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Legislation Review Committee

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

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Membership

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Guide to the Digest

COMMENT ON BILLS

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

COMMENT ON REGULATIONS

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

Conclusions

PART ONE – BILLS

1. COMMUNITY PROTECTION LEGISLATION AMENDMENT BILL 2018

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

Use of information in parole proceedings

The Committee notes that the Bill enables the State to use information obtained under the Terrorism Act in parole proceedings for terrorism related offenders. The information that may be used is broad and may not have any direct connection to the offender's current behaviour, such as their education and workplace history. The Committee notes the purpose of the provision is to assist parole authorities to have access to as much information as possible in assessing whether an offender poses a terrorism risk. However, given a person's liberty is being assessed during parole proceedings, the Committee refers this issue to Parliament for it to consider whether the provision unduly trespasses on personal rights and liberties.

Judicial discretion - freedom of movement

The Committee notes the provisions to provide for the Supreme Court to impose a mandatory condition on each interim and extended supervision order that an offender is not to leave New South Wales without approval. Providing for mandatory conditions that a court must impose limits the ability of the court to make determinations suitable for individual cases. The Committee also notes that the mandatory condition restricts the person's ability to leave New South Wales thus impacting their freedom of movement.

The Committee acknowledges the intention of the Bill is to provide measures to increase supervision of high risk offenders and protect the community from offenders that pose a risk of committing future offences. However, the Committee refers this provision to Parliament for its consideration as to whether it unduly trespasses on personal rights and liberties.

Treatment of prisoners

The Committee notes Article 10 of the International Covenant on Civil and Political Rights which provides that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' Allowing surveillance devices to be used inside a correctional centre for specific inmates may impact on their right to privacy and their right to be treated with respect while in detention.

The Committee notes the intentions behind the provisions being to enable the gathering of evidence to assist in determining whether serious offenders pose a risk to the community. The Committee also notes that an eligible judge will need to be satisfied that the application for the warrant to use a surveillance device is justified in the circumstances. However, the Committee consider it appropriate to refer this issue to Parliament for its further consideration.

Right to a fair trial

The Committee notes that the provisions in this Bill expand the current provisions relating to the confidentiality of terrorism intelligence. The Committee refers to its previous comments on these provisions in Legislation Review Digest No 56, namely, that restricting access to certain

information may trespass on a person's right to a fair trial, including by potentially impairing the ability of the accused to properly understand and respond to the case against them.

The Committee again notes that the penalties attached to terrorism offences are significant and in such circumstances it is especially important that the right to a fair trial is protected. The Committee refers this issue to Parliament for further consideration.

Proposed section 25C of the Crimes Act 1900 – supply of drugs causing death

The Committee notes proposed section 25C of the *Crimes Act 1900* and notes that it has never been the law in this country or in other common law countries that a person can be made criminally responsible for a homicide where no such causal relationship can be established. This is because, for all offences involving prohibited results, it is a fundamental principle that a causal relationship between the actions of the accused and the occurrence of the event must be established.

The Committee notes this was an issue raised by the New South Wales Bar Association and refers the issue to Parliament for its consideration.

2. NATIONAL PARKS AND WILDLIFE LEGISLATION AMENDMENT (RIVERINA) BILL 2018*

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

3. PROTECTION OF THE ENVIRONMENT OPERATIONS AMENDMENT (CLEAN AIR) 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*.

Part One – Bills

1. Community Protection Legislation Amendment Bill 2018

Date introduced	13 November 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

1. The objects of this Bill are:

- a) to amend certain legislation to make further provision with respect to the supervision and detention of high risk offenders, and
- b) to amend the *Crimes Act 1900*:
 - i. to make it an offence, punishable by imprisonment for 20 years, to supply a prohibited drug for financial or material gain if the self-administration of the drug by another person causes or substantially causes that other person's death, and
 - ii. to provide that only a person who is of or above the age of 18 years can commit the offence of concealing a serious indictable offence, and
 - iii. to introduce a staggered penalty regime for offences of failing to report the commission of a serious indictable offence or a child abuse offence that is based on the seriousness of the offence that the person fails to report, and
 - iv. to provide a member of staff of a school with an alternative means of reporting certain minor assaults and other offences occurring on school premises where the offender and the victim are both under 18 years of age, and
 - v. to increase the maximum penalty, from imprisonment for 14 years to imprisonment for 21 years, for an offence of intentionally causing a fire and being reckless as to its spread to vegetation on public land or land belonging to another person, and
 - vi. to include additional offences in a Schedule to the *Crimes Act 1900* that sets out former sexual offences for the purposes of a number of provisions of that Act, and

- c) to amend the *Crimes (Appeal and Review) Act 2001* to set aside statutory prohibitions on the publication or disclosure of information relating to certain mercy petitions.

Background

2. This Bill makes a number of amendments to various Acts. The amendments are aimed at keeping the community safe and include reforms to legislation concerning terrorism offenders, bushfires, child abuse and the supply of drugs. Some of the amendments include:
 - introducing a new offence of supplying a drug for financial or material gain that causes death. The offence provides for a maximum imprisonment of 20 years. In the Second Reading Speech, the Attorney General commented that the introduction of the offence follows a recommendation of the "Keeping People Safe at Music Festivals" panel. The Attorney General noted that, in accordance with the panel's observations, the offence is not targeted at young people involved but those that are drug dealing and supplying for profit;
 - introducing a staggered penalty regime for offences of failing to report the commission of a serious indictable offence or a child abuse offence. The Attorney General noted that the staggered penalty regime builds on the reforms responding to the Royal Commission into Institutional Responses to Child Sexual Abuse.

Issues considered by committee

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

Use of information in parole proceedings

3. The Bill provides for the State to use relevant information obtained under the *Terrorism (High Risk Offenders) Act 2017* (the Terrorism Act) in proceedings for parole before the State Parole Authority and the Children's Court in relation to a terrorism-related offender. Currently, the State, through the Commissioner of Corrective Services, may make submissions in parole proceedings but this does not currently extend to using information obtained under the Terrorism Act.
4. The information that may be used includes information obtained under Part 5 of the Terrorism Act which can include a wide range of information including, amongst others:
 - reports, records or other documents about the eligible offender's educational history (including the offender's behaviour at an educational institution);
 - reports, records or other documents containing information about the eligible offender's work and employment history (including the offender's behaviour at work); and
 - letters or correspondence of the eligible offender to an associate or family member.
5. In the Second Reading Speech, the Attorney General commented that:

It has become clear during operationalisation of the post-sentence order that there is more information available for the purposes of determining whether to seek a post-sentence order than is available to parole authorities in determining whether an offender poses a terrorism risk. These amendments therefore address the risk that an offender who poses a terrorism risk would be released on parole due to parole authorities being unaware of the risk.

The Committee notes that the Bill enables the State to use information obtained under the Terrorism Act in parole proceedings for terrorism related offenders. The information that may be used is broad and may not have any direct connection to the offender's current behaviour, such as their education and workplace history. The Committee notes the purpose of the provision is to assist parole authorities to have access to as much information as possible in assessing whether an offender poses a terrorism risk. However, given a person's liberty is being assessed during parole proceedings, the Committee refers this issue to Parliament for it to consider whether the provision unduly trespasses on personal rights and liberties.

Judicial discretion - freedom of movement

6. The Bill inserts provisions which provide that the Supreme Court must impose a mandatory condition on each interim and extended supervision order that an offender is not to leave New South Wales except with the approval of the Commissioner of Corrective Services.
7. In the Second Reading Speech, the Attorney General noted that this brings New South Wales into line with Victoria and Queensland, both of which require a court to impose a condition not to leave the jurisdiction without approval.

The Committee notes the provisions to provide for the Supreme Court to impose a mandatory condition on each interim and extended supervision order that an offender is not to leave New South Wales without approval. Providing for mandatory conditions that a court must impose limits the ability of the court to make determinations suitable for individual cases. The Committee also notes that the mandatory condition restricts the person's ability to leave New South Wales thus impacting their freedom of movement.

The Committee acknowledges the intention of the Bill is to provide measures to increase supervision of high risk offenders and protect the community from offenders that pose a risk of committing future offences. However, the Committee refers this provision to Parliament for its consideration as to whether it unduly trespasses on personal rights and liberties.

Treatment of prisoners

8. The Bill permits a law enforcement officer to apply for a surveillance device warrant for the use of a surveillance device in a correctional centre with respect to an inmate who is an eligible offender within the meaning of the Terrorism Act. The Bill provides that the use of the device is for an investigation into applications for supervision or detention orders in respect of the offender.
9. In the Second Reading Speech the Attorney General commented:

Surveillance device material will be crucial in determining whether an application should be made in relation to an eligible offender under the Terrorism (High Risk Offenders) Act. A key part of investigations under the Terrorism (High Risk Offenders) Act is determining whether there is any evidence of ideology or support for terrorism generally or associations with people who support terrorism. Using surveillance device material rather than relying on information provided by an offenders cellmate will reduce safety risks for confidential informants.

10. The Committee notes that the bill does not provide any guidance or limitations on where in the correctional centre the surveillance device may be used.

The Committee notes Article 10 of the International Covenant on Civil and Political Rights which provides that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' Allowing surveillance devices to be used inside a correctional centre for specific inmates may impact on their right to privacy and their right to be treated with respect while in detention.

The Committee notes the intentions behind the provisions being to enable the gathering of evidence to assist in determining whether serious offenders pose a risk to the community. The Committee also notes that an eligible judge will need to be satisfied that the application for the warrant to use a surveillance device is justified in the circumstances. However, the Committee consider it appropriate to refer this issue to Parliament for its further consideration.

Right to a fair trial

11. The Bill makes further provision to maintain the confidentiality of terrorism intelligence under the Terrorism Act.
12. In previous amendments to the Terrorism Act, the Act was amended to introduce new provisions relating to terrorism intelligence. Terrorism intelligence is information relating to actual or suspected terrorist activity which if disclosed could (among other things) prejudice a criminal or intelligence investigation. The effect of a terrorism intelligence application being granted is that the Supreme Court is then to take steps to maintain the confidentiality of that intelligence in proceedings under the Terrorism Act.
13. The amendments in this Bill extend the confidentiality of the intelligence information. In the Second Reading Speech the Attorney General stated:

Currently, terrorism intelligence is provided in full to an offender or their legal representative, with the possibility of the court denying any form of access to the offender, and the possibility of redactions if there is a successful claim of public interest immunity. The possibility of terrorism intelligence being provided to an offender in full can be a concern, including for other agencies or jurisdictions providing information under the Terrorism Act.

14. The Attorney General further noted that the amendments contained in this Bill will extend the ability of the court to grant restricted access to information to all offenders, whether or not they are represented.

15. Where the most restricted level of protection and access is granted, the court must appoint an independent third party representative who will have full access to the information and will be able to make submissions on behalf of the offender on whether the information is terrorism information. The independent third party may also make submissions on what level of access should be granted to the offender and/or their representatives.

The Committee notes that the provisions in this Bill expand the current provisions relating to the confidentiality of terrorism intelligence. The Committee refers to its previous comments on these provisions in Legislation Review Digest No 56, namely, that restricting access to certain information may trespass on a person's right to a fair trial, including by potentially impairing the ability of the accused to properly understand and respond to the case against them.

The Committee again notes that the penalties attached to terrorism offences are significant and in such circumstances it is especially important that the right to a fair trial is protected. The Committee refers this issue to Parliament for further consideration.

Proposed section 25C of the Crimes Act 1900 – supply of drugs causing death

16. The Committee notes it has never been the law in this country or in other common law countries that a person can be made criminally responsible for a homicide where no such causal relationship can be established. This is because, for all offences involving prohibited results, it is a fundamental principle that a causal relationship between the actions of the accused and the occurrence of the event must be established. The Committee notes this was an issue raised by the New South Wales Bar Association.

The Committee notes proposed section 25C of the *Crimes Act 1900* and notes that it has never been the law in this country or in other common law countries that a person can be made criminally responsible for a homicide where no such causal relationship can be established. This is because, for all offences involving prohibited results, it is a fundamental principle that a causal relationship between the actions of the accused and the occurrence of the event must be established.

The Committee notes this was an issue raised by the New South Wales Bar Association and refers the issue to Parliament for its consideration.

2. National Parks and Wildlife Legislation Amendment (Riverina) Bill 2018*

Date introduced	15 November 2018
House introduced	Legislative Assembly
Member responsible	Mr Austin Evans MP
	*Private member's Bill

Purpose and description

1. The object of this Bill is to revoke the reservation under the *National Parks and Wildlife Act 1974* (the NPW Act) of certain lands comprised in Murray Valley National Park and Murray Valley Regional Park and to dedicate those lands under the *Forestry Act 2012* (the Forestry Act) as State forest. The lands concerned were reserved as national park and regional park by the *National Park Estate (Riverina Red Gum Reservations) Act 2010*.

Background

2. According to the Second Reading Speech, the bill proposes to repeal the classification of Murray Valley National Park and the Murray Valley Regional Park as national parks and restore them as 24 State forests. Mr Evans indicated that while the *National Park Estate (Riverina Red Gums Reservations) Act 2010* converted 45 State forests into nine national parks, the bill proposes to only revoke two of the national parks.
3. The Second Reading Speech also notes that the subject land previously supported a forestry industry in the Riverina.

Issues considered by committee

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

3. Protection of the Environment Operations Amendment (Clean Air) Bill 2018*

Date introduced	15 November 2018
House introduced	Legislative Council
Member responsible	Ms Cate Faehrmann MLC
	Private Member's Bill

Purpose and description

1. The object of this Bill is to improve air quality by prescribing the standards of concentration for emissions of certain air impurities, being nitrogen dioxide, nitric oxide, sulfur dioxide, PM_{2.5} particles and mercury, that are not to be exceeded in respect of coal-fired power stations in New South Wales.

Background

2. This bill amends the *Protection of the Environment Operations Act 1997*.
3. In the second reading speech, Ms Faehrmann stated that this Bill intends to safeguard public health by ensuring that the five remaining coal-fired power stations are required to meet improved standards of air quality and align it with those set by the European Union in 2010.

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.

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:
 - (c) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (d) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - vi that the regulation trespasses unduly on personal rights and liberties,
 - vii that the regulation may have an adverse impact on the business community,
 - viii that the regulation may not have been within the general objects of the legislation under which it was made,
 - ix 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,
 - x that the objective of the regulation could have been achieved by alternative and more effective means,

- xii that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - xiii that the form or intention of the regulation calls for elucidation, or
 - xiii 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
 - (e) 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:
- (f) 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
 - (g) 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.