory Impact Statement](#), June 2018, pp 12 - 13

2. Sydney Olympic Park Authority Regulation 2018

Date published	31 August 2018
Disallowance date	20 November 2018
Minister responsible	The Hon. Stuart Ayres MP
Portfolio	Sport

Purpose and description

1. The object of this Regulation is to remake, with some changes, the *Sydney Olympic Park Authority Regulation 2012*, which is repealed on 1 September 2018 by section 10 (2) of the *Subordinate Legislation Act 1989*.
2. This Regulation makes provision for the following:
 - a) the regulation of activities at Sydney Olympic Park generally,
 - b) the regulation of activities at the sportsgrounds within Sydney Olympic Park (such as the ANZ Stadium and the Sydney Olympic Park Aquatic Centre),
 - c) the functions of a local government council (additional to those specified in the *Sydney Olympic Park Authority Act 2001*) that the Sydney Olympic Park Authority may exercise in relation to Sydney Olympic Park,
 - d) the issue of penalty notices for certain offences.
3. The main changes made by this Regulation are:
 - a) to make further provision for the appointment and identification of authorised persons, and
 - b) to provide that entry to sportsgrounds, or events at sportsgrounds, is subject to conditions, either as determined by the Authority and exhibited on signs, or as conditions of the ticket for the event, and
 - c) to introduce increased penalties for parking offences that relate to contraventions of no stopping signs or school zone signs.
4. This Regulation is made under the *Sydney Olympic Park Authority Act 2001*, including sections 19, 79 and 82 (the general regulation-making power).

Issues considered by Committee

That the regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Freedom of movement/freedom of assembly

5. The Regulation provides the Sydney Olympic Park Authority (the Authority) with wide powers to restrict freedom of movement within Sydney Olympic Park, including:
 - a) to prohibit categories of persons from entering Sydney Olympic Park: clause 4
 - b) ban any person from entering any part of Sydney Olympic Park for 6 months or less if the person contravenes any provision of the Regulation: clause 11
 - c) direct a person to leave Sydney Olympic Park if the person causes inconvenience to other persons at Sydney Olympic Park or the part of Sydney Olympic Park concerned: clause 25.
6. Contravening these aspects of the Regulation can attract a penalty of up to 20 units.
7. The Authority had substantially similar powers under the previous version of the Regulation.

The Sydney Olympic Park Authority has wide powers under the Regulation to prohibit categories of persons from entering Sydney Olympic Park, direct a person to leave if the person causes inconvenience, and to ban any person from entering the Park for up to 6 months.

The above provisions may trespass on the right to freedom of movement and freedom of assembly, particularly in the context of a public place, in circumstances where, for example, there is little information provided as to what constitutes an 'inconvenience,' or when categories of persons can be prohibited from entering the Park.

While acknowledging that these provisions existed under the previous regulation, the Committee draws the nature of these powers to the attention of the Parliament.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

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

9 Functions with respect to Regulations

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

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

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