



Legislation Review Committee

Correspondence received in response to the Legislation Review Committee
Digest No. 11/57 – 25 March 2020



TABLE OF CONTENTS

<i>Better Regulation and Customer Service Legislation Amendment (Bushfire Relief) Bill 2020; Motor Accident Guidelines Version 5</i> - Letter from the Hon Victor Dominello MP, Minister for Customer Service – 30 April 2020.....	2
<i>Firearms and Weapons Legislation Amendment (Criminal Use)</i> - Letter from the Hon. David Elliot MP, Minister for Police and Emergency Services – 30 April 2020	4
<i>Evidence Amendment (Tendency and Coincidence) Bill 2020</i> - Letter from the Hon. Mark Speakman MP, Attorney General and Minister for Prevention of Domestic Violence – 11 June 2020	7
<i>Better Regulation Legislation Amendment Bill 2020; the Professional Standards Act 1994 – Notification pursuant to section 13 – the NSW Bar Association Professional Standards Scheme; the Property and Stock Agents Amendment Regulation 2019; and the Work Health and Safety Amendment (Traffic Control Work Training) Regulation 2019</i> - Letter from the Hon. Kevin Anderson MP, Minister for Innovation and Better Regulation – 8 October 2020	10



The Honourable Victor Dominello MP
Minister for Customer Service

Our reference: COR-01888-2020

Felicity Wilson MP
Chair
Legislation Review Committee

By email: legislation.review@parliament.nsw.gov.au

Dear Ms Wilson

Better Regulation and Customer Service Legislation Amendment (Bushfire Relief) Bill 2020 and Motor Accidents Guidelines Version 5

Thank you for the Legislation Review Committee's consideration of the *Better Regulation and Customer Service Legislation Amendment (Bushfire Relief) Bill 2020* (Bushfire Relief Bill) and the Motor Accidents Guidelines Version 5 and its comments.

Bushfire Relief Bill

I note the Committee's comments on the Bushfire Relief Bill, which received assent on 25 March 2020.

The Committee raised concerns about appropriate Parliamentary oversight of the powers to provide fee relief, the powers of the CEO of Service NSW (SNSW) and the expansion of SNSW's functions. The powers were drafted in consultation with the Parliamentary Counsel to provide relief during and after the bushfire crisis. The powers are broad to ensure the Government can deliver relief and respond quickly and effectively in other emergencies and unforeseen events in future. This capacity is particularly important given the current circumstances that we are experiencing with COVID-19.

The provision of fee relief will be subject to appropriate government approvals and oversight. The amendments provide greater consistency with other legislation in the portfolio and standardise the regulation making powers. In most principal Acts, there was already a regulation making power to either waive, reduce, postpone or refund fees. To ensure public disclosure and oversight of how the proposed fee waiver measures are implemented, SNSW will report on the type, number and dollar value of fees waived via its Annual Report.

The Bill does not give the CEO of SNSW any additional powers without approval from the Minister, delegation from another Minister or notice from a Government agency or agency head. The Minister can direct the CEO of SNSW to deliver functions relating to the delivery of Government services to the people of NSW. This will allow SNSW to deliver transactions and services when there is no agency owner to delegate or confer to. It is important, particularly in times of disaster and crisis, that SNSW can deliver support and other services to the people of NSW with minimal red tape.

As you have noted, the Bill also allows SNSW to deliver new functions where prescribed by regulation. This gives SNSW the flexibility it needs to quickly stand up new customer service functions which are not provided for in the Act, in response to future disasters and emergencies.

In summary, these amendments will provide the flexibility SNSW needs to respond to current and future disasters or emergencies and to support the people of NSW in times of need.

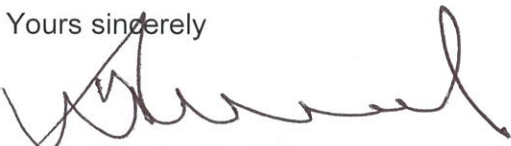
Motor Accident Guidelines Version 5

I note your comments on the impact of the Motor Accident Guidelines Version 5 on personal rights and liberties and the regulatory impact on the business community. In respect of each of the issues you raised, I comment as follows:

- Retrospectivity – Retrospective effect of the Guidelines is necessary to support delivery of the objectives of the primary legislation under which the Guidelines are made, the *Motor Accident Injuries Act 2017* which came into force in December 2017. The requirements for assessing the degree of permanent impairment resulting from an injury caused by a motor accident remain unchanged since the publication of the Motor Accident Guidelines Version 1.
- Privacy – Publication of decisions – I note the Committee’s comments that provisions for withholding confidential or sensitive information sufficiently safeguard the privacy of individuals.
- Privacy – Surveillance of claimants – I note the Committee’s comments that the limited circumstances in which an insurer can conduct surveillance sufficiently safeguard the privacy of individuals.
- Impact on business – Restrictions on the setting of insurance premiums – I note the Committee’s comment that the administrative requirements for insurers under the Guidelines contribute to the aims of the CTP scheme.
- Impact on business – Administrative burden – I note the Committee’s comment that the administrative requirements for insurers under the Guidelines contribute to the aims of the CTP scheme.

Please contact Cheri Boxoen, Principal Policy Officer, Office of the Secretary, Department of Customer Service cheri.boxoen@customerservice.nsw.gov.au, if you wish to discuss any aspect of this matter.

Yours sincerely



Victor Dominello MP
Minister for Customer Service

Date: 30.4.20



Felicity Wilson MP
Chair
Legislation Review Committee
Parliament House
SYDNEY NSW 2000

Dear Ms Wilson

Thank you for your correspondence.

The provisions contained in the *Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020* are balanced provisions targeting serious criminal activity, not the legitimate firearms regime. These provisions are the end result of formal reviews by both the NSW Ombudsman and the National Firearms and Weapons Policy Working Group. These provisions are appropriate and reasonable in the circumstances.

Self-incrimination and the right to silence

This Government respects the principle of law regarding self-incrimination. This principle should not impede the investigations of the NSW Police Force which are conducted according to law and in good faith.

The *Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020* creates new offences prohibiting the unauthorised manufacture of firearms and firearms parts, including precursors such digital blueprints and computer software.

The corresponding new seizure powers would allow a police officer to seize any firearm, firearm part or firearm precursor including a computer or data storage device that the officer suspects on reasonable grounds while have been used in the commission of an offence, or may provide evidence of the commission of an offence.

The NSW Police Force has no current power in the *Firearms Act 1996* or in the *Weapons Prohibition Act 1998* to require an owner or person with knowledge of such a computer or date storage device to disclose passwords or codes to access this electronic equipment which has been lawfully seized.

In this day and age, this is akin to not being able to open a filing cabinet or drawer which has been lawfully seized. Police can seize physical items under warrant, charge anyone hindering a search and use reasonable force to, for example, break open a cabinet or safe. In contrast, in the case of electronic devices, where the vast majority of information is kept in this technological age, access to relevant evidence can be easily thwarted.

Encryption or security features are used by criminals to hide evidence relating to illicit activities. While there is some limited technical capability to bypass encryption on seized devices, the wait for specialist units within police to conduct an initial examination can be months.

The proposed power allowing a police officer to direct a person responsible for a thing that has been seized to provide information including a password to enable the officer to access information held in the thing, is entirely reasonable to support enforcement of the new offence of taking part in unauthorised manufacture of a firearm, and the power to seize computer and data storage devices which a police officer reasonably believes may contain evidence of the commission of an offence. The intent of these provisions may be defeated if the police officer did not have this power.

The Government believes the proposal does not trespass on a person's right to silence. The power forms part of the lawful execution of search and investigative processes. The legislation does not permit law enforcement officers to use these powers to obtain information that does not directly relate to the express purposes in the Act.

The offence being investigated, that requires such a power, is a serious offence. It carries a degree of severity that warrants clear and effective investigative powers by law enforcement officers. The powers can only be used as reasonably necessary to investigate the illegal manufacturing of firearms offence. Law enforcement will still be required to complete all other investigative steps in identifying any evidence.

Search powers

The Bill intends to clarify this aspect of a Firearms Prohibition Order (FPO) search to make the parameters of the search powers clear.

The Ombudsman acknowledged the logic of the search powers including other persons present on the premises: *... no ancillary search power ... may present a difficulty for police if a person, who is not the subject of an FPO, hides a firearm, firearm part or ammunition on their person in an effort to prevent police from finding the item at the premises.*

The report went on to note, *A number of submissions made to this review argued that the NSW Police Force should be provided with ancillary search powers... Police require sufficient powers to support the execution of an FPO search in a manner that enables the identification of firearms, firearm parts and ammunition that may be on the premises. We consider that this balance is best achieved by giving police the same powers to search other people present at the premises as they would have when executing a search warrant¹.*

The search powers are reasonable and proportionate in the circumstances.

Commencement by proclamation

The operational implementation of the provisions will take time.

Those provisions relating to reviews of Firearms Prohibition Orders, in particular, have significant resource implications for the NSW Police Force. The NSW Police need to get this right and delaying commencement will ensure that all the changes necessary to policies, procedures and training will take place; as well as allocation of resources to give effect to the Bill.

¹ Page 78: https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0016/37132/Review-of-police-use-of-firearms-prohibition-order-search-powers.pdf

The commencement will occur as soon as possible and as such commencement by proclamation is reasonable in the circumstances.

I trust this is of assistance to the Committee

Yours sincerely

A handwritten signature in black ink, appearing to read 'D Elliott', written in a cursive style.

The Hon. David Elliott MP
Minister for Police and Emergency Services

30 April 2020



Mark Speakman
Attorney General
Minister for the Prevention of Domestic Violence

IM20/11658
EAP20/5741

Ms Felicity Wilson MP
Chair
Legislation Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000



By email: Legislation.Review@parliament.nsw.gov.au

Dear Ms Wilson *Felicity*

Legislation Review Digest No.11/57 regarding the Evidence Amendment (Tendency and Coincidence) Bill 2020

Thank you for your letter dated 30 March 2020 concerning the consideration of the Evidence Amendment (Tendency and Coincidence) Bill 2020 ('the Bill') by the Legislative Review Committee. I note that the Bill passed Parliament on 3 June 2020 and received assent on 10 June 2020. I welcome the Committee's close consideration of the Bill and the opportunity to respond to the issues discussed in the Digest.

I note the central issue raised by the Committee regarding the Bill, namely whether an accused person's right to a fair trial is adequately protected.

Specifically, the Committee raised the following concerns that are connected to this issue:

1. The amendments proposed in the Bill may impact on an accused person's right to be presumed innocent until guilt is proved beyond reasonable doubt;
2. The amendments proposed in the Bill may increase the risk that evidence that is unfairly prejudicial to an accused person will be admitted; and
3. It is likely that evidence will be admitted that would have been excluded if not for the amendments proposed in the Bill.

The amendments proposed in the Bill do not alter the burden or standard of proof in relation to criminal offences, and do not remove the presumption of innocence. For matters in which tendency or coincidence evidence is led, the prosecution will still be required to prove that an accused person is guilty beyond reasonable doubt; an accused person will still be presumed innocent until proven guilty; and juries will continue to be directed in relation to these matters and the use to which they can properly put tendency and coincidence evidence. The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) specifically considered the concern that the admission of tendency or coincidence evidence could give rise to a risk of unfair prejudice and found that the risk of unfair prejudice to an accused person arising from tendency and coincidence evidence, "has been overstated and that, in fact, this risk is minimal."¹

¹ Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report, Parts III-VI ('Criminal Justice Report'), p 627-628

As acknowledged by the Committee, there are a number of safeguards that will apply in the context of the admission of either tendency or coincidence evidence. First, the evidence must be relevant (s 56, *Evidence Act 1995*). Second, the evidence must have significant probative value (ss 97(1)(b) and 98(1)(b), *Evidence Act 1995*). Third, under the amended test in s 101 of the *Evidence Act 1995* proposed in the Bill, the probative value of the evidence must outweigh the danger of unfair prejudice to the defendant. The existing discretion and exclusion in ss 135 and 137 of the *Evidence Act 1995* respectively, which provide for the exclusion of evidence in some circumstances, will also remain and are unchanged by the Bill.

The Bill introduces a presumption of significant probative value in relation to some tendency evidence in child sexual assault prosecutions. Importantly, the Bill proposes a presumption that can be rebutted, thus ensuring that judicial discretion can still be exercised. A court may determine that tendency evidence does not have significant probative value if satisfied that there are sufficient grounds to do so.

The proposed s 97A(5) sets out a number of matters that may not be taken into account by a court when determining that there are sufficient grounds to find that tendency evidence does not have significant probative value. These matters were drawn from the findings of the Royal Commission, and recent case law, and seek to dispel myths and misconceptions that have traditionally prevented courts from finding that certain tendency evidence in child sexual offence matters has significant probative value. Again, judicial discretion has been incorporated into this provision and a court may still consider one or more of the matters enumerated in s 97A(5), if the court considers that there are exceptional circumstances in relation to those matters to warrant them being taken into account.

In relation to the amendment proposed to s 101 of the *Evidence Act 1995*, this amendment addresses an asymmetry in the provision, which is currently weighted more heavily towards the exclusion of tendency and coincidence evidence. The Royal Commission did not find this asymmetry to be justified:

...we do not accept the current unequal weighting of the test in favour of exclusion. That is, it is not clear why the probative value of the evidence should be required to 'substantially outweigh' the risk of unfair prejudice.

We agree with Professor Hamer's submission in response to the Consultation Paper in this regard, that:

The asymmetry in s 101, skewing the test towards exclusion, appears unjustifiable...²

I note that the amendment proposed to s 101 was not opposed by the majority of legal stakeholders.

The amendments proposed in the Bill aim to increase the admission of tendency and coincidence evidence and, in particular, the admission of tendency evidence in child sexual assault matters. Strong justification for this course, with the appropriate safeguards provided for in the Bill, is found in the findings of the Royal Commission, that:

- tendency and coincidence evidence is important in child sexual abuse matters³;
- there have been unjust outcomes in the form of unwarranted acquittals in institutional sexual abuse prosecutions as a consequence of the exclusion of relevant evidence in the form of tendency and coincidence evidence and, further, these unjust outcomes were not limited to prosecutions in relation to child sexual abuse in an institutional context;⁴

² Criminal Justice Report, p 640.

³ Criminal Justice Report, pp 628-633.

⁴ Criminal Justice Report, p 629.

- the risk of unfair prejudice to the accused arising from tendency and coincidence evidence has been overstated and that, in fact, this risk is minimal;⁵
- tendency and coincidence evidence has been unnecessarily excluded from criminal proceedings;⁶
- excluding tendency and coincidence evidence unfairly risks undermining the credibility and reliability of the evidence given by some complainants in the eyes of the jury;⁷
- the application of the rules to exclude tendency and coincidence evidence unnecessarily prevents joint trials being held;⁸ and
- the law needs to change.⁹

The Bill strikes the right balance by recognising the findings of the Royal Commission and implementing its recommendations, but also incorporating judicial discretion and appropriate thresholds in order to ensure that an accused person's right to a fair trial is maintained.

What happened to survivors of child sexual abuse, including those who came forward and bravely shared their stories with the Royal Commission, cannot be undone, but this Bill is one of many ways that the NSW Government is seeking to continue to support victims and survivors of child sexual abuse and recognise their advocacy for meaningful change in response to the Royal Commission.

Thank you for taking the time to write.

Yours sincerely



Mark Speakman

11/06/2020

⁵ Criminal Justice Report, pp 627-628.

⁶ Criminal Justice Report, p 634.

⁷ Criminal Justice Report, p 634

⁸ Criminal Justice Report, p 634.

⁹ Criminal Justice Report, p 635.



The Honourable Kevin Anderson MP
Minister for Better Regulation and Innovation

Our reference: COR-01764-2020
Your reference: LAC20/007.02

Ms Felicity Wilson MP
Chair
Legislation Review Committee
By email: legislation.review@parliament.nsw.gov.au

Dear Ms Wilson

A handwritten signature in black ink, appearing to read 'Felicity'.

Thank you for your correspondence about Legislation Review Digest No. 11/57.

I have considered the Committee's comments in Digest No. 11/57 concerning the Better Regulation Legislation Amendment Bill 2020, the *Professional Standards Act 1994*, the Property and Stock Agents Amendment Regulation 2019 and the Work Health and Safety Amendment (Traffic Control Work Training) Regulation 2019. The Department's response, as summarised below, is also attached (Tab A – Department Response).

Better Regulation Legislation Amendment Bill 2020

The Department acknowledges the Committee's comments towards strict liability offences. It is agreed that there is a public safety interest in ensuring vehicles are only repaired by those with appropriate qualifications. Accordingly, the amendments are proportional to the potential public safety risks and are necessary to deter noncompliance.

The Department notes the Committee's preference for legislation to commence on a fixed date or on assent, particularly if proposed amendments affect the rights of individuals. Although this approach may provide greater clarity to affected parties, specifying a commencement date may be unfeasible in circumstances where many stakeholders are involved, and the process of developing regulations is complex. A flexible start date enables comprehensive stakeholder consultation to be conducted and the implementation of necessary administrative arrangements prior to commencement.

The Department also notes the Committee's view on the potential for search warrant provisions to trespass on personal rights and liberties. It is considered that as the Bill still provides for an opportunity for Police to be present where appropriate, ensures there are safeguards in place to protect an individual's right to privacy and to be free from arbitrary search and seizure.

The Department notes the Committee's comments in relation to the *Pawnbrokers and Second-hand Dealers Act 1996* and the *Gas and Electricity (Consumer Safety) Act 2017*. The Committee has correctly identified that requiring an amendment regulation to grant an exemption may be time-consuming, costly and burdensome for the businesses concerned and the government. Given the frequency and short-term nature of these exemptions it is considered appropriate for these to be determined by the Secretary.

Professional Standards Act 1994

The Department notes the Committee's views that consumers rights may be limited by the \$1.5 million cap on the occupational liability of barristers covered by the NSW Bar Association Professional Standards scheme. As observed by the Committee, the scheme makes provisions to safeguard the rights of consumers by implementing detailed risk management strategies and subjecting activities to independent monitoring by the statutory Professional Standards Council of New South Wales. The rights of consumers of professional services provided by the members of the NSW Bar Association are therefore adequately protected through insurance, proper risk management and independent scrutiny.

Property and Stock Agents Amendment Regulation 2019

The Department agrees with the Committee's comments that the provisions are intended to promote disclosure of matters that may affect the value of a property and are necessary to encourage compliance.

Work Health and Safety Amendment (Traffic Control Work Training) Regulation 2019

The Department acknowledges the Committee's comments towards strict liability offences. It is agreed that strict liability offences promote compliance and strengthen offence provisions. This is necessary to achieve the objectives of the Work Health and Safety Amendment (Traffic Control Work Training) Regulation 2019.

For a detailed summary of the Department's response, please refer to **Tab A**.

Thank you for bringing these matters to my attention and the valuable ongoing contribution the Committee makes in ensuring robust legislation in NSW.

Yours sincerely



Kevin Anderson MP
Minister for Better Regulation and Innovation

Date: 8.10.20

Encl. Department response