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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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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. AGEING AND DISABILITY COMMISSIONER BILL 2019

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

Definition of older adult

Clause 3 of the Bill provides two different definitions of 'older adult' – 50 years and over for Aboriginal or Torres Strait Islander (ATSI) persons or 65 years and over in any other case. The Committee notes that the provision affords services to older adults depending on ATSI status to afford equal access to the Commission's services due to the gap in life expectancy and health outcomes overall. In these circumstances, the Committee considers this fits within the special needs exception under section 21 of the *Anti-Discrimination Act 1977* and does not constitute discrimination on the basis of race.

Privilege against self-incrimination

Clause 18 of the Bill stipulates that no Act or law, existing or new, affects the duty to provide information to the Commissioner. The Committee notes that this may infringe on the common law privilege against self-incrimination which allows a person to refuse to answer questions or provide documents or information if in doing so they would tend to incriminate themselves. The Committee refers this issue to Parliament for consideration of whether the provision infringes on the privilege against self-incrimination and whether the Act incorporates appropriate safeguards against this.

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

Independence of the Commissioner

The Committee notes that the Commissioner may be subject to the control or direction of the Minister in exercising functions outside those listed in Clause 12(3) of the Bill. These functions are intended to protect and promote the rights of ageing adults or adults with a disability. The Bill may thereby make the rights of those subject to it unduly dependent on the insufficiently defined administrative powers of the Minister. The Committee refers the matter to Parliament for consideration.

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

Commencement by proclamation

Section 2 provides that some parts of the Bill are to commence by proclamation. Generally, the Committee prefers that laws commence on a fixed date or on assent to provide certainty to those affected by the Act's provisions. However, the Committee notes that these sections involve the appointment and functions of Official Community Visitors who are to have responsibilities to aged, disabled and vulnerable people under a range of Acts listed in the Bill. In these circumstances, the Committee acknowledges that a flexible start date may be preferable to allow time to recruit and train official community visitors.

2. APPROPRIATION BILL 2019; APPROPRIATION (PARLIAMENT) BILL 2019; STATE REVENUE AND OTHER LEGISLATION AMENDMENT BILL 2019

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. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (INMATE BEHAVIOUR) BILL 2019

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

Right to humane treatment in detention

The Bill allows the Commissioner to adopt behaviour management policies under which inmate privileges can be withdrawn or increased. Such privileges may include the pursuit of a hobby, access to CDs/DVDs, the keeping of personal property, contact visits, telephone use and leave permits. The Committee recognises that withdrawable privileges are an important tool to respond quickly to inmate behaviour, ensure the safety and good order of correctional centres, and incentivise good behaviour. Further, the Committee notes that they are permitted under the existing Act and Regulations. However, the Committee must comment where a bill infringes on personal rights and liberties set out in legislation, the common law or international agreements. As the Bill removes privileges from inmates, it affects their right to humane treatment in detention. The Committee draws this to the attention of the Parliament.

Double Punishment

The Bill provides that inmate privileges can be removed under a behaviour management policy even if such removal relates to a criminal or correctional centre offence. Further, privileges can be removed regardless of any proceedings or penalty for the offence. The Bill thereby permits double punishment – an inmate could have privileges removed and be subject to a penalty for an offence. The Committee recognises that withdrawable privileges are an important tool to respond quickly to inmate behaviour, ensure the safety and good order of correctional centres, and incentivise good behaviour. Nonetheless, it is an important rule of law that a person not be punished twice for the same offence. The Committee refers the issue to the Parliament for consideration of whether the Bill unduly trespasses on rights and liberties of detained persons.

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

Rights dependent on wide administrative power

The Bill provides the Commissioner with a wide discretionary power to adopt behavioural management policies for inmates. They can be applied to any behavioural management matter at any time and allow the Commissioner to remove inmate privileges. Consequently, the rights and liberties of inmates depend on the widely defined powers of the Commissioner. The Committee considers that administrative powers that affect rights and liberties should be sufficiently defined to ensure that the scope of the power is clear. Therefore, the Committee refers this issue to the Parliament to consider whether the Bill makes the rights and liberties of inmates unduly dependent on insufficiently defined administrative powers of the Commissioner.

4. CRIMES (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2019*

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

Double jeopardy

By widening the circumstances under which a person can be re-tried for offences of which he or she has been acquitted, the Bill impacts on the double jeopardy rule. This rule provides that no one can be re-tried for an alleged offence of which he or she has already been acquitted, or convicted. The rule is intended to prevent the State, with its considerable power and resources, making repeated attempts to convict an individual for an alleged offence, thereby subjecting him or her to a continued state of uncertainty. The Committee notes the strict requirements contained in the *Crimes (Appeal and Review) Act 2001* that must be satisfied before a re-trial can be ordered. Nonetheless, the Committee refers the matter to Parliament for it to consider whether there is an undue trespass against personal rights and liberties.

Retrospectivity

The Bill is drafted to have retrospective effect. Retrospectivity is contrary to the rule of law that allows people knowledge of the laws to which they are subject at any given time. The Committee refers the matter to Parliament for it to consider whether there is an undue trespass against personal rights and liberties.

5. CROWN LAND MANAGEMENT AMENDMENT (RESERVATION AND VESTING OF CROWN LAND) BILL 2019*

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

6. FAIR TRADING AMENDMENT (CASH LOAN MACHINES) BILL 2019*

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

7. INDUSTRIAL RELATIONS AMENDMENT (CONTRACTS OF CARRIAGE) BILL 2019*

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

8. LIBRARY AMENDMENT BILL 2019

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

9. LIQUOR LEGISLATION AMENDMENT (REPEAL OF LOCK-OUT LAWS) BILL 2019*

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

10. LOCAL GOVERNMENT AMENDMENT BILL 2019

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

Commencement by proclamation

Clause 2 of the Bill provides that certain parts of the Bill will commence by proclamation. The Committee prefers that laws commence on a fixed date or on assent to provide certainty to those affected by their provisions. The Committee does note that the clauses to commence by proclamation are those that deal with the regulation-making powers, and acknowledges that it may be preferable to have a flexible start date for this type of legislative and regulatory change. However, the Committee draws this to the Parliament's attention for consideration of whether this is an appropriate delegation of legislative power.

Matters that should be set by Parliament

The Bill permits certain matters to be delegated to the regulations. In particular, it permits regulations to be made to confer jurisdiction on the Land and Environment Court to deal with appeals of council decisions about mutual recognition of council approvals. It also permits regulations to be made to confer discretion on the Court to award compensation payable by councils in certain circumstances. The Committee considers that the matters over which a court is to have jurisdiction should be set down in primary, not subordinate, legislation to ensure an appropriate level of parliamentary oversight.

The Bill also permits local councils to delegate certain regulatory functions to another council. These regulatory functions include matters relating to water supply, sewerage and drainage work, and waste management. The Committee considers provisions determining the bodies that are to exercise regulatory powers that have public health implications should be included in primary, not subordinate legislation, to ensure an appropriate level of parliamentary scrutiny over arrangements.

Consequently, the Committee refers these matters to the Parliament to consider whether an inappropriate delegation of legislative power has occurred.

11. MINING AMENDMENT (COMPENSATION FOR CANCELLATION OF EXPLORATION LICENCE) BILL 2019*

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

Ill-defined and wide powers I

The Bill provides for the appointment of an independent arbitrator to determine compensation entitlements for people financially affected by the cancellation of an exploration licence over certain land at Doyles Creek. In doing so, it grants the arbitrator a wide and ill-defined power to determine the procedure that will be used for assessing claims, and the information that must be provided in support of a claim. The Committee considers administrative powers affecting rights should be sufficiently defined to ensure that their scope and content is clear. The Committee refers the matter to Parliament to consider whether these powers granted to the arbitrator are too wide and ill-defined.

Ill-defined and wide powers II

The Bill grants the Minister a wide discretion to appoint an independent arbitrator to determine entitlements under the new compensation scheme. The Committee considers that administrative powers affecting rights should be sufficiently defined so that their scope and content is clear. The Committee would prefer the Bill to contain more detail about the factors that would qualify a candidate for the arbitrator's role assessing claims. Nonetheless, the Bill does require the appointee to be legally qualified and makes persons who have been employed by the ICAC ineligible. Owing to these safeguards and the countervailing need for some flexibility to find a suitable and available person to fill the role, the Committee makes no further comment.

12. PARLIAMENTARY BUDGET OFFICER AMENDMENT BILL 2019*

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

13. PLANNING LEGISLATION AMENDMENT BILL 2019

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

Retrospectivity

Some of the amendments proposed by the Bill will apply retrospectively. This is contrary to the rule of law which allows people to know which laws apply to them at any given time. The Committee notes that the amendments appear to be relatively minor in nature. Any development consents granted which were based on an incorrectly adopted provision are also protected. Nevertheless, the Committee refers clauses 2(2) and (3) of the Bill to Parliament for consideration of whether the retrospective commencement of provisions may unduly trespass on the personal rights or liberties of any stakeholders in the NSW planning system.

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

Unclear commencement dates

The language used to describe the commencement of some of the provisions in the Bill is unclear. The relevant provisions also operate retrospectively. The imprecise language impacts on the rule of law which allows people to know which laws apply to them at any given time and whether their rights, liberties or obligations may be affected. The Committee refers clauses 2(2) and (3) of the Bill to Parliament for consideration as to whether the commencement dates of the provisions are sufficiently defined.

14. PLASTIC SHOPPING BAGS (PROHIBITION ON SUPPLY BY RETAILERS) BILL 2019*

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

Absolute liability

The Bill creates an offence of absolute liability for a person who sells goods in trade or commerce to supply single-use plastic bags. The Committee generally comments where a bill creates an offence of absolute liability as this does not require proof of fault nor provide a defence of an honest and reasonable mistake of fact. In this case the maximum fine for the offence is not insignificant, being $5,500. The Committee does however recognise that the offence is intended to apply to retailers rather than private individuals and cannot be penalised through imprisonment, only a fine. The Committee refers the matter to Parliament to consider whether the creation of the absolute liability offence unacceptably infringes on personal rights.

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

Wide regulation-making power

The Bill permits the Governor to make regulations with respect to any matter required under the Act. This is a wide administrative power to make any regulation under the Act that may affect the obligations of those subject to the Act. The Committee draws this to the attention of the Parliament for its consideration of whether this makes obligations unduly dependent upon insufficiently defined administrative powers.

15. PRIVACY AND PERSONAL INFORMATION PROTECTION AMENDMENT (NOTIFICATION OF SERIOUS VIOLATIONS OF PRIVACY BY PUBLIC SECTOR AGENCIES) BILL 2019*

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

16. PUBLIC FINANCE AND AUDIT AMENDMENT (NORTHERN BEACHES HOSPITAL) BILL 2019*

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

17. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2019

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

18. URANIUM MINING AND NUCLEAR FACILITIES (PROHIBITIONS) REPEAL BILL 2019*

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

PART TWO – REGULATIONS

1. CASINO CONTROL AMENDMENT (MISCELLANEOUS) REGULATION 2018

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

Rights to Administrative Review and Freedom of Movement

The Regulation declares premises surrounding and forming part of The Star to be a 'casino precinct'. This means the Commissioner of Police can direct the casino operator to exclude persons from the precinct. Such directions are not able to be legally challenged or appealed. The Committee considers that this amendment may unduly trespass on the freedom of movement of affected persons. The Committee acknowledges that such provisions may assist in preventing criminal activity and help problem gamblers. However, given that there is no ability to challenge such a direction, the Committee draws this provision to the attention of Parliament.

2. CHILDREN (DETENTION CENTRES) AMENDMENT (CLASSIFICATION) REGULATION 2019

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

Judicial Review Rights

The Regulation prescribes certain offences and provides that detainees who have been convicted of those offences will be detained within a secure physical barrier at all times unless, in the opinion of the Secretary they should be classified otherwise. The Committee appreciates that it is important for the security and good order of detention centres that authorities be free to make day to day operational decisions. Nonetheless, decisions about the classification of youth detainees have the potential to cause disadvantage to a detainee if not made appropriately. The Committee therefore considers that such decisions should be subject to an objective test of reasonableness and should be subject to judicial oversight. While detainees can complain to the NSW Ombudsman about custodial services and the Ombudsman can make recommendations, agencies do not have to comply with them. In the circumstances, the Committee refers the matter to Parliament for further consideration.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters which should be set by Parliament

The Regulation provides for a new system of classification for youth detainees. The Committee prefers provisions which prescribe offences and affect the fundamental rights and liberties of minors to be included in primary, not delegated legislation. This is to foster an appropriate level

of parliamentary oversight. In the current case, the prescribed offences that will make it more likely a youth detainee receives a restrictive classification are very serious. However, as above, there appears to be no provision for judicial review of classification decisions. In the circumstances, the Committee refers the matter to Parliament to consider whether the matters dealt with by the Regulation should instead have been included in primary legislation.

3. CHILDREN (DETENTION CENTRES) AMENDMENT REGULATION 2018

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

Administrative Review Rights

The Committee notes that the Regulation allows the Secretary of the Department of Justice to designate a juvenile detainee as a 'national security interest detainee' which would make the detainee subject to more restrictive custodial arrangements. For example, he or she would be detained separately from other 'national security interest detainees' and his or her visitors would need to be approved by the Secretary. The Committee appreciates the counter-terrorism intent of these provisions but notes that the Regulation does not appear to provide for a detainee to seek independent review of a decision to designate him or her a 'national security interest detainee' and that this will result in more restrictive custodial arrangements. The Committee refers the matter to Parliament for further consideration.

Privacy – Right to Personal Physical Integrity

The Regulation permits Juvenile Justice officers to conduct searches of detainees to ensure the security, safety and good order of a detention centre. The Committee notes that searching detainees, particularly through partially clothed searches, impacts on their right to have autonomy over their own bodies, and to be treated humanely whilst detained. Nonetheless, the Committee recognises that Juvenile Justice officers need adequate tools to detect contraband and to ensure the safety, security and good order of detention centres. Similarly, it notes the Regulation's safeguards including that an officer cannot examine a detainee's body by touch and that searches must generally be conducted by a person of the same sex as the detainee. The Committee also notes the response of the NSW Government to a recent report of the Inspector of Custodial Services indicating that it supported, and had taken action, on recommendations relating to searches of juvenile detainees. In the circumstances, the Committee makes no further comment.

4. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (PAROLE SUPERVISION OF SERIOUS SEX OFFENDERS) REGULATION 2019

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

Freedom of movement

The amendments to the *Crimes (Administration of Sentences) Regulation 2014* will impact on the freedom of movement of serious sex offenders released on parole by tracking their activities and locations. However, the Committee does not believe these restrictions would unduly trespass on the right to freedom of movement. In the Committee's view, public safety is adequately balanced against allowing eligible offenders to be released into the community. The Committee also notes that the amendments only apply to serious sex offenders and will not apply to individuals already on parole when the amendments commence. In the circumstances, the Committee makes no further comment.

5. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (RESTRICTED ASSOCIATES) REGULATION 2018

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

Freedom of association

The Regulation extends restricted associate requirements to offenders placed on interim supervision orders and directly infringes their freedom of association. However, the Committee acknowledges that justifiable limits on the freedom of association include protection of the public and public order, including restricting the association of certain persons or groups that are likely to be involved in crime. As those subject to interim supervision orders have been considered by the State to represent an unacceptable risk of serious reoffending and are awaiting court proceedings for an application for extended supervision orders, the Committee makes no further comment.

6. CRIMES (SENTENCING PROCEDURE) AMENDMENT (VICTIM IMPACT STATEMENTS) REGULATION 2019

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

Rights of People with Mental Illness and Potential for Arbitrary Detention

The Regulation concerns victim impact statements made in respect of persons found not guilty of an offence by reason of mental illness. The Committee notes that it requires the Tribunal to take victim impact statements into account when determining applications by forensic patients for leave or release. The Committee recognises that it is very important for a victim to participate in the justice process and to be heard. However, victim impact statements can be highly emotionally charged and a requirement for a Tribunal to take them into account for the purpose of making decisions about continued detention or release of a person has the potential to be prejudicial to that person.

The Committee notes that the Regulation will apply in the mental health context, that is, to persons found not guilty of offending by reason of mental illness. Detention of such persons should only occur for valid reasons such as to ensure community safety. In short, whilst acknowledging the expertise of the Tribunal to make decisions in this area, and the need to respect victims' rights, the Committee identifies that the Regulation has potential to prejudice decisions about the continued detention of forensic patients. It may thereby trespass on the fundamental right of people with mental illness to be free from arbitrary detention, particularly where that detention relates to an offence over which s/he has been judged to be not guilty. The Committee refers the matter to Parliament for consideration.

Procedural Fairness

The Committee notes that the Regulation places restrictions on the access of forensic patients and their legal representatives to victim impact statements that the Tribunal will take into account to determine applications for the patient's leave or release. The Committee acknowledges that such statements can contain extremely sensitive material. However, if a patient does not know the contents, or exact contents, of a statement, he or she cannot challenge or respond to it in accordance with the principles of procedural fairness. This has the potential to affect decisions about the patient's fundamental rights to freedom and liberty. The Committee refers the matter to Parliament for consideration.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters which should be set by Parliament

The Regulation concerns matters about which there is considerable public interest – victims' rights, community safety, and the rights of persons with mental illness. The Committee therefore considers that they would be more suitably included in primary, not subordinate, legislation to foster increased opportunity for parliamentary scrutiny and debate. The Committee refers this matter to Parliament for consideration.

7. CRIMINAL PROCEDURE AMENDMENT (PENALTY NOTICES FOR DRUG POSSESSION) REGULATION 2019

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

Rights to judicial review/excessive or unwarranted punishment

By allowing Police to issue on the spot fines for certain drug possession offences, the Regulation affects any automatic right to have the matter decided by an independent court. It may therefore lead to harsher penalties in some cases, or to people losing a chance to have their charges dismissed. However, the Committee notes that such persons will have the right to *elect* for the matter to proceed to Court. Similarly, by paying an on the spot fine persons can avoid being convicted and sentenced by a Court, with the attendant criminal record, and the fine payable, while not insignificant, is relatively modest. In addition, the Regulation is part of a broader policy aimed at deterring drug-taking and reducing drug-related deaths in NSW. In the circumstances, and given the above safeguards, the Committee makes no further comment.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters that should be set by Parliament

The Regulation provides for on the spot fines of $400 to be issued by Police for certain drug possession offences. The Committee prefers provisions such as these, which set penalties and affect individual rights, to be included in primary, not subordinate, legislation. This is to foster an appropriate level of Parliamentary oversight. The Committee refers this matter to Parliament to consider whether this is an inappropriate delegation of legislative power.

8. CROWN LAND MANAGEMENT AMENDMENT REGULATION 2019

That the objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII Clause

The Regulation amends the *Crown Lands Management Act 2016* by way of a Henry VIII clause contained in the Act. This is an inappropriate delegation of legislative powers. If amendments are to be made to an Act, this should be done through an amending Bill and not through subordinate legislation. This is to foster appropriate parliamentary oversight of the changes. The Committee refers the matter to Parliament for consideration.

9. ELECTRICITY SUPPLY (GENERAL) AMENDMENT REGULATION 2019

That the objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII clause

The Regulation amends the *Electricity Supply Act 1995,* made possible by a Henry VIII clause in the Act. This is an inappropriate delegation of legislative power. Primary legislation should not be changed by subordinate legislation because it reduces parliamentary scrutiny of those changes. The Committee refers this matter to Parliament for further consideration.

10. EVIDENCE (AUDIO AND AUDIO VISUAL LINKS) AMENDMENT (BAIL EXEMPTIONS) REGULATION 2019

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

Access to Justice

By facilitating the use of AVL in bail proceedings, the regulation may affect the rights of accused persons, especially Aboriginal people and people with mental health and cognitive impairment issues, to access justice. This is of particular concern in bail proceedings, where a person's liberty is at stake. The Committee acknowledges that the use of AVL in court proceedings may have cost savings and some practical benefits, but does not consider that this outweighs its access to justice concerns in the context of bail proceedings. In the circumstances, the Committee refers the matter to Parliament for further consideration.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters that should be set by Parliament

The Regulation facilitates the use of AVL in bail proceedings. In doing so, it may impact on the rights of accused persons to participate in bail proceedings, and thereby access justice. Matters such as these, which directly affect individual rights and liberties should be dealt with in primary, not subordinate legislation. This is to foster an appropriate level of Parliamentary oversight. The Committee refers the matter to Parliament for further consideration.

11. GAMING AND LIQUOR ADMINISTRATION AMENDMENT (MUSIC FESTIVALS) REGULATION 2019

That the regulation may have an adverse impact on the business community: s9(1)(b)(ii) of the LRA

Decision not subject to administrative review

The Committee notes that the *Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019* excludes the ability of an applicant to ask NCAT to review a decision by the Authority that a music festival licence is the appropriate means of selling or supplying liquor in a particular situation. The Committee notes that many other applications can be reviewed by NCAT under clause 7 of the *Gaming and Liquor Administration Regulation 2016*, and that the 2019 Regulation may have an adverse impact on the business community. However, conditions are attached to music festival licences to ensure public safety. In the circumstances the Committee makes no further comment.

12. LIQUOR AMENDMENT (MUSIC FESTIVALS) REGULATION 2019

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

Ill-defined and Wide Powers, and Administrative Review Rights

The Regulation provides that the Authority must not grant an approval for a person to be an agent if it has reasonable grounds to believe, from information provided by the Commissioner

of the Police, that the person is a member of, or is a close associate of a 'declared association' and the circumstances of the person's relationship with the organisation, or its members, are such that it could reasonably be inferred that improper conduct that would further criminal activities of the organisation is likely to occur if the person is granted an approval. In doing so, the Regulation grants the Authority a wide and ill-defined power to refuse approvals. Administrative powers that limit rights and liberties should be drafted with sufficient precision so that their scope and content is clear.

Further, the Authority is not required to give reasons for its decision to the extent that this would disclose criminal intelligence, and there is no provision for independent review of the decision. In short, the Regulation contains insufficient safeguards to ensure that arbitrary decision-making does not take place. The Committee refers these matters to Parliament for further consideration.

Freedom of Association

The Regulation provides that the Authority must not grant an approval for a person to be an agent if it has reasonable grounds to believe that the person is a member of, or is a close associate of, or regularly associates with, one or more members of a 'declared association' and it could be reasonably inferred that improper conduct that would further the criminal activities of the organisation is likely to occur as a result of the approval. The Regulation thereby impacts on freedom of association which protects the right to form and join associations to pursue common goals.

However, limits on this freedom may be justified for the protection of public safety and where it prevents the association of certain groups of people who are involved, or likely to be involved, in crime. In this case, the provisions are clearly designed to prevent the furtherance of the goals of criminal organisations – the approval is to be refused if it would be reasonably likely to further the criminal activities of the relevant organisation. The Committee refers this matter to Parliament to consider whether the impact on freedom of association is reasonable and proportionate in the circumstances.

13. LIQUOR AMENDMENT (SPECIAL LICENSE CONDITIONS) REGULATION (NO 2) 2019

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII clause

The Regulation amends its parent Act by way of a Henry VIII clause contained in the legislation. The Committee generally discourages Henry VIII clauses as they provide the Executive with power to override the principal legislation by way of delegated legislation. This permits the principal legislation to be amended without an appropriate level of parliamentary scrutiny applied. The Committee draws this to the attention of the Parliament for consideration of whether the objective of the Regulation could have been achieved by alternative or more effective means that subjects amendments of the legislation to an appropriate level of parliamentary scrutiny.

14. MOTOR ACCIDENT GUIDELINES – VERSION 4 – 15 JANUARY 2019

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

Retrospectivity

The Committee notes that the Guidelines are drafted to have retrospective effect, applying to accidents that occurred on or after 1 December 2017. Retrospectivity is a matter about which the Committee will generally comment as it runs counter to the rule of law which allows people knowledge of what the law is at any given time. In the current case, the retrospectivity does not affect the primary legislation under which the Guidelines operate, the *Motor Accident Injuries Act 2017*, which came into force on 1 December 2017. Having regard to this, and the fact that the Guidelines focus on matters of a machinery nature to support delivery of the objects of the Act, the Committee makes no further comment.

Right to Privacy

By facilitating the surveillance of insurance claimants in certain circumstances, the Guidelines impact on the right to privacy. However, an insurer can only conduct such surveillance where there is evidence to indicate that the claimant is exaggerating an aspect of a claim or providing misleading information. Similarly, an insurer can only conduct surveillance in public places or where the claimant, while on private property is observable by members of the public going about their ordinary daily activities. Given these safeguards, the Committee makes no further comment.

That the regulation may have an adverse impact on the business community: s9(1)(b)(ii) of the LRA

Regulation of Insurance Premiums

By facilitating restriction of the amounts that insurers may charge for insurance, the Guidelines may have an adverse impact on this section of the business community. However, the Guidelines are part of a regime established under the *Motor Accidents Injuries Act 2017* that seeks to keep premiums affordable and promote fair market practices. Under the regime, consumer rights are balanced with those of insurers – insurers can adopt risk-based pricing but they must keep premiums affordable by ensuring that their profits do not exceed the amount sufficient to underwrite the relevant risk. Given this balance, the Committee makes no further comment.

Requirement to Provide Insurance

By providing that insurers must make third party insurance policies readily accessible and available to all customers who approach them, irrespective of the risk characteristics of the vehicle and its owner, the Guidelines may have an adverse impact on this section of the business community. Nonetheless, these provisions are consistent with the regime established under the Act to make third party bodily insurance compulsory for all owners of motor vehicles registered in NSW. Having regard to the importance of this objective, and the legislative frameworks that exist in NSW around vehicle registration, driver licensing and road safety, the Committee makes no further comments.

Non-reviewable Decision

By providing that a claims assessor's decision is binding on an insurer in certain circumstances, the Guidelines restrict the insurer's rights to have damages assessments reviewed by a judicial officer. While this restriction only applies in limited circumstances, it has the potential to impact on the rights of this section of the business community should a problematic assessment be made. The Committee therefore refers the matter to Parliament for consideration.

15. MOTOR ACCIDENTS INJURIES AMENDMENT REGULATION 2019

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

Compensation Rights

The Committee notes that the Regulation will change the definition of 'loss of earnings' in the *Motor Accidents Injuries Act 2017*. This will mean the monetary amount of any annual, sick or other leave entitlement will not be included in the definition of 'loss of earnings' for which a person injured in a motor accident can be compensated under the Act. The Committee refers this matter to Parliament to consider whether it is an undue trespass on the right of injured persons to compensation for loss of earnings.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII Clause

The Committee notes that the Regulation makes various amendments to the *Motor Accidents Injuries Act 2017*, made possible by the presence of Henry VIII clauses in the Act. The Committee will always comment concerning the presence of Henry VIII clauses. If amendments are to be made to an Act, this should be done through an amending Bill and not through subordinate legislation. This is to foster appropriate parliamentary oversight of the changes. The Committee refers this matter to Parliament for further consideration.

16. NATIONAL REDRESS SCHEME FOR INSTITUTIONAL CHILD SEXUAL ABUSE (COMMONWEALTH POWERS) REGULATION 2018

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

Right to Compensation

Under the Act, nothing in State law prevents a participating State institution from giving information to the Operator of the Redress Scheme when determining an application for redress, unless that law is prescribed by the regulations. The Regulation then prescribes a number of State laws which prevent the participating State institution or another State agency from complying with the request. The Committee notes that the exemptions listed in the Regulations may restrict an applicant's access to compensation by limiting the information that can be provided to the Operator to determine an application for redress. Nonetheless, this important consideration must be balanced with other important considerations and the exemptions are clearly designed to protect extremely sensitive information, for example, the identity of persons in witness protection programs and information the confidentiality of which is necessary to ensure the integrity of investigations conducted by law enforcement and integrity agencies. In the circumstances, the Committee makes no further comment.

17. ROAD TRANSPORT LEGISLATION AMENDMENT (FEES, PENALTY LEVELS AND CHARGES) REGULATION 2019

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

Right to a Fair Trial

The Regulation sets significant monetary penalties for certain offences that can be dealt with by way of a penalty notice issued under the *Road Transport Act 2013* – as high as $3,895. A person issued with a penalty notice may elect to have the matter heard by a court. However, the Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may thereby impact on a person's right to a fair trial – that is, to have

the matter heard by an impartial decision maker in public, and to put forward his or her side of the case. Notwithstanding this, as the Regulation does not remove a person's right to elect to have the matter heard by a court, and given the practical benefits of penalty notices (including that they reduce the costs and time associated with the administration of justice), the Committee makes no further comment.

18. ROAD TRANSPORT LEGISLATION AMENDMENT (RELEASE OF INFORMATION TO TOLL OPERATORS) REGULATION 2018

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

Right to Privacy

This Regulation extends the categories of personal information that RMS may agree to release to toll operators. However, the Committee does not believe these circumstances would unduly trespass on the privacy of registered vehicle operators. The Committee notes that release of an individual's date of birth and death, their licence number, and other contact details could assist toll operators to accurately identify and contact persons who owe them a debt. The requirement for RMS to consult with the Privacy Commissioner before entering into any disclosure agreement of this kind should also minimise the risk of unreasonable privacy impacts.

19. SNOWY HYDRO CORPORATISATION REGULATION 2019

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

Native Title and Compensation Rights

The Regulation is part of a scheme that contemplates possible impact on native title rights as a result of a project to expand the Snowy Mountains Hydro-Electric Scheme. It further voids the Government's liability to pay compensation for such impacts. However, in doing so, the Regulation provides for an alternative party, the Snowy Hydro Company, to pay any compensation i.e. a company gaining commercial benefit from the project. Having regard to these alternative arrangements for compensation, and the significance of the project for the State's energy needs, the Committee makes no further comment.

20. TERRORISM (HIGH RISK OFFENDERS) AMENDMENT REGULATION 2018

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

Right to a Fair Trial

The Regulation prescribes the persons who are qualified to be 'independent third party representatives' of eligible offenders in terrorism intelligence applications. The Committee is of the view that consideration should be given to requiring such a representative to have a current qualification to practise law. A representative who has a current qualification to practise law will be bound by the rules of professional and ethical conduct that apply to practising lawyers. It is the representative's role to make submissions in the best interests of the offender that may ultimately impact on whether he or she is required to submit to continued detention or supervision following the expiry of his or her sentence. Therefore, the representative is crucial to ensuring the offender's right to a fair trial and it is essential that the representative is subject to the highest possible professional and ethical standards. The Committee refers the matter to Parliament for consideration.

21. TOW TRUCK INDUSTRY AMENDMENT (FEES) REGULATION 2018

That the regulation may have an adverse impact on the business community: s9(1)(b)(ii) of the LRA

Automatic Adjustment of Fees under the Regulation does not take account of Deflation

The Committee notes that in providing for fees to be automatically adjusted to take account of inflation, the Regulation could also allow for automatic adjustment that takes account of deflation. By failing to do so, there may be some adverse impact on tow truck industry businesses, though in other cases there may be benefits. The Committee makes no further comment.

Regulation of Fees for Service

The Committee notes that by setting maximum fees that may be charged for the provision of certain services by the tow truck industry, the Regulation may adversely impact on this section of the business community. However, the Committee also notes that these requirements are part of a broader consumer protection regime that applies in NSW. Further, the Regulation allows for the automatic adjustment of these fees to take account of inflation. In the circumstances, the Committee makes no further comment.

22. UNIFORM CIVIL PROCEDURE (AMENDMENT NO 90) RULE 2019

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

Judicial review rights

The Rule excludes rights to have certain administrative decisions and orders judicially reviewed. These include a Registrar's decision to direct that the whole or part of a fee payable to the registrar be waived, postponed or remitted, subject to any conditions that the registrar thinks fit to impose; and winding up orders made under the *Corporations Act 2001*. The Committee will generally comment where independent review of administrative decisions is removed and refers the matter to Parliament to consider whether the removal is reasonable in this instance.

23. WORKERS COMPENSATION AMENDMENT REGULATION 2018

That the regulation may have an adverse impact on the business community: s9(1)(b)(ii) of the LRA

Regulation of Fees for Service

3. Schedule 2, clause 6A of the Regulation sets the maximum costs recoverable by lawyers for legal services provided to an insurer or claimant in connection with a work capacity decision. In doing so, it may adversely impact on this section of the business community.

By setting the maximum cost that lawyers can recover for certain services, the Regulation may adversely impact on this section of the business community. However, the Committee notes that this provision is consistent with a wider regime that regulates the NSW legal profession under the Legal Profession Uniform Law (NSW). The Uniform Law aims to promote consistency between States and Territories in the law applying to the Australian legal profession, and to enhance the protection of clients, including with respect to costs. In the circumstances, the Committee makes no further comments.

24. YOUNG OFFENDERS AMENDMENT (EXEMPTED SEXUAL OFFENCES) REGULATION 2019

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters that should be set by Parliament

The Regulation prescribes certain offences under the *Crimes Act* 1900 that are not covered by the *Young Offenders Act* 1997. The Committee prefers provisions which prescribe offences and affect the fundamental rights and liberties of minors to be included in primary, not delegated legislation. This is to foster an appropriate level of parliamentary oversight. In the current case, the prescribed offences that will exclude young people from being diverted from the criminal justice system under the *Young Offenders Act 1997* are sexual offences over which there are serious community concerns. For example, sexual touching of and sexual acts with or towards people under the age of 10 years. Similarly, all regulations must be tabled in Parliament and are subject to disallowance under the *Interpretation Act 1987.* Owing to this safeguard, and the nature of the prescribed offences, the Committee makes no further comment.

Part One – Bills
1. Ageing and Disability Commissioner Bill 2019

Date introduced	8 May 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Gareth Ward MP
Portfolio	Families, Communities and Disability Services

Purpose and description

1. The objects of this Bill are to protect and promote the rights of adults with disability and older adults and to protect those adults from abuse, neglect and exploitation.

2. The Bill establishes the office of Ageing and Disability Commissioner (the Commissioner) and provides for the Commissioner's functions, which include:

   (a) dealing with allegations of abuse, neglect or exploitation of adults with disability and older adults, and

   (b) community education and general advice and assistance to the public, and

   (c) inquiring into and reporting on systemic issues, and

   (d) advising and making recommendations to the Minister administering the proposed Act.

3. The Bill also establishes an Ageing and Disability Advisory Board (the Board) and provides that the Official Community Visitor program, to the extent that it relates to visits to accommodation provided to adults with disability and certain boarding houses, is to be administered by the Commissioner instead of the Ombudsman as is currently the case.

4. This Bill was referred to the Legislative Council Standing Committee on Social Issues for inquiry and report. The Committee reported on 4 June 2019 and noted stakeholder concerns such as the independence of the Commissioner, the requirement for consent to investigate, public inquiries for systemic issues, and other related matters. The Committee recommended that the Legislative Council proceed to consider the Bill in conjunction with consideration of the amendments in the committee stage that address stakeholder concerns raised in the inquiry.

Background

5. This Bill establishes the office of the Ageing and Disability Commissioner and its functions.

6. The Bill follows the announcement on 15 December 2018 by the Berejiklian government to establish "a powerful and independent Ageing and Disability Commissioner will be established in NSW to investigate the abuse of older people and adults with a disability".[1]

7. In his Second Reading Speech regarding the Bill, the Minister noted that its intention is to improve protection for vulnerable people who do not come within the ambit of other complaints mechanisms. The Minister noted that a number of reports and reviews argued the need for such protections, including the NSW Ombudsman,[2] the NSW Law Reform Commission,[3] and the Legislative Council General Purpose Standing Committee No.2 (2016)[4] which all recommended the need for an independent body or public office with investigatory powers to respond to abuse and neglect of vulnerable adults.

Issues considered by committee

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

Definition of older adult

8. Clause 3 of the Bill defines 'older adult' as a person who is aged:

   (a) 50 years or over, in the case of an Aboriginal or Torres Strait Islander (ATSI) person, or

   (b) 65 years or over, in any other case.

9. While the definition of older adult differs based on a person's status as an ATSI person, the Committee recognises that this does not aim to discriminate or prevent a person's access to the Commission's services to non-ATSI people who are required to be in an older age bracket. As noted in the Minister's Second Reading Speech, this provision is intended to recognise the gap in life expectancy between the ATSI population and the rest of the Australian population.

10. The Committee notes that under the *Anti-Discrimination Act 1977* (NSW), racial discrimination does not include anything done in affording persons of a particular race access to facilities, services or opportunities to meet their special needs or to promote equal or improved access for them to facilities, services and opportunities.[5]

11. As the Bill's definition of older adult seeks to afford ATSI persons equal access to the Commission's services and assistance, rather than prevent access to older adults from the rest of the Australian population, this provision does not constitute discrimination on the basis of race.

Clause 3 of the Bill provides two different definitions of 'older adult' – 50 years and over for Aboriginal or Torres Strait Islander (ATSI) persons or 65 years and

[1] Berejiklian G, New Commissioner to Protect Older People and Adults with Disability, Media Release, 15 December 2018.

[2] NSW Ombudsman, Abuse and neglect of vulnerable adults in NSW – the need for action: A special report to Parliament under section 31 of the Ombudsman Act 1974, 2 November 2018, Recommendation 2, p 4.

[3] NSW Law Reform Commission, Report 145: Review of the Guardianship Act 1987, May 2018, p xxii.

[4] NSW Legislative Council General Purpose Standing Committee No. 2, Elder Abuse in New South Wales, Report 44 – June 2016, p xvii, 28.

[5] *Anti-Discrimination Act 1977* (NSW), s 21.

over in any other case. The Committee notes that the provision affords services to older adults depending on ATSI status to afford equal access to the Commission's services due to the gap in life expectancy and health outcomes overall. In these circumstances, the Committee considers this fits within the special needs exception under section 21 of the *Anti-Discrimination Act 1977* and does not constitute discrimination on the basis of race.

Privilege against self-incrimination

12. Clause 18 of the Bill stipulates that a provision of any other Act or law (including those enacted or made before or after the Bill's commencement) that prohibits or restricts the disclosure of information does not operate to prevent the provision of information, or affect a duty to provide information, to the Commissioner.

13. This is a wide-ranging provision that ensures that no existing or new law affects the duty to supply information, or prevents supply of information, to the Commissioner. The Committee notes that this may infringe on common law rights such as the privilege against self-incrimination. The privilege against self-incrimination 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. This privilege intends to maintain a balance between the power of the state and the rights and interests of citizens, to preserve the presumption of innocence and to ensure that the burden of proof remains on the prosecution.

14. The Committee notes that generally the principle of legality provides the presumption that, when interpreting a statute, courts will presume that Parliament did not intend to interfere with the privilege unless the legislative intent is expressly clear. However, as clause 18 states that no Act or *law* prohibits or restricts the disclosure of information, it is not definitively clear whether this provision intends to override the common law privilege of self-incrimination.

Clause 18 of the Bill stipulates that no Act or law, existing or new, affects the duty to provide information to the Commissioner. The Committee notes that this may infringe on the common law privilege against self-incrimination which allows a person to refuse to answer questions or provide documents or information if in doing so they would tend to incriminate themselves. The Committee refers this issue to Parliament for consideration of whether the provision infringes on the privilege against self-incrimination and whether the Act incorporates appropriate safeguards against this.

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

Independence of the Commissioner

15. Clause 12(3) of the Bill provides that the Commissioner is not subject to the control or direction of the Minister in the exercise of the following functions: conducting investigations under Part 3; advising or making recommendations to the Minister; preparing annual reports and special reports under Part 5.

16. However, during an inquiry of the Legislative Council Standing Committee on Social Issues into the Bill, stakeholders raised concerns that the independence of the Commissioner

was qualified.[6] That is, the Commissioner may be subject to the control or direction of the Minister in exercising functions outside those listed in clause 12(3) of the Bill. These functions are intended to protect and promote the rights of ageing adults or adults with a disability.

The Committee notes that the Commissioner may be subject to the control or direction of the Minister in exercising functions outside those listed in Clause 12(3) of the Bill. These functions are intended to protect and promote the rights of ageing adults or adults with a disability. The Bill may thereby make the rights of those subject to it unduly dependent on the insufficiently defined administrative powers of the Minister. The Committee refers the matter to Parliament for consideration.

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

Commencement by proclamation

17. Clause 2 provides that the Bill commences on 1 July 2019, except Part 4 and Schedule 1.1[1] which are to commence by proclamation.

18. The Committee generally comments on bills that commence by proclamation as it is a delegation of the parliament's power to set a commencement date to the executive.

19. The Committee notes that the sections that are to commence by proclamation involve the appointment and functions of Official Community Visitors. The Second Reading Speech notes that these official community visitors have function relating to people who reside in "visitable services", which are accommodation services in full-time care of a service provider or assisted boarding house. These functions include informing the Minister and Commissioner on matters affecting their welfare, interests and conditions. The Committee notes that in these circumstances it may be preferable to have a flexible start date to allow time for recruitment and training of Official Community Visitors.

Section 2 provides that some parts of the Bill are to commence by proclamation. Generally, the Committee prefers that laws commence on a fixed date or on assent to provide certainty to those affected by the Act's provisions. However, the Committee notes that these sections involve the appointment and functions of Official Community Visitors who are to have responsibilities to aged, disabled and vulnerable people under a range of Acts listed in the Bill. In these circumstances, the Committee acknowledges that a flexible start date may be preferable to allow time to recruit and train official community visitors.

[6] Legislative Council Standing Committee on Social Issues, *Ageing and Disability Commissioner Bill 2019*, pp7-9.

2. Appropriation Bill 2019; Appropriation (Parliament) Bill 2019; State Revenue and Other Legislation Amendment Bill 2019

Date introduced	18 June 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasury

Purpose and description

Appropriation Bill 2019

1. The object of this Bill is to appropriate from the Consolidated Fund various sums of money required during the 2019-20 financial year for the services of the Government, including:

   (a) Departments of the Public Service; and

   (b) various special offices.

2. The Bill appropriates a single sum for the services of each agency, including recurrent services, capital works and services, and debt repayment.

3. The Consolidated Fund largely comprises receipts from, and payments out of, taxes, fines, some regulatory fees, Commonwealth grants and income from Crown assets.

4. The Bill for the 2019-20 financial year contains an additional appropriation which allocates revenue raised in connection with gaming machine taxes to the Minister for Health and Medical Research for spending on health related services.

5. The Bill for the 2019-20 financial year contains provision for transfer payments from the Commonwealth to non-Government schools and local government.

6. The Bill provides for appropriation for the whole of the 2019-20 financial year.

7. The Bill also appropriates the additional amounts for recurrent services under section 22(1) of the *Public Finance and Audit Act 1983*, the details of which are set out in Column 1 of Schedule 1.

Appropriation (Parliament) Bill 2019

8. The object of this Bill is to appropriate from the Consolidated Fund the sum of $164,242,000 required during the 2019-20 financial year for the services of the Legislature, including recurrent services, capital works and services and debt repayment.

State Revenue and Other Legislation Amendment Bill 2019

9. The objects of this Bill are as follows:

(a) to amend the *Duties Act 1997* to provide for the indexation of duty thresholds for dutiable transactions, in line with increases in the Consumer Price Index for Sydney,

(b) to amend the *Duties Act 1997* and the *Land Tax Act 1956* to extend existing exemptions from surcharge purchaser duty and surcharge land tax relating to foreign persons who are permanent residents so that the exemptions apply to the holders of certain retirement visas under the *Migration Act 1958* of the Commonwealth,

(c) to amend the *Payroll Tax Act 2007* to enable employers who have an annual payroll tax liability of less than $150,000 to pay monthly payroll tax payments during a financial year on the basis of an estimate of the amount of payroll tax payable for the whole financial year (as an alternative to payments based on actual wages) and to extend the period within which an employer is required to lodge a return and pay an amount of tax in respect of the month of June,

(d) to reduce extended leave entitlements for public sector employees who are employed on or after 1 July 2019 from 5 months on full pay proportionate to each 10 years of service, after the first 10 years of service, to 3 months on full pay proportionate to each of those additional 10 years of service,

(e) to dissolve Roads and Maritime Services (RMS) and transfer its assets, rights, liabilities and functions to Transport for NSW (TfNSW),

(f) to dissolve the Barangaroo Delivery Authority and transfer its assets, rights, liabilities and functions to Infrastructure NSW,

(g) to dissolve the UrbanGrowth NSW Development Corporation and transfer its assets, rights, liabilities and functions to Infrastructure NSW.

Background

10. These Bills give effect to the 2019-20 Budget.

11. Although they are separate Acts when operative, the Appropriation Bill 2019, Appropriation (Parliament) Bill 2019 and State Revenue and Other Legislation Amendment Bill 2019 are cognate Bills. Therefore, all three Bills have been considered in the one report.

12. However, the Committee makes no comment on the Appropriation Bill 2019 and the Appropriation (Parliament) Bill 2019 in respect of the issues set out in section 8A of the *Legislation Review Act 1987*.

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. Crimes (Administration of Sentences) Amendment (Inmate Behaviour) Bill 2019

Date introduced	28 May 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Counter Terrorism and Corrections

Purpose and description

1. The object of this Bill is to permit the Commissioner of Corrective Services to adopt policies to manage the behaviour of inmates of correctional centres.

2. It allows the Commissioner of Corrective Services to adopt policies to manage the behaviour of inmates in correctional centres ('behaviour management policies'). A behaviour management policy may include any matter relating to management of the behaviour of inmates and may specify circumstances in which certain privileges provided to inmates may be modified by being withdrawn or increased.

3. The modification to the privileges of an inmate in accordance with a behaviour management policy can occur even if the circumstances causing the modification relate to a criminal or correctional centre offence. The modification does not affect, and is not affected by, any proceedings or penalty for the related offence.

Background

4. This Bill amends the *Crimes (Administration of Sentences) Act 1999* (the principal Act).

5. As noted in the Second Reading Speech, this Bill responds to the decision in *Hamzy v R* (unreported) on 21 February 2019. In this case, the Court found that "it is unlawful to use incentive-based schemes to remove withdrawable privileges in response to inmate conduct that may also constitute a correctional centre offence where it is done otherwise than in accordance with the process set out in division 6, part 2 of the *Crimes (Administration of Sentences) Act*." Further, the Court quashed the inmate's conviction for assaulting a correctional officer and ordered a permanent stay of the prosecution.

6. In his Second Reading Speech the Minister stated that "The Bill will provide clarity and certainty to Corrective Services to ensure that there can be an immediate lawful response to address inmate behaviour without affecting the outcomes of any disciplinary proceedings or criminal proceedings".

Issues considered by committee

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

Right to humane treatment in detention

7. The Bill inserts section 65A which provides that the Commissioner may adopt policies to manage the behaviour of inmates in accordance with the principal Act and its regulations.

8. This includes the power to modify an inmate's withdrawable privileges, which are defined under clause 163 of the Regulations as including:

- watching films or videos
- using television, video, radio or audio player
- participating in leisure activities; using a musical instrument
- using library facilities
- purchasing goods
- keeping of approved personal property
- pursuing a hobby; using the telephone (except for calls to legal practitioners and exempt bodies)
- participation in contact visits
- permission for leave permits.

9. The right to humane treatment in detention is an internationally recognised human right and extends to a wider range of less serious mistreatment.[7] The UN Human Rights Committee has stated that the right has been violated in cases where the detainee was unreasonably denied reading and radio facilities, confined to their cell for an unreasonably long period, and subjected to restrictions on correspondence with his/her family.

10. In his Second Reading Speech on the Bill, the Minister noted that it is important that correctional officers have the tools necessary to manage inmate behaviour to ensure the safety and security of correctional centres. He also stated that "Privileges are tools that can be used to incentivise good behaviour and be removed following a regression in behaviour and allow an immediate response to an inmate's behaviour". Further, withdrawable privileges are already permitted under the existing Act and Regulations.

> **The Bill allows the Commissioner to adopt behaviour management policies under which inmate privileges can be withdrawn or increased. Such privileges may include the pursuit of a hobby, access to CDs/DVDs, the keeping of personal property, contact visits, telephone use and leave permits. The Committee recognises that withdrawable privileges are an important tool to respond quickly to inmate behaviour, ensure the safety and good order of correctional centres,**

[7] *International Covenant on Civil and Political Rights*, Article 10.

and incentivise good behaviour. Further, the Committee notes that they are permitted under the existing Act and Regulations. However, the Committee must comment where a bill infringes on personal rights and liberties set out in legislation, the common law or international agreements. As the Bill removes privileges from inmates, it affects their right to humane treatment in detention. The Committee draws this to the attention of the Parliament.

Double Punishment

11. The Bill provides that a modification to the privileges of an inmate under a behaviour management policy, may occur even if the circumstances causing the modification relate to a criminal or correctional centre offence. Further, the modification does not affect, and is not affected by, any proceedings or penalty for the related offence.

12. Therefore, the Bill allows for the double punishment of an inmate. Where he or she has committed an offence he or she could have privileges withdrawn *and* be subject to penalties arising from criminal justice or disciplinary proceedings.

13. The issue of double punishment was considered by the Court in *Hamzy v R* (unreported, 21 February 2019), where it was noted that removing privileges "is clearly capable of being seen by those who are subject to it as creating some form of punishment".[8] As above, the Court found that it was unlawful to use incentive-based schemes to remove withdrawable privileges in response to inmate conduct that may also constitute a correctional centre offence where it is done otherwise than in accordance with the process set out in division 6, part 2 of the *Crimes (Administration of Sentences) Act*. The Court quashed the inmate's conviction for assaulting a correctional officer and ordered a permanent stay of prosecution.

The Bill provides that inmate privileges can be removed under a behaviour management policy even if such removal relates to a criminal or correctional centre offence. Further, privileges can be removed regardless of any proceedings or penalty for the offence. The Bill thereby permits double punishment – an inmate could have privileges removed and be subject to a penalty for an offence. The Committee recognises that withdrawable privileges are an important tool to respond quickly to inmate behaviour, ensure the safety and good order of correctional centres, and incentivise good behaviour. Nonetheless, it is an important rule of law that a person not be punished twice for the same offence. The Committee refers the issue to the Parliament for consideration of whether the Bill unduly trespasses on rights and liberties of detained persons.

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

Rights dependent on wide administrative power

14. The Bill allows the Commissioner a wide discretionary power to remove the privileges of persons in detention. Under proposed section 65A of the Bill, the Commissioner can adopt behavioural management policies for inmates which may:

- Include any matter relating to the management of inmate behaviour;

[8] See New South Wales, Parliamentary Debates, Legislative Council, 19 June 2019, p9.

- Specify circumstances in which the withdrawable privileges may be modified;
- Authorise the use of withdrawable privileges even in circumstances where the behaviour is subject to a correctional centre offence or criminal offence;
- Be done at any time, regardless of any proceedings or penalty imposed for the behaviour; and
- Not prevent the commencement or continuation of proceedings for a correctional centre offence or criminal offence.

The Bill provides the Commissioner with a wide discretionary power to adopt behavioural management policies for inmates. They can be applied to any behavioural management matter at any time and allow the Commissioner to remove inmate privileges. Consequently, the rights and liberties of inmates depend on the widely defined powers of the Commissioner. The Committee considers that administrative powers that affect rights and liberties should be sufficiently defined to ensure that the scope of the power is clear. Therefore, the Committee refers this issue to the Parliament to consider whether the Bill makes the rights and liberties of inmates unduly dependent on insufficiently defined administrative powers of the Commissioner.

4. Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019*

Date introduced	30 May 2019
House introduced	Legislative Council
Member responsible	Mr David Shoebridge MLC
	Private Member's Bill*

Purpose and description

1. The object of this Bill is to amend the *Crimes (Appeal and Review) Act 2001* to extend an exception to the rule against double jeopardy in relation to an acquitted person where previously inadmissible evidence becomes admissible.

2. The Bill provides that, when the Director of Public Prosecutions applies to the Court of Criminal Appeal for an order that an acquitted person be retried for an offence punishable by life imprisonment, evidence against the acquitted person is to be considered fresh (for the purpose of determining whether it is "fresh and compelling" in the sense required for a re-trial) if it was inadmissible in the proceedings in which the person was acquitted but, as a result of a substantive legislative change in the law of evidence since the acquittal, would now be admissible if the acquitted person were to be retried.

3. The Bill also amends the *Crimes (Appeal and Review) Act 2001* to allow for a second application for the re-trial of an acquitted person to be made in exceptional circumstances.

Background

4. The Bill follows the 2019 High Court decision in *Attorney-General for New South Wales v XX* (2019).[9] In that case, the High Court upheld the 2018 decision by the NSW Court of Criminal Appeal that rejected an application for a re-trial of a person who was acquitted for the murder of three Aboriginal children in Bowraville between 1990 and 1993. The 2018 decision concluded that for evidence to be "fresh" for the purposes of section 102(2) of the *Crimes (Appeal and Review) Act 2006* (NSW) it must not have been "tendered" or "brought forward" or have been able to have been with the exercise of reasonable diligence.

5. The Bill seeks to amend the definition of fresh evidence to allow a re-trial following these court decisions. On 30 May 2019, the Bill was referred to the Legislative Council Standing Committee on Law and Justice for inquiry and report.

[9] *Attorney-General for New South Wales v XX* [2019] HCATrans 052.

Issues considered by committee

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

Double jeopardy

6. Section 100 of the *Crimes (Appeal and Review) Act 2001* (the Act) provides that the Court of Criminal Appeal may, on application of the Director of Public Prosecutions, order an acquitted person to be re-tried for a life sentence if satisfied that:

   (a) there is fresh and compelling evidence against the acquitted person in relation to the offence, and

   (b) in all circumstances it is in the interests of justice for the order to be made.

7. Section 102(2) of the Act provides that evidence is fresh if:

   (a) It was adduced in the proceedings in which the person was acquitted, and

   (b) It could not have been adduced in those proceedings with the exercise of reasonable diligence.

8. Section 102(3) of the Act provides that evidence is compelling if:

   (a) it is reliable, and

   (b) it is substantial, and

   (c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.

9. The Bill expands the definition of fresh evidence in section 102(2) to catch evidence that was inadmissible in proceedings in which a person was acquitted but that would now be admissible were the person to be re-tried because of changes to the law of evidence.

10. In a 2015 review of the Act by Justice Wood, he rejected expanding the definition of fresh evidence along these lines stating that it could lead to the revival of a number of acquittals where similar fact evidence was rejected. Justice Wood also noted that the perception of finality for a person acquitted of a life sentence offence may be affected by such an amendment stating that "A person acquitted of a life sentence offence may forever remain attentive to any changes in evidence law that may impact upon his or her case".[10]

11. Further the Bill amends the Act to allow for a second application for the re-trial of an acquitted person in exceptional circumstances. Currently only one application for the re-trial of an acquitted person can be made.

12. The Committee notes that in the Second Reading Speech on the Bill Mr Shoebridge stated that the reform to the law of double jeopardy that the Bill seeks is to 'clear the path to justice' for 'the families whose three children were murdered in Bowraville'.

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

13. In the Second Reading Speech on the Bill, Mr Shoebridge also noted that a number of safeguards are contained in the Act under Part 8 Division 2. These safeguards require that applications for re-trial must have the consent of the Attorney-General, that they can only be made in respect of serious crimes that carry a possible life sentence, and that they must be heard by the Court of Criminal Appeal. Similarly, the application can only succeed if the evidence that was not admitted by the trial judge is fresh and compelling, if granting the application would be in the interests of justice, and where the accused will be granted a fair trial.[11]

> **By widening the circumstances under which a person can be re-tried for offences of which he or she has been acquitted, the Bill impacts on the double jeopardy rule. This rule provides that no one can be re-tried for an alleged offence of which he or she has already been acquitted, or convicted. The rule is intended to prevent the State, with its considerable power and resources, making repeated attempts to convict an individual for an alleged offence, thereby subjecting him or her to a continued state of uncertainty. The Committee notes the strict requirements contained in the *Crimes (Appeal and Review) Act 2001* that must be satisfied before a re-trial can be ordered. Nonetheless, the Committee refers the matter to Parliament for it to consider whether there is an undue trespass against personal rights and liberties.**

Retrospectivity

14. Proposed section 102(2A) of the Bill retrospectively expands the evidence that can be relied on to obtain a conviction in certain cases. That is, evidence not admissible to convict a person at the time of their acquittal may now be able to be used in any re-trial if changes to the law of evidence since acquittal mean that it is now admissible.

15. Similarly, proposed section 102(2B) provides that the Bill's extension of the exceptions to the double jeopardy rule are to apply retrospectively, that is, to people acquitted prior to the commencement of the Bill.

> **The Bill is drafted to have retrospective effect. Retrospectivity is contrary to the rule of law that allows people knowledge of the laws to which they are subject at any given time. The Committee refers the matter to Parliament for it to consider whether there is an undue trespass against personal rights and liberties.**

[11] New South Wales, Parliamentary Debates, Legislative Council, 30 May 2019, pp 11-12.

5. Crown Land Management Amendment (Reservation and Vesting of Crown Land) Bill 2019*

Date introduced	6 June 2019
House introduced	Legislative Council
Member responsible	The Hon. Mick Veitch MLC
	Private Members Bill*

Purpose and description

1. The object of this Bill is to make further provision with respect to the reservation and vesting of Crown land. Schedule 1 [1] of the Bill substitutes a provision requiring revocations of reserved Crown land to be tabled in both Houses of Parliament, and stipulating that either House of Parliament may resolve to disallow the revocation. Schedule 1 [2] inserts a provision requiring a proposed notice to vest Crown land in a government agency to be tabled in both Houses of Parliament, and stipulating that either House of Parliament may resolve to disallow the vesting proposal.

Background

2. In his Second Reading Speech regarding the Bill, Mr Veitch told Parliament that the Bill seeks to increase protections and safeguards around Crown land. He explained that Crown land is land managed by the NSW Government on behalf of the people of NSW.

3. Mr Veitch indicated that the *Crown Land Management Act 2016* ('the Act') currently provides a greater level of protection for dedicated Crown land than it does for Crown land that is reserved for public purposes. In short, where the Minister wishes to remove a protection over a piece of dedicated Crown land, he or she must notify both Houses of Parliament and either House can disallow an intention to remove such a protection. Mr Veitch stated that the Bill extends such protections to all land reserved for any public purpose and that:

> This is a simple check and balance that will ensure greater parliamentary protection and oversight. It will provide more oversight for a range of public lands – showgrounds, travelling stock reserves, community halls, parks and sporting fields that need protection.

4. Mr Veitch also told Parliament that the second element to the Bill relates to situations where the Minister responsible for the Act wants to, or is instructed to, transfer land to (or 'vest' it in) another government agency, meaning that it is no longer Crown land. Mr Veitch stated:

> When the Crown Lands Management Bill was passed by Parliament in 2015 the Government went to great pains to say that dealings in Crown land would be subject to community consultation provisions…[The Government's] community consultation

> strategy allows the Minister to unilaterally waive its community engagement strategy over a dealing in Crown land, such as a vesting in another government agency, in the following certain circumstances: (1) in emergency or exceptional circumstances; (2) to enable approved NSW Government priorities that require Crown Land; (3) where the Minister is satisfied that a waiver is in the public interest; or (4) where the Minister is satisfied that other legislation is applicable and delivers the same or better engagement.
>
> The waivers are broad, subjective and simply do not stack up. I am concerned about what "emergency or exceptional circumstances" may be contemplated…Given these escape clauses, it is important that we ensure greater oversight of any proposal to transfer Crown land to another government agency.

5. The Bill inserts provisions into the Act requiring a proposed notice to vest land in a government agency to be tabled in both Houses of Parliament, and stipulating that either House can disallow such a vesting proposal.

Issues considered by the committee

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

6. Fair Trading Amendment (Cash Loan Machines) Bill 2019*

Date introduced	9 May 2019
House introduced	Legislative Assembly
Member responsible	Ms. Yasmin Catley MP
	*Private member's bill

Purpose and description

1. The object of this Bill is to prohibit cash loan machines from being installed or kept on any premises. A cash loan machine is a machine used:

   (a) to approve a small amount credit contract between a user of the machine and a credit provider, and

   (b) for the withdrawal of cash by the user under that contract.

Background

2. This Bill aims to prohibit the installation and keeping of cash loan machines. Cash loan machines are similar in appearance to ATMs and approve short-term small loan amounts to consumers.

3. In her Second Reading Speech, the Member for Swansea noted that payday lenders have recently installed these machines in local shopping centres and tobacconists in low-income areas. There have been concerns that these machines allow predatory lenders to exploit low-income earners by quickly approving loan amounts with high fees and interest rates.

4. A 2010 review by Consumer Action[12] examined the growth of high-cost short-term lending in Australia and the regulation of this sector. It found that the short-term loan industry had increased in Australia, particularly with the increased accessibility of loans through online services. It also found high-cost short term loans are a form of 'sub-prime' lending that typically attracts young low-income consumers who can't afford to borrow elsewhere.

5. In 2016 the Australian Treasury[13] reviewed small amount credit contract (SACC) laws and made recommendations for consumer protection, including reducing the cap of total SACC repayments and length of time for credit contracts. The use of cash loan machines was not included in this review.

[12] Consumer Action Law Centre, *Payday loans: Helping hand or quicksand? Examining the growth of high-cost short-term lending in Australia, 2002-2010*, September 2010.

[13] Australian Government The Treasury, *Review of small amount credit contracts – Final report*, March 2016.

Issues considered by the committee

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

7. Industrial Relations Amendment (Contracts of Carriage) Bill 2019*

Date introduced	30 May 2019
House introduced	Legislative Council
Member responsible	The Hon. Adam Searle MLC
	*Private member's bill

Purpose and description

1. The object of this Bill is to amend the *Industrial Relations Act 1996* to include contracts for the transportation of bread, milk or cream for sale or delivery for sale as contracts of carriage under that Act. As a result, any such contract will be subject to the provisions of Chapter 6 of that Act, including enabling the Industrial Relations Commission to make determinations with respect to the remuneration of the carrier, and any conditions, under the contract and to exercise dispute resolution powers in relation to the contract.

Background

2. A similar Bill was introduced in the Legislative Assembly in 2018 by Mr Greg Warren MP, which has since lapsed upon prorogation of the 56th parliament.[14] That bill was reviewed in the Legislation Review Digest No. 49/56 on 13 February 2018.

3. This bill intends to extend the protections under the *Industrial Relations Act 1966* to include contracts for the transportation or delivery for sale of bread, milk, or cream.

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.

[14] *Industrial Relations Amendment (Contracts of Carriage) Bill 2018*.

8. Library Amendment Bill 2019

Date introduced	29 May 2019
House introduced	Legislative Council
Member responsible	The Hon. Don Harwin MLC
Portfolio	Special Minister for State

Purpose and description

1. The objects of this Bill are as follows:

   (a) to identify legal deposit libraries and specify additional functions of those libraries,

   (b) to authorise the head librarian of a legal deposit library to direct the publisher of library material to deliver a copy of the material in the library or to make the material available for copying,

   (c) to authorise the head librarian of a legal deposit library to collect free of charge relevant library material that is made freely available by the publisher of the material,

   (d) to provide for the service of documents under the Library Act 1939 (the principal Act),

   (e) to repeal the *Copyright Act 1879* and to make savings and transitional arrangements consequent on that repeal,

   (f) to make other minor amendments.

Background

2. The *Copyright Act 1879* currently requires copies of all books published in New South Wales to be deposited with the three legal deposit libraries in New South Wales. These libraries are the State Library of New South Wales, the Parliamentary Library and the Library of the University of Sydney. In the Second Reading Speech, the Minister commented that this requirement:

   > … ensures that published material in New South Wales is catalogued, accessible and archived in perpetuity to appropriately record published works in New South Wales.

3. This Bill provides the head librarian of a legal deposit library with greater functions to identify and collect library material from publishers. The Bill permits the head librarian to order a publisher to deliver copies of library material free of charge to the library, or make the material available to the library to copy. Library material has also been amended to include electronic publications.

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*.

9. Liquor Legislation Amendment (Repeal of Lock-out Laws) Bill 2019*

Date introduced	30 May 2019
House introduced	Legislation 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 Entertainment 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 that impose the 'lock-out laws' in the Sydney CBD and Kings Cross precincts after 1:30am. The lock-out laws were enforced in February 2014 following the fatal assaults of two young men in 2013.

3. These laws are currently under review by the Joint Select Committee on Sydney's Night Time Economy. The Committee will examine measures to maintain and enhance community safety, individuals and community health outcomes; measures to ensure existing regulatory arrangements in relation to businesses and other stakeholders remain appropriately balanced; and measures to enhance Sydney's night time economy. The Committee is due to report by 30 September 2019.

Issues considered by the Committee

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

10. Local Government Amendment Bill 2019

Date introduced	4 June 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Shelley Hancock MP
Portfolio	Local Government

Purpose and description

1. The object of this Bill is to amend the *Local Government Act 1993* and other legislation as follows:

   (a) to increase to $250,000 the value of a contract at or above which a council is required to invite tenders and to provide for other exceptions from the tendering requirement,

   (b) to extend by a further 12 months the period for which the Minister for Local Government may maintain the existing rate path for amalgamated councils,

   (c) to extend the cut-off dates for councils to decide to enter into arrangements with the Electoral Commissioner to administer the 2020 ordinary council elections, and to enter into the arrangements, to 1 October 2019 and 1 January 2020, respectively,

   (d) to enable the delegation of regulatory functions of councils to other councils, their committees and employees, and to committees of boards of joint organisations,

   (e) to enable regulations to be made to exempt councils from requirements relating to public notice of fees or determination of fees according to pricing methodologies where the fees relate to specified commercial activities,

   (f) to enable regulations to be made to establish a scheme for mutual recognition by councils of approvals and for appeals from decisions about the approvals.

Background

2. In the Second Reading Speech, the Minister noted that the Bill reflects the Government's commitment to assist local councils through consultation and the easing of regulatory burden. The Bill also seeks to remove current limits on procurement and cut red tape for councils and local communities.

Issues considered by committee

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

Commencement by proclamation

3. Clause 2 of the Bill provides that Schedule 1 [4], [15]–[20] and Schedule 2.2 commence on a day or days to be appointed by proclamation.

Clause 2 of the Bill provides that certain parts of the Bill will commence by proclamation. The Committee prefers that laws commence on a fixed date or on assent to provide certainty to those affected by their provisions. The Committee does note that the clauses to commence by proclamation are those that deal with the regulation-making powers, and acknowledges that it may be preferable to have a flexible start date for this type of legislative and regulatory change. However, the Committee draws this to the Parliament's attention for consideration of whether this is an appropriate delegation of legislative power.

Matters that should be set by Parliament

4. The Bill delegates a number of functions to the regulations, rather than requiring that these matters be dealt with in primary legislation. In particular, Schedule 1[4] enables regulations to be made conferring jurisdiction on the Land and Environment Court to deal with appeals relating to council decisions about mutual recognition of council approvals. Similarly, it enables regulations to be made conferring discretion on the Land and Environment Court to award compensation payable by a council for expenses incurred because of a refusal or delay in recognising an approval in circumstances where the council has been influenced by vexatious or unmeritorious submissions by the public or acted vexatiously.

5. The Bill also contains a number of provisions that allow councils to delegate certain regulatory functions, including:

- Schedule 1[8], which enables a council to delegate its regulatory functions (relating to water supply, sewerage and drainage work, waste management, community land and other matters) to another council.

- Schedule 1[9], which requires approval from a council before any regulatory functions are delegated to it by another council. It also provides that the regulations may prescribe circumstances where regulatory functions may not be delegated to another council.

- Schedule 1[10], which enables a joint organisation to which a regulatory function is delegated by a council to delegate the function to a committee of the board of the joint organisation.

- Schedule 1[11], which enables a council to delegate a regulatory function (from another council) to a committee or general manager of another council (who may in turn delegate the function to an employee of another council).

The Bill permits certain matters to be delegated to the regulations. In particular, it permits regulations to be made to confer jurisdiction on the Land and Environment Court to deal with appeals of council decisions about mutual recognition of council approvals. It also permits regulations to be made to confer discretion on the Court to award compensation payable by councils in certain circumstances. The Committee considers that the matters over which a court is to have jurisdiction should be set down in primary, not subordinate, legislation to ensure an appropriate level of parliamentary oversight.

The Bill also permits local councils to delegate certain regulatory functions to another council. These regulatory functions include matters relating to water

supply, sewerage and drainage work, and waste management. The Committee considers provisions determining the bodies that are to exercise regulatory powers that have public health implications should be included in primary, not subordinate legislation, to ensure an appropriate level of parliamentary scrutiny over arrangements.

Consequently, the Committee refers these matters to the Parliament to consider whether an inappropriate delegation of legislative power has occurred.

11. Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019*

Date introduced	6 June 2019
House introduced	Legislative Council
Member responsible	Revd the Hon. Fred Nile MLC
	Private Members Bill*

Purpose and description

1. The object of this Bill is to amend the *Mining Act 1992* to provide that persons financially affected by the cancellation of exploration licence 7270 over certain land at Doyles Creek can apply to an independent arbitrator for an assessment and determination of compensation for the licence cancellation.

2. That exploration licence was cancelled as a result of the Independent Commission Against Corruption (ICAC) findings in Operation Acacia and Schedule 6A to the Act currently precludes compensation being payable by the State.

Background

3. In his Second Reading Speech regarding the Bill, Revd Nile told Parliament that the Bill "seeks to correct serious injustices that arose during the terms of the previous two Parliaments".

4. In 2012 and 2013, the ICAC conducted Operation Acacia. It concerned the granting of the Doyles Creek exploration licence to Doyles Creek Mining Pty Ltd, a wholly-owned subsidiary of NuCoal Resources Ltd. As a result of its investigations, the ICAC made findings of corrupt conduct in the grant of the Doyles Creek exploration licences. However, it made no findings of corrupt conduct against the directors of NuCoal in relation to the granting or creation of the licences. The ICAC also recommended special legislation to expunge the licences, which could be accompanied by a power to compensate any innocent parties affected by such expungement.

5. Revd Nile told Parliament:

> In January 2013 the NSW Parliament implemented one aspect of ICAC's recommendations and cancelled the Mount Penny, Glendon Brook and Doyles Creek exploration licences. This was done through the Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014 – the cancellation Act. Contrary to the advice of both ICAC and Bret Walker SC, the cancellation Act denied any claim for compensation for the shareholders.

> Nearly 3000 innocent NuCoal mum-and-dad investors lost a considerable value of their investment as a result of the introduction of the cancellation bill.

6. Revd Nile further stated: "The Bill sets in train a fair process for fair compensation…[It] establishes a scheme that parties who have been unjustly adversely impacted as a consequence of the ICAC investigations and what followed in their wake may seek recourse to".

Issues considered by the committee

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

Ill-defined and wide powers I

7. The Bill establishes a scheme so that persons financially affected by the cancellation of exploration licence 7270 over certain land at Doyles Creek can apply to an independent arbitrator for compensation. The arbitrator would have the power to determine the entitlements to compensation, the amount of compensation payable and any conditions of payment (proposed section 7A(8)).

8. In doing so, the Bill grants the arbitrator a very wide and ill-defined power to determine the procedure that will be used for assessing claims. Proposed section 7A(6) provides "The procedure for assessing claims for compensation is to be determined by the arbitrator". Similarly, the Bill grants the arbitrator a wide discretion to determine the information that must be provided in support of a claim. Proposed section 7A(5) provides that "A claim for compensation must be supported by the information determined by the independent arbitrator…".

> **The Bill provides for the appointment of an independent arbitrator to determine compensation entitlements for people financially affected by the cancellation of an exploration licence over certain land at Doyles Creek. In doing so, it grants the arbitrator a wide and ill-defined power to determine the procedure that will be used for assessing claims, and the information that must be provided in support of a claim. The Committee considers administrative powers affecting rights should be sufficiently defined to ensure that their scope and content is clear. The Committee refers the matter to Parliament to consider whether these powers granted to the arbitrator are too wide and ill-defined.**

Ill-defined and wide powers II

9. The Bill requires the Minister to appoint an independent arbitrator to determine entitlements under the new compensation scheme. The Minister is given a wide discretion with respect to making this appointment although the appointee must be legally qualified, and a person who has been an employee or officer of the ICAC is not eligible for the role.

> **The Bill grants the Minister a wide discretion to appoint an independent arbitrator to determine entitlements under the new compensation scheme. The Committee considers that administrative powers affecting rights should be sufficiently defined so that their scope and content is clear. The Committee would prefer the Bill to contain more detail about the factors that would qualify a candidate for the arbitrator's role assessing claims. Nonetheless, the Bill does**

require the appointee to be legally qualified and makes persons who have been employed by the ICAC ineligible. Owing to these safeguards and the countervailing need for some flexibility to find a suitable and available person to fill the role, the Committee makes no further comment.

12. Parliamentary Budget Officer Amendment Bill 2019*

Date introduced	6 June 2019
House introduced	Legislative Assembly
Member responsible	Mr Ryan Park MP
	*Private Member's Bill

Purpose and description

1. The object of this Bill is to amend the *Parliamentary Budget Officer Act 2010* in relation to the office and functions of the Parliamentary Budget Officer (PBO), including:

(a) providing for the office of PBO to continue on an ongoing basis throughout successive terms of Parliament, rather than being limited to the periods immediately preceding and following a State general election, and

(b) authorising the PBO, at the request of a member of Parliament at any time during a term of Parliament, to prepare costings of policies proposed by the member and provide analysis, advice or briefings of a technical nature on financial, fiscal and economic matters, and

(c) enabling the parliamentary leaders of any registered party and independent members of Parliament to request the preparation of election policy costings by the PBO, and

(d) requiring the PBO to prepare and give to the Public Accounts Committee of the Legislative Assembly an annual report relating to the activities of the PBO in the preceding year, and

(e) extending the period to which each operational plan of the PBO is required to relate (from the periods immediately preceding and following a State general election) to an entire term of Parliament.

Background

2. The Bill intends to establish a permanent Parliamentary Budget Office (PBO). Currently in New South Wales, the PBO is set up periodically around the time of the state election.

3. In his second reading speech, Mr Park noted that the changes in the Bill would create an ongoing PBO, similar to the model used at the Commonwealth level, to ensure that policies are funded appropriately throughout the parliamentary term.

Issues considered by committee

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

13. Planning Legislation Amendment Bill 2019

Date introduced	18 June 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Rob Stokes MP
Portfolio	Planning and Public Spaces

Purpose and description

1. The object of this Bill is to make miscellaneous amendments to the *Environmental Planning and Assessment Act 1979* and instruments made under that Act and to make minor amendments to the *Land and Environment Court Act 1979*.

Background

2. In 2017, the *Environmental Planning and Assessment Amendment Act 2017* (2017 Act) made extensive changes to the NSW planning framework by amending legislation such as the *Environmental Planning and Assessment Act 1979*.

3. The Bill addresses some consequential and minor issues that have been identified in the planning system since the 2017 Act commenced.

Issues considered by committee

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

Retrospectivity

4. The bulk of the Act will commence on 18 September 2019. However, some amendments will commence retrospectively (see clause 2(2) and (3) of the Bill).

5. In particular, amendments to the *Standard Instrument (Local Environmental Plans) Order 2006* apply from immediately before the commencement of the *Standard Instrument (Local Environmental Plans) Amendment (Primary Production and Rural Development) Order 2019*. That instrument commenced on 28 February 2019. The changes in the Bill update and insert directions to assist with preparing standard local environmental plans under the *Environmental Planning and Assessment Act 1979*.

6. Amendments to the *Blacktown Local Environmental Plan 2015 (Amendment No 7)* apply from immediately before the commencement of the *Blacktown Local Environmental Plan 2015 (Amendment No 7).* That instrument commenced on 10 August 2018. The explanatory notes to the Bill state that the changes correct a standard provision in a local environmental plan which was incorrectly adopted. The Bill re-adopts this optional provision which is about minimum subdivision lot size for community title schemes. A savings provision will also be included in the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* to protect any development consent granted based on the incorrectly adopted provision (see schedule 1.5 of the Bill).

Some of the amendments proposed by the Bill will apply retrospectively. This is contrary to the rule of law which allows people to know which laws apply to them at any given time. The Committee notes that the amendments appear to be relatively minor in nature. Any development consents granted which were based on an incorrectly adopted provision are also protected. Nevertheless, the Committee refers clauses 2(2) and (3) of the Bill to Parliament for consideration of whether the retrospective commencement of provisions may unduly trespass on the personal rights or liberties of any stakeholders in the NSW planning system.

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

Unclear commencement dates

7. As previously mentioned, the bulk of the Act will commence on 18 September 2019. However, some amendments will commence retrospectively (see clause 2(2) and (3) of the Bill). The Bill says these provisions are 'taken to have commenced immediately before the commencement of' other listed instruments. The wording is imprecise as to whether the commencement dates for these provisions would be the day before those other instruments commenced or the same day but immediately before.

The language used to describe the commencement of some of the provisions in the Bill is unclear. The relevant provisions also operate retrospectively. The imprecise language impacts on the rule of law which allows people to know which laws apply to them at any given time and whether their rights, liberties or obligations may be affected. The Committee refers clauses 2(2) and (3) of the Bill to Parliament for consideration as to whether the commencement dates of the provisions are sufficiently defined.

14. Plastic Shopping Bags (Prohibition on Supply by Retailers) Bill 2019*

Date introduced	6 June 2019
House introduced	Legislative Council
Member responsible	The Hon. Penny Sharpe MLC
	*Private Member's Bill

Purpose and description

1. The object of this Bill is to prohibit retailers from supplying plastic shopping bags to their customers.

Background

2. The Bill aims to reduce waste and landfill to lessen the negative environmental impacts of plastic bags, including impacts on marine life. A similar bill was introduced in 2016 in the Legislative Council by the Hon. Penny Sharpe MLC; and in 2017 in the Legislative Assembly by Mr Luke Foley MP.

3. In her Second Reading Speech for the current Bill, the Hon. Penny Sharpe MLC noted that this Bill was originally drafted based on the plastic bag ban in the Australian Capital Territory and has since been updated to reflect the latest laws introduced in Queensland. Ms Sharpe also noted that all States and Territories in Australia have introduced a ban except New South Wales.

Issues considered by committee

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

Absolute liability

4. Clause 4 of the Bill provides that a person who sells goods in trade or commerce must not supply a single-use plastic shopping bag to another person for the purpose of that other person carrying goods purchased, or to be purchased, from the premises where the bag is supplied. This offence carries a maximum penalty of 50 penalty units.

5. As there are no qualifying elements of the offence nor any defences available, this provision creates an absolute liability offence. Absolute liability offences do not require proof of fault nor provide a defence of an honest and reasonable mistake of fact. This is a derogation from the common law principle that intention is a requirement of an offence, particularly criminal offences.

> **The Bill creates an offence of absolute liability for a person who sells goods in trade or commerce to supply single-use plastic bags. The Committee generally comments where a bill creates an offence of absolute liability as this does not require proof of fault nor provide a defence of an honest and reasonable mistake of fact. In this case the maximum fine for the offence is not insignificant, being**

$5,500. The Committee does however recognise that the offence is intended to apply to retailers rather than private individuals and cannot be penalised through imprisonment, only a fine. The Committee refers the matter to Parliament to consider whether the creation of the absolute liability offence unacceptably infringes on personal rights.

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

Wide regulation-making power

6. Clause 6 provides that the Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

The Bill permits the Governor to make regulations with respect to any matter required under the Act. This is a wide administrative power to make any regulation under the Act that may affect the obligations of those subject to the Act. The Committee draws this to the attention of the Parliament for its consideration of whether this makes obligations unduly dependent upon insufficiently defined administrative powers.

15. Privacy and Personal Information Protection Amendment (Notification of Serious Violations of Privacy by Public Sector Agencies) Bill 2019*

Date introduced	20 June 2019
House introduced	Legislative Assembly
Minister responsible	Mr Paul Lynch MP
Portfolio	Private Member's Bill*

Purpose and description

1. The object of this Bill is to require a public sector agency that has caused a serious violation of the privacy of an individual by contravening an information protection principle or a privacy code of practice, or by disclosing personal information kept in a public register, to notify the individual concerned, and the Privacy Commissioner, of the contravention or disclosure.

Background

2. The Bill amends the *Privacy and Personal Information Protection Act 1998* (PPIP Act). Mr Lynch MP also introduced a Bill which was substantially the same as this Bill in the Legislative Assembly in 2017.

3. The Second Reading Speech notes that in 2015, the NSW Privacy Commissioner recommended that the PPIP Act be amended to include mandatory notification of serious breaches of an individual's privacy by a public sector agency. The Bill seeks to implement this recommendation. Provisions of this kind have also been adopted in Commonwealth privacy laws.

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*.

16. Public Finance and Audit Amendment (Northern Beaches Hospital) Bill 2019*

Date introduced	30 May 2019
House introduced	Legislative Council
Member responsible	The Hon. Walt Secord MLC
	*Private Member's Bill

Purpose and description

1. The object of this Bill is to authorise the Auditor-General to conduct performance audits of the Northern Beaches Hospital.

Background

2. This Bill amends the *Public Finance and Audit Act 1983* to authorise the Auditor-General to conduct performance audits of the Northern Beaches Hospital.

3. The Northern Beaches Hospital is a public-private partnership and opened on 19 November 2018.

4. In the Auditor-General's *Health 2018* report, it was noted that the Act does not provide the Auditor-General with the mandate to provide independent assurance about service delivery outcomes and financial accountability in these arrangements ('follow the money' powers).[15] Consequently, the Auditor-General can only consider the project management processes of the Ministry and the relevant health entities.

5. Since the introduction of this Bill, a Legislative Council inquiry into the operation and management of the Northern Beaches Hospital was established on 6 June 2019 and will report by the first sitting day in 2020.

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.

[15] Audit Office of New South Wales, Health 2018, 12 December 2018, p32.

17. Statute Law (Miscellaneous Provisions) Bill 2019

Date introduced	9 May 2019
House introduced	Legislative Assembly
Member responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

1. The objects of this Bill are:

   (a) to make minor amendments to various Acts and instruments (Schedule 1), and

   (b) to amend certain other Acts and instruments for the purpose of effecting statute law revision (Schedule 2), and

   (c) to repeal various Acts and instruments and provisions of Acts and instruments (Schedule 3), and

   (d) to make other provisions of a consequential or ancillary nature (Schedule 4).

Background

2. In the second reading speech, the Attorney General noted that this Bill continues the statute law revision program that has been in place for more than 30 years. The Attorney General commented that statute law bills:

> … are an effective method for making minor policy changes and maintaining the quality of the New South Wales statute book.

3. The Bill consists of minor amendments to policy and terminology in various Acts and legislative instruments and the repeal of Acts and legislative instruments that are deemed redundant or of no practical utility.

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*.

18. Uranium Mining and Nuclear Facilities (Prohibitions) Repeal Bill 2019*

Date introduced	6 June 2019
House introduced	Legislative Council
Member responsible	The Hon. Mark Latham MLC
	Private Members Bill*

Purpose and description

1. The object of this Bill is to lift the ban on nuclear power and uranium mining in NSW. It repeals the *Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986* and repeals section 10A of the *Mining Act 1992* which provides that a mining authorisation (other than an exploration licence or an environmental assessment permit relating to an exploration licence) may not be granted in respect of uranium.

Background

2. In his Second Reading Speech regarding the Bill, Mr Latham told Parliament that by lifting the ban on nuclear power and uranium mining in NSW the Bill aimed "to liberate a significant part of the NSW power and resource sector to create jobs and investment and, most of all, to undertake the long-term planning needed to keep the lights on in NSW".

3. Mr Latham further noted "the sense of going down the nuclear path as a solution for climate change". In addition, he stated:

> The best insurance for keeping the lights on and doing something positive about emission reduction is nuclear. Renewables have their place but they must be supplementary to baseload power. If the sun is not shining and the wind is not blowing there is nothing to despatch. There is no dispatchable baseload power.

4. Mr Latham told Parliament that "nuclear has improved immensely in its technology over recent decades". He noted the new Small Modular Reactors and stated that "they are very safe". Regarding uranium mining Mr Latham stated:

> Why not mine it here when across the border South Australia has been creating jobs and investment for many decades? A new uranium mine was approved in Western Australia earlier this year. Why is NSW missing out on the jobs, investment and prosperity from uranium mining?

5. Uranium is a very heavy metal which can be used as a source of energy. In a nuclear power station, the fissioning of uranium atoms replaces the burning of coal or gas.[16]

[16] World Nuclear Association website: http://www.world-nuclear.org/information-library/nuclear-fuel-cycle/introduction/what-is-uranium-how-does-it-work.aspx.

Issues considered by the committee

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

Part Two – Regulations

1. Casino Control Amendment (Miscellaneous) Regulation 2018

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

Purpose and description

1. The object of this Regulation is to amend the *Casino Control Regulation 2009*:

   a) to exempt contracts for the transfer of gaming equipment from a casino operator to a related casino operator from the definition of controlled contract in the Casino Control Act 1992, and

   b) to declare a casino precinct comprising the premises in the immediate vicinity of The Star casino for the purposes of a provision in the Act that enables the Commissioner of Police to direct casino operators to give a person an exclusion order to prohibit them from entering or remaining in the casino or casino precinct, and

   c) to omit certain provisions relating to junkets, and

   d) to prescribe the offence of contravention by a casino operator of a requirement of an approved internal control or administrative or accounting procedure as a penalty notice offence.

2. This Regulation is made under the *Casino Control Act 1992*, including sections 36 (definition of controlled contract), 81 (4), 168A and 170 (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

Rights to Administrative Review and Freedom of Movement

3. The Regulation inserts a new clause 46A into the *Casino Control Regulation 2009*. That clause provides that land including and surrounding the Star is a 'casino precinct' for the purposes of section 81 of the *Casino Control Act 1992*.

4. Section 81 enables the Commissioner of Police to direct that a casino operator exclude a person from the casino precinct. Notably, such a direction may not be challenged, reviewed, appealed, 'or called into question on any grounds whatsoever before any court or tribunal in any legal proceedings': section 81(7A).

The Regulation declares premises surrounding and forming part of The Star to be a 'casino precinct'. This means the Commissioner of Police can direct the casino operator to exclude persons from the precinct. Such directions are not able to be legally challenged or appealed. The Committee considers that this amendment may unduly trespass on the freedom of movement of affected persons. The Committee acknowledges that such provisions may assist in preventing criminal activity and help problem gamblers. However, given that there is no ability to challenge such a direction, the Committee draws this provision to the attention of Parliament.

2. Children (Detention Centres) Amendment (Classification) Regulation 2019

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Gareth Ward MP
Portfolio	Families, Communities and Disability Services

Purpose and description

1. The object of the Regulation is to provide for a new system of classification of youth detainees. In particular, it prescribes certain offences and provides that detainees who have been convicted of those offences will be detained within a secure barrier at all times unless, in the opinion of the Secretary they should be classified otherwise. The prescribed offences include murder, manslaughter, aggravated sexual assault in company and a terrorism offence within the meaning of the *Crimes Act 1914* of the Commonwealth or an offence under section 310J of the *Crimes Act 1900*.

2. The Regulation is made under the *Children (Detention Centres) Act 1987*, including sections 16 (1) and 109 (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

Judicial Review Rights

3. The Regulation provides for a new system of classification of youth detainees. In particular, it prescribes certain offences and provides that detainees who have been convicted of those offences will be detained within a secure physical barrier at all times unless, in the opinion of the Secretary they should be classified otherwise. The Regulation thereby provides that decisions about the classification of youth detainees are to be based somewhat on the subjective opinion of the Secretary. There is no requirement for such decisions to be reasonable and there appears to be no provision for judicial review. While detainees can complain to the NSW Ombudsman about custodial services and the Ombudsman can make recommendations, agencies do not have to comply with them.[17]

> **The Regulation prescribes certain offences and provides that detainees who have been convicted of those offences will be detained within a secure physical barrier at all times unless, in the opinion of the Secretary they should be classified otherwise. The Committee appreciates that it is important for the security and good order of detention centres that authorities be free to make day to day**

[17] See NSW Ombudsman Website: https://www.ombo.nsw.gov.au/what-we-do/our-work/custodial-services/juvenile-justice.

operational decisions. Nonetheless, decisions about the classification of youth detainees have the potential to cause disadvantage to a detainee if not made appropriately. The Committee therefore considers that such decisions should be subject to an objective test of reasonableness and should be subject to judicial oversight. While detainees can complain to the NSW Ombudsman about custodial services and the Ombudsman can make recommendations, agencies do not have to comply with them. In the circumstances, the Committee refers the matter to Parliament for further consideration.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters which should be set by Parliament

4. The Regulation provides for a new system of classification of youth detainees. In particular, it prescribes certain offences and provides that detainees who have been convicted of those offences will be detained within a secure physical barrier at all times unless, in the opinion of the Secretary they should be classified otherwise.

5. Matters such as these, which directly affect the individual rights and liberties of minors should be dealt with in primary, not subordinate legislation. This is to ensure an appropriate level of parliamentary oversight. Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987),* the statutory rule may have already been in operation for some time before disallowance occurs[18].

The Regulation provides for a new system of classification for youth detainees. The Committee prefers provisions which prescribe offences and affect the fundamental rights and liberties of minors to be included in primary, not delegated legislation. This is to foster an appropriate level of parliamentary oversight. In the current case, the prescribed offences that will make it more likely a youth detainee receives a restrictive classification are very serious. However, as above, there appears to be no provision for judicial review of classification decisions. In the circumstances, the Committee refers the matter to Parliament to consider whether the matters dealt with by the Regulation should instead have been included in primary legislation.

[18] See discussion of the limits to parliamentary oversight of subordinate legislation in ACT Standing Committee on Justice and Community Safety, 'Henry VIII FactSheet' November 2011 pp2-3 at https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

3. Children (Detention Centres) Amendment Regulation 2018

Date tabled	16 October 2018
Disallowance date	LA: 28 May 2019 LC: 29 May 2019
Minister responsible	The Hon. Gareth Ward MP
Portfolio	Minister for Families, Communities and Disability Services

Purpose and description

1. The objects of this Regulation are as follows:

   a) to enable the Secretary of the Department of Justice (the Secretary) to designate a detainee as a national security interest detainee if the detainee has been charged with or convicted of certain terrorism offences, has associations with a terrorist organisation, has made statements or carried out activities advocating support for terrorist acts or violent extremism and if there is a risk that the detainee may engage in, or incite, activities that constitute a serious threat to the peace, order or good government of the State or any other place,

   b) to permit the Secretary to direct that national security interest detainees be detained separately from other national security interest detainees,

   c) to require visitors to national security interest detainees to be approved by the Secretary and to allow the Secretary to require a person to undergo a criminal record check before being approved as a visitor,

   d) to require letters and parcels sent to or by national security interest detainees to be opened, inspected and read,

   e) to prevent national security interest detainees from communicating by letter with national security interest detainees in other detention centres and certain adult inmates in correction centres,

   f) to require monitoring of certain telephone calls made by national security interest detainees,

   g) to further provide for the searching of detainees in detention centres, including by providing that searches may be conducted by running a hand-held metal detector over a detainee's outer garments or by means of a pat-down or partially clothed search.

2. This Regulation is made under the *Children (Detention Centres) Act 1987*, including sections 16, 32A and 109 (the general-regulation making power).

3. The Committee notes that this Regulation was tabled in Parliament on 16 October 2018 and that it is no longer subject to disallowance. Section 9(1A) of the *Legislation Review Act 1987* provides that the Committee is not precluded from exercising its functions of considering and reporting on Regulations under section 9(1) of the Act after a Regulation has ceased to be subject to disallowance if, while it is subject to disallowance, the Committee resolves to review and report to Parliament on the Regulation.

4. In this instance, the Committee was dissolved on 1 March 2019 with the expiration of the 56th Parliament and no such resolution was made during the disallowance period. Therefore, this Regulation report is provided for information only.

Issues considered by Committee

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

Administrative Review Rights

5. Clauses 7A and 7B of the Regulation would allow the Secretary of the Department of Justice to designate a juvenile detainee a 'national security interest detainee' in certain circumstances which would in turn permit more restrictive custodial arrangements for that detainee including:

- He or she could be detained separately from other 'national security interest detainees';
- His or her visitors would need to be approved by the Secretary and the Secretary could require a person to undergo a criminal record check before being approved as a visitor;
- Letters and parcels that he or she sends and receives would have to be opened, inspected and read;
- Certain telephone calls that he or she makes would be monitored.

6. Clause 7A(3) of the Regulation provides that the Secretary may refer a matter relating to the designation of a detainee as a national security interest detainee to the Review Panel. However, there appears to be no corresponding right for a detainee to seek review of the Secretary's decision.

> **The Committee notes that the Regulation allows the Secretary of the Department of Justice to designate a juvenile detainee as a 'national security interest detainee' which would make the detainee subject to more restrictive custodial arrangements. For example, he or she would be detained separately from other 'national security interest detainees' and his or her visitors would need to be approved by the Secretary. The Committee appreciates the counter-terrorism intent of these provisions but notes that the Regulation does not appear to provide for a detainee to seek independent review of a decision to designate him or her a 'national security interest detainee' and that this will result in more restrictive custodial arrangements. The Committee refers the matter to Parliament for further consideration.**

Privacy – Right to Personal Physical Integrity

7. Clause 11A of the Regulation permits Juvenile Justice officer to search detainees for the purpose of ensuring the security, safety and good order of a detention centre. A search can be conducted by either:

    - running a metal detector over the detainee's outer garments;
    - performing a pat-down search; or
    - performing a partially clothed search.

8. The Regulation provides that a partially clothed search requires the detainee to remove clothes from the top or bottom half of the detainees' body for examination. A Juvenile Justice officer may not require the detainee to remove all of the detainee's clothes at once, or search the detainee's body cavities, or examine the detainee's body by touch.

9. In addition, except in the case of an emergency, a partially clothed search must be conducted by a person of the same sex as the detainee and in the presence of another person. A partially clothed search must not be conducted as part of the general routine of a detention centre, except in the case of a detainee being admitted to a detention centre or returning to a detention centre following day leave or overnight leave.

10. The Regulation also provides that a search of any kind must be conducted with due regard to the dignity, self-respect and well-being of the detainee and as quickly as reasonably practicable.

11. In November 2018, the Inspector of Custodial Services published its report into the use of force, separation, segregation and confinement in NSW juvenile justice centres.[19] The issue of strip searches was raised in the report, in particular the impact and frequency of strip searching. The Inspector commented that 'the practice of searching young people by asking them to partially remove their clothes may be humiliating and distressing for young people. This is particularly the case given that many young people in detention have experienced abuse.'[20] The recommendations included:

    - that strip searches should not be carried out on a routine basis and should be replaced by a rigorous risk-based assessment process to target the trafficking of contraband;
    - that training be provided on the circumstances in which a strip search may occur and best practice processes for conducting these searches; and
    - that the Juvenile Justice works with the NSW Ombudsman to develop a system of notification of pre-planned use of force and strip searching of young people.

12. The Inspector also referred to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse which recommended that state and

[19] Inspector of Custodial Services, *Use of force, separation, segregation and confinement in NSW juvenile justice centres*, November 2018 accessed at http://www.custodialinspector.justice.nsw.gov.au/Documents/use-of-force-seperation-segregation-confinement-nsw-juvenile-justice-centre.pdf on 14 March 2019

[20] Inspector of Custodial Services, *Use of force, separation, segregation and confinement in NSW juvenile justice centres*, November 2018, p 20

territory governments should review legislation, policies and procedure to ensure best practice approaches are in place for strip searches and other contact between staff and children.

13. In its response to the Inspector's report, the Government supported all of the Inspector's recommendations and indicated that action on them had been completed.[21]

> **The Regulation permits Juvenile Justice officers to conduct searches of detainees to ensure the security, safety and good order of a detention centre. The Committee notes that searching detainees, particularly through partially clothed searches, impacts on their right to have autonomy over their own bodies, and to be treated humanely whilst detained. Nonetheless, the Committee recognises that Juvenile Justice officers need adequate tools to detect contraband and to ensure the safety, security and good order of detention centres. Similarly, it notes the Regulation's safeguards including that an officer cannot examine a detainee's body by touch and that searches must generally be conducted by a person of the same sex as the detainee. The Committee also notes the response of the NSW Government to a recent report of the Inspector of Custodial Services indicating that it supported, and had taken action, on recommendations relating to searches of juvenile detainees. In the circumstances, the Committee makes no further comment.**

[21] NSW Government, *Response to the ICS report on use of force, separation, segregation and confinement*, accessed at http://www.custodialinspector.justice.nsw.gov.au/Documents/NSW%20Government%20Response%20to%20the%20ICS%20Report%20on%20Use%20of%20Force,%20Sepaation,%20Segration%20and%20Confinement.pdf on 14 March 2019.

4. Crimes (Administration of Sentences) Amendment (Parole Supervision of Serious Sex Offenders) Regulation 2019

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

1. The object of this Regulation is to amend the *Crimes (Administration of Sentences) Regulation 2014* to impose additional obligations relating to electronic monitoring on offenders who are on parole and serving a sentence for a serious sex offence.

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

2. The new regulation amends the *Crimes (Administration of Sentences) Regulation 2014* to include additional obligations for serious sex offenders released on parole and subject to supervision conditions. In particular, the offender will need to:

   a. provide a schedule of proposed activities for approval by a community corrections officer (if directed to do so), and

   b. submit to electronic monitoring, including complying with all reasonable directions in relation to the monitoring and not removing, tampering, damaging or disabling the equipment.

3. These additional obligations will only apply to offenders released on parole after the commencement of the provisions.

> **The amendments to the *Crimes (Administration of Sentences) Regulation 2014* will impact on the freedom of movement of serious sex offenders released on parole by tracking their activities and locations. However, the Committee does not believe these restrictions would unduly trespass on the right to freedom of movement. In the Committee's view, public safety is adequately balanced against allowing eligible offenders to be released into the community. The Committee also notes that the amendments only apply to serious sex offenders and will not apply to individuals already on parole when the amendments commence. In the circumstances, the Committee makes no further comment.**

5. Crimes (Administration of Sentences) Amendment (Restricted Associates) Regulation 2018

Date tabled	16 October 2018
Disallowance date	LA: 28 May 2019 LC: 29 May 2019
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Counter Terrorism and Corrections

Purpose and description

1. The objects of this Regulation are:

   (a) to extend provisions relating to restricted associates of an inmate to include persons that the inmate has been directed not to associate or make contact with under certain interim supervision orders within the meaning of the *Crimes (High Risk Offenders) Act 2006* or the *Terrorism (High Risk Offenders) Act 2017* (in addition to extended supervision orders under those Acts), and

   (b) to transfer, from a governor of a correctional centre to the Commissioner of Corrective Services, powers to prevent a restricted associate from visiting a correctional centre and to prevent an inmate from corresponding or communicating with a restricted associate.

2. The Committee notes that this Regulation was tabled in Parliament on 16 October 2018 and that it is no longer subject to disallowance. Section 9(1A) of the *Legislation Review Act 1987* provides that the Committee is not precluded from exercising its functions of considering and reporting on Regulations under section 9(1) of the Act after a Regulation has ceased to be subject to disallowance if, while it is subject to disallowance, the Committee resolves to review and report to Parliament on the Regulation.

3. In this instance, the Committee was dissolved on 1 March 2019 with the expiration of the 56th Parliament and no such resolution was made during the disallowance period. Therefore, this Regulation report is provided for information only.

Issues considered by the committee

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

Freedom of association

4. Under the *Crimes (Administration of Sentences) Regulation 2014*, a person under an 'extended supervision order' can be directed not to make contact or associate with certain restricted persons.

5. This Regulation would mean that a similar direction could now be made in respect of a person under an 'interim supervision order'.

6. An 'extended supervision order' allows for the strict supervision of high risk sex and violent offenders in the community by Community Corrections Officers. Supervision conditions can include electronic monitoring, restrictions on the persons with whom offenders can associate and where offenders can go, regular reporting to a Community Corrections Officer and participation in rehabilitation programs.[22]

7. Under this Regulation, an interim supervision order is that within the meaning of the *Crimes (High Risk Offenders) Act 2006* (Part 2 Division 3) and the *Terrorism (High Risk Offenders) Act 2017* (Part 2 Division 2.5). Those Acts provide that the Court may make an interim supervision order if, in proceedings for an extended supervision order, it appears to the Court that the offender's current custody or supervision will expire before the proceedings are determined and that the matters alleged in the supporting documentation would, if proved, justify the making of an extended supervision order.

8. The extension of restricted associate requirements for persons subject to interim supervision orders infringes upon the freedom of association of these persons. Freedom of association is a common law right of all persons to group together voluntarily for a common goal or form or join an association.[23] Limits on this freedom may be justified for the protection of public safety and where it prevents the association of certain groups of people who are involved, or likely to be involved, in crime.[24]

> **The Regulation extends restricted associate requirements to offenders placed on interim supervision orders and directly infringes their freedom of association. However, the Committee acknowledges that justifiable limits on the freedom of association include protection of the public and public order, including restricting the association of certain persons or groups that are likely to be involved in crime. As those subject to interim supervision orders have been considered by the State to represent an unacceptable risk of serious reoffending and are awaiting court proceedings for an application for extended supervision orders, the Committee makes no further comment.**

[22] NSW Justice (website), High risk offender reform, accessed 15 July 2019.

[23] *International Covenant on Civil and Political Rights*, Article 22(1).

[24] *International Covenant on Civil and Political Rights*, Article 22(2).

6. Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Regulation 2019

Date tabled	28 May 2019
Disallowance date	LA: 20 August 2019 LC: 17 Sept 2019
Minister responsible	The Hon. Mark Speakman MP
Portfolio	Attorney General

Purpose and description

1. The object of this Regulation is to amend the Crimes (Sentencing Procedure) Regulation 2017 as follows:

   (a) to specify requirements for victim impact statements prepared by or on behalf of victims of offenders who have been found not guilty by reason of mental illness or, after a special hearing, on the limited evidence available, to have committed an offence,

   (b) to require the court to whom a victim impact statement for a victim of any such offender is given to provide the statement to the Mental Health Review Tribunal (the Tribunal) as soon as practicable after the court makes a decision that causes the offender to become a forensic patient,

   (c) to require the Tribunal to consider and take into account the statement when determining applications by the forensic patient for leave or release,

   (d) to provide for the disclosure by the Tribunal of the contents of victim impact statements to legal representatives of forensic patients,

   (e) to specify matters about which a court may seek a submission from a designated carer or principal care provider of an offender who has been found not guilty by reason of mental illness or, after a special hearing, on the limited evidence available, to have committed an offence.

2. This Regulation is made under the *Crimes (Sentencing Procedure) Act 1999*, including sections 30M, 30N and 103 (the general regulation-making power).

3. By way of background, the law also provides for victim impact statements in certain cases where a person has been found guilty of an offence. Under the *Crimes (Sentencing Procedure) Act 1999*, victim impact statements can be prepared for certain offences being heard by a Court. Section 30E(1) of the Act provides that the court must consider the statement at any time after it convicts, but before it sentences the offender for the offence, and it may make any comment on the statement that the court considers appropriate. Similarly, section 30E(2) of the Act provides that a victim impact statement may be considered by the Supreme Court when it determines an application under

Schedule 1 for the determination of a term and a non-parole period for an existing life sentence referred to in that schedule.

Issues considered by committee

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

Rights of People with Mental Illness and Potential for Arbitrary Detention

4. The Regulation specifies requirements for victim impact statements prepared by or on behalf of victims of persons who have been found not guilty of an offence by reason of mental illness. It requires the Mental Health Review Tribunal to consider and take the statement into account when determining applications by forensic patients for leave or release.

5. The statement may include the following matters:

   (a) The risk that the release of the offender would pose to the victim

   (b) The conditions that should be imposed on the release of the offender

   (c) Any other matter relating to the victim that the victim thinks should be considered in declining the conditions of release for the offender.

6. The Committee recognises that it is very important for a victim to participate in the justice process and to be heard. The criminal law is protective of public safety and the inclusion of a victim impact statement in proceedings acknowledges and respects the victim's suffering and right to human dignity. However, victim impact statements can be highly emotionally charged and a requirement for a Tribunal to take them into account for the purpose of making decisions about continued detention or release of a person has the potential to be prejudicial to that person.

7. The Committee notes that the provision is being applied in the mental health context, that is to persons found not guilty of offending by reason of mental illness. Provisions dealing with the detention or continued detention of such persons should be drafted very carefully so that detention and continued detention only occurs for valid reasons such as to ensure community safety.

   The Regulation concerns victim impact statements made in respect of persons found not guilty of an offence by reason of mental illness. The Committee notes that it requires the Tribunal to take victim impact statements into account when determining applications by forensic patients for leave or release. The Committee recognises that it is very important for a victim to participate in the justice process and to be heard. However, victim impact statements can be highly emotionally charged and a requirement for a Tribunal to take them into account for the purpose of making decisions about continued detention or release of a person has the potential to be prejudicial to that person.

   The Committee notes that the Regulation will apply in the mental health context, that is, to persons found not guilty of offending by reason of mental illness. Detention of such persons should only occur for valid reasons such as to ensure community safety. In short, whilst acknowledging the expertise of the Tribunal to make decisions in this area, and the need to respect victims' rights, the

Committee identifies that the Regulation has potential to prejudice decisions about the continued detention of forensic patients. It may thereby trespass on the fundamental right of people with mental illness to be free from arbitrary detention, particularly where that detention relates to an offence over which s/he has been judged to be not guilty. The Committee refers the matter to Parliament for consideration.

Procedural Fairness

8. As above, the Regulation requires the Tribunal to consider and take victim impact statements into account when determining applications by forensic patients for leave or release. Further, the Regulation provides that the contents of the victim impact statement may be disclosed to the legal representative of the forensic patient, but only in circumstances permitted by the Tribunal. In addition, the Tribunal may direct that certain information in the statement not be disclosed by the legal representative to the forensic patient and may also, in that case, consent to general information about the statement being disclosed to the forensic patient.

The Committee notes that the Regulation places restrictions on the access of forensic patients and their legal representatives to victim impact statements that the Tribunal will take into account to determine applications for the patient's leave or release. The Committee acknowledges that such statements can contain extremely sensitive material. However, if a patient does not know the contents, or exact contents, of a statement, he or she cannot challenge or respond to it in accordance with the principles of procedural fairness. This has the potential to affect decisions about the patient's fundamental rights to freedom and liberty. The Committee refers the matter to Parliament for consideration.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters which should be set by Parliament

9. As above, the Regulation concerns matters surrounding victims' rights, community safety and the rights of persons with mental illness.

The Regulation concerns matters about which there is considerable public interest – victims' rights, community safety, and the rights of persons with mental illness. The Committee therefore considers that they would be more suitably included in primary, not subordinate, legislation to foster increased opportunity for parliamentary scrutiny and debate. The Committee refers this matter to Parliament for consideration.

7. Criminal Procedure Amendment (Penalty Notices for Drug Possession) Regulation 2019

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

1. The object of the Regulation is to prescribe, as a penalty notice offence under the *Criminal Procedure Regulation 2017*, the offence of possession of a prohibited drug under the *Drug Misuse and Trafficking Act 1985* (excluding possession of cannabis leaf) if:

    - not more than a small quantity of the prohibited drug is involved or,
    - in the case of 3,4-Methylenedioxymethylamphetamine:
        - if in capsule form it does not exceed a small quantity, and
        - in any other form it is less than a traffickable quantity (within the meaning of the Act).

2. This Regulation is made under the *Criminal Procedure Act 1986*, including sections 4 (1) (the general regulation-making power), 336 and 337.

3. This Regulation replaces a scheme under which those found in possession of prohibited drugs at music festivals were generally given a court attendance notice requiring them to attend court at a later date. The new scheme put in place by the Regulation allows for such people to be dealt with without the need to go to court and without the possibility of a conviction.[25]

Issues considered by Committee

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

Rights to judicial review/excessive or unwarranted punishment

4. The Committee notes that by allowing Police to issue on the spot fines of $400 for certain drug possession offences, the Regulation affects any automatic right for people to have

[25] See gotocourt.com.au website: https://www.gotocourt.com.au/criminal-law/nsw/penalty-notice-drug-possession/.

such matters determined by an independent Court. While such persons will have the right to *elect* for the matter to proceed to Court, it is likely many will waive this right and instead pay the on the spot fine. In so doing, some may be dealt a harsher penalty than if the matter were determined by a court as courts have the option of dismissing charges or conditionally discharging defendants in drug possession cases, e.g. where there are mitigating circumstances.

By allowing Police to issue on the spot fines for certain drug possession offences, the Regulation affects any automatic right to have the matter decided by an independent court. It may therefore lead to harsher penalties in some cases, or to people losing a chance to have their charges dismissed. However, the Committee notes that such persons will have the right to *elect* for the matter to proceed to Court. Similarly, by paying an on the spot fine persons can avoid being convicted and sentenced by a Court, with the attendant criminal record, and the fine payable, while not insignificant, is relatively modest. In addition, the Regulation is part of a broader policy aimed at deterring drug-taking and reducing drug-related deaths in NSW. In the circumstances, and given the above safeguards, the Committee makes no further comment.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters that should be set by Parliament

5. Clause 3 of the Regulation provides that Police can issue on the spot fines of $400 for certain drug possession offences. Provisions that set penalties and affect individual rights should be included in primary, not subordinate legislation. This is to ensure an appropriate level of parliamentary oversight. Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987),* the statutory rule may have already been in operation for some time before disallowance occurs[26].

The Regulation provides for on the spot fines of $400 to be issued by Police for certain drug possession offences. The Committee prefers provisions such as these, which set penalties and affect individual rights, to be included in primary, not subordinate, legislation. This is to foster an appropriate level of Parliamentary oversight. The Committee refers this matter to Parliament to consider whether this is an inappropriate delegation of legislative power.

[26] See discussion of the limits to parliamentary oversight of subordinate legislation in ACT Standing Committee on Justice and Community Safety, 'Henry VIII FactSheet' November 2011 pp2-3 at https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

8. Crown Land Management Amendment Regulation 2019

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Rob Stokes MP
Portfolio	Planning and Public Spaces

Purpose and description

1. The object of the Regulation is to amend the savings and transitional provisions in Schedule 7 to the *Crown Land Management Act 2016* to extend until 1 July 2020 the transitional period for certain reserve trusts managed by corporations under the repealed *Crown Lands Act 1989*.

2. Below are some examples of corporations and the reserve trusts they manage:

   (a) the Hawkesbury Racecourse Reserve Trust as trustee for the Hawkesbury Racecourse[27]

   (b) Central Coast Conservatorium of Music Inc as trustee for the Gosford Community Purposes (R170139) Reserve Trust (reserve for community purposes)[28]

   (c) Local Lands Services as the trustee for the Edinglassie Travelling Stock (R1039049) Reserve Trust (reserve for rural purposes and travelling stock)[29]

   (d) Binya Hall Trust Incorporated as the trustee for the Binya Public Hall Trust (reserve for a public hall and public recreation)[30]

   (e) Broken Hill Historical Society Incorporated as the trustee for the Jamieson House Reserve Trust (reserve for heritage purposes and urban services)[31]

   (f) Forest Cemetery Association Inc as the trustee for the Forest Cemetery Reserve Trust (cemetery and crematorium and reserve for heritage purposes).[32]

[27] See the definition of 'reserve trust' in clause 2(1) of Schedule 7 to the *Crown Land Management Act* 2016; see also the repealed section 5 of the *Hawkesbury Racecourse Act 1996* (historical version of the Act for 17 July 2009 to 30 June 2018).

[28] NSW Government Gazette, no 43 of 13 April 2018, p 2349.

[29] NSW Government Gazette, no 18 of 16 February 2018, p 636.

[30] NSW Government Gazette, no 110 of 29 September 2017, p 5724.

[31] NSW Government Gazette, no 72 of 30 June 2017, p 3469.

[32] NSW Government Gazette, no 67 of 23 June 2017, p 2992.

3. The Regulation is made under the Crown Land Management Act 2016, including section 13.5 (the general regulation-making power) and clause 1 of Schedule 7.

Issues considered by Committee

That the objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII Clause

4. The Regulation amends the *Crown Lands Management Act 2016* to extend transitional period for certain reserve trusts managed by corporations under the repealed *Crown Lands Act 1989*. It does this by way of a Henry VIII clause contained in the Act.

5. A Henry VIII clause is a clause of an Act that enables the Act to be amended by subordinate legislation. That is, the Parliament has delegated its legislation-making power to the Executive. Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987),* the statutory rule may have already been in operation for some time before disallowance occurs[33].

> **The Regulation amends the *Crown Lands Management Act 2016* by way of a Henry VIII clause contained in the Act. This is an inappropriate delegation of legislative powers. If amendments are to be made to an Act, this should be done through an amending Bill and not through subordinate legislation. This is to foster appropriate parliamentary oversight of the changes. The Committee refers the matter to Parliament for consideration.**

[33] See discussion of Henry VIII Clauses in ACT Standing Committee on Justice and Community Safety, 'Henry VIII FactSheet' November 2011 at https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

9. Electricity Supply (General) Amendment Regulation 2019

Date tabled	4 June 2019
Disallowance date	LA: 17 September 2019 LC: 24 September 2019
Minister responsible	The Hon. Matt Kean MP
Portfolio	Energy and Environment

Purpose and description

1. The objects of this Regulation are:

   (a) to extend the obligation on metering providers to have a safety management system in place before installing a meter for a further 24 months, ending on 1 June 2021, and

   (b) to extend the prohibition against the remote de-energisation and re-energisation of a small customer's premises using a digital meter for a further 12 months, ending on 1 June 2020.

Issues considered by Committee

That the objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII clause

2. The Regulation amends the *Electricity Supply Act 1995* by extending the timeframes for safety obligations on retailers or metering providers when providing, installing, replacing or maintaining advanced meters. This is made possible by a Henry VIII clause in the Act. A Henry VIII clause is a clause of an Act that enables the Act to be amended by subordinate legislation. This is an inappropriate delegation of legislative power.

3. Changes to an Act should be made by an amending Bill, not through subordinate legislation. This is to foster appropriate parliamentary oversight of the changes. Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987),* the statutory rule may have already been in operation for some time before disallowance occurs[34].

   The Regulation amends the *Electricity Supply Act 1995,* made possible by a Henry VIII clause in the Act. This is an inappropriate delegation of legislative power. Primary legislation should not be changed by subordinate legislation because it

[34] See discussion of Henry VIII Clauses in ACT Standing Committee on Justice and Community Safety, 'Henry VIII FactSheet' November 2011 at https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

reduces parliamentary scrutiny of those changes. The Committee refers this matter to Parliament for further consideration.

10. Evidence (Audio and Audio Visual Links) Amendment (Bail Exemptions) Regulation 2019

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

1. The object of the Regulation is to ensure that accused detainees held in custody at the Newcastle Justice Precinct are not required to appear physically before a court in bail proceedings.

2. Section 5BA of the *Evidence (Audio and Audio Visual Links) Act 1998* provides that an accused detainee who is charged with an offence and required to appear (or be brought or be present) before a NSW court in physical appearance proceedings must appear physically before the court. This principle does not apply if the court otherwise directs. There are other exceptions to this general rule in relation to bail proceedings, for example, proceedings that occur during a weekend or on a public holiday or where an accused detainee is being held in custody at a place prescribed by the *Evidence (Audio and Audio Visual Links) Regulation 2015.*

3. Apart from the Newcastle Justice Precinct, the *Evidence (Audio and Audio Visual Links) Regulation 2015* also prescribes ten other places that are exempt from the requirement for an accused detainee to physically appear in bail proceedings. For example, this includes the cells at Surry Hills Police Station, Tweed Heads Police Station, Parkes Police Station and the Wagga Wagga Court Cells.

4. This Regulation is made under the *Evidence (Audio and Audio Visual Links) Act 1998*, including sections 5BA (2) (e) and 22 (1) (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

Access to Justice

5. The Regulation facilitates the use of audio visual links (AVL) in court proceedings, in particular, bail proceedings. It removes any presumption that detainees held in the Newcastle Justice precinct will appear in person rather than by AVL. In doing so, it may affect the ability of accused persons to participate effectively in bail proceedings, and

thereby their right to access justice, a particularly important consideration given their liberty is at stake.

6. For example, legal practitioners have reported challenges identifying clients with mental health issues and cognitive impairment when meeting them for the first time via AVL. Similarly, they have reported additional challenges obtaining instructions from vulnerable clients with mental health and cognitive impairment issues, and from Aboriginal clients, where AVL is used.[35] These issues could contribute to an overrepresentation of these groups within custody.

> **By facilitating the use of AVL in bail proceedings, the regulation may affect the rights of accused persons, especially Aboriginal people and people with mental health and cognitive impairment issues, to access justice. This is of particular concern in bail proceedings, where a person's liberty is at stake. The Committee acknowledges that the use of AVL in court proceedings may have cost savings and some practical benefits, but does not consider that this outweighs its access to justice concerns in the context of bail proceedings. In the circumstances, the Committee refers the matter to Parliament for further consideration.**

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters that should be set by Parliament

7. As above, the Regulation facilitates the use of AVL in bail proceedings. In doing so, it may impact on the rights of accused persons to participate in bail proceedings and thereby access justice. Matters such as these, which directly affect individual rights and liberties should be dealt with in primary, not subordinate legislation. This is to ensure an appropriate level of parliamentary oversight. Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987),* the statutory rule may have already been in operation for some time before disallowance occurs[36].

> **The Regulation facilitates the use of AVL in bail proceedings. In doing so, it may impact on the rights of accused persons to participate in bail proceedings, and thereby access justice. Matters such as these, which directly affect individual rights and liberties should be dealt with in primary, not subordinate legislation. This is to foster an appropriate level of Parliamentary oversight. The Committee refers the matter to Parliament for further consideration.**

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[35] See D. Humphries OAM, President, NSW Law Society, *Letter to Attorney General dated 30 April 2018 regarding expanding Audio Visual Links*, NSW Law Society website: https://www.lawsociety.com.au/sites/default/files/2018-06/Letter%20to%20Attorney%20General%20-%20Expanding%20Audio%20Visual%20Links%20%28AVL%29%20-%20Proposals%20to%20amend%20the%20Evidence%20%28Audio%20and%20Audio%20Visual%20Links%29%20Act%201998%20%28the%20Act%29%20-%2030%20April%202018.pdf, viewed 31 January 2019.

[36] See discussion of the limits to parliamentary oversight of subordinate legislation in ACT Standing Committee on Justice and Community Safety, 'Henry VIII FactSheet' November 2011 pp2-3 at https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

11. Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

Purpose and description

1. The object of this Regulation is (as a consequence of amendments to the *Liquor Regulation 2018* made by the *Liquor Amendment (Music Festivals) Regulation 2019*) to provide that particular decisions of the Independent Liquor and Gaming Authority (the Authority) in relation to music festival licences under gaming and liquor legislation are not subject to review under the *Gaming and Liquor Administration Regulations 2016* by the Civil and Administrative Tribunal of New South Wales (NCAT).

Issues considered by Committee

That the regulation may have an adverse impact on the business community: s9(1)(b)(ii) of the LRA

Decision not subject to administrative review

2. Recent amendments to the *Liquor Regulation 2018* by the *Liquor Amendment (Music Festivals) Regulation 2019* introduced a liquor licence for music festivals. This will allow a licensee to sell or supply liquor on licensed premises, subject to conditions. The amendments also provide for the Authority to direct certain applicants to apply for this kind of licence.

3. Clause 7 of the *Gaming and Liquor Administration Regulation 2016* prescribes certain decisions of the Authority that can be reviewed by NCAT. However, the *Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019* amended this clause. A decision of the Authority that the sale or supply of liquor in a particular situation would be more appropriately provided under a music festival licence is not a decision that can be reviewed by NCAT.

> **The Committee notes that the *Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019* excludes the ability of an applicant to ask NCAT to review a decision by the Authority that a music festival licence is the appropriate means of selling or supplying liquor in a particular situation. The Committee notes that many other applications can be reviewed by NCAT under clause 7 of the *Gaming and Liquor Administration Regulation 2016*, and that the**

2019 Regulation may have an adverse impact on the business community. However, conditions are attached to music festival licences to ensure public safety. In the circumstances the Committee makes no further comment.

12. Liquor Amendment (Music Festivals) Regulation 2019

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

Purpose and description

1. The object of this Regulation is to amend the Liquor Regulation 2018 to provide for a new type of liquor licence for music festivals and provide for the Independent Liquor and Gaming Authority to direct particular applicants to apply for a music festival licence. A music festival licence will authorise the licensee to sell or supply liquor on licensed premises, subject to conditions. The Regulation will provide also for the training requirements of licensees, managers, approved agents and supervisors for licensed premises under a music festival licence.

2. This Regulation is made under the Liquor Act 2007, including sections 10 (1) (g), 11 (1) (b), 40 (4) (b) and (d), 41 (3), 45 (4), 55 (5), 60A (3) (b) and 159 (the general regulation-making power).

Issues considered by committee

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

Ill-defined and Wide Powers, and Administrative Review Rights

3. Clause 61N of the Regulation provides that a music festival licensee may appoint an individual as the licensee's agent to sell or supply liquor under a music festival licence. However, clause 61P provides that the Authority must not approve a person to be an agent unless he or she is a 'fit and proper person'.

4. A person is not a 'fit and proper person' if the Authority has reasonable grounds to believe, from information provided by the Commissioner of the Police, that the person is a member of, or is a close associate of, or regularly associates with one or more members of a 'declared association' within the meaning of the *Crimes (Criminal Organisations Control) Act 2012,* and the nature and circumstances of the person's relationship with the organisation or its members are such that it could reasonably be inferred that improper conduct that would further criminal activities of the organisation is likely to occur if the person is granted an approval.

5. The Authority is not required to give any reasons for not granting the approval to the extent that this would disclose any criminal intelligence, and there is no provision for independent review of decisions.

The Regulation provides that the Authority must not grant an approval for a person to be an agent if it has reasonable grounds to believe, from information provided by the Commissioner of the Police, that the person is a member of, or is a close associate of a 'declared association' and the circumstances of the person's relationship with the organisation, or its members, are such that it could reasonably be inferred that improper conduct that would further criminal activities of the organisation is likely to occur if the person is granted an approval. In doing so, the Regulation grants the Authority a wide and ill-defined power to refuse approvals. Administrative powers that limit rights and liberties should be drafted with sufficient precision so that their scope and content is clear.

Further, the Authority is not required to give reasons for its decision to the extent that this would disclose criminal intelligence, and there is no provision for independent review of the decision. In short, the Regulation contains insufficient safeguards to ensure that arbitrary decision-making does not take place. The Committee refers these matters to Parliament for further consideration.

Freedom of Association

6. As above, the Regulation provides that the Authority must not grant an approval for a person to be an agent to sell or supply liquor if it has reasonable grounds to believe, from information provided by the Commissioner of the Police, that the person is a member of, or is a close associate of, or regularly associates with, one or more members of a 'declared association' and the nature and circumstances of the person's relationship with the organisation or its members are such that it could reasonably be inferred that improper conduct that would further criminal activities of the organisation is likely to occur if the person is granted an approval. The Regulation thereby impacts on freedom of association.

The Regulation provides that the Authority must not grant an approval for a person to be an agent if it has reasonable grounds to believe that the person is a member of, or is a close associate of, or regularly associates with, one or more members of a 'declared association' and it could be reasonably inferred that improper conduct that would further the criminal activities of the organisation is likely to occur as a result of the approval. The Regulation thereby impacts on freedom of association which protects the right to form and join associations to pursue common goals.

However, limits on this freedom may be justified for the protection of public safety and where it prevents the association of certain groups of people who are involved, or likely to be involved, in crime.[37] In this case, the provisions are clearly designed to prevent the furtherance of the goals of criminal organisations – the approval is to be refused if it would be reasonably likely to further the criminal activities of the relevant organisation. The Committee refers this matter to Parliament to consider whether the impact on freedom of association is reasonable and proportionate in the circumstances.

[37] *International Covenant on Civil and Political Rights*, Article 22(2).

13. Liquor Amendment (Special License Conditions) Regulation (No 2) 2019

Date tabled	28 May 2019
Disallowance date	LA: 20 August 2019 LC: 17 Sept 2019
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

Purpose and description

1. The object of this Regulation is to change the list of licensed premises that are subject to the special licence conditions set out in Schedule 4 to the *Liquor Act 2007*.

2. Schedule 4 sets out special licence conditions for premises to which a level one or level two licence relates. The Regulation removes the Argyle Sydney at The Rocks and The Coast Hotel in Coffs Harbour from being subject to a level one licence so that there are no premises subject to this kind of licence.

3. The Argyle Sydney at The Rocks and The Coast Hotel in Coffs Harbour are now subject to a level two licence. The Regulation changes some of the other premises subject to this kind of licence.

4. Premises subject to a level two licence must comply with various conditions, such as the following:

   (a) glasses and breakable plastic containers are prohibited during the restricted service period

   (b) service of alcohol is to cease 30 minutes before closing time, and

   (c) the licensee must maintain an incident register in relation to incidents occurring during the standard trading period.

5. While the changes made to Schedule 4 of the *Liquor Act 2007* mean there are now no premises subject to a level one licence, premises that were subject to this kind of licence were required to comply with further conditions relating to the following:

   (a) additional security measures

   (b) lock out periods

   (c) not serving certain drinks during a restricted service period.

6. This Regulation is made under the Liquor Act 2007, including sections 11 (1A) and 159 (the general regulation-making power).

Issues considered by committee

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII clause

7. The regulation amends the *Liquor Act 2007* by way of a Henry VIII clause contained in the Act.

8. A Henry VIII clause is where a clause of an Act allows subordinate legislation to amend provisions of an Act. That is, the Parliament has delegated its legislation-making power to the Executive.

> **The Regulation amends its parent Act by way of a Henry VIII clause contained in the legislation. The Committee generally discourages Henry VIII clauses as they provide the Executive with power to override the principal legislation by way of delegated legislation. This permits the principal legislation to be amended without an appropriate level of parliamentary scrutiny applied. The Committee draws this to the attention of the Parliament for consideration of whether the objective of the Regulation could have been achieved by alternative or more effective means that subjects amendments of the legislation to an appropriate level of parliamentary scrutiny.**

14. Motor Accident Guidelines – Version 4 – 15 January 2019

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

Purpose and description

1. The *Motor Accident Injuries Act 2017* (the Act) establishes a scheme of compulsory third party insurance and the provision of benefits and support relating to the death of, or injury to, people as a result of motor accidents in NSW on or after 1 December 2017.

2. The Guidelines are made under section 10.2 of the Act and support the delivery of the objects of the Act and Regulation by establishing processes and procedures, scheme objectives and compliance requirements.

Issues considered by Committee

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

Retrospectivity

3. The Guidelines were published on 29 November 2018 to come into effect on 15 January 2019, and apply to motor accidents occurring on or after 1 December 2017. That is, they have retrospective effect.

> **The Committee notes that the Guidelines are drafted to have retrospective effect, applying to accidents that occurred on or after 1 December 2017. Retrospectivity is a matter about which the Committee will generally comment as it runs counter to the rule of law which allows people knowledge of what the law is at any given time. In the current case, the retrospectivity does not affect the primary legislation under which the Guidelines operate, the *Motor Accident Injuries Act 2017*, which came into force on 1 December 2017. Having regard to this, and the fact that the Guidelines focus on matters of a machinery nature to support delivery of the objects of the Act, the Committee makes no further comment.**

Right to Privacy

4. Clauses 4.136 to 4.142 of the Guidelines facilitate the surveillance of those claiming insurance under the Act, in certain circumstances. In doing so, they impact on the right to privacy.

By facilitating the surveillance of insurance claimants in certain circumstances, the Guidelines impact on the right to privacy. However, an insurer can only conduct such surveillance where there is evidence to indicate that the claimant is exaggerating an aspect of a claim or providing misleading information. Similarly, an insurer can only conduct surveillance in public places or where the claimant, while on private property is observable by members of the public going about their ordinary daily activities. Given these safeguards, the Committee makes no further comment.

That the regulation may have an adverse impact on the business community: s9(1)(b)(ii) of the LRA

Regulation of Insurance Premiums

5. The Guidelines set mechanisms for the regulation of insurance premium amounts and clause 1.11 of the Guidelines provides that the State Insurance Regulatory Authority may reject a premium if it considers it to be excessive.

By facilitating restriction of the amounts that insurers may charge for insurance, the Guidelines may have an adverse impact on this section of the business community. However, the Guidelines are part of a regime established under the *Motor Accidents Injuries Act 2017* that seeks to keep premiums affordable and promote fair market practices. Under the regime, consumer rights are balanced with those of insurers – insurers can adopt risk-based pricing but they must keep premiums affordable by ensuring that their profits do not exceed the amount sufficient to underwrite the relevant risk. Given this balance, the Committee makes no further comment.

Requirement to Provide Insurance

6. Clause 2.17 of the Guidelines provides that insurers must make third party insurance policies readily accessible and available to all customers who approach them, irrespective of the risk characteristics of the vehicle and its owner. Further, clause 2.19 sets out very limited circumstances under which insurers and their agents may refuse to issue a third party insurance policy.

By providing that insurers must make third party insurance policies readily accessible and available to all customers who approach them, irrespective of the risk characteristics of the vehicle and its owner, the Guidelines may have an adverse impact on this section of the business community. Nonetheless, these provisions are consistent with the regime established under the Act to make third party bodily insurance compulsory for all owners of motor vehicles registered in NSW. Having regard to the importance of this objective, and the legislative frameworks that exist in NSW around vehicle registration, driver licensing and road safety, the Committee makes no further comments.

Non-reviewable Decision

7. Under the Act, an insurer or claimant can refer a claim for damages to a claims assessor. Clause 7.504 of the Guidelines facilitates restriction of rights to judicial review by providing that a claims assessor's resulting assessment is binding on the insurer where it admits liability under the claim and the claimant accepts the amount of damages.

By providing that a claims assessor's decision is binding on an insurer in certain circumstances, the Guidelines restrict the insurer's rights to have damages assessments reviewed by a judicial officer. While this restriction only applies in limited circumstances, it has the potential to impact on the rights of this section of the business community should a problematic assessment be made. The Committee therefore refers the matter to Parliament for consideration.

15. Motor Accidents Injuries Amendment Regulation 2019

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

Purpose and description

1. The object of this Regulation is to amend the *Motor Accident Injuries Act 2017* and the *Motor Accident Injuries Regulation 2017*:

(a) to make further provision with respect to the adjustment of premiums for third-party policies and Authority Fund levies to avoid or minimise excess profits and losses of insurers as a consequence of the establishment of the motor accident injuries scheme by that Act, and

(b) to specify further disputes arising in connection with claims under that Act that are subject to merit review, medical assessment or miscellaneous claims assessment, and to fix the maximum costs recoverable by Australian legal practitioners for legal services provided in connection with those matters, and

(c) to make further provision with respect to fixing the maximum amount of costs payable in connection with a claim for legal services provided to a claimant who is under the age of 18 years, and

(d) to modify certain definitions for the purposes of provisions of that Act relating to weekly payments of compensation (including by extending a definition of pre-accident weekly earnings to self-employed persons and excluding leave entitlements from a person's income from personal exertion), and

(e) to make other minor related amendments.

Issues considered by committee

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

Compensation Rights

2. Division 3.3 of the *Motor Accidents Injuries Act 2017* (the Act) provides for weekly payments of statutory benefits to people injured in motor accidents to compensate for 'loss of earnings'.

3. Schedule 1, item 1 of the Regulation amends Schedule 1 of the Act to make changes to the definition of 'loss of earnings'. This change will mean that the monetary amount of any annual, sick or other leave entitlement will not be included in the definition of 'loss of earnings' for which an injured person can be compensated under the Act.

> **The Committee notes that the Regulation will change the definition of 'loss of earnings' in the *Motor Accidents Injuries Act 2017*. This will mean the monetary amount of any annual, sick or other leave entitlement will not be included in the definition of 'loss of earnings' for which a person injured in a motor accident can be compensated under the Act. The Committee refers this matter to Parliament to consider whether it is an undue trespass on the right of injured persons to compensation for loss of earnings.**

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII Clause

4. The Regulation makes various amendments to the *Motor Accidents Injuries Act 2017*, which evidences the presence of Henry VIII clauses in the Act. A Henry VIII clause is a clause of an Act that enables the Act to be amended by subordinate legislation. Indeed, a number of sections of the *Motor Accidents Injuries Act 2017* (including ss 3.5, 7.51 and Schedule 4, Part 1 Clause 2) provide that the Regulations may amend certain parts of the Act.

5. The Committee will always comment on the presence of Henry VIII clauses. If amendments are to be made to an Act this should be done through an amending Bill, and not through subordinate legislation. This is to foster an appropriate level of parliamentary oversight of the changes.

6. Bills introduced into Parliament are considered and debated and must be passed by Parliament before they can commence. In contrast, subordinate legislation is made by the Executive – it is not required to be passed by Parliament – and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987*), the statutory rule may already have been in operation for some time before disallowance occurs.[38]

> **The Committee notes that the Regulation makes various amendments to the *Motor Accidents Injuries Act 2017*, made possible by the presence of Henry VIII clauses in the Act. The Committee will always comment concerning the presence of Henry VIII clauses. If amendments are to be made to an Act, this should be done through an amending Bill and not through subordinate legislation. This is to foster appropriate parliamentary oversight of the changes. The Committee refers this matter to Parliament for further consideration.**

[38] See discussion of Henry VIII Clauses in ACT Standing Committee on Justice and Community Safety, 'Henry VIII FactSheet' November 2011 at https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

16. National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Regulation 2018

Date tabled	16 October 2018
Disallowance date	LA: 28 May 2019 LC: 29 May 2019
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

1. The object of this Regulation is to restrict certain information from being:

   (a) given by a State institution to the National Redress Scheme Operator at the request of the Operator, or

   (b) shared between State agencies for the purpose of assisting any State institution in complying with such a request by the Operator.

2. This Regulation is made under the *National Redress Scheme for Institutional Child Sexual abuse (Commonwealth Powers) Act 2018,* including sections 10 and 11 (the general regulation-making power).

3. The Committee notes that this Regulation was tabled in Parliament on 16 October 2018 and that it is no longer subject to disallowance. Section 9(1A) of the *Legislation Review Act 1987* provides that the Committee is not precluded from exercising its functions of considering and reporting on Regulations under section 9(1) of the Act after a Regulation has ceased to be subject to disallowance if, while it is subject to disallowance, the Committee resolves to review and report to Parliament on the Regulation.

4. In this instance, the Committee was dissolved on 1 March 2019 with the expiration of the 56th Parliament and no such resolution was made during the disallowance period. Therefore, this Regulation report is provided for information only.

Issues considered by Committee

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

Right to Compensation

5. Section 10 of the *National Redress Scheme for Institutional Child Sexual abuse (Commonwealth Powers) Act 2018* (the Act) provides that nothing in State law – unless prescribed by the regulations – prevents a participating State institution from giving information requested by the Operator of the National Redress Scheme or an agency assisting another State agency to comply with such a request. The Regulation then

prescribes a number of aspects of State law which would prevent the provision of information to the Operator by a participating State institution.

Under the Act, nothing in State law prevents a participating State institution from giving information to the Operator of the Redress Scheme when determining an application for redress, unless that law is prescribed by the regulations. The Regulation then prescribes a number of State laws which prevent the participating State institution or another State agency from complying with the request. The Committee notes that the exemptions listed in the Regulations may restrict an applicant's access to compensation by limiting the information that can be provided to the Operator to determine an application for redress. Nonetheless, this important consideration must be balanced with other important considerations and the exemptions are clearly designed to protect extremely sensitive information, for example, the identity of persons in witness protection programs and information the confidentiality of which is necessary to ensure the integrity of investigations conducted by law enforcement and integrity agencies. In the circumstances, the Committee makes no further comment.

17. Road Transport Legislation Amendment (Fees, Penalty Levels and Charges) Regulation 2019

Date tabled	LA: 18 June 2019 LC: 18 June 2019
Disallowance date	LA: 24 Sept 2019 LC: 15 Oct 2019
Minister responsible	The Hon. Andrew Constance MP
Portfolio	Transport and Roads

Purpose and description

1. The object of this Regulation is to increase certain fees and charges imposed, and penalty levels for offences dealt with by way of a penalty notice issued, under the *Road Transport Act 2013*. The increases are generally in line with movements in the Consumer Price Index.

2. This Regulation is made under the *Road Transport Act 2013*, including sections 23 (the general statutory rule-making power), 24 and 195 (3) and Schedule 1.

Issues considered by Committee

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

Right to a Fair Trial

3. The Regulation increases the monetary penalties for certain offences that can be dealt with by way of a penalty notice issued under the *Road Transport Act 2013*. Section 195(2) of the Act provides that a penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, he or she can pay, within the time and to the person specified in the notice, the amount of the penalty prescribed by the statutory rules for the offence. Some of the penalty notice amounts set by the Regulation are significant – up to $3,895.

4. There is evidence to the effect that most people issued with a penalty notice pay the penalty. A 2012 NSW Law Reform Commission Report found that only 1 per cent elect to go to court "so that the guilt or innocence of the recipient is rarely scrutinised". The Law Reform Commission remarked further that "It may be the case that some people who believe that they are not guilty nevertheless pay the penalty because they are apprehensive about courts or because of the cost benefits of doing so".[39]

The Regulation sets significant monetary penalties for certain offences that can be dealt with by way of a penalty notice issued under the *Road Transport Act*

[39] NSW Law Reform Commission, *Summary Report 132-S Penalty Notices – Summary*, February 2012, pp1-2 at https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-132-Summary.pdf.

2013 **– as high as $3,895. A person issued with a penalty notice may elect to have the matter heard by a court. However, the Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may thereby impact on a person's right to a fair trial – that is, to have the matter heard by an impartial decision maker in public, and to put forward his or her side of the case. Notwithstanding this, as the Regulation does not remove a person's right to elect to have the matter heard by a court, and given the practical benefits of penalty notices (including that they reduce the costs and time associated with the administration of justice), the Committee makes no further comment.**

18. Road Transport Legislation Amendment (Release of Information to Toll Operators) Regulation 2018

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Andrew Constance MP
Portfolio	Transport and Roads

Purpose and description

1. The object of this Regulation is to amend the *Road Transport (Driver Licensing) Regulation 2017* to enable Roads and Maritime Services (RMS) to provide driver licence numbers to toll operators for the purposes of collecting unpaid tolls and charges.

2. The Regulation also amends the *Road Transport (Vehicle Registration) Regulation 2017* to permit the release of additional registration information to toll operators.

Issues considered by Committee

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

Right to Privacy

3. The new Regulation amends the *Road Transport (Vehicle Registration) Regulation 2017* and the *Road Transport (Driver Licensing) Regulation 2017* to extend the amount of information that RMS can disclose to a toll operator under an agreement between the parties.

4. The *Road Transport (Vehicle Registration) Regulation 2017* allows RMS to disclose to a toll operator the name of a person registered to use a vehicle, along with their residential address and address for serving notices. The amendments will also allow RMS to disclose the individual's date of birth and death (if applicable) and any other contact details for them.

5. In addition, amendments to the *Road Transport (Driver Licensing) Regulation 2017* will permit RMS to provide to a toll operator the driver licence number of a person registered to use a vehicle. This will assist the toll operator to recover an unpaid toll or charge from the person.

6. RMS must consult with the Privacy Commissioner before entering into an agreement with a toll operator about releasing the kind of information listed in these regulations.

This Regulation extends the categories of personal information that RMS may agree to release to toll operators. However, the Committee does not believe these circumstances would unduly trespass on the privacy of registered vehicle operators. The Committee notes that release of an individual's date of birth and death, their licence number, and other contact details could assist toll operators to accurately identify and contact persons who owe them a debt. The requirement for RMS to consult with the Privacy Commissioner before entering into any disclosure agreement of this kind should also minimise the risk of unreasonable privacy impacts.

19. Snowy Hydro Corporatisation Regulation 2019

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. John Barilaro MP
Portfolio	Regional New South Wales, Industry and Trade

Purpose and description

1. The Regulation provides that the Snowy Hydro Company must indemnify the State for any compensation payable relating to native title as a result of the expansion of the Snowy Mountains Hydro-Electric Scheme.

Issues considered by Committee

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

Native Title and Compensation Rights

2. The Regulation is made pursuant to section 39B of the *Snowy Hydro Corporatisation Act 1999*. Section 39B states that the Regulations may provide that if any compensation for native title is payable as a result of the project to expand the Snowy Mountains Hydro-Electric Scheme, the Government may seek indemnity from various companies. Clause 3 of the Regulation accordingly provides that the Snowy Hydro Company must so indemnify the State.

> **The Regulation is part of a scheme that contemplates possible impact on native title rights as a result of a project to expand the Snowy Mountains Hydro-Electric Scheme. It further voids the Government's liability to pay compensation for such impacts. However, in doing so, the Regulation provides for an alternative party, the Snowy Hydro Company, to pay any compensation i.e. a company gaining commercial benefit from the project.[40] Having regard to these alternative arrangements for compensation, and the significance of the project for the State's energy needs, the Committee makes no further comment.**

[40] See Hon Don Harwin MLC, *Legislative Council Debates*, 24 October 2018, NSW Parliament website, https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-77854'.

20. Terrorism (High Risk Offenders) Amendment Regulation 2018

Date tabled	23 October 2018
Disallowance date	LA: 4 June 2019 LC: 5 June 2019
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

1. The object of this Regulation is to make provision with respect to the following matters under the *Terrorism (High Risk Offenders) Act 2017*:

   (a) ensuring that the Attorney General may require the provision of information to determine whether to make an application to the Supreme Court for a declaration that a person is a convicted NSW terrorist offender, a convicted NSW underlying terrorism offender or a convicted NSW terrorism activity offender,

   (b) expanding the class of persons who can be compelled to provide that information so as to include the heads of certain health service organisations,

   (c) prescribing persons who are qualified to be independent third party representatives of eligible offenders in terrorism intelligence applications.

2. The Regulation is made under the *Terrorism (High Risk Offenders) Act 2017*, including sections 58 (1), 60 (6) and 74 (the general regulation-making power).

3. The Committee notes that this Regulation was tabled in Parliament on 23 October 2018 and that it is no longer subject to disallowance. Section 9(1A) of the *Legislation Review Act 1987* provides that the Committee is not precluded from exercising its functions of considering and reporting on Regulations under section 9(1) of the Act after a Regulation has ceased to be subject to disallowance if, while it is subject to disallowance, the Committee resolves to review and report to Parliament on the Regulation.

4. In this instance, the Committee was dissolved on 1 March 2019 with the expiration of the 56th Parliament and no such resolution was made during the disallowance period. Therefore, this Regulation report is provided for information only.

Issues considered by Committee

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

Right to a Fair Trial

5. The *Terrorism (High Risk Offenders) Act 2017* (the Act) provides for the supervision and detention of certain offenders after they have completed their sentence if they are judged

by the Supreme Court to pose an unacceptable risk of committing serious terrorism offences.

6. Section 59A of the Act provides that the Attorney General or a prescribed terrorism intelligence authority can make a 'terrorism intelligence application' to the Supreme Court in any proceedings before the Court under the Act, for particular information to be dealt with as 'terrorism intelligence' in those proceedings.

7. The effect of a 'terrorism intelligence application' is that the Court must take steps to maintain the confidentiality of information to which such an application relates. Similarly, if the terrorism intelligence application is granted, the Court must maintain the confidentiality of the terrorism intelligence in the proceedings. For example, a Court can grant an offender various levels of access to the information, including by allowing restricted access to a redacted document or a written summary of the facts.

8. The definition of 'terrorism intelligence' in the Act indicates that the rationale for this confidentiality requirement relates to the sensitivity of the information. Section 4 of the Act states:

> Terrorism intelligence means information relating to actual or suspected terrorism activity (whether in the State or elsewhere) the disclosure of which could reasonably be expected:
>
> (a) to adversely affect the capacity of persons or bodies involved in the prevention of terrorist acts from preventing such acts or the capacity of intelligence agencies (for example, the Australian Security Intelligence Organisation) to carry out their functions, or
>
> (b) to prejudice criminal investigations or investigations by intelligence agencies, or
>
> (c) to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or the functions of intelligence agencies, or
>
> (d) to endanger a person's life or physical safety.

9. While the Committee acknowledges this rationale, it notes that these arrangements impact on the offender's right to a fair trial – an accused will be less able to respond to the case against him or her if s/he does not have full knowledge of it.

10. Under section 59B of the Act, the Court must appoint an 'independent third party representative' for an offender where the applicant in a 'terrorism intelligence application' requests that the Court significantly restrict the offender's access to information to which the application relates (e.g. by only providing the offender with a redacted version of the information). The 'independent third party representative' is allowed access to the information the subject of the application, and it is his/her role to make submissions to the Court in the best interests of the offender about whether or not the information is 'terrorism intelligence' and the level of access to terrorism intelligence that should be given to the offender.

11. Clause 10 of the Regulation prescribes the persons who are qualified to be 'independent third party representatives' of eligible offenders in terrorism intelligence applications.

Specifically, the person must be a retired judicial officer, or qualified to be appointed as a judicial officer of any Australian jurisdiction.

12. The Committee notes that there is no requirement for a person to have a current qualification to practise law to qualify as an independent third party representative. While the Committee notes that a retired judicial officer may be considered extremely experienced and knowledgeable, a representative who has no current qualification to practise law, but who can make submissions to the Court on an offender's behalf, will not be bound by the same rules of professional and ethical conduct that apply to practising lawyers.

13. The Committee considers the representative should be subject to the highest professional and ethical standards to ensure the offender's right to a fair trial is respected. The consequences of proceedings in which a representative will act are very serious for the offender concerned and could result in him/her being subject to continued detention or supervision following the expiry of sentence.

> **The Regulation prescribes the persons who are qualified to be 'independent third party representatives' of eligible offenders in terrorism intelligence applications. The Committee is of the view that consideration should be given to requiring such a representative to have a current qualification to practise law. A representative who has a current qualification to practise law will be bound by the rules of professional and ethical conduct that apply to practising lawyers. It is the representative's role to make submissions in the best interests of the offender that may ultimately impact on whether he or she is required to submit to continued detention or supervision following the expiry of his or her sentence. Therefore, the representative is crucial to ensuring the offender's right to a fair trial and it is essential that the representative is subject to the highest possible professional and ethical standards. The Committee refers the matter to Parliament for consideration.**

21. Tow Truck Industry Amendment (Fees) Regulation 2018

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

Purpose and description

1. The objects of the Regulation are:

   (a) to increase certain fees payable under the *Tow Truck Industry Act 1998*, and

   (b) to provide for a mechanism for the automatic adjustment for inflation of those fees in future.

2. The fee increases are generally in line with movements in the Consumer Price Index. The Regulation is made under the *Tow Truck Industry Act 1998*, including sections 54 and 105 (the general regulation-making power).

Issues considered by Committee

That the regulation may have an adverse impact on the business community: s9(1)(b)(ii) of the LRA

Automatic Adjustment of Fees under the Regulation does not take account of Deflation

3. Schedule 2 of the Regulation provides a mechanism for the automatic adjustment of fees payable under the *Tow Truck Industry Act 1998*, to take account of inflation.

4. However, schedule 2, clause 2(3) of the Regulation provides that if the resulting fee amount calculated for any financial year is less than the amount that applied for the previous financial year, then the fee for the previous financial year applies instead.

5. By not providing a mechanism to take account of deflation, the Regulation may impact adversely on members of the business community who pay fees to the Government under the *Tow Truck Industry Act 1998*. In other cases, it may benefit these members of the tow truck industry i.e. where the fee payable relates to the maximum that can be charged for tow truck industry work, in which case adverse economic impacts could fall on consumers.

   The Committee notes that in providing for fees to be automatically adjusted to take account of inflation, the Regulation could also allow for automatic adjustment that takes account of deflation. By failing to do so, there may be

some adverse impact on tow truck industry businesses, though in other cases there may be benefits. The Committee makes no further comment.

Regulation of Fees for Service

6. Schedule 1 of the Regulation sets maximum fees that may be charged for the provision of certain services by the tow truck industry. In doing so, it may adversely impact on that section of the business community.

The Committee notes that by setting maximum fees that may be charged for the provision of certain services by the tow truck industry, the Regulation may adversely impact on this section of the business community. However, the Committee also notes that these requirements are part of a broader consumer protection regime that applies in NSW. Further, the Regulation allows for the automatic adjustment of these fees to take account of inflation. In the circumstances, the Committee makes no further comment.

22. Uniform Civil Procedure (Amendment No 90) Rule 2019

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

1. The object of the Rule is to amend the Uniform Civil Procedure Rules 2005 to provide that decisions of the Registrar of the Court under clause 11 (1) of the *Civil Procedure Regulation 2017* are not reviewable by a Court under Division 4 of Part 49 of the Rules, and to make other consequential changes.

2. Clause 11(1) of the *Civil Procedure Regulation 2017* provides that the registrar of the court may, by order in writing, direct that the whole or part of a fee payable to the registrar be waived, postponed or remitted, subject to any conditions the registrar thinks fit to impose.

Issues considered by Committee

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

Judicial review rights

3. The Rule excludes a party's right to apply for the Court to review certain decisions or orders of the Registrar of the Court. Put differently, it excludes rights to have certain administrative decisions judicially reviewed. These decisions include a Registrar's decision to direct that the whole or part of a fee payable to the registrar be waived, postponed or remitted, subject to any conditions that the registrar thinks fit to impose; and winding up orders made under the *Corporations Act 2001*. A winding up order is an order that forces an insolvent company into compulsory liquidation, and whereby the liquidated assets are used to pay creditors.

> **The Rule excludes rights to have certain administrative decisions and orders judicially reviewed. These include a Registrar's decision to direct that the whole or part of a fee payable to the registrar be waived, postponed or remitted, subject to any conditions that the registrar thinks fit to impose; and winding up orders made under the *Corporations Act 2001*. The Committee will generally comment where independent review of administrative decisions is removed and refers the matter to Parliament to consider whether the removal is reasonable in this instance.**

23. Workers Compensation Amendment Regulation 2018

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

Purpose and description

1. The object of the Regulation is to amend the *Workers Compensation Regulation 2016* to make provision with respect to the following matters as a consequence of the enactment of the *Workers Compensation Legislation Amendment Act 2018*:

   (a) the notification of decisions of insurers and the procedure for reviews by insurers of work capacity decisions and claims,

   (b) prescribing the use of mobile device applications as a method by which an employer may notify workers of return-to-work programs,

   (c) costs recoverable for legal services provided to an insurer or a claimant in connection with a work capacity decision,

   (d) other minor related matters.

2. The Regulation is made under the *Workers Compensation Act 1987*, including section 280 (the general regulation-making power) and clause 1 of Part 20 of Schedule 6, and the *Workplace Injury Management and Workers Compensation Act 1998*, including sections 52 (2) and (4), 79 (1) (b) and (4), 287B and 337.

Issues considered by Committee

That the regulation may have an adverse impact on the business community: s9(1)(b)(ii) of the LRA

Regulation of Fees for Service

3. Schedule 2, clause 6A of the Regulation sets the maximum costs recoverable by lawyers for legal services provided to an insurer or claimant in connection with a work capacity decision. In doing so, it may adversely impact on this section of the business community.

   By setting the maximum cost that lawyers can recover for certain services, the Regulation may adversely impact on this section of the business community. However, the Committee notes that this provision is consistent with a wider regime that regulates the NSW legal profession under the Legal Profession

Uniform Law (NSW). The Uniform Law aims to promote consistency between States and Territories in the law applying to the Australian legal profession, and to enhance the protection of clients, including with respect to costs. In the circumstances, the Committee makes no further comments.

24. Young Offenders Amendment (Exempted Sexual Offences) Regulation 2019

Date tabled	LA: 7 May 2019 LC: 8 May 2019
Disallowance date	LA: 6 August 2019 LC: 22 August 2019
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

1. The object of the Regulation is to prescribe certain sexual offences under the *Crimes Act 1900*, enacted by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*, as offences that are not covered by the *Young Offenders Act 1997*. The Regulation is made under the *Young Offenders Act 1997*, including sections 8 (2) (g) and 73 (the general regulation-making power).

Issues considered by Committee

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters that should be set by Parliament

2. The Regulation prescribes certain offences under the *Crimes Act 1900* as offences that are not covered by the *Young Offenders Act 1997*. These include sexual touching of a child under 10 and of a child aged between 10 and 16; and a sexual act with or towards a child under 10 and with or towards a child aged between 10 and 16. The *Young Offenders Act* is designed to divert children from the criminal justice system. Its aim is to ensure that the least restrictive form of sanction is applied against a child who is alleged to have committed an offence, and that criminal proceedings are not instituted against a child if there is an alternative means of dealing with the matter (e.g. warnings, cautions or youth justice conferences).[41]

3. Matters such as these, which directly affect individual rights and liberties, particularly of minors, should be dealt with in primary, not subordinate legislation. This is to ensure an appropriate level of parliamentary oversight. Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987),*

[41] See *Young Offenders Act 1997* in particular ss7(a) and (c).

the statutory rule may have already been in operation for some time before disallowance occurs[42].

The Regulation prescribes certain offences under the *Crimes Act* 1900 that are not covered by the *Young Offenders Act* 1997. The Committee prefers provisions which prescribe offences and affect the fundamental rights and liberties of minors to be included in primary, not delegated legislation. This is to foster an appropriate level of parliamentary oversight. In the current case, the prescribed offences that will exclude young people from being diverted from the criminal justice system under the *Young Offenders Act 1997* are sexual offences over which there are serious community concerns. For example, sexual touching of and sexual acts with or towards people under the age of 10 years. Similarly, all regulations must be tabled in Parliament and are subject to disallowance under the *Interpretation Act 1987.* Owing to this safeguard, and the nature of the prescribed offences, the Committee makes no further comment.

[42] See discussion of the limits to parliamentary oversight of subordinate legislation in ACT Standing Committee on Justice and Community Safety, 'Henry VIII FactSheet' November 2011 pp2-3 at https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

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.