



Legislation Review Committee

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

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Membership

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Guide to the Digest

COMMENT ON BILLS

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

COMMENT ON REGULATIONS

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

Conclusions

PART ONE – BILLS

1. CRIMES AMENDMENT (ZOE'S LAW) BILL 2019*

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

Right to terminate a pregnancy

The Committee acknowledges the concerns which the Bill seeks to address in creating a new offence to allow proceedings to be brought against an offender for serious harm to or destruction of the unborn. However, creating a separate offence for serious harm or destruction caused to an unborn child may create the implication that the unborn have separate legal rights. As the Committee has previously commented, this may have some broader implications for a woman's right to terminate a pregnancy. The Committee acknowledges however, that the Bill specifically excludes anything done in the course of a medical procedure, or anything done by or with the consent of the mother of the child. The Committee refers the matter to Parliament for consideration.

2. GAMBLING LEGISLATION AMENDMENT (ONLINE AND OTHER BETTING) BILL 2019

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

Liability of directors and managers for offences by corporation

The Bill inserts new executive liability offences into the *Betting and Racing Act 1998*. This means that a director or certain managers of a corporation may be prosecuted for an offence committed by the corporation. The Committee notes that the prosecution is not required to prove actual knowledge of the offence on the part of the accused, only that the person ought reasonably to know that the executive liability offence, or an offence of the same type, would be, or is being, committed. However, the Committee acknowledges that the prosecution still bears the burden of proving the elements of an executive liability offence.

The Committee notes that lower thresholds for the mental element that must be proved to hold a defendant liable are not unusual in regulatory contexts to encourage compliance. The Committee also notes that the executive liability offences in the Bill will only attract a maximum penalty of \$5,500, not a term of imprisonment. For these reasons, the Committee makes no further comments.

3. NATIONAL PARKS AND WILDLIFE AMENDMENT (TREE THINNING OPERATIONS) 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*.

4. RACING LEGISLATION AMENDMENT BILL 2019

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

Right to silence and right to appeal against self-incrimination

The Bill introduces powers for a person to be compelled to attend a special inquiry and provide information or face a penalty. A person is not excused from the requirement to provide the

information on the ground that it may incriminate him or her. The Bill thereby impacts on the right to silence and the right against self-incrimination. The Committee notes that the Bill includes some safeguards including that the compelled information is not admissible in evidence against the person in criminal, civil or disciplinary proceedings. The Committee also acknowledges that the powers are intended to assist to surmount existing hurdles in investigating threats to the integrity of the racing industry. Nonetheless, the right to silence and right against self-incrimination are well-established legal principles and the Committee refers the matter to Parliament to consider whether the Bill unduly trespasses on these rights.

Freedom of movement, procedural fairness and administrative review rights

The Bill would allow the Police Commissioner to make an order excluding a person from racecourses during race meetings if the Commissioner thinks it is necessary to do so in the public interest. In doing so, the Bill impacts on the freedom of movement of affected persons. The Committee acknowledges that the provisions may assist in preventing criminal activity in the racing industry. Similarly, the Bill provides that an exclusion order may be appealed to NCAT. However, given that the Commissioner may, in certain circumstances, decline to give reasons for making an exclusion order, and given the breadth of the Commissioner's power to make such orders, a person may in practice find it difficult to challenge such a decision before NCAT. In the circumstances, the Committee draws these matters to the attention of Parliament to consider whether the provisions trespass unduly on the right to freedom of movement.

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

Commencement by proclamation

The Committee notes that the bulk of the Bill's provisions, dealing with compulsion orders, exclusion powers and the Racing Appeals Tribunal (Schedules 1–4), commence by proclamation. The Committee prefers legislation affecting individual rights and liberties to commence on assent or on a fixed date to provide certainty to affected persons. The Committee refers the matter to Parliament for consideration.

5. REPEAL OF KOSCIUSZKO WILD HORSE HERITAGE LEGISLATION BILL 2019*

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

Compensation Rights

The Bill provides for the dissolution of the Wild Horse Community Advisory Panel, that members of the Panel will cease to hold office from the date of assent, and that they will not be entitled to compensation because of the loss of that office. Currently, under the *Kosciuszko Wild Horse Heritage Act 2018*, members of the Panel can be appointed for terms of up to four years, with the possibility of re-appointment, and are entitled to be paid such remuneration as the Minister may determine.

In short, a Panel member who lost office as a result of the Bill would also lose any corresponding remuneration to which he or she would otherwise have been entitled to cover the remainder of his or her term. By providing that the member would receive no compensation for the loss of this remuneration, the Bill thereby impacts on panel members' compensation rights.

The Committee understands that no Panel members currently exist to be affected by the Bill's provisions, as the Panel has not yet been established. Nonetheless, the Bill has potential to affect future members depending on any date of assent. The Committee refers the matter to

Parliament to consider whether it is an undue trespass on the right of Panel members to compensation for loss of remuneration.

PART TWO – REGULATIONS

1. AGEING AND DISABILITY COMMISSIONER REGULATION 2019

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

Right to privacy

The regulation permits the Ageing and Disability Commissioner to enter into information sharing arrangements with certain Commonwealth bodies. The relevant information that may be shared includes reports regarding the safety, welfare or well-being of an adult with a disability or older adult and any abuse, or neglect or exploitation of an adult with disability or older adult. It may also include information about any matter prescribed by the regulations. This may contain sensitive health and medical information about the individual concerned and may infringe on a person's privacy if shared. However, the Committee acknowledges the practical reasons for sharing this information with authorised Commonwealth bodies to carry out the functions of the Commissioner under the Act and to maintain the wellbeing of persons with disability and older adults. The Committee makes no further comment.

2. APPRENTICESHIP AND TRAINEESHIP AMENDMENT REGULATION 2019

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

Increased penalties

The Regulation significantly increases the maximum penalty for an offence where an employer's agent fails to comply with certain requirements relating to the keeping and inspection of training contracts and associated documents. Large increases in penalties can sometimes result in excessive punishment, where the penalty is not proportionate to the offence.

The Committee acknowledges that the penalty increase in this Regulation is related to broader increases in penalties in this area to make them more consistent with other similar frameworks. The Committee also notes that penalties in this area have not increased for a long time.

However, due to the significant increase in the maximum penalty for this offence from \$550 to \$11,000, the Committee refers this issue to Parliament for further consideration as to whether the proposed penalty is proportionate to the offence in question.

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 significantly increases the maximum penalty for an offence relating to the obligations of an employer's agent from \$550 to \$11,000. The Committee considers that it would be more appropriate to include an offence with a maximum penalty of this magnitude in primary legislation rather than subordinate legislation. This would foster a greater level of parliamentary oversight over the maximum penalty to be set. The Committee refers this issue to Parliament for further consideration.

3. BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT AMENDMENT REGULATION 2019

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA*Liability of directors and managers for offences by corporation*

The Regulation deems certain offences under the *Building and Construction Industry Security of Payment Regulation 2008* to be executive liability offences. This means that a director or certain managers of a corporation may be prosecuted for an offence committed by the corporation. The Committee notes that the prosecution is not required to prove actual knowledge of the offence on the part of the accused, only that the accused was recklessly indifferent about the offence.

However, the Committee acknowledges that the prosecution still bears the burden of proving the elements of an executive liability offence. Similarly, lower thresholds for the mental element that must be proved to hold a defendant liable are not unusual in regulatory contexts to encourage compliance. Further, the offences deemed to be executive liability offences by the Regulation will not attract a custodial sentence, the maximum penalty being a \$22,000 fine. In the circumstances, the Committee makes no further comments.

4. BUILDING PROFESSIONALS AMENDMENT (INSURANCE) REGULATION 2019

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA*Consumer rights to make a claim for rectification or compensation*

The Regulation makes changes to the *Building Professionals Regulation 2007* to allow a professional indemnity contract covering a certifier to exclude cover for certain claims in relation to non-compliant cladding or the use, application or installation of cladding in a non-compliant way. The Committee acknowledges that this is intended to be a short-term change to ensure certifiers can continue their businesses and has been influenced by international events that have caused changes to the insurance market.

However, the Committee notes that this may impact on consumers who may make claims for rectification or compensation relating to the certification of cladding-related works. If insurance policies applying to certifiers do not cover these claims, consumers may have difficulty successfully making claims against certifiers, who may not have the capacity to fund them.

The Committee acknowledges the difficult tension between the rights of certifiers to continue working and the rights of consumers in relation to rectification or compensation claims. The Committee refers this issue to Parliament to consider where the public interest lies in appropriately balancing these rights.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA*Exclusion of certain types of claims from insurance policies applying to certifiers*

The Regulation amends the *Building Professionals Regulation 2007* to allow professional indemnity contracts applying to certifiers to exclude certain claims made in relation to non-compliant cladding or the use, installation or application of cladding in a non-compliant way. The Committee acknowledges that this change has been made to ensure certifiers can continue working. Existing laws would otherwise prevent certifiers who are covered by such insurance policies from being accredited to provide services.

However, the Committee notes the effect this change may have on the business community of certifiers in New South Wales and the flow on effect to the broader business community. If a consumer makes a successful claim against a certifier in relation to non-compliant cladding, the

certifier will be uninsured for that claim and would presumably need to fund it themselves, which they may not be able to do. The Committee refers this issue to Parliament for further consideration.

5. COAL MINE SUBSIDENCE COMPENSATION AMENDMENT (MISCELLANEOUS) 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

Henry VIII clause

The Regulation amends the *Coal Mine Subsidence Compensation Act 2017*, made possible by a Henry VIII clause in the Act. 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.

6. GREYHOUND RACING AMENDMENT (TRANSITION PERIOD) 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

Henry VIII clause

The Regulation amends the *Greyhound Racing Act 2017* by way of a Henry VIII clause contained in the Act. 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 draws this matter to the attention of the Parliament to consider whether the objective of the Regulation could have been achieved by alternative or more effective means that subject amendments of the legislation to appropriate parliamentary oversight.

7. PUBLIC FINANCE AND AUDIT AMENDMENT (FINANCIAL REPORTING AND AUDITING EXCLUSIONS) 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

Henry VIII clause

The Regulation amends the *Public Finance and Audit Act 1983*, made possible by a Henry VIII clause in the Act. The Committee prefers changes to an Act to be made by an amending Bill, not through subordinate legislation. If primary legislation is changed by subordinate legislation it reduces parliamentary scrutiny of those changes. The Committee refers this matter to Parliament for further consideration.

8. ROAD TRANSPORT (DRIVER LICENSING) AMENDMENT (RELEASE OF PHOTOGRAPHS TO ASIO) REGULATION 2019

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

Privacy

The Regulation expands the circumstances in which RMS can release photographs, photographic images or other material in a photo database to ASIO. The Committee notes that the changes in the Regulation would impact on the privacy of affected individuals. Many individuals would not

anticipate that RMS would release their information for purposes unrelated to RMS' functions and, in particular, release that information to ASIO without a warrant. The Committee is also aware that privacy laws and standards can differ between jurisdictions and in their application to different organisations and agencies.

The Committee notes some privacy safeguards in the Regulation. For example, an authorised person from ASIO must certify in writing that the material requested is reasonably necessary for ASIO to exercise its functions. In addition, any release of information by RMS must accord with any protocol approved by the NSW Privacy Commissioner.

While the Committee acknowledges that privacy considerations must be appropriately balanced against national security concerns and public safety, the Committee refers the Regulation to Parliament for further consideration as to whether it unduly trespasses on the privacy rights of individuals.

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 broadens the circumstances under which RMS can release photographs, photographic images or other material in a photo database to ASIO, without the requirement for a warrant. The Committee prefers changes such as these, that have privacy implications for individuals, to be included in primary rather than subordinate legislation. This would foster a greater level of parliamentary oversight. The Committee refers this issue to Parliament for further consideration.

9. WATER MANAGEMENT (GENERAL) AMENDMENT (EXEMPTION) 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 in primary legislation

The Regulation provides that the Minister may, on application, exempt a public authority that supplies water to the public from a provision that creates an offence under the *Water Management Act 2000*. The Committee considers that matters involving the exemption from an offence in an Act which carries significant maximum monetary penalties should be dealt with in primary, not subordinate legislation. This is to ensure an appropriate level of parliamentary oversight.

The Committee notes that the Minister is only entitled to grant such an exemption if satisfied that conditions of drought exist and the exemption is in the public interest. The Committee also acknowledges that either House of Parliament can pass a resolution disallowing a statutory rule. Nevertheless, the Committee refers to Parliament for further consideration whether the objectives in the Regulation could be more effectively achieved through primary legislation.

Part One – Bills

1. Crimes Amendment (Zoe's Law) Bill 2019*

Date introduced	8 August 2019
House introduced	Legislative Council
Member responsible	Reverend the Hon. Fred Nile MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Crimes Act 1900*:
 - (a) to establish a separate offence for conduct causing serious harm to or the destruction of an unborn child (proposed section 41B), and
 - (b) to extend the offence of dangerous driving causing death or grievous bodily harm (under s 52A) to dangerous driving causing the destruction of, or serious harm to, an unborn child.

BACKGROUND

2. This Bill was previously introduced into the Legislative Council by Reverend the Hon Fred Nile MLC on 21 February 2013 and again on 9 March 2017.¹ A similar Bill was also introduced into the Legislative Assembly by Mr Chris Spence MP on 29 August 2013.² The Bills were introduced in response to cases involving dangerous driving and domestic violence, causing a pregnant woman to lose an unborn child.
3. In the second reading speech for the current Bill, Reverend Nile referred to Renee Shields' loss of her unborn child Byron after a road incident in 2001, and Kylie Flick's miscarriage after she was beaten by her boyfriend in 2002, stating: 'In both cases, the law failed to directly address the injustice and the grief suffered by those women as there was no existing offence for destruction of a child in utero.'
4. Following these cases, the then Attorney General commissioned Mervyn Finlay QC to conduct an inquiry into the issue. The 2003 Finlay report recommended that an offence be enacted in relation to a criminal act of killing an unborn child but this recommendation was not adopted by the NSW Government.³

¹ See the Crimes Amendment (Zoe's Law) Bill 2013; and the Crimes Amendment (Zoe's Law) Bill 2017.

² See the Crimes Amendment (Zoe's Law) Bill 2013 (No 2).

³ M Finlay, Review of the Law of Manslaughter in New South Wales, April 2003, pp 6, 112: 'I recommend that New South Wales legislate to introduce the offence of "child destruction" relating to a criminal act causing a child, capable of being born alive to die before it has an existence independent of its mother. I have preferred the description of the offence "Killing an Unborn Child" to "Child Destruction".'

5. However, following the case of *R v King*⁴ the NSW Government amended the existing concept of grievous bodily harm under the *Crimes Act 1900*. In *R v King*, the Court of Criminal Appeal held that an injury causing the destruction of a foetus could constitute the infliction of grievous bodily harm upon the mother. The Crimes Amendment (Grievous Bodily Harm) Bill 2005 (known as 'Byron's law') codified this decision, expanding the definition of grievous bodily harm under section 4 to include 'the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm.'

6. Subsequent to these changes, in 2009, Brodie Donegan, who was eight months pregnant, was hit by a drug-affected driver. In his second reading speech regarding the Bill, Reverend Nile stated:

The impact killed Ms Donegan's unborn baby, Zoe, and inflicted significant injuries upon Ms Donegan, who suffered a shattered pelvis and injuries to her lower spine, hip and right foot. Pursuant to the Crimes Act 1900 the driver was charged with inflicting grievous bodily harm as Ms Donegan had sustained injury. However, the death of her child in utero was rendered legally irrelevant. The failure of the law to acknowledge Ms Donegan's loss demonstrated that the concerns I had raised previously had not been adequately addressed. That is why I have introduced the bill.

7. In October 2010, in response to the Donegan matter, a further review of the law was conducted by Michael Campbell QC. He found that the current provisions in the Crimes Act 'do respond appropriately' and did not recommend any change.⁵
8. The Campbell review canvassed the issue of the legal status of a foetus or unborn child, as addressed by several stakeholders' submissions. For example, the Australian Medical Association 'opposed any legislative amendment or creation of a criminal offence which recognises an unborn child as a legal entity independent of its mother', submitting that such recognition 'would create unnecessary complications' to specialties including genetics and obstetrics.⁶ Traditionally under the common law, legal personhood does not arise until a foetus becomes a person by being 'born alive'. For example, a foetus cannot be the victim of homicide.⁷
9. In the second reading speech regarding the Bill, Reverend Nile also referred to the death of the unborn children of other women (such as Susan Harris and Caroline Fraser) and stated:

The constant complaint made by those who suffer the death of a child in utero as a result of the malicious or otherwise reckless act of another is that the law fails to provide for the remedial

⁴ *R v King* (2003) 59 NSWLR 472; [2003] NSWCCA 399.

⁵ M Campbell, Review of Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child, October 2010, pp5,42.

⁶ M Campbell, Review of Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child, October 2010, p 32.

⁷ See section 20 of the Crimes Act 1900 in relation to child murder, where the 'child shall be held to have been born alive if it has breathed'. The common law 'born alive' rule was affirmed by Spigelman CJ in *R v Iby* (2005) 63 NSWLR 278 at [56]. However, limited exceptions to the general rule that only a person born alive can have interests protected by law have been used in circumstances where the application of this general rule would produce an unjust result.

restitution of justice due to a failure to adequately acknowledge the loss directly...We now have the opportunity to rectify what amounts to a serious gap in our legislation and an injustice.

10. Reverend Nile also stated:

The bill makes it clear that there is an exemption for medical procedures, which is the terminology used for the termination of a pregnancy or aborting of a foetus. The bill states specifically that it has nothing to do with termination of a pregnancy. I encourage members not to raise that issue as a reason for opposing the bill – it is a red herring.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to terminate a pregnancy

11. At present, under the *Crimes Act 1900*, proceedings can be brought against an offender who causes the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, as proceedings for grievous bodily harm to the pregnant woman.
12. In contrast, the Bill (by establishing a new offence for conduct causing serious harm to or destruction of an unborn child), would allow proceedings to be brought against an offender as proceedings for harm to or destruction of the unborn child itself.
13. The Committee notes that the Bill specifically excludes anything done in the course of a medical procedure, or anything done by or with the consent of the mother of the child.
14. The Bill raises sensitive issues. Minds may differ as to whether an injury upon a pregnant mother, causing the loss of an unborn child, constitutes the infliction of grievous bodily harm upon the mother (as found in *R v King* [2003] NSWCCA 399) or upon the unborn child, or both. The Committee notes the cases of offences resulting in the loss of an unborn child discussed by Reverend Nile in his second reading speech and his comment that the current law 'failed to directly address the injustice and grief suffered by these women'.
15. The Committee further notes that there may be legal consequences to recognising the distinct value of an unborn child's life. A separate offence which directly recognises the unborn child could be interpreted as giving it independent legal status or rights. When earlier versions of the Bill came before the Committee, the Committee commented that they may have some broader implications for a woman's right to choose to terminate a pregnancy.⁸ In addition, as mentioned above, the Australian Medical Association has previously opposed the creation of a criminal offence which recognises an unborn child as a legal entity independent of its mother, indicating that recognition would create unnecessary complications to specialties including obstetrics.

The Committee acknowledges the concerns which the Bill seeks to address in creating a new offence to allow proceedings to be brought against an offender for serious harm to or destruction of the unborn. However, creating a separate offence for serious harm or destruction caused to an unborn child may create the

⁸ See *Legislation Review Digest* 43/55, 10 September 2013 at <https://www.parliament.nsw.gov.au/ladocs/digests/424/Digest%20No.%2043%20-%2010%20Sept.%202013.pdf>; and *Legislation Review Digest* 33/56, 28 March 2017 at <https://www.parliament.nsw.gov.au/committees/Pages/legislation-review-digest-details.aspx?pk=600>.

implication that the unborn have separate legal rights. As the Committee has previously commented, this may have some broader implications for a woman's right to terminate a pregnancy. The Committee acknowledges however, that the Bill specifically excludes anything done in the course of a medical procedure, or anything done by or with the consent of the mother of the child. The Committee refers the matter to Parliament for consideration.

2. Gambling Legislation Amendment (Online and Other Betting) Bill 2019

Date introduced	7 August 2019
House introduced	Legislative Council
Minister responsible	The Hon. Sarah Mitchell MLC
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The objects of this Bill are to amend the *Betting and Racing Act 1998* and the *Totalizator Act 1997* as follows:
 - (a) to prohibit direct marketing to the holders of betting accounts without express consent,
 - (b) to prohibit inducements being offered to persons to open a betting account, to invite another person to open a betting account or not to close a betting account,
 - (c) to require providers of betting accounts to set up schemes to enable holders to limit deposits into their accounts unless the holder expressly refuses,
 - (d) to require providers of betting accounts to provide a simple and easy to use process to close betting accounts, to improve the access of holders of betting accounts to information about how to close accounts and to require requests to close accounts to be dealt with immediately,
 - (e) to make it clear that offers of gambling products with incentives relating to better odds and other advantages to holders of betting accounts (whether by advertisement or otherwise) will be prohibited inducements,
 - (f) to provide for circumstances in which directors of corporations will be liable for betting account offences,
 - (g) to make other consequential amendments and provision of a transitional nature consequent on the enactment of the proposed Act.

BACKGROUND

2. The Minister's Second Reading Speech notes that the Bill ensures 'there are appropriate controls in place to proactively deal with gambling-related harm in online wagering.' It highlights that in 2018, more than 34 per cent of Australians placed an online bet and that this is more than double the rate in 2012.
3. The Minister's Second Reading Speech also confirms that the Bill has two main objectives:

First, to implement New South Wales commitments under the National Consumer Protection Framework for Online Wagering, which is a uniform set of standard minimum protections for online gamblers across all Australian jurisdictions. Secondly, the bill inserts a new definition of "inducements" into New South Wales wagering laws to ensure that New South Wales wagering laws continue to have the broad effect that this Parliament endorsed last year.

ISSUES CONSIDERED BY THE COMMITTEE

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

Liability of directors and managers for offences by corporation

4. The Bill creates offences that permit a director or manager of a corporation to be prosecuted for an offence of the corporation in certain circumstances.
5. In particular, the Bill amends section 36AA of the *Betting and Racing Act 1998* so that offences relating to the following obligations will become executive liability offences:
 - (a) prohibition on direct marketing
 - (b) prohibited inducements
 - (c) deposit limits for betting accounts
 - (d) closing betting accounts (see Schedule 1, clauses [7] and [8] of the Bill).
6. A person commits an executive liability offence if:
 - a corporation commits the offence, and
 - the person is either:
 - a director of the corporation, or
 - involved in the management of the corporation and in a position to influence the conduct of the corporation in relation to the commission of the offence, and
 - the person:
 - knows or ought reasonably to know that the executive liability offence, or an offence of the same type, would be, or is being, committed, and
 - fails to take all reasonable steps to prevent or stop the commission of the offence (see section 36AA of the *Betting and Racing Act 1998*).
7. The Committee notes that the prosecution does not have to prove the mental element of actual knowledge on the part of the director or manager. The prosecution only needs to prove that the person ought reasonably to know that the executive liability offence, or an offence of the same type, would be, or is being, committed.

8. The Act:
- (a) provides a non-exhaustive list of what could be considered taking 'reasonable steps' for the purposes of these offences
 - (b) states that the prosecution bears the legal burden of proving the elements of an executive liability offence, and
 - (c) provides that the executive liability offence provisions apply whether or not the corporation is prosecuted for, or convicted of, the executive liability offence and do not affect the liability of the corporation for the offence (see section 36AA of the *Betting and Racing Act 1998*).
9. The maximum penalty for a person convicted of one of the executive liability offences referred to in the Bill is \$5,500 (see Schedule 1, clauses [5] and [6] of the Bill).

The Bill inserts new executive liability offences into the *Betting and Racing Act 1998*. This means that a director or certain managers of a corporation may be prosecuted for an offence committed by the corporation. The Committee notes that the prosecution is not required to prove actual knowledge of the offence on the part of the accused, only that the person ought reasonably to know that the executive liability offence, or an offence of the same type, would be, or is being, committed. However, the Committee acknowledges that the prosecution still bears the burden of proving the elements of an executive liability offence.

The Committee notes that lower thresholds for the mental element that must be proved to hold a defendant liable are not unusual in regulatory contexts to encourage compliance. The Committee also notes that the executive liability offences in the Bill will only attract a maximum penalty of \$5,500, not a term of imprisonment. For these reasons, the Committee makes no further comments.

3. National Parks and Wildlife Amendment (Tree Thinning Operations) Bill 2019*

Date introduced	8 August 2019
House introduced	Legislative Council
Member responsible	The Hon. Mark Banasiak MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to provide for the authorisation of tree thinning operations in Murray Valley National Park and Pilliga National Park, including the removal and sale of timber or timber products obtained from the carrying out of those operations.

BACKGROUND

2. In his Second Reading Speech to Parliament, the Hon. Mark Banasiak MLC stated that "The current legislation, although it allows for tree thinning in both the Murray Valley and the Pilliga, makes it extremely difficult to do so, and even more difficult to sell the timber". Mr Banasiak stated further:

The Shooters, Fishers and Farmers want working forests not environmental dead zones that are useless to flora, fauna and humans alike. National parks threaten Australian wildlife – our flora and fauna. They threaten our biodiversity and are dormant tinderboxes waiting to destroy our regional and rural communities with wildfire.

3. In addition, Mr Banasiak stated:

Firestick ecology was being used by Indigenous land owners long before white settlement...By allowing these tree-thinning operations in national parks and replicate the firestick, which for thousands of years, managed our forests, we can eliminate all these threats while boosting the economies of rural and regional communities in New South Wales.

ISSUES CONSIDERED BY THE COMMITTEE

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

4. Racing Legislation Amendment Bill 2019

Date introduced	7 August 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The objects of the Bill are as follows:
 - (a) to amend the *Thoroughbred Racing Act 1996* and the *Harness Racing Act 2009* to permit Racing NSW and Harness Racing NSW to compel persons to provide information for the purposes of a special inquiry, but only where the use of the powers has been authorised by the Supreme Court,
 - (b) to provide an explicit power for Racing NSW to make rules in relation to horse racing,
 - (c) to amend the *Betting and Racing Act 1998* to permit the Commissioner of Police to make an order excluding a person from racecourses during race meetings if it is in the public interest to do so,
 - (d) to expand the circumstances in which a qualified person may be appointed to act as the Racing Appeals Tribunal (the Tribunal) and to allow the Tribunal to appoint expert assessors to assist the Tribunal in particular proceedings,
 - (e) to increase the maximum penalty for failing to comply with a notice requiring attendance before the Tribunal from \$550 to \$11,000 or imprisonment for 6 months (or both),
 - (f) to allow the Tribunal to make use of the services of the staff of any racing controlling body (being Racing NSW, Harness Racing NSW, the Greyhound Welfare and Integrity Commission and Greyhound Racing NSW),
 - (g) to permit the electronic service of documents under the *Racing Appeals Tribunal Act 1983*,
 - (h) to wind up the Tax Reduction Trust Fund and to pay any money standing to the credit of the Fund to Greyhound Racing NSW,
 - (i) to make other minor statute law amendments.

BACKGROUND

2. In his Second Reading Speech regarding the Bill, the Hon Kevin Anderson MP, Minister for Better Regulation, told Parliament that:

The Bill...significantly enhances regulation of thoroughbred and harness racing in New South Wales. Through the bill, the Government will continue its support for a competitive and sustainable racing industry in New South Wales with high standards of integrity.
3. The Bill empowers Racing NSW and Harness Racing NSW to compel unlicensed persons to attend special inquiries and provide relevant information where authorisation has been obtained from the Supreme Court. The Minister told Parliament that unlicensed and unregistered persons include racegoers, bettors, suppliers of unapproved or prohibited

substances, industry licence holders who hand in their licence to avoid disciplinary action and organised crime figures. He further stated that there are many threats to the integrity of the racing industry and that the compulsion powers are necessary to investigate them:

Threats to racing integrity come in many forms ranging from breach of riding and driving rules to serious issues such as the systemic use of performance enhancing substances and criminal interference in betting activities and race fixing. These matters can negatively affect industry growth, public confidence in the industry, animal welfare and wagering revenue...However, the lack of authority for racing stewards to question unlicensed industry participants has the potential to undermine the controlling bodies' ability to fully investigate threats to racing integrity. In recent years, persons relevant to investigations but not licensed by racing authorities have refused to cooperate with stewards inquiries...Over the past five years a number of investigations by both Racing NSW and Harness Racing NSW have been frustrated by the controlling bodies' inability to compel unlicensed persons to provide relevant information.

4. In 2013, the New South Wales Government commissioned a report on the powers of Racing NSW over unlicensed persons. The report, by David Armati of the Racing Appeals Tribunal, recommended that compulsion powers be granted to both Racing NSW and Harness Racing NSW. The report also recommended that criminal sanctions apply for non-compliance with a compulsion order, including a monetary penalty and term of imprisonment.⁹
5. The Bill would also amend the *Betting and Racing Act 1998* to permit the Commissioner of Police to make an order excluding a person from racecourses during race meetings if he or she is of the opinion it is necessary to do so in the public interest. Regarding these powers, the Minister told Parliament:

A further gap in the integrity controls for New South Wales racing is the inability of the Commissioner of the New South Wales Police Force to exercise powers to exclude persons from attending the State's racecourses in a manner similar to powers in respect of casinos pursuant to the Casino Control Act 1992...The extension of the Commissioner's exclusion powers to New South Wales racecourses would add another layer of protection to the State's racing industry, including by reducing opportunities for organised crime figures to exploit the industry for the purposes of certain criminal activities, such as money laundering.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to silence and right to appeal against self-incrimination

6. The Bill seeks to insert proposed section 27C into the *Harness Racing Act 2009*, and proposed section 29S into the *Thoroughbred Racing Act 1996*, to permit Harness Racing NSW and Racing NSW respectively to apply to the Supreme Court for an order to compel a person to attend a hearing of the special inquiry; to provide information at a hearing; and/or to otherwise provide information.

⁹ The Armati report was tabled in Parliament as an annexure to the Statutory Review of the Thoroughbred Racing Act 1996 and the Australian Jockey and Sydney Turf Clubs Merger Act 2010 (2014): https://www.parliament.nsw.gov.au/tp/files/8463/4501_001.pdf.

7. A special inquiry is an inquiry that Harness Racing NSW (under proposed section 27B) or Racing NSW (under proposed section 29R) decides to treat as a special inquiry if reasonably satisfied that the inquiry raises a threat to racing or harness racing.
8. Harness Racing NSW (under proposed section 27C) or Racing NSW (under proposed section 29S) could apply for the compulsion order only if it is reasonably satisfied that the person has relevant information but is unwilling to provide it to the special inquiry; or the person has relevant information and exceptional circumstances exist that require a compulsion power to be used without first asking the person to voluntarily provide the information. Exceptional circumstances include where there is 'a very high likelihood' that the information will be lost if the person is first asked to voluntarily comply with a request for information.
9. It would be an offence for a person to fail to comply with a requirement imposed by the compulsion power, punishable by a maximum penalty of 6 months imprisonment or a fine of \$11,000 or both.
10. The Bill also seeks to insert proposed section 27E(2) into the *Harness Racing Act 2009* and proposed section 29U(2) into the *Thoroughbred Racing Act 1996* to provide that a person is not excused from a requirement to provide information on the ground that it might incriminate the person.
11. By providing that people can be compelled to attend a hearing and provide information, and by providing that a person is not excused from the requirement to provide information on the ground that it might incriminate the person, the Bill impacts on the right to silence and the right against self-incrimination. It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her. For example, in criminal proceedings there is a general right to silence at common law and under section 89 of the *Evidence Act 1995*.¹⁰ Similarly, article 14 of the International Covenant on Civil and Political Rights provides that, in criminal proceedings, a person has a right 'not to be compelled to testify against himself or confess guilt'.
12. The Committee notes that there are some safeguards in relation to the compulsion orders. For example, any information provided is not admissible in evidence against the person in criminal, civil or disciplinary proceedings. The compelled person has the right to be represented by a lawyer, and the racing body is assisted in its proceedings by a legal practitioner of at least 7 years standing. Also, a person is not guilty of an offence unless warned that failure to comply is an offence. On the other hand, the person has no right of appeal against the initial granting of the application by the Supreme Court.

The Bill introduces powers for a person to be compelled to attend a special inquiry and provide information or face a penalty. A person is not excused from the requirement to provide the information on the ground that it may incriminate him or her. The Bill thereby impacts on the right to silence and the right against self-incrimination. The Committee notes that the Bill includes some safeguards including that the compelled information is not admissible in

¹⁰ The common law is set out in *Sanchez v R* [2009] NSWCCA 171; (2009) 196 A Crim R 472 at [48]-[52]. Section 89 of the *Evidence Act 1995* provides that, generally, an unfavourable inference must not be drawn if a person fails or refuses to answer a question in criminal proceedings.

evidence against the person in criminal, civil or disciplinary proceedings. The Committee also acknowledges that the powers are intended to assist to surmount existing hurdles in investigating threats to the integrity of the racing industry. Nonetheless, the right to silence and right against self-incrimination are well-established legal principles and the Committee refers the matter to Parliament to consider whether the Bill unduly trespasses on these rights.

Freedom of movement, procedural fairness and administrative review rights

13. The Bill seeks to insert Division 3 into Part 2 of the *Betting and Racing Act 1998* to authorise the Commissioner of Police to make an exclusion order against a person. The order would exclude the person from racecourses during race meetings if the Commissioner is of the opinion that it is necessary to do so in the public interest. Contravening an exclusion order would attract a maximum penalty of 12 months imprisonment or a fine of \$5,500 or both.
14. The above powers impact on the right to freedom of movement which is recognised by Articles 12 and 13 of the International Covenant on Civil and Political Rights.
15. The Committee acknowledges the Minister's comments in his Second Reading Speech (discussed above) that the powers are intended to protect the racing industry from exploitation by criminal elements. Further, proposed section 15D provides that a person who is subject to an order may appeal to the NSW Civil and Administrative Tribunal (NCAT) against the decision to make the order.
16. However, in practice, a person may experience difficulty challenging an exclusion order before NCAT. The Committee notes that under proposed section 15B(9), the Commissioner is not required to provide reasons for making the exclusion order if the giving of those reasons would disclose the existence or content of any criminal intelligence report or other criminal information. The Committee identifies that if a person does not know the reasons for which the order was made, he or she cannot respond to or challenge it in accordance with the principles of procedural fairness. Similarly, by providing that the Commissioner can exclude a person if s/he 'is of the opinion that it is necessary to do so in the public interest' the Bill provides the Commissioner with a vague and ill-defined power. Where the scope and content of a power is unclear, it is hard to challenge its exercise before an appeal body.

The Bill would allow the Police Commissioner to make an order excluding a person from racecourses during race meetings if the Commissioner thinks it is necessary to do so in the public interest. In doing so, the Bill impacts on the freedom of movement of affected persons. The Committee acknowledges that the provisions may assist in preventing criminal activity in the racing industry. Similarly, the Bill provides that an exclusion order may be appealed to NCAT. However, given that the Commissioner may, in certain circumstances, decline to give reasons for making an exclusion order, and given the breadth of the Commissioner's power to make such orders, a person may in practice find it difficult to challenge such a decision before NCAT. In the circumstances, the Committee draws these matters to the attention of Parliament to consider whether the provisions trespass unduly on the right to freedom of movement.

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

Commencement by proclamation

17. Clause 2 of the Bill provides that the Act commences by proclamation, except for Schedules 5 and 6 which commence on the date of assent. Schedules 5 and 6 relate to winding up the Tax Reduction Trust Fund and distributing the greyhound industry's share of revenue to Greyhound Racing NSW.

The Committees notes that the bulk of the Bill's provisions, dealing with compulsion orders, exclusion powers and the Racing Appeals Tribunal (Schedules 1–4), commence by proclamation. The Committee prefers legislation affecting individual rights and liberties to commence on assent or on a fixed date to provide certainty to affected persons. The Committee refers the matter to Parliament for consideration.

5. Repeal of Kosciuszko Wild Horse Heritage Legislation Bill 2019*

Date introduced	8 August 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 repeal the *Kosciuszko Wild Horse Heritage Act 2018* and dissolve the Wild Horse Community Advisory Panel.

BACKGROUND

2. Section 5(1) of the *Kosciuszko Wild Horse Heritage Act 2018* ('the Act'), requires the Chief Executive of the Office of the Environment and Heritage to cause a draft wild horse heritage management plan to be prepared for Kosciuszko National Park. Section 5(2) of the Act provides that the draft plan is to:
 - (a) identify the heritage value of sustainable wild horse populations within identified parts of the park, and
 - (b) set out how that heritage value will be protected while ensuring other environmental values of the park (including values identified in the plan of management for the park) are also maintained, and
 - (c) take into account the object of this Act, and
 - (d) take into account the objects of the National Parks and Wildlife Act 1974 and the matters that are required (by section 72AA of that Act) to be taken into consideration in the preparation of a plan of management, and
 - (e) include any other matter prescribed by the regulations.
3. Section 5 (3) of the Act provides that the Chief Executive is to seek the advice of the Wild Horse Community Advisory Panel constituted under Schedule 1 of the Act in the preparation of the draft plan.
4. In her Second Reading Speech to Parliament, the Hon. Penny Sharpe MLC stated:

This bill will repeal the Kosciuszko Wild Horse Heritage Act, reversing the Deputy Premier's legislation that placed horses above every other animal in the park. The Act put up barriers to managing the horse population.
5. Ms Sharpe also stated:

The damage being done to the park can no longer be ignored...nothing has happened as a result of the Kosciuszko Wild Horse Heritage Act 2018...Other than horses dying from starvation and poor health as a result of overpopulation – a terrible animal welfare outcome – there has been no reduction in numbers. Nothing has been done to remove horses from the park.

6. In addition, Ms Sharpe stated:

It is clear what needs to happen. If we are serious about looking after the water – it really is the birthplace of the Murray and Murrumbidgee rivers – and if we are serious about protecting this fragile alpine park, we must repeal the Act. We need to restore a proper plan to manage the horse in Kosciuszko National Park.

ISSUES CONSIDERED BY THE COMMITTEE

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

Compensation Rights

7. Clause 4 of the Bill provides for the dissolution of the Wild Horse Community Advisory Panel on the date of assent. It further provides that members of the Panel will cease to hold office from that date and are not entitled to compensation because of the loss of that office.
8. As above, the Panel is constituted under Schedule 1 of the Act. Its functions are:
 - (a) to provide advice to the Minister or the Chief Executive (if requested to do so) on any matter relating to the identification of the heritage value of, and the management of, sustainable wild horse populations within Kosciuszko National Park, and
 - (b) to provide advice to the Chief Executive on the preparation of a draft wild horse heritage management plan under Part 2 of this Act.
9. A member of the panel holds office for such period not exceeding four years as is specified in his or her instrument of appointment but is eligible, if otherwise qualified, for re-appointment. A member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.
10. A note on the NSW Office of Environment and Heritage website indicates that the Panel has not yet been convened and states that applications are currently being assessed for appointment to it.¹¹

The Bill provides for the dissolution of the Wild Horse Community Advisory Panel, that members of the Panel will cease to hold office from the date of assent, and that they will not be entitled to compensation because of the loss of that office. Currently, under the *Kosciuszko Wild Horse Heritage Act 2018*, members of the Panel can be appointed for terms of up to four years, with the possibility of re-appointment, and are entitled to be paid such remuneration as the Minister may determine.

¹¹ NSW Office of Environment and Heritage website:

<https://www.environment.nsw.gov.au/NPWS/AdvisoryCommittees.htm>, viewed 9 August 2019.

In short, a Panel member who lost office as a result of the Bill would also lose any corresponding remuneration to which he or she would otherwise have been entitled to cover the remainder of his or her term. By providing that the member would receive no compensation for the loss of this remuneration, the Bill thereby impacts on panel members' compensation rights.

The Committee understands that no Panel members currently exist to be affected by the Bill's provisions, as the Panel has not yet been established. Nonetheless, the Bill has potential to affect future members depending on any date of assent. The Committee refers the matter to Parliament to consider whether it is an undue trespass on the right of Panel members to compensation for loss of remuneration.

Part Two – Regulations

1. Ageing and Disability Commissioner Regulation 2019

Date published	LA: 30 July 2019 LC: 6 August 2019
Disallowance date	LA: 15 October 2019 LC: 22 October 2019
Minister responsible	The Hon. Gareth Ward MP
Portfolio	Families, Communities and Disability

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are as follows:
 - (a) to enable the Ageing and Disability Commissioner to delegate the Commissioner's functions to persons employed by Catholic Healthcare Limited,
 - (b) to enable the Commissioner to enter into information sharing arrangements with certain Commonwealth bodies such as the NDIS Quality and Safeguards Commission,
 - (c) to enable Official Community Visitors to monitor providers of accommodation services for adults with disability under the National Disability Insurance Scheme.
2. This Regulation is made under the *Ageing and Disability Commissioner Act 2019*, including sections 11, 14 (8) (paragraph (f) of the definition of relevant agency), 20 (paragraph (e) of the definition of service provider), 22 (1) (j) and 35 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to privacy

3. Clause 5 enables the Commissioner to enter into information sharing arrangements with the Aged Care Quality and Safety Commission, the National Disability Insurance Scheme Launch Transition Agency, and the NDIS Quality and Safeguards Commission.
4. This provision is for the purposes of section 14(8)(f) of the parent Act, which stipulates that the regulations may prescribe persons and bodies as a 'relevant agency' for an information sharing agreement.
5. Under this provision, the relevant information that may be shared includes information concerning a report under this Act; the safety, welfare or well-being of an adult with

disability or older adult; the abuse, neglect or exploitation of an adult with disability or older adult; any other matter prescribed by the regulations. Consequently, this type of information may contain sensitive health and medical records that may infringe on a person's right to privacy if shared.

The regulation permits the Ageing and Disability Commissioner to enter into information sharing arrangements with certain Commonwealth bodies. The relevant information that may be shared includes reports regarding the safety, welfare or well-being of an adult with a disability or older adult and any abuse, or neglect or exploitation of an adult with disability or older adult. It may also include information about any matter prescribed by the regulations. This may contain sensitive health and medical information about the individual concerned and may infringe on a person's privacy if shared. However, the Committee acknowledges the practical reasons for sharing this information with authorised Commonwealth bodies to carry out the functions of the Commissioner under the Act and to maintain the wellbeing of persons with disability and older adults. The Committee makes no further comment.

2. Apprenticeship and Traineeship Amendment Regulation 2019

Date published	LA: 30 July 2019 LC: 6 August 2019
Disallowance date	LA: 15 October 2019 LC: 22 October 2019
Minister responsible	The Hon. Geoff Lee MP
Portfolio	Skills and Tertiary Education

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Apprenticeship and Traineeship Regulation 2017* consequent on the enactment of the *Apprenticeship and Traineeship Amendment Act 2017*. In particular, the Regulation:
 - (a) enables the Commissioner for Vocational Training to require an applicant for recognition of qualifications or experience in a particular recognised trade vocation to provide certain information in connection with the application, and
 - (b) prescribes the requirements for the conduct of assessments by a registered training organisation for the purposes of determining whether a person has acquired the competencies of a particular recognised trade vocation, and
 - (c) provides for the issue of certificates of identification to conciliators and penalty notice officers authorised under the *Apprenticeship and Traineeship Act 2001*, and
 - (d) prescribes further requirements relating to the making of applications for the establishment of apprenticeships or traineeships by agents on behalf of employers, and
 - (e) increases (from \$550 to \$11,000) the maximum penalty that a court may impose on the agent of an employer for failing to comply with requirements related to the keeping and inspection of relevant training contracts and associated documentation, and
 - (f) prescribes the offences for which penalty notices may be issued under the *Apprenticeship and Traineeship Act 2001*, and the amounts payable under those penalty notices.

ISSUES CONSIDERED BY THE COMMITTEE

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

2. The Regulation amends the *Apprenticeship and Traineeship Regulation 2017* to increase the maximum penalty for an offence where an employer's agent does not comply with requirements relating to the keeping and inspection of relevant training contracts and associated documents. The current maximum penalty for this offence is \$550. The Regulation increases it to \$11,000.
3. The changes made by the Regulation are consequent on the enactment of the *Apprenticeship and Traineeship Amendment Act 2017*. In his Second Reading Speech for that Bill, The Hon. John Barilaro MP said the Bill would involve the first update of maximum penalties in the Act since 2001. Mr Barilaro noted that increasing the penalties under the Act would bring them 'into line with modern legislative frameworks of other government agencies'. He further stated that the changes would 'strengthen the New South Wales apprentice and trainee system by introducing a sanction for inappropriate behaviour.'

The Regulation significantly increases the maximum penalty for an offence where an employer's agent fails to comply with certain requirements relating to the keeping and inspection of training contracts and associated documents. Large increases in penalties can sometimes result in excessive punishment, where the penalty is not proportionate to the offence.

The Committee acknowledges that the penalty increase in this Regulation is related to broader increases in penalties in this area to make them more consistent with other similar frameworks. The Committee also notes that penalties in this area have not increased for a long time.

However, due to the significant increase in the maximum penalty for this offence from \$550 to \$11,000, the Committee refers this issue to Parliament for further consideration as to whether the proposed penalty is proportionate to the offence in question.

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*

4. As explained above, the Regulation increases the maximum penalty for an offence where an employer's agent does not comply with requirements relating to the keeping and inspection of relevant training contracts and associated documents from \$550 to \$11,000.
5. Subordinate legislation should only contain very minor offences with a low maximum penalty. Offences of a more serious nature, with a higher maximum penalty, should be dealt with in primary legislation. This is to ensure an appropriate level of parliamentary oversight.

6. 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 occurs¹².

The Regulation significantly increases the maximum penalty for an offence relating to the obligations of an employer's agent from \$550 to \$11,000. The Committee considers that it would be more appropriate to include an offence with a maximum penalty of this magnitude in primary legislation rather than subordinate legislation. This would foster a greater level of parliamentary oversight over the maximum penalty to be set. The Committee refers this issue to Parliament for further consideration.

¹² See general discussion of the limits to parliamentary oversight of subordinate legislation in ACT Standing Committee on Justice and Community Safety, 'Henry VIII clauses fact sheet' November 2011 pp2-3 at https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

3. Building and Construction Industry Security of Payment Amendment Regulation 2019

Date published	LA: 30 July 2019 LC: 6 August 2019
Disallowance date	LA: 15 October 2019 LC: 22 October 2019
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are as follows:
 - (a) to exempt owner occupier construction contracts from the operation of the Building and Construction Industry Security of Payment Act 1999 (the Act),
 - (b) to specify the offences with respect to retention money trust accounts that are executive liability offences,
 - (c) to specify the offences under the Act and the *Building and Construction Industry Security of Payment Regulation 2008* for which penalty notices may be issued and the amount of the penalty payable.

ISSUES CONSIDERED BY THE COMMITTEE

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

Liability of directors and managers for offences by corporation

2. The Regulation deems offences relating to the following issues under the *Building and Construction Industry Security of Payment Regulation 2008* to be executive liability offences:
 - requirement for retention money to be held in a trust account (clause 6(1))
 - unauthorised withdrawal from trust account (clause 8)
 - notification requirements relating to overdrawn trust accounts and closure of trust accounts (clauses 11 and 12)
 - record-keeping requirements in relation to trust accounts (clause 14)
 - requirement to comply with request for information from the Secretary (clause 15(3))

- providing false or misleading information to the Secretary (clause 17).
3. A person commits an executive liability offence if:
- a corporation commits the offence, and
 - the person is either:
 - a director, or
 - involved in the management of the corporation and in a position to influence the conduct of the corporation in relation to the commission of the offence, and
 - the person knows the offence (or an offence of a similar kind) would be, or is being, committed, or is recklessly indifferent, and does not take all reasonable steps to prevent or stop the commission of the offence.
4. The Committee notes that the prosecution does not have to prove the mental element of actual knowledge on the part of the accused director or manager. The prosecution only needs to prove that the person is recklessly indifferent about the offence being committed.
5. The executive liability provisions:
- provide a non-exhaustive list of what could be considered taking 'reasonable steps' for the purposes of these offences
 - state that the prosecution bears the legal burden of proving the elements of an executive liability offence, and
 - provide that the executive liability offence provisions apply whether or not the corporation is prosecuted for, or convicted of, the executive liability offence and do not affect the liability of the corporation for the offence (see proposed section 34D of the *Building and Construction Industry Security of Payment Act 1999*¹³).
6. The current maximum penalty for these offences is \$22,000.

The Regulation deems certain offences under the *Building and Construction Industry Security of Payment Regulation 2008* to be executive liability offences. This means that a director or certain managers of a corporation may be prosecuted for an offence committed by the corporation. The Committee notes that the prosecution is not required to prove actual knowledge of the offence on the part of the accused, only that the accused was recklessly indifferent about the offence.

However, the Committee acknowledges that the prosecution still bears the burden of proving the elements of an executive liability offence. Similarly, lower

¹³ Note that this section will be inserted into the *Building and Construction Industry Security of Payment Act 1999* by the *Building and Construction Industry Security of Payment Amendment Act 2018* and will commence on 21 October 2019.

thresholds for the mental element that must be proved to hold a defendant liable are not unusual in regulatory contexts to encourage compliance. Further, the offences deemed to be executive liability offences by the Regulation will not attract a custodial sentence, the maximum penalty being a \$22,000 fine. In the circumstances, the Committee makes no further comments.

4. Building Professionals Amendment (Insurance) Regulation 2019

Date published	LA: 30 July 2019 LC: 6 August 2019
Disallowance date	LA: 15 October 2019 LC: 22 October 2019
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovatio

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide that certain risks associated with cladding and the use, application or installation of cladding are not risks in respect of which an accredited certifier is required to be indemnified.

ISSUES CONSIDERED BY THE COMMITTEE

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

Consumer rights to make a claim for rectification or compensation

2. The Regulation amends the *Building Professionals Regulation 2007* so that a professional indemnity contract relating to an accredited certifier may provide that the cover does not apply to any claim made in relation to:
 - (a) cladding that does not comply with the requirements of the *Building Code of Australia*, an Australian Standard, or an Act or law of the Commonwealth, New South Wales or another State or Territory to the extent it applies to cladding, or
 - (b) cladding that is used, installed or applied to a building in way that does not comply with the requirements of the *Building Code of Australia*, an Australian Standard, or an Act or law of the Commonwealth, New South Wales or another State or Territory to the extent it applies to the use, installation or application of cladding.
3. This provision applies in relation to professional indemnity contracts providing cover for a period of not more than 12 months, starting on or before 30 June 2020.
4. The Minister for Better Regulation and Innovation issued a media release on 26 June 2019 explaining this change in more detail.¹⁴ The Minister highlights that to be accredited in New South Wales, certifiers must hold professional indemnity insurance without exclusions or conditions. In light of the Grenfell tower fire in London in 2017, advice to the NSW Government confirms that all professional indemnity insurance providers for

¹⁴ The Hon. Kevin Anderson MP, Minister for Better Regulation and Innovation, [Statement on NSW Certifiers Insurance](#), media release, 26 June 2019, viewed 19 July 2019.

certifiers in Australia will change policies entered into from July 2019. Policies will not cover certifiers for work relating to non-compliant and non-conforming cladding in building work.¹⁵

5. The Minister explains that the amendment has been made to allow the Building Professionals Board to accept insurance policies with conditions or exclusions. Otherwise, such policies would be non-compliant and would prevent certifiers from being accredited to carry out their services. Building professionals will still be required to carry out work that complies with New South Wales laws and other relevant requirements. Likewise, certifiers will need to ensure work they are certifying meets these same standards.¹⁶
6. The Minister made the following comments about the rationale for the change and the future of this issue:

The amendment is a short-term, urgent action to avoid a situation in which the unavailability of professional indemnity insurance prevents certifiers from operating, and pulls a hand brake on building and construction in NSW. The amendment will be removed in no later than 12 months, with the expectation that other reforms will improve the insurance market situation before then.

The NSW Government will closely monitor the situation to ensure that there are no adverse outcomes for consumers or certifiers from the change to professional indemnity insurance policy exclusions.¹⁷

The Regulation makes changes to the *Building Professionals Regulation 2007* to allow a professional indemnity contract covering a certifier to exclude cover for certain claims in relation to non-compliant cladding or the use, application or installation of cladding in a non-compliant way. The Committee acknowledges that this is intended to be a short-term change to ensure certifiers can continue their businesses and has been influenced by international events that have caused changes to the insurance market.

However, the Committee notes that this may impact on consumers who may make claims for rectification or compensation relating to the certification of cladding-related works. If insurance policies applying to certifiers do not cover these claims, consumers may have difficulty successfully making claims against certifiers, who may not have the capacity to fund them.

The Committee acknowledges the difficult tension between the rights of certifiers to continue working and the rights of consumers in relation to rectification or compensation claims. The Committee refers this issue to Parliament to consider where the public interest lies in appropriately balancing these rights.

¹⁵ The Hon. Kevin Anderson MP, Minister for Better Regulation and Innovation, [Statement on NSW Certifiers Insurance](#), media release, 26 June 2019, viewed 19 July 2019.

¹⁶ The Hon. Kevin Anderson MP, Minister for Better Regulation and Innovation, [Statement on NSW Certifiers Insurance](#), media release, 26 June 2019, viewed 19 July 2019.

¹⁷ The Hon. Kevin Anderson MP, Minister for Better Regulation and Innovation, [Statement on NSW Certifiers Insurance](#), media release, 26 June 2019, viewed 19 July 2019.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Exclusion of certain types of claims from insurance policies applying to certifiers

7. The Regulation amends the Building Professionals Regulation 2007 to allow professional indemnity contracts applying to certifiers to exclude certain claims in relation to non-compliant cladding, or the use, installation or application of cladding in a non-compliant way.
8. The section above contains more detail about this change and the background to it.

The Regulation amends the *Building Professionals Regulation 2007* to allow professional indemnity contracts applying to certifiers to exclude certain claims made in relation to non-compliant cladding or the use, installation or application of cladding in a non-compliant way. The Committee acknowledges that this change has been made to ensure certifiers can continue working. Existing laws would otherwise prevent certifiers who are covered by such insurance policies from being accredited to provide services.

However, the Committee notes the effect this change may have on the business community of certifiers in New South Wales and the flow on effect to the broader business community. If a consumer makes a successful claim against a certifier in relation to non-compliant cladding, the certifier will be uninsured for that claim and would presumably need to fund it themselves, which they may not be able to do. The Committee refers this issue to Parliament for further consideration.

5. Coal Mine Subsidence Compensation Amendment (Miscellaneous) Regulation 2019

Date published	LA: 30 July 2019 LC: 6 August 2019
Disallowance date	LA: 15 October 2019 LC: 22 October 2019
Minister responsible	The Hon. Kevin Anderson
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

- The objects of this Regulation are:
 - to amend the *Coal Mine Subsidence Compensation Act 2017* to continue for a further period of 3 months (ending on 30 September 2019) provisions of the repealed *Mine Subsidence Compensation Act 1961* relating to certificates of compliance and certificates of compensation claims paid, and
 - to amend the *Coal Mine Subsidence Compensation Regulation 2017* to specify the contributions to the Coal Mine Subsidence Compensation Fund that may be levied by the Chief Executive of Subsidence Advisory NSW on proprietors of certain coal mines.

ISSUES CONSIDERED BY THE 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

- The Regulation amends the *Coal Mine Subsidence Compensation Act 2017*. In particular, it updates savings and transitional provisions to extend the application of provisions of the repealed *Mine Subsidence Compensation Act 1961* from 30 June 2019 to 30 September 2019 that relate to certificates of compliance and certificates of compensation claims paid. 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.
- The Committee prefers changes to an Act to 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.¹⁸

The Regulation amends the *Coal Mine Subsidence Compensation Act 2017*, made possible by a Henry VIII clause in the Act. 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.

¹⁸ See discussion of Henry VIII clauses in ACT Standing Committee on Justice and Community Safety, 'Henry VIII clauses fact sheet' November 2011 at https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

6. Greyhound Racing Amendment (Transition Period) Regulation 2019

Date published	LA: 30 July 2019 LC: 6 August 2019
Disallowance date	LA: 15 October 2019 LC: 22 October 2019
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to extend, until 1 September 2019, the savings and transitional provisions of the Greyhound Racing Act 2017 relating to registration and to the GRNSW Racing Rules repealed by that Act. The transitional arrangement would otherwise end on 30 June 2019.
2. This Regulation is made under the *Greyhound Racing Act 2017*, including section 101 (the general regulation-making power) and clause 1 of Schedule 4.

ISSUES CONSIDERED BY THE 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

3. The Regulation amends the *Greyhound Racing Act 2017* by way of a Henry VIII clause contained in the Act.
4. 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 occurs¹⁹.

The Regulation amends the *Greyhound Racing Act 2017* by way of a Henry VIII clause contained in the Act. 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 draws this matter to the attention of the Parliament to consider whether the

¹⁹ 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.

objective of the Regulation could have been achieved by alternative or more effective means that subject amendments of the legislation to appropriate parliamentary oversight.

7. Public Finance and Audit Amendment (Financial Reporting and Auditing Exclusions) Regulation 2019

Date published	LA: 30 July 2019 LC: 6 August 2019
Disallowance date	LA: 15 October 2019 LC: 22 October 2019
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasury

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to exclude certain persons, groups of persons, bodies or entities from the operation of provisions relating to the preparation and auditing of separate financial reports.

ISSUES CONSIDERED BY THE 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

2. The Regulation amends the *Public Finance and Audit Act 1983*. In particular, it removes the Energy Corporation of New South Wales and the Residual Transport Corporation of New South Wales from the list of statutory bodies subject to particular financial reporting and auditing requirements under the Act. 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.
3. The Committee prefers changes to an Act to 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.²⁰

The Regulation amends the *Public Finance and Audit Act 1983*, made possible by a Henry VIII clause in the Act. The Committee prefers changes to an Act to be made by an amending Bill, not through subordinate legislation. If primary

²⁰ See discussion of Henry VIII clauses in ACT Standing Committee on Justice and Community Safety, 'Henry VIII clauses fact sheet' November 2011 at https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

legislation is changed by subordinate legislation it reduces parliamentary scrutiny of those changes. The Committee refers this matter to Parliament for further consideration.

8. Road Transport (Driver Licensing) Amendment (Release of Photographs to ASIO Regulation 2019

Date published	LA: 30 July 2019 LC: 6 August 2019
Disallowance date	LA: 15 October 2019 LC: 22 October 2019
Minister responsible	The Hon. Andrew Constance MP
Portfolio	Transport and Roads

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to extend the circumstances in which Roads and Maritime Services may release certain photographs (for example, photographs taken and provided for driver licence applications) to the Australian Security Intelligence Organisation for any purpose connected with the exercise of its functions under the Australian Security Intelligence Organisation Act 1979 of the Commonwealth.
2. Currently, the photographs may only be released for the purposes of the investigation of a terrorism offence under that Act. The Regulation also makes amendments consequential on the enactment of the *Road Transport and Other Legislation Amendment (Digital Driver Licences and Photo Cards) Act 2018*.

ISSUES CONSIDERED BY THE COMMITTEE

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

Privacy

3. At present, Roads and Maritime Services (RMS) can release a photograph, photographic image or other material contained in a database of photos to the Australian Security Intelligence Organisation (ASIO) for the purpose of investigating a terrorism offence within the meaning of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act).
4. The Regulation amends the *Roads Transport (Driver Licensing) Regulation 2017* to expand the circumstances in which RMS can release this material to ASIO to include any purpose connected with the exercise of ASIO's functions under the ASIO Act; not just for the purpose of investigating terrorism offences.
5. Release of personal information, such as photographs of individuals, from a New South Wales government agency to an intelligence organisation of the Commonwealth can impact on the privacy of affected individuals. Privacy laws and standards can differ between jurisdictions and in their application to different organisations or agencies.

6. Photographs collected by RMS have been collected for particular purposes, such as licensing purposes. Individuals who have their photograph recorded on RMS' database are likely to expect that this information will only be used for purposes associated with RMS' work. Individuals are unlikely to expect that their photograph would be provided to Commonwealth intelligence agencies such as ASIO. In addition, ASIO could seek information from RMS' databases on a case by case basis through other means, for example, via a warrant.
7. However, the Regulation contains some privacy safeguards. For example, the Director-General of ASIO must provide written authorisation to RMS in relation to the person in ASIO who is to receive the information. This authorised person must certify in writing that the material sought is reasonably necessary for ASIO to exercise its functions under the ASIO Act.
8. Clause 109(2) of the *Road Transport (Driver Licensing) Regulation 2017* also provides that any release of this kind of information must be in accordance with any protocol approved by the NSW Privacy Commissioner.

The Regulation expands the circumstances in which RMS can release photographs, photographic images or other material in a photo database to ASIO. The Committee notes that the changes in the Regulation would impact on the privacy of affected individuals. Many individuals would not anticipate that RMS would release their information for purposes unrelated to RMS' functions and, in particular, release that information to ASIO without a warrant. The Committee is also aware that privacy laws and standards can differ between jurisdictions and in their application to different organisations and agencies.

The Committee notes some privacy safeguards in the Regulation. For example, an authorised person from ASIO must certify in writing that the material requested is reasonably necessary for ASIO to exercise its functions. In addition, any release of information by RMS must accord with any protocol approved by the NSW Privacy Commissioner.

While the Committee acknowledges that privacy considerations must be appropriately balanced against national security concerns and public safety, the Committee refers the Regulation to Parliament for further consideration as to whether it unduly trespasses on the privacy rights of individuals.

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

9. As explained above, the Regulation amends the *Roads Transport (Driver Licensing) Regulation 2017* to expand the circumstances in which RMS can release a photograph, photographic image or other material contained in a database of photos to ASIO, without any requirement for a warrant.
10. The Committee considers that changes such as these, which have privacy implications for individuals should be dealt with in primary legislation. This is to ensure an appropriate level of parliamentary oversight.

11. 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 occurs²¹.

The Regulation broadens the circumstances under which RMS can release photographs, photographic images or other material in a photo database to ASIO, without the requirement for a warrant. The Committee prefers changes such as these, that have privacy implications for individuals, to be included in primary rather than subordinate legislation. This would foster a greater level of parliamentary oversight. The Committee refers this issue to Parliament for further consideration.

²¹ See general discussion of the limits to parliamentary oversight of subordinate legislation in ACT Standing Committee on Justice and Community Safety, 'Henry VIII clauses fact sheet' November 2011 pp2-3 at https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

9. Water Management (General) Amendment (Exemption) Regulation 2019

Date tabled	6 August 2019
Disallowance date	22 October 2019
Minister responsible	The Hon. Melinda Pavey MP
Portfolio	Water, Property and Housing

PURPOSE AND DESCRIPTION

1. The object of the Regulation is to enable the Minister administering the *Water Management Act 2000* to exempt public authorities who supply water to the public from the requirement under the Act to hold a water supply work approval to construct and use a water supply work. The Minister may only grant an exemption in time of drought, if satisfied the exemption is in the public interest. An exemption is for 12 months or another period (including an extended period) determined by the Minister.

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 in primary legislation

2. The Regulation amends the *Water Management (General) Regulation 2018* so the Minister may, on application, exempt a public authority that supplies water to the public from section 91B(1) of the *Water Management Act 2000*. That provision of the Act creates an offence relating to a person who constructs or uses a water supply work without approval. The maximum penalties for this offence are:
 - (a) \$2,002,000 for a corporation and, for a continuing offence, \$132,000 for each day the offence continues
 - (b) \$500,500 for any other case and, for a continuing offence, \$66,000 for each day the offence continues (see section 363B of the *Water Management Act 2000*).
3. The Minister can only grant the exemption if satisfied that conditions of drought exist and the exemption is in the public interest.
4. The Minister may impose any conditions on the exemption that the Minister considers appropriate. The Minister may also revoke an exemption for any reason the Minister considers appropriate.
5. The standard timeframe for an exemption is 12 months or such other timeframe set out in the notice. An exemption may also be extended on application to the Minister.

The Regulation provides that the Minister may, on application, exempt a public authority that supplies water to the public from a provision that creates an offence under the *Water Management Act 2000*. The Committee considers that matters involving the exemption from an offence in an Act which carries significant maximum monetary penalties should be dealt with in primary, not subordinate legislation. This is to ensure an appropriate level of parliamentary oversight.

The Committee notes that the Minister is only entitled to grant such an exemption if satisfied that conditions of drought exist and the exemption is in the public interest. The Committee also acknowledges that either House of Parliament can pass a resolution disallowing a statutory rule. Nevertheless, the Committee refers to Parliament for further consideration whether the objectives in the Regulation could be more effectively achieved through primary legislation.

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.