



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. ANTI-DISCRIMINATION AMENDMENT (COMPLAINTS HANDLING) BILL 2020*

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

Right to protection against discrimination I

The Bill seeks to amend the *Anti-Discrimination Act 1977* (the Act) by providing that the President of the Anti-Discrimination Board must decline a complaint on certain grounds. This includes the current grounds under which the President may decline a complaint under section 89B(2), and additional grounds. One of the additional grounds upon which the President would be required to decline a complaint is where the respondent to a complaint has a cognitive impairment, and it is reasonably expected that the cognitive impairment was a significant contributing factor to the conduct that is the subject of the complaint.

By providing that the President must decline complaints of this kind, the Bill may impact on the right to protection against discrimination. However, the Committee acknowledges that the Bill seeks to balance the right to be protected from discrimination with appropriate protections for people with disability. The Committee refers the provision to Parliament to assess whether it is reasonable and proportionate in the circumstances.

Right to protection against discrimination II

The Bill also provides that the President must decline a complaint where one or more of the respondents is an individual who has made a public statement to which the complaint relates and, at the time of making the statement, was a resident of another State or Territory, and was not in NSW.

By requiring the President to decline complaints of this kind, the Bill may stop people who have experienced discrimination from seeking appropriate recourse. The Bill may thereby impact on the right to protection against discrimination. The Committee acknowledges that the provision is intended to prevent people 'forum shopping' and lodging complaints in NSW when they do not meet the relevant thresholds of other States and Territories, with attendant budgetary impacts for NSW. The Committee refers the matter to Parliament to consider whether the Bill unduly limits access to recourse under the Act.

Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

Excludes administrative review

The Bill seeks to remove section 93A of the Act which requires the President to refer a complaint he or she has declined during an investigation to the NSW Civil and Administrative Tribunal if requested by the complainant. Removing this requirement may limit procedural fairness and impact on access to administrative review.

The Committee notes that the Act already limits administrative review rights in respect of decisions by the President to decline complaints. Currently, under section 89B the President can decline an initial complaint made to him or her and such a decision is not reviewable by the

Tribunal. However, if a complaint has been initially accepted by the President, and is later declined during an investigation, this decision is reviewable pursuant to section 93A.

Removing section 93A from the Act would remove the inconsistency in review rights for decisions to decline an initial complaint versus decisions to decline a complaint during an investigation. However, there may be reasons for this inconsistency. The Act provides the President with much broader, discretionary grounds to decline a complaint during an investigation as compared with a decision to decline an initial complaint. Given the more discretionary grounds by which the President can decline a complaint during an investigation the right to administrative review may be of greater significance for decisions under this section of the Act.

In the circumstances, the Committee refers the matter to Parliament to consider whether the Bill unduly limits access to review of decisions made under the Act.

2. BETTER REGULATION AND CUSTOMER SERVICE LEGISLATION AMENDMENT (BUSHFIRE RELIEF) BILL 2020

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

Matters that should be set by Parliament I

The Bill amends various Acts and regulations to provide for the regulations to enable fees payable under those Acts or regulations to be waived, reduced, postponed or refunded where the person paying the fee, or who has paid the fee, is experiencing financial hardship or where special circumstances, such as a natural disaster exist.

The Committee notes that the powers to waive, reduce, postpone or refund fees are drafted widely so that a relevant authority may do so if satisfied it is appropriate because the payer is experiencing "financial hardship" or "special circumstances". These terms are not defined although "a natural disaster or recovery from a natural disaster" is listed as an example of "special circumstances". The Bill may thereby grant the relevant authorities a wide and ill-defined power to waive, reduce, postpone or refund fees according to unclear criteria.

The Committee generally prefers such powers to be drafted with sufficient precision so that Parliament has an appropriate level of oversight over their scope and content. Further, the Committee would prefer the powers to be included in primary, not subordinate legislation, to foster an appropriate level of parliamentary oversight should there be further amendments. Notwithstanding these considerations, the Committee acknowledges that the Bill is intended to allow sufficient flexibility to provide appropriate relief for people affected by the NSW bushfires. In the circumstances, the Committee makes no further comment.

Matters that should be set by Parliament II

The Bill expands the functions of the Chief Executive Officer of Service NSW to include "any other functions relating to the delivery of Government services to the people of NSW as directed by the Minister". It also enables the regulations to prescribe additional customer service functions for which the CEO has responsibility.

The Committee would prefer significant matters such as the functions of a CEO of a government agency to be clearly defined in primary legislation to ensure an appropriate level of parliamentary oversight. The Committee acknowledges that the provisions require any new functions to relate to the delivery of government services or customer service. Further, they are

intended to promote the efficient delivery of government services and transactions in NSW, and they may allow administrative flexibility to respond to customer needs. The Committee refers the provisions to Parliament to consider whether they involve an appropriate delegation of legislative powers.

3. BETTER REGULATION LEGISLATION AMENDMENT BILL 2020

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

Strict liability

The Bill amends the *Motor Dealers and Repairers Act 2013* so that it is a strict liability offence for a transport service vehicle owner to enter into an agreement for repair work to be done on the vehicle by a person who is not a licensed motor vehicle repairer. It is also a strict liability offence for a transport service vehicle owner to permit a person who does not have the appropriate qualifications to do repair work on the vehicle. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability.

However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. It further notes that the purpose of the amendments is to address a regulatory gap so that the requirements that currently apply to taxis, hire cars and Uber vehicles also apply to other small businesses that provide similar services directly to consumers; and that there is a public safety interest in ensuring that such vehicles are only repaired by those with the appropriate qualifications. Given these circumstances, as well as the maximum penalty being limited to \$2,200, the Committee makes no further comment.

Execution of search warrants

The Bill amends seven Acts to remove the requirement that a police officer must accompany the authorised officer executing a search warrant to investigate a concern that the relevant Act or regulation is being contravened. The amendments still allow a police officer to attend the search as though they were named in the warrant.

This may have the effect of reducing some of the safeguards that ensure that search warrants are executed appropriately, by people with the requisite skill and expertise, and in a way that the person subject to the search warrant knows who may attend the execution of the search warrant. The amendments may thereby impact on the right to privacy, and to be free from arbitrary search and seizure.

However, the Committee notes that these amendments replicate existing search warrant provisions in other Fair Trading legislation and are designed to ensure searches and associated enforcement action are carried out in a timely manner to protect consumers. Further, it notes that a police officer is not prevented from accompanying an authorised officer executing a search warrant where it is deemed necessary or appropriate. The amendments will also free police time so that police do not have to attend searches unnecessarily, and they have the support of the NSW Police Force. In addition, requirements to obtain the search warrants from an independent third party before they can be executed will remain. Owing to these considerations and safeguards, the committee makes no further comment.

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

Commencement by proclamation

Parts of the Bill commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes in this case that a flexible start date may assist with the implementation of necessary administrative arrangements including those around the granting of exemptions from the *Gas and Electricity (Consumer Safety) Act 2017*, and changes to how unclaimed moneys are dealt with. Given these circumstances, and the fact that the majority of the Bill commences on assent, the Committee makes no further comment.

Power to grant exemptions from operation of Act

The Bill amends the *Pawnbrokers and Second-hand Dealers Act 1996* and the *Gas and Electricity (Consumer Safety) Act 2017* to empower the Secretary to grant exemptions from the operation of certain provisions of those Acts.

If an exemption is to be made to the operation of an Act, the Committee prefers this to be done by amending regulation. This is to foster an appropriate level of parliamentary oversight over the exemptions granted. Regulations must be tabled in Parliament and are subject to disallowance under the *Interpretation Act 1987*. There is no such requirement for exemptions granted by the Secretary.

The Committee notes that proposed section 4A of the *Pawnbrokers and Second-hand Dealers Act 1996* would require that details of any exemptions granted be published as soon as practicable. The Committee also acknowledges that requiring an amending regulation to grant an exemption may be time-consuming, costly and burdensome for the businesses concerned and the government. However, the Committee refers the matter to Parliament to consider whether the delegation of legislative power is appropriate in the circumstances.

Matters that should be in primary legislation

The Bill amends section 171 of the *Motor Dealers and Repairers Act 2013* so that the cap on the amount of compensation that may be paid per claim from the Motor Dealers and Repairers Compensation Fund is no longer provided for in the Act, but will instead be prescribed by the regulations.

The Committee generally prefers provisions which affect personal rights to be located in primary legislation to foster an appropriate level of parliamentary oversight. The Committee notes that the majority of claims from the fund are for relatively small amounts of money and that imposing a cap may assist the fund in paying numerous small claims without it being drained. The Committee also notes that locating the cap in the regulation may offer greater flexibility to ensure the cap is commensurate with consumer needs and the fund's capacity. In addition, any amending regulations would have to be tabled in Parliament and would be subject to disallowance under the *Interpretation Act 1987*. Given these considerations, the Committee makes no further comment.

4. CIVIL REMEDIES FOR SERIOUS INVASIONS OF PRIVACY BILL 2020*

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

Cause of action extinguishes upon death

The Bill creates a new statutory cause of action for serious invasion of privacy and provides that such a cause of action does not survive for the benefit of the plaintiff's estate or against the defendant's estate. The right of the aggrieved party to compensation may be affected as a result.

The Committee notes that this was recommended by the Australian Law Reform Commission in its 2014 report, *Serious Invasions of Privacy in the Digital Era* to reflect the fact that 'privacy is a matter of personal sensibility'. In NSW, the *Law Reform (Miscellaneous Provisions) Act 1944* provides that causes of action survive against or for the benefit of the person's estate. However, it provides for some exceptions, including for defamation. In the circumstances, the Committee makes no further comment.

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

Commencement by proclamation

The Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that a flexible start date may assist with the implementation of necessary administrative arrangements so that the Courts, the NSW Civil and Administrative Tribunal and the Privacy Commissioner can handle a new category of matters and complaints. In the circumstances, the Committee makes no further comment.

5. EVIDENCE AMENDMENT (TENDENCY AND COINCIDENCE) BILL 2020

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

Right to a fair trial

The Bill makes a number of changes to the *Evidence Act 1995* concerning the admissibility of tendency and coincidence evidence. These changes may impact the defendant's right to a fair trial, including the right to be presumed innocent unless guilt is proved beyond reasonable doubt. They are likely to allow evidence to be admitted that would have been excluded were it not for the changes, with the possibility that some such evidence could be unfairly prejudicial to a defendant in a given case.

For example, the Bill introduces a presumption that certain tendency evidence has significant probative value. It also relaxes the test about the circumstances under which tendency and coincidence evidence can be used against a defendant. The amended test would require that the probative value of the evidence outweighs the danger of unfair prejudice to the defendant. Under the current test, it is necessary that the probative value of the evidence *substantially* outweighs any prejudicial effect on the defendant before it can be used.

The Committee notes that some of the Bill's changes around tendency evidence apply only to criminal proceedings concerning a child sexual offence. Further, the Bill's changes implement recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. The Royal Commission noted the particular evidentiary hurdles that may be faced by victims of child sexual offences in court proceedings; that tendency and coincidence evidence plays an especially important role in such proceedings; and that the existing rules unnecessarily preclude evidence being admitted in criminal proceedings, and joint trials being held.

The Bill also includes some safeguards. The presumption that certain tendency evidence is of significant probative value is rebuttable. The Court also retains its discretion in proposed section

97A so that it may consider the matters that are generally excluded when determining whether tendency evidence has significant probative value, if the court considers that there are exceptional circumstances. In addition, even though the test has been relaxed, tendency or coincidence evidence cannot be used against a defendant unless its probative value outweighs any possible prejudicial effect to the defendant.

Notwithstanding the above considerations and safeguards, the changes may increase the risk that evidence unfairly prejudicial to a defendant is admitted in a particular case. Accordingly, the Committee refers to Parliament the matter of whether the defendant's right to a fair trial is adequately protected by the Bill.

6. FIREARMS AND WEAPONS LEGISLATION AMENDMENT (CRIMINAL USE) BILL 2020

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

Self-incrimination and the right to silence

The Bill proposes to create specific offences of knowingly taking part in the manufacture of firearms, firearm parts and prohibited weapons under the *Firearms Act 1996* and the *Weapons Prohibition Act 1998*. As a consequence, police are authorised to seize any firearm, prohibited weapon, parts or precursors (including computer software), and may direct a person who is in charge of, or responsible for, the item seized to provide assistance or information. It will be an offence to fail to comply.

The power to demand information on pain of penalty may impact on the privilege 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. The Committee recognises that the power contained in the Bill is intended to help suppress the manufacture of illegal firearms in NSW with attendant benefits to the community. The Committee refers the power to Parliament to consider whether its impact on the privilege against self-incrimination is reasonable in the circumstances.

Risk of arbitrary search

The Bill proposes to expand the search powers connected to a firearms prohibition order (FPO), which is made against a person who, in the opinion of the Commissioner of Police, is not fit to possess a firearm. The existing power to search without a warrant applies to a person who is the subject of an FPO (the FPO subject), their premises and vehicles. As police are not required to obtain a warrant from an independent judicial officer to conduct such searches this may increase the risk of arbitrary search, impacting on the right to privacy and personal physical integrity.

The Bill expands the existing power by allowing police who enter the premises of the FPO subject to search any person present who is reasonably suspected of possessing a firearm, part or ammunition. This may potentially include persons who are not the subject of an FPO and are not involved in criminal activities. Similarly, the Bill allows any vehicle on the premises to be searched – it would no longer have to be controlled or managed by the FPO subject. The Bill may thereby compound the possible increased risk of arbitrary searches taking place.

The Committee acknowledges the intention behind the amendments is to prevent concealment or disposal of evidence, assisting to remove illegal firearms from the community. Further, searches are subject to reasonableness requirements. The Committee refers the expanded search powers to Parliament to consider whether they are reasonable and proportionate in the circumstances.

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

The Bill provides that the Act will commence by proclamation. The Committee prefers that an Act commences on a fixed date or on assent, as this provides certainty to anyone affected by its provisions. This is particularly the case with Bills such as this one which affect police powers and personal rights and liberties. The Committee acknowledges that there may be practical reasons for imposing a flexible starting date, to allow for police training or other operational arrangements. The Committee refers the matter to Parliament to consider whether commencement on proclamation is reasonable in the circumstances.

7. LOCAL GOVERNMENT AMENDMENT (DISQUALIFICATION FROM CIVIC OFFICE) BILL 2020*

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA*Right to stand for public office*

The Bill proposes to disqualify real estate agents and property developers from holding the office of mayor or councillor on a local council or holding a similar position on a county council. This may impact on the right to stand for elected public office. However, the Committee notes that the Bill is intended to prevent corruption in the property and planning decisions made by local councils, and to ensure that local council representatives act for the benefit of the community. Further, there are other categories of person already disqualified from holding “civic office” under the *Local Government Act 1993*, including certain categories of person whose profession has the potential to conflict with their role as a councillor. For example, judges of any court are so excluded. In the circumstances, the Committee makes no further comment.

Retrospectivity

The Bill proposes to disqualify real estate agents and property developers from holding “civic office” under the *Local Government Act 1993*. Further, it provides that if on the commencement of these changes a real estate agent or property developer holds a “civic office”, the person is not disqualified from holding that office for the balance of the person’s term of office, or for the period of 6 months (whichever is the shorter period). The changes thereby have the potential to have some retrospective effect. If they came into force during a period when affected councillors had more than a 6 month balance on their term of office, they would lose their right to remain in that office and serve out their term.

The Committee generally comments on retrospectivity as it runs counter to the rule of law principle that people are entitled to know the law to which they are subject at any given time. This is particularly the case where a Bill seeks to retrospectively remove rights or impose obligations. The Committee acknowledges the corruption prevention objectives of the Bill but refers this retrospectivity to Parliament to consider whether it is reasonable in the circumstances.

8. WATER MANAGEMENT AMENDMENT (WATER RIGHTS TRANSPARENCY) BILL 2020*

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

Under the *Water Management Act 2000* a person may apply to the Minister for a water access licence which entitles the holder to specified shares in available water within a specified water management area. The Act also requires the Minister to keep a Water Licence Register (Access

Register) and certain matters relating to a water access licence must be recorded on the Access Register including any general dealing in the licence.

The Bill seeks to amend the Act to provide for information recorded in the Access Register to be made publicly available through an electronic search facility, and so that searches could be performed by entering the name of a natural person.

By allowing information recorded in the Access Register to be made publicly available, including information that is attached to the name of a person, the Bill may impact on the privacy rights of affected persons. However, the Committee notes that similar searches can already be performed in NSW in respect of real property. Further, by increasing the amount of publicly available information about water entitlements the proposed changes are intended to promote transparency and public trust in NSW's water management system. The Committee refers these matters to Parliament to consider whether the possible privacy impacts are reasonable in the circumstances.

Retrospectivity

The Bill would increase the amount of information that people and companies need to provide when making an application for a water access licence under section 61(1) of the *Water Management Act 2000*. This information includes the applicant's name, address and contact details, and details of any existing interests in access licences held by the applicant. These requirements would operate retrospectively. That is, those who already held water access licences on the day on which the proposed Act commenced would have to provide the additional information to the Minister or risk having their water access licence cancelled.

The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to him or her at any given time. In this case, a person could have his or her existing water access licence cancelled if he or she did not wish to comply with retrospectively imposed requirements relating to that licence. The Committee notes that the proposed retrospective changes are intended to promote transparency and public trust in NSW's water management system. The Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

PART TWO – REGULATIONS

1. HEAVY VEHICLE (ADOPTION OF NATIONAL LAW) AMENDMENT (PENALTIES) REGULATION 2020

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

Delegation of legislative powers

The Regulation amends the *Heavy Vehicle (Adoption of National Law) Regulation 2013* to ensure national consistency in the application of heavy vehicle penalties relating to fatigue offences. It commences on the commencement of Part 3 of the *Heavy Vehicle National Law and Other Legislation Amendment Act 2019* of Queensland.

The Committee prefers penalties to be included in primary, not subordinate legislation to foster an appropriate level of parliamentary oversight. It also notes that national schemes for the harmonisation of legislation, such as the Heavy Vehicle National Law, have the potential to inappropriately delegate the legislative powers of the Parliaments in participating jurisdictions.

However, the penalties set down in the Regulation are relatively minor, and not custodial. Further, in seeking to harmonise legislation across jurisdictions, the Heavy Vehicle National Law is intended to promote public safety, industry productivity, and efficiency in the road transport of goods and passengers by heavy vehicles. The scheme also allows for some variation between jurisdictions. In the circumstances, the Committee makes no further comment.

2. LOCAL LAND SERVICES AMENDMENT (ELECTIONS) REGULATION 2019

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

Right to stand for election or appointment as a member of local board

The Regulation tightens the eligibility criteria for membership of a local board of a Land Services region. A person is ineligible if he or she has been bankrupt in the last 15 years, whereas bankruptcy usually lasts for three years. Further, a person is ineligible if he or she has been convicted of an offence punishable by 12 months imprisonment or more, and there does not appear to be any time limit during which this provision is applicable. This differs from other legislation as regards seriousness of disqualifying offence and timeframes.

The Committee acknowledges the importance of Land Service board members being persons of good character and having a record of sound financial management skills. However, it refers to Parliament the question of whether the eligibility criteria are too restrictive in the circumstances.

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

Significant matters in subordinate legislation

The Regulation provides for the powers of the Land and Environment Court in determining an election dispute concerning local board elections. It also stipulates that the Court is not bound by the rules of evidence when considering such disputes. The Committee prefers significant matters, such as the powers to be conferred on a Court, to be located in primary rather than subordinate legislation to foster an appropriate level of parliamentary oversight. The Committee acknowledges that there may be benefits to the Land and Environment Court adopting a more flexible approach when obtaining relevant information in relation to an election dispute. However, it refers these provisions to Parliament to consider whether they would be more appropriately located in primary legislation.

3. MOTOR ACCIDENT GUIDELINES VERSION 5

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

Retrospectivity

The *Motor Accident Guidelines – Version 5* generally apply to motor accidents occurring on or after 1 December 2017 despite having been published on 20 December 2019. They accordingly have some retrospective effect. The Committee will usually comment about retrospectivity as it runs counter to the rule of law principle that a person is entitled to know the law that applies to him or her at any given time. The Committee notes in particular that the Guidelines apply retrospectively to the way in which the degree of permanent impairment resulting from an injury caused by a motor accident is to be assessed, and may therefore affect the rights of claimants to compensation. Accordingly, the Committee refers the matter to Parliament.

Privacy – publication of decisions

Section 7.50 of the *Motor Accident Injuries Act 2017* empowers the State Insurance Regulatory Authority to publish the decisions of merit reviewers and claims assessors under the Act. Part 7 of the Guidelines outlines which decisions may be published. The publication of decisions may reveal the names of claimants, details of accidents, and injuries sustained which has privacy implications for the individuals involved. However, the Committee acknowledges that publishing decisions may facilitate transparency and accountability in decision making, and also improve claims management, insurer decision making, and so minimise disputes. It also notes that the Dispute Resolution Service may withhold details of a decision where it includes information of a confidential or sensitive nature. Given these considerations, the Committee makes no further comment.

Privacy – surveillance of claimants

The Guidelines set out the circumstances under which insurers can investigate claimants by means of surveillance. Surveillance investigations, including the use of video surveillance, may interfere with the privacy of claimants. However, the Committee notes that surveillance may only occur in particular circumstances, namely where there is evidence that an aspect of the claim is exaggerated, misleading or inconsistent. In addition, the Guidelines limit surveillance to public areas or where individuals can be seen by members of the public. Inducement, entrapment or trespass is not permitted. There are also requirements designed to protect children from unnecessary video surveillance. Further, the Committee acknowledges the public interest in ensuring that fraudulent claims are not successful. Accordingly, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA*Restrictions on the setting of insurance premiums for third party policies*

Part 1 of the Guidelines provides for the regulation of insurance premiums, with SIRA able to reject premiums it believes are excessive or inadequate or if they do not conform to the Guidelines. This may interfere with the autonomy of insurance companies when setting prices for their insurance products. However, the Committee notes that the Guidelines relate to the scheme of compulsory third party insurance established under the *Motor Accident Injuries Act 2017* relating to the death of, or injury to, people as a result of motor accidents in NSW. There is accordingly a public interest in ensuring that premiums are affordable and the scheme is sustainable. It further notes that risk-based pricing is permitted, within certain limits. In the circumstances, the Committee makes no further comment.

Administrative burden – business plans

The Guidelines set out the requirements for the business plans, data and self-assessment reports that a licensed insurer must prepare each year. This may impose an administrative burden on insurers. However, the Committee notes that these requirements are designed to help achieve the objects of the *Motor Accident Injuries Act 2017* which include the early resolution of motor accident claims and the quick, cost effective and just resolution of disputes, as well as ensuring fair market practices. In the circumstances, the Committee makes no further comment.

4. **PROFESSIONAL STANDARDS ACT 1994 – NOTIFICATION PURSUANT TO SECTION 13 – THE NEW SOUTH WALES BAR ASSOCIATION PROFESSIONAL STANDARDS SCHEME**

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

Consumer rights – limited liability

The NSW Bar Association (NSWBA) Professional Standards scheme limits the occupational liability of barristers covered by the scheme to a maximum of \$1.5 million. It may thereby limit the consumer rights of people who bring occupational liability actions against barristers.

However, the Committee notes that the scheme makes provision for consumers by stipulating that the barristers must have occupational liability insurance cover for a minimum of \$1.5 million to take advantage of the limited liability provisions. Further, the NSWBA has developed a detailed list of the risk management strategies intended to be implemented in respect of its members and the means by which those strategies are intended to be implemented. The scheme thereby seeks to strike a balance between consumer rights and the commercial viability of practising as a barrister in NSW, protecting consumers through insurance and risk management, not unlimited liability. The Committee also notes that unlimited liability may only be an effective consumer protection strategy if all barristers concerned had significant assets. In the circumstances, the Committee makes no further comment.

5. PROPERTY STOCK AND BUSINESS AGENTS AMENDMENT REGULATION 2019

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

The Regulation sets down the material facts that an agent under the *Property, Stock and Business Agents Act 2002* must disclose when inducing a person to enter into any contract or arrangement. Failure to disclose would be an offence regardless of whether it is intentional, if the agent knows of the material facts, or ought reasonably to know. That is, the prosecution does not have to establish that the agent intentionally failed to disclose the material fact or that s/he knew of the material fact – only that s/he ought reasonably to have known. The maximum penalty for the offence is a \$22,000 fine.

The Committee will generally comment where significant penalties can be imposed without a requirement to establish actual knowledge on the part of the accused, noting the common law principle that the mental element of an offence is relevant to the imposition of liability. Nonetheless, the Committee notes that such provisions are not uncommon in regulatory settings to encourage compliance and strengthen offence provisions. In this case, the provisions are intended to promote disclosure of matters that may affect the value of a property, and the prosecution must prove they are matters about which the agent should reasonably have known. Given these considerations, and the fact that no custodial penalty applies, the Committee makes no further comment.

6. WORK HEALTH AND SAFETY AMENDMENT (TRAFFIC CONTROL WORK TRAINING) REGULATION 2019

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

The Regulation introduces several strict liability offences. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mental element of an offence is relevant to imposition of liability. However, the Committee notes that strict liability offences are relatively common in regulatory settings to promote compliance and strengthen offence provisions. In this instance, the offences relate to obligations placed on employers and duties of their employees in relation to the health and safety of those employees.

The Committee notes that the maximum penalty for a body corporate of an \$18,000 fine is reasonably high for an offence created by Regulation. However, the maximum penalty for an individual is a \$3,600 fine and no custodial penalties apply. In the circumstances, the Committee makes no further comments.

Part One – Bills

1. Anti-Discrimination Amendment (Complaints Handling) Bill 2020*

Date introduced	27 February 2020
House introduced	Legislative Council
Member responsible	The Hon. Mark Latham MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to make further provision with respect to the declining of certain complaints by the President of the Anti-Discrimination Board and to remove the requirement for the President to refer certain declined complaints to the Civil and Administrative Tribunal (the Tribunal).

BACKGROUND

2. In the second reading speech, Mr Latham stated that there is a risk that the *Anti-Discrimination Act 1977* will be misused:

The risk...with the Anti-Discrimination Act is one of misuse. If it is too legalistic, too open to vexatious complaints, it can be exploited by political activists for the wrong purpose. It can be used for personal feuds and political campaigns, rather than justice and the fair treatment of citizens. This Parliament needs to be vigilant in protecting the Act's integrity. We must ensure that anti-discrimination provisions are not abused, that activists do not use them as a blunt instrument for personal financial gain or vengeance, or for political purposes trying to silence those who simply hold views with which they disagree. Such activism would not only be morally wrong but also represent a misallocation of scarce resources in the New South Wales legal system.

3. The *Anti-Discrimination Act 1977* (the Act) is an Act to render unlawful, racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons.
4. The Act defines unlawful discrimination, and provides an avenue for complaints to be made when it is alleged that a person has contravened a provision of the Act.
5. The Act establishes the Anti-Discrimination Board, made up of five members, including a President (section 71).
6. Complaints are made by being lodged with the President, who makes an initial determination of whether or not the complaint is to be accepted or declined, in whole or in part (section 89B(1)). If a complaint is declined at this stage, this decision is not reviewable by the Tribunal (section 89B(4)).

7. The President is obliged to investigate each complaint that has been accepted (section 90 (1)). The President is able to decline the complaint at any stage during the investigation (section 92).
8. If the President declines a complaint during the investigation, the complainant may write to the President and require the President to refer the complaint to the Tribunal (section 93A).
9. At any stage after the complaint has been accepted, the President can seek to resolve the complaint by conciliation (section 91A).
10. The President is able to refer complaints to the Tribunal if he or she is of the view the complaint cannot be resolved by conciliation, if conciliation has been unsuccessful, if he or she is of the view it should be referred to the Tribunal or if all parties wish for it to be referred (section 93C).
11. The Tribunal may dismiss the complaint, or find it substantiated in whole or in part. If it is found to be substantiated, it may order the respondent to pay damages, undertake other redress action, or decline to take further action (section 108).
12. The Act sets out the circumstances under which the President may decline a complaint in the first instance (section 89B(2)(a-e)). These are if:
 - (a) no part of the conduct complained of could amount to a contravention of a provision of the Act or the regulations, or
 - (b) the whole or part of the conduct complained of occurred more than 12 months before the making of the complaint, or
 - (c) the conduct complained of could amount to a contravention of a provision of the Act for which a specific penalty is imposed, or
 - (d) in the case of a vilification complaint, it fails to satisfy the requirements of section 88, or
 - (e) the President is not satisfied that the complaint was made by or on behalf of the complainant named in the complaint.
13. The Act also provides the President with the discretion to decline a complaint during the investigation (section 92(1)(a)). This can occur if the President is satisfied that:
 - i. the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance, or
 - ii. the conduct alleged, or part of the conduct alleged, if proven, would not disclose the contravention of a provision of this Act or the regulations, or
 - iii. the nature of the conduct alleged is such that further action by the President in relation to the complaint, or any part of the complaint, is not warranted, or
 - iv. another more appropriate remedy has been, is being, or should be, pursued in relation to the complaint or part of the complaint, or
 - v. the subject-matter of the complaint has been, is being, or should be, dealt with by another person or body, or
 - vi. the respondent has taken appropriate steps to remedy or redress the conduct, or part of the conduct, complained of, or
 - vii. it is not in the public interest to take any further action in respect of the complaint or any part of the complaint

14. In addition, a complaint can be declined if the President is satisfied that for any other reason no further action should be taken in respect of the complaint, or part of the complaint (section 92(1)(b)).

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to protection against discrimination I

15. Schedule 1[3] and [4] of the Bill seeks to amend the Act by providing that the President must decline a complaint on certain grounds. This includes the current grounds under which the President may decline a complaint under section 89B(2), and the following additional grounds:

- (a) the President is of the opinion that the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance,
- (b) the President is of the opinion there is another more appropriate remedy that should be pursued in relation to the complaint or part of the complaint,
- (c) the subject-matter of the complaint has been dealt with by the President, an authority of the State or the Commonwealth,
- (d) the President is of the opinion that the subject-matter of the complaint may be more effectively or conveniently dealt with by an authority of the State or the Commonwealth,
- (e) one or more of the respondents is an individual who has made a public statement to which the complaint relates and, at the time of making the statement, was—
 - i. a resident of another State or Territory, and
 - ii. unless otherwise established by the complainant, not in New South Wales,
- (f) the complaint falls within an exception to the unlawful discrimination concerned,
- (g) the respondent has a cognitive impairment and it is reasonably expected that the cognitive impairment was a significant contributing factor to the conduct that is the subject of the complaint.

16. In his second reading speech, Mr Latham stated that:

Under Section 89 it requires complaints to be lodged in writing and they need not demonstrate a prima facie case. Section 89B (2) limits the president's powers to decline complaints to matters more than 12 months old; those outside the scope of the Act; where someone has falsely lodged a complaint on behalf of someone else; and in vilification cases where the person making the complaint does not have the characteristic allegedly being vilified.

17. Mr Latham also provided specific commentary regarding the Bill's proposed change to require the President to decline a complaint where the respondent is cognitively impaired, and it is reasonably expected that the cognitive impairment was a significant contributing factor to the conduct that is the subject of the complaint. Mr Latham referred to a case where a complaint had been made against a respondent, Mr John Sunol, who had experienced brain damage following a car accident:

Sunol has used social media to rant about gays in a random and incoherent fashion befitting his level of incapacity... Scores of complaints have been lodged against Sunol... This is what the New South Wales legal system has become: a cruel and bizarre forum where political campaigners can pursue intellectually disabled people for comments with zero social and political impact.

The Bill seeks to amend the *Anti-Discrimination Act 1977* (the Act) by providing that the President of the Anti-Discrimination Board must decline a complaint on certain grounds. This includes the current grounds under which the President may decline a complaint under section 89B(2), and additional grounds. One of the additional grounds upon which the President would be required to decline a complaint is where the respondent to a complaint has a cognitive impairment, and it is reasonably expected that the cognitive impairment was a significant contributing factor to the conduct that is the subject of the complaint.

By providing that the President must decline complaints of this kind, the Bill may impact on the right to protection against discrimination. However, the Committee acknowledges that the Bill seeks to balance the right to be protected from discrimination with appropriate protections for people with disability. The Committee refers the provision to Parliament to assess whether it is reasonable and proportionate in the circumstances.

Right to protection against discrimination II

18. As noted, Schedule 1[4] of the Bill would also require the President to decline a complaint where one or more of the respondents is an individual who has made a public statement to which the complaint relates and, at the time of making the statement, the respondent was a resident of another State or Territory, and was not in NSW.
19. Mr Latham referred to an example where 'homosexual vilification complaints' had been lodged in NSW against a blogger who lives in Queensland. Mr Latham stated:

Individuals allegedly offending on social or traditional media should be pursued under the laws of their home State or Territory. New South Wales should not be a soft touch for forum shopping, dragging in interstate cases against respondents because the threshold for complaint acceptance in our State has been set too low. We should not be dedicating parts of the New South Wales Government's legal budget to what someone in Perth, Brisbane or Hobart has said on Facebook.

The Bill also provides that the President must decline a complaint where one or more of the respondents is an individual who has made a public statement to which the complaint relates and, at the time of making the statement, was a resident of another State or Territory, and was not in NSW.

By requiring the President to decline complaints of this kind, the Bill may stop people who have experienced discrimination from seeking appropriate recourse. The Bill may thereby impact on the right to protection against discrimination. The Committee acknowledges that the provision is intended to prevent people 'forum shopping' and lodging complaints in NSW when they do not meet the relevant thresholds of other States and Territories, with attendant budgetary impacts for NSW. The Committee refers the matter to Parliament to consider whether the Bill unduly limits access to recourse under the Act.

Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

Excludes administrative review

20. Schedule 1[11] of the Bill seeks to remove a provision in the Act (section 93A) that requires the President to refer a complaint that has been declined during an investigation to the Tribunal, if requested by the complainant.
21. On this proposed amendment, Mr Latham told Parliament that:

Under section 93A once the president has discontinued an investigation the complainant may, within 21 days, require the president, by notice in writing, to refer the complaint to the tribunal. That is in effect an appeal process to the New South Wales Civil and Administrative Tribunal [NCAT]. This is a second bite of the cherry, eating up scarce resources in the New South Wales legal system at a time when court backlogs are long and getting longer.
22. Mr Latham also referred to the different administrative review rights that apply in respect of an initial complaint that has been declined by the President, and a complaint that the President declines during an investigation:

Under section 89B (4) a decision by the Anti-Discrimination Board to decline a complaint in whole or in part is not reviewable by the tribunal, yet a decision to discontinue an investigation is reviewable. A clear inconsistency.
23. Under section 89B(1) of the Act, the President is to determine whether or not a complaint made to him/her is to be accepted or declined. As previously noted, section 89B(2)(a-e) sets down the grounds on which the President may decline such a complaint. Further, section 89(4) provides that such a decision is not reviewable by the Tribunal.
24. However, if a complaint has been initially accepted by the President, but is declined during an investigation, this decision is reviewable because section 93A of the Act provides that the complainant may, within 21 days, require the President to refer the complaint to the Tribunal. As previously noted, section 92(1) sets down the grounds on which the President may decline a complaint during an investigation.
25. The grounds for declining a complaint during an investigation, as set out in section 92(1) are significantly broader and more discretionary than the grounds for declining a complaint in the first instance (section 89B). For example, section 92(1)(b) provides that a complaint can be declined if "the President is satisfied that for any other reason no further action should be taken". This broad power to decline a complaint is not available for decisions made under section 89B, to decline a complaint in the first instance.

The Bill seeks to remove section 93A of the Act which requires the President to refer a complaint he or she has declined during an investigation to the NSW Civil and Administrative Tribunal if requested by the complainant. Removing this requirement may limit procedural fairness and impact on access to administrative review.

The Committee notes that the Act already limits administrative review rights in respect of decisions by the President to decline complaints. Currently, under section 89B the President can decline an initial complaint made to him or her and such a decision is not reviewable by the Tribunal. However, if a complaint has

been initially accepted by the President, and is later declined during an investigation, this decision is reviewable pursuant to section 93A.

Removing section 93A from the Act would remove the inconsistency in review rights for decisions to decline an initial complaint versus decisions to decline a complaint during an investigation. However, there may be reasons for this inconsistency. The Act provides the President with much broader, discretionary grounds to decline a complaint during an investigation as compared with a decision to decline an initial complaint. Given the more discretionary grounds by which the President can decline a complaint during an investigation the right to administrative review may be of greater significance for decisions under this section of the Act.

In the circumstances, the Committee refers the matter to Parliament to consider whether the Bill unduly limits access to review of decisions made under the Act.

2. Better Regulation and Customer Service Legislation Amendment (Bushfire Relief) Bill 2020

Date introduced	4 March 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The object of this Bill is to—
 - (a) make amendments to certain Acts administered by the Minister for Better Regulation and Innovation to—
 - (i) provide for the regulations to enable fees payable or paid under those Acts or regulations under those Acts to be waived, reduced, postponed or refunded (wholly or in part) where the person paying the fee, or who has paid the fee, is experiencing financial hardship or where special circumstances, such as a natural disaster, exist, and
 - (ii) validate any waiver, reduction, postponement or refund of fees that occurred in the period starting 18 July 2019 and ending immediately before the commencement of the proposed Act, and
 - (b) amend the regulations under those Acts to allow the Secretary (or equivalent) of the relevant Department to waive, reduce, postpone or refund (wholly or in part) those fees, and
 - (c) amend the *Service NSW (One-stop Access to Government Services) Act 2013* to—
 - (i) enable the Chief Executive Officer of Service NSW (CEO) and members of staff of Service NSW to waive, reduce, postpone or refund fees (wholly or in part) or make certain payments on behalf of a person or class of persons when a special circumstances declaration is published, and
 - (ii) validate any waiver, reduction, postponement or refund of fees that occurred in the period starting 18 July 2019 and ending immediately before the commencement of the proposed Act.

BACKGROUND

2. In the second reading speech, the Hon. Victor Dominello MP, Minister for Customer Service provided background regarding the Bill:

This bill makes important amendments to provide fee relief for people affected by disasters like the current bushfire crisis. The impact of the bushfires in New South Wales has been catastrophic. Over 2,500 homes and 250 facilities and their contents have been destroyed. A further 1000 homes and 200 facilities have received significant damage.

3. The Minister told Parliament that the Bill would make fee-waiving simpler for the various government agencies involved, by creating more consistent processes:

The aim of the Bill is to make the process of waiving fees simpler for the various government agencies involved through more consistent processes with Service NSW as the front door. The bill also harmonises 14 legislative schemes within the Better Regulation and Innovation portfolio. Schedule 1 makes amendments to laws that regulate associations, cooperatives and over 800,000 home builders, property agents, motor dealers and other professionals. The amendments... allow the regulations to provide for relief by inserting a consistent power to waive, reduce, refund or postpone fees in each of the 14 schemes. The secretary will be able to use this power to provide relief in special circumstances and in response to financial hardship.

4. The Minister also provided the following further detail:

The bill will provide a consistent power for all four forms of fee relief. It will simplify administration and provide equity across the 14 schemes, ensuring access to targeted relief when it is needed most. The bill will support the current commitment to replace important business documents free of charge. It will also allow for reductions, refunds and postponements. If someone needs to renew their licence but cannot meet the application deadline, the bill will allow the fee to be reduced.

5. In addition, the Minister explained that the Bill will further enable Service NSW to deliver government services and transactions in NSW:

The amendments [in schedule 2] will clarify the power of Service NSW to waive, reduce, postpone and refund fees on behalf of government agencies during special circumstances, which include a declared natural disaster or state of emergency. The amendments will also enable the customer service functions, which detail the functions that Service NSW performs, to be prescribed by regulation. This means that Service NSW can stand up new functions, programs and services that support customers. The amendments will further enable Service NSW to deliver transactions and services on behalf of the Government where there is no clear government agency owner.

ISSUES CONSIDERED BY THE COMMITTEE

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

Matters that should be set by Parliament I

6. Schedule 1 of the Bill amends various Acts and regulations to provide for the regulations to enable fees payable under those Acts or regulations to be waived, reduced, postponed or refunded in whole or in part where the person paying the fee, or who has paid the fee, is experiencing financial hardship or where special circumstances, such as a natural disaster exist.
7. The powers to waive, reduce, postpone or refund the fees are drafted widely. Schedule 1 provides that the relevant authorities "may waive, reduce, postpone or refund, in whole or part, a fee payable or paid...if satisfied that it is appropriate because (a) the person who is to pay or has paid the fee is suffering from financial hardship, or (b) special circumstances exist". A note under each provision that confers the power also

states that an example of "special circumstances" is "circumstances involving a natural disaster or recovery from natural disaster".

The Bill amends various Acts and regulations to provide for the regulations to enable fees payable under those Acts or regulations to be waived, reduced, postponed or refunded where the person paying the fee, or who has paid the fee, is experiencing financial hardship or where special circumstances, such as a natural disaster exist.

The Committee notes that the powers to waive, reduce, postpone or refund fees are drafted widely so that a relevant authority may do so if satisfied it is appropriate because the payer is experiencing "financial hardship" or "special circumstances". These terms are not defined although "a natural disaster or recovery from a natural disaster" is listed as an example of "special circumstances". The Bill may thereby grant the relevant authorities a wide and ill-defined power to waive, reduce, postpone or refund fees according to unclear criteria.

The Committee generally prefers such powers to be drafted with sufficient precision so that Parliament has an appropriate level of oversight over their scope and content. Further, the Committee would prefer the powers to be included in primary, not subordinate legislation, to foster an appropriate level of parliamentary oversight should there be further amendments. Notwithstanding these considerations, the Committee acknowledges that the Bill is intended to allow sufficient flexibility to provide appropriate relief for people affected by the NSW bushfires. In the circumstances, the Committee makes no further comment.

Matters that should be set by Parliament II

8. Schedule 2[1] of the Bill amends the *Service NSW (One-stop Access to Government Services) Act 2013* (Service NSW Act) to expand the functions of the Chief Executive Officer (CEO) of Service NSW to include "any other functions relating to the delivery of Government services to the people of New South Wales, as directed by the Minister".
9. Schedule 2[2] of the Bill amends the Service NSW Act to enable the regulations to prescribe additional customer service functions for which the CEO has responsibility.
10. Currently, section 4 of the Service NSW Act provides that the CEO's functions are:
 - the customer service functions delegated to or otherwise conferred on the CEO under the Service NSW Act or any other Act,
 - any other function conferred or imposed on the CEO by or under the Service NSW Act or any other Act.
11. Section 3 of the Service NSW Act provides that a "function" includes a power, authority or duty.
12. As noted above, the Minister stated in the second reading speech that the amendments in Schedule 2 will further enable Service NSW to deliver government services and transactions in NSW. The Minister told Parliament:

Service NSW has been an outstanding success story of the New South Wales Government. Since it was established in 2013, it has gone from strength to strength. Service NSW is the one-stop shop where eligible customers can apply for refunds and waivers across more than 30 transactions delivered by the New South Wales Government, covering areas such as replacement driver licences, vehicle registrations, and birth certificates.

13. As also noted, in stating that the Bill enables the regulations to prescribe customer service functions of Service NSW the Minister told Parliament "This means that Service NSW can stand up new functions, programs and services that support customers".

The Bill expands the functions of the Chief Executive Officer of Service NSW to include "any other functions relating to the delivery of Government services to the people of NSW as directed by the Minister". It also enables the regulations to prescribe additional customer service functions for which the CEO has responsibility.

The Committee would prefer significant matters such as the functions of a CEO of a government agency to be clearly defined in primary legislation to ensure an appropriate level of parliamentary oversight. The Committee acknowledges that the provisions require any new functions to relate to the delivery of government services or customer service. Further, they are intended to promote the efficient delivery of government services and transactions in NSW, and they may allow administrative flexibility to respond to customer needs. The Committee refers the provisions to Parliament to consider whether they involve an appropriate delegation of legislative powers.

3. Better Regulation Legislation Amendment Bill 2020

Date introduced	3 March 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend various Acts and regulations, and to repeal a regulation, administered by the Minister for Better Regulation and Innovation, including as follows—
 - (a) to amend the *Motor Dealers and Repairers Act 2013*—
 - (i) to allow the Secretary to cancel licences issued due to misrepresentations or in error, and
 - (ii) to ensure that repair work for transport service vehicles is carried out by the holder of a motor vehicle repairer's licence, and
 - (iii) to allow the regulations to specify the maximum amount of compensation payable from the Motor Dealers and Repairers Compensation Fund, and
 - (iv) to ensure that a person is not required to be licensed as a motor dealer to sell a trailer in connection with the sale of a second-hand boat,
 - (b) to amend the *Gas and Electricity (Consumer Safety) Act 2017*—
 - (i) to expand investigation powers under that Act to include investigations into autogas installations, and
 - (ii) to enable the Minister to grant exemptions from the Act for certain gas appliances, gas installations and autogas installations, and
 - (iii) to make it clear that a person must hold the relevant trade certificate to carry out autogas work on an installation that is designed for use with liquefied natural gas,
 - (c) to amend the *Pawnbrokers and Second-hand Dealers Act 1996* to allow the Secretary to grant exemptions from provisions of that Act,
 - (d) to amend the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* with respect to the membership of the Long Service Leave Committee under that Act,

- (e) to amend the *Retail Trading Act 2008* with respect to the granting of exemptions from provisions of that Act,
- (f) to amend the *Charitable Fundraising Act 1991*, *Community Gaming Act 2018*, *Entertainment Industry Act 2013*, *Home Building Act 1989*, *Motor Dealers and Repairers Act 2013*, *Residential (Land Lease) Communities Act 2013* and *Residential Tenancies Act 2010* with respect to the execution of search warrants,
- (g) to amend the *Storage Liens Act 1935* to provide that unclaimed proceeds from the sale of goods under that Act are to be dealt with under the *Unclaimed Money Act 1995*,
- (h) to amend the *Residential Tenancies Act 2010* to require a landlord to disclose the jurisdiction in which they ordinarily reside,
- (i) to amend the *Property, Stock and Business Agents Act 2002* to ensure that proceedings for an indictable offence under the Act are not subject to the time limit in that Act for summary offences,
- (j) to make other amendments of a minor or consequential nature.

BACKGROUND

2. The Minister for Better Regulation and Innovation noted in the second reading speech that:

The bill makes miscellaneous amendments to 13 principal Acts and associated amendment Acts across the Better Regulation and Innovation portfolio. The bill ensures that the legislation being amended can operate as Parliament intended. It does so by ensuring strong consumer protections by inserting specificity into powers; clarifying legislative intent and reducing uncertainty; and clarifying and streamlining regulatory requirements and removing unnecessary red tape.

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict liability

3. The Bill amends section 15 of the *Motor Dealers and Repairers Act 2013* to provide that it is an offence for the owner of a transport service vehicle to enter into an agreement for any repair work to be done on the vehicle by a person who does not hold a motor vehicle repairer's licence. "Transport service vehicle" is defined in the Bill as "a motor vehicle used for the carriage of passengers or goods in connection with a business": schedule 1[3].
4. The Bill also amends section 16 of the *Motor Dealers and Repairers Act 2013* so that it is an offence for the owner of a transport service vehicle to permit a person who does not have the correct qualifications to do repair work on the vehicle.
5. These are strict liability offences and so derogate from the common law principle that the mental element of an offence is relevant to the imposition of liability. The maximum penalty that applies for both offences is \$2,200.

6. In the second reading speech the Minister provided the following background to the amendments:

The amendments contained in schedule 1 to the bill also seek to address a regulatory gap by ensuring that non-minor repairs to all transport service vehicles are carried out only by a licensed motor vehicle repairer. This requirement currently exists under the point to point transport legislation for taxis, hire cars and Uber vehicles. However, this important safety obligation should also apply to other small businesses providing services directly to consumers, such as Car Next Door and GoGet. In addition, other types of businesses may enter the marketplace in the future. To ensure clarity, the bill includes a new definition of a "transport service vehicle" in section 10 of the Motor Dealers and Repairers Act. This definition removes any ambiguity as to what vehicles are subject to the requirements.

The Bill amends the *Motor Dealers and Repairers Act 2013* so that it is a strict liability offence for a transport service vehicle owner to enter into an agreement for repair work to be done on the vehicle by a person who is not a licensed motor vehicle repairer. It is also a strict liability offence for a transport service vehicle owner to permit a person who does not have the appropriate qualifications to do repair work on the vehicle. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability.

However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. It further notes that the purpose of the amendments is to address a regulatory gap so that the requirements that currently apply to taxis, hire cars and Uber vehicles also apply to other small businesses that provide similar services directly to consumers; and that there is a public safety interest in ensuring that such vehicles are only repaired by those with the appropriate qualifications. Given these circumstances, as well as the maximum penalty being limited to \$2,200, the Committee makes no further comment.

Execution of search warrants

7. The Bill amends the *Charitable Fundraising Act 1991*, *Community Gaming Act 2018*, *Entertainment Industry Act 2013*, *Home Building Act 1989*, *Motor Dealers and Repairers Act 2013*, *Residential (Land Lease) Communities Act 2013* and *Residential Tenancies Act 2010* regarding the execution of search warrants.
8. These Acts currently provide that an authorised Fair Trading officer may apply for a search warrant if there are reasonable grounds to believe that the relevant Act or regulations are being contravened. Applications must be made to an independent third party – an "authorised officer" within the meaning of section 3 of the *Law Enforcement (Powers and Responsibilities) Act 2002* – being a Magistrate, Children's Magistrate, Registrar of the Local Court, or an employee of the Attorney General's Department, authorised by the Attorney-General.¹ If the warrant is granted, the authorised officer may enter and search the premises concerned, provided that he or she is accompanied by a police officer.

¹ See *Charitable Fundraising Act 1991*, s29; *Community Gaming Act 2018*, s26; *Entertainment Industry Act 2013*, s28; *Motor Dealers and Repairers Act 2013*, s154; *Residential (Land Lease) Communities Act 2013*, s183; and *Residential Tenancies Act 2010*, s200. See also *Home Building Act 1989*, s 126(4) and (5) which require the relevant officer to

9. The Bill amends the above Acts to remove the requirement for the authorised Fair Trading officer to be accompanied by a police officer: Schedule 2. However, a police officer *may* still accompany the person executing the search warrant as if he or she were named in it.
10. In the second reading speech, the Minister provided the following background to the amendments:

The amendments are necessary to carry out searches of premises and gather information in a timely way. Search warrants obtained from a court allow the department to ensure the appropriate compliance and enforcement of the laws. However, not all these search warrants require the NSW Police Force to accompany the department's authorised investigators. Under the amendments contained in schedule 2 to the bill, search warrants can be executed without the presence of a police officer when it is either not appropriate or not necessary. This schedule replicates existing search warrant provisions in other Fair Trading legislation and allows investigative and enforcement action to be carried out expeditiously.

The amendments have the support of New South Wales police, who were consulted during the development of the bill. The nature of some of the offences under these Acts, such as unlicensed trading, odometer tampering and unqualified repair work, requires Fair Trading to urgently take investigative and enforcement action to protect consumers from actual or potential loss or harm. Authorised investigators will continue to execute search warrants in accordance with their investigation and enforcement powers to safeguard consumer rights and protect citizens in New South Wales. It is imperative that I point out that this reform does not prevent a police officer from accompanying an authorised officer when a search warrant is executed where it is appropriate or necessary for the police to attend.

The amendments will reduce the demand on the time of the New South Wales police, allowing them to attend to their duties and provide Fair Trading with greater flexibility to take enforcement action swiftly. This will lead to better outcomes for consumers and greater protection for the community.

The Bill amends seven Acts to remove the requirement that a police officer must accompany the authorised officer executing a search warrant to investigate a concern that the relevant Act or regulation is being contravened. The amendments still allow a police officer to attend the search as though they were named in the warrant.

This may have the effect of reducing some of the safeguards that ensure that search warrants are executed appropriately, by people with the requisite skill and expertise, and in a way that the person subject to the search warrant knows who may attend the execution of the search warrant. The amendments may thereby impact on the right to privacy, and to be free from arbitrary search and seizure.

However, the Committee notes that these amendments replicate existing search warrant provisions in other Fair Trading legislation and are designed to ensure searches and associated enforcement action are carried out in a timely manner to protect consumers. Further, it notes that a police officer is not prevented from accompanying an authorised officer executing a search warrant where it is deemed necessary or appropriate. The amendments will also free police time so

apply to an "authorised officer" within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*. Proposed amendments in Schedule 2 of the Bill would amend these provisions but retain this requirement.

that police do not have to attend searches unnecessarily, and they have the support of the NSW Police Force. In addition, requirements to obtain the search warrants from an independent third party before they can be executed will remain. Owing to these considerations and safeguards, the committee makes no further comment.

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

Commencement by proclamation

11. The Bill mostly commences on the date of assent. However, there are some exceptions. Schedule 2.1 commences on the date of assent or the commencement of Schedule 1[26] to the *Charitable Fundraising Amendment Act 2018*, whichever occurs later. Schedule 2.1 amends the *Charitable Fundraising Act 1991* to remove the requirement that a person executing a search warrant under that Act must be accompanied by a police officer (see above).
12. Schedule 3 is to commence on proclamation. Schedule 3 amends the *Storage Liens Act 1935* to provide that the surplus (if any) remaining after the storer of goods sells the goods to settle a debt owed to the storer is to be dealt with as unclaimed money under the *Unclaimed Money Act 1995*, if it is not claimed within 14 days after the sale.
13. Schedule 7.2[3] and [5] also commence on proclamation. Schedule 7.2[3] authorises the Secretary (generally the Commissioner of Fair Trading²) to exempt a person or gas appliance from the requirement under the *Gas and Electricity (Consumer Safety) Act 2017* that a gas appliance not be sold unless it is a certified gas appliance and is labelled in accordance with the regulations. Schedule 7.2[5] makes a consequential amendment.

Parts of the Bill commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes in this case that a flexible start date may assist with the implementation of necessary administrative arrangements including those around the granting of exemptions from the *Gas and Electricity (Consumer Safety) Act 2017*, and changes to how unclaimed moneys are dealt with. Given these circumstances, and the fact that the majority of the Bill commences on assent, the Committee makes no further comment.

Power to grant exemptions from operation of Act

14. Schedule 6.1 of the Bill inserts proposed section 4A into the *Pawnbrokers and Second-hand Dealers Act 1996* to empower the Secretary (generally the Commissioner of Fair Trading³) to grant exemptions from the operation of the Act, or provisions therein. Proposed section 4A(3) requires that the Secretary publish details of any exemptions granted as soon as practicable after the exemption is given.

² *Gas and Electricity (Consumer Safety) Act 2017*, s4.

³ *Pawnbrokers and Second-hand Dealers Act 1996*, s3.

15. In the second reading speech, the Minister provided the following background to this amendment:

Licensed pawnbrokers and second-hand dealers must comply with detailed record-keeping requirements about the origin and owners of goods. These requirements help prevent and detect trading in stolen goods. The Act allows for exemptions for certain persons from these record-keeping requirements. However, these exemptions can only be granted by making a bespoke amendment regulation. This means that each such exemption requires an amendment regulation, the approval of the Minister and the Executive Council, and the Governor's assent. This process can result in delays and costs for the businesses seeking exemptions and also imposes costs and administrative burdens for government.

Current exemptions for second-hand dealers include licensees who receive and resell used mobile phones and tablet computers provided by telecommunications companies such as Optus and Telstra. These licensees are exempted from the record-keeping requirements because the origin and details of the original owner of the devices have already been carefully recorded and the goods are not at high risk of theft. When the amendments commence, the existing exemptions under the regulation will remain. The amendments will apply to future applications for exemptions. The new process for dealing with exemptions will allow the secretary to condition, revoke or vary an exemption at any time. This ensures that the agency can act quickly if the exemption is no longer appropriate or needs amendment.

A publicly available register of exemptions will also be required to be kept. This will ensure that information about exemptions can be quickly and easily ascertained if an entity has the benefit of an exemption and what the exemption is for.

16. As above, the Bill also amends section 21 of the *Gas and Electricity (Consumer Safety) Act 2017* to enable the Secretary to exempt a person or gas appliance from the requirement that a gas appliance not be sold unless it is a certified gas appliance and is labelled in accordance with the regulations. The Minister provided the following background to this amendment:

...the bill enables the secretary to grant exemptions for certain persons, classes of persons, gas appliances and gas installations from the provisions of the Act relating to the sale and connection of uncertified gas appliances. This would apply in scenarios involving trade shows where safety plans are adequately in place.

The Bill amends the *Pawnbrokers and Second-hand Dealers Act 1996* and the *Gas and Electricity (Consumer Safety) Act 2017* to empower the Secretary to grant exemptions from the operation of certain provisions of those Acts.

If an exemption is to be made to the operation of an Act, the Committee prefers this to be done by amending regulation. This is to foster an appropriate level of parliamentary oversight over the exemptions granted. Regulations must be tabled in Parliament and are subject to disallowance under the *Interpretation Act 1987*. There is no such requirement for exemptions granted by the Secretary.

The Committee notes that proposed section 4A of the *Pawnbrokers and Second-hand Dealers Act 1996* would require that details of any exemptions granted be published as soon as practicable. The Committee also acknowledges that requiring an amending regulation to grant an exemption may be time-consuming, costly and burdensome for the businesses concerned and the government. However, the Committee refers the matter to Parliament to

consider whether the delegation of legislative power is appropriate in the circumstances.

Matters that should be in primary legislation

17. Part 8 of the *Motor Dealers and Repairers Act 2013* (the Act) establishes the Motor Dealers and Repairers Compensation Fund that is administered by the Secretary (generally the Commissioner of Fair Trading⁴). The fund is designed to protect people from loss incurred when buying or selling a vehicle through a licensed motor dealer or when repair work is done by a licensed motor vehicle repairer. Section 171 of the Act provides that the Secretary is to certify the amount of loss when he or she allows a claim for compensation from the Fund, and caps this amount at the actual amount of loss, or \$40,000, whichever is the lower.
18. The Bill amends section 171 of the *Motor Dealers and Repairers Act 2013* so that the amount to be certified is the lesser of the actual amount of the loss or an amount prescribed by the regulations: Schedule 1[10]. That is, the cap on the amount of compensation paid would be set by the regulations and no longer the primary legislation.

The Bill amends section 171 of the *Motor Dealers and Repairers Act 2013* so that the cap on the amount of compensation that may be paid per claim from the Motor Dealers and Repairers Compensation Fund is no longer provided for in the Act, but will instead be prescribed by the regulations.

The Committee generally prefers provisions which affect personal rights to be located in primary legislation to foster an appropriate level of parliamentary oversight. The Committee notes that the majority of claims from the fund are for relatively small amounts of money and that imposing a cap may assist the fund in paying numerous small claims without it being drained. The Committee also notes that locating the cap in the regulation may offer greater flexibility to ensure the cap is commensurate with consumer needs and the fund's capacity. In addition, any amending regulations would have to be tabled in Parliament and would be subject to disallowance under the *Interpretation Act 1987*. Given these considerations, the Committee makes no further comment.

⁴ *Motor Dealers and Repairers Act 2013*, s4.

4. Civil Remedies for Serious Invasions of Privacy Bill 2020*

Date introduced	27 February 2020
House introduced	Legislative Assembly
Member responsible	Mr Paul Lynch MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to implement the proposals for legislation in the Report on civil remedies for serious invasion of privacy, which is a Report of the Legislative Council Standing Committee on Law and Justice, published in March 2016.
2. That Report recommends—
 - the substantial adoption of the proposals for legislation in the Report of the Australian Law Reform Commission (Report 123 of 2014) in relation to the creation of a statutory tort of serious invasion of personal privacy, to be enforceable by court proceedings, and
 - the conferral of similar jurisdiction on the NSW Civil and Administrative Tribunal (NCAT), and
 - the conferral of power on the Privacy Commissioner to receive and deal with complaints about serious invasion of personal privacy.
3. The proposed Act is divided into Parts, the significant ones being—
 - Part 2, which creates rights to proceed against a person in the Supreme Court or the District Court for a serious invasion of privacy, based on a statutory cause of action created by the proposed Act, and
 - Part 3, which creates rights to proceed against a person in NCAT for a serious invasion of privacy, based on rights analogous to the statutory cause of action in Part 2, and
 - Part 4, which enables a person to make a complaint to the Privacy Commissioner about a serious invasion of privacy.

BACKGROUND

4. The Australian Law Reform Commission (ALRC) conducted an inquiry into serious invasions of privacy in the digital era, publishing its final report in June 2014. The ALRC had been asked by the Commonwealth Attorney-General to design a statutory cause of action for serious invasions of privacy and to consider ways in which the law may reduce serious invasions of privacy in the digital era.

5. The Legislative Council Standing Committee on Law and Justice published its report – *Remedies for the serious invasion of privacy in New South Wales* in March 2016. The Committee recommended that the NSW Government introduce a statutory cause of action for serious invasions of privacy (recommendation 3). Further, the Committee recommended that the NSW Government base the statutory cause of action on the model detailed by the Australian Law Reform Commission in its 2014 report (recommendation 4).
6. The *Civil Remedies for Serious Invasions of Privacy Bill 2020* (the Bill) seeks to implement the legislation proposed by the Standing Committee on Law and Justice in the above report.
7. A similar Bill, the *Civil Remedies for Serious Invasions of Privacy Bill 2016*, was introduced by Mr Lynch in the Legislative Assembly on 13 October 2016. However, it lapsed in accordance with the standing orders.

ISSUES CONSIDERED BY THE COMMITTEE

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

Cause of action extinguishes upon death

8. Proposed section 21 specifies that a cause of action for serious invasion of privacy does not survive for the benefit of the plaintiff's estate or against the defendant's estate. This is despite section 2 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) which provides that causes of action survive against or for the benefit of the person's estate, with some exceptions including in relation to causes of action for defamation.
9. The ALRC in its 2014 report recommended that a cause of action for serious invasion of privacy should not survive for the benefit of the plaintiff's estate or against the defendant's estate (recommendation 10-3). This was to reflect the fact that 'privacy is a matter of personal sensibility'.⁵

The Bill creates a new statutory cause of action for serious invasion of privacy and provides that such a cause of action does not survive for the benefit of the plaintiff's estate or against the defendant's estate. The right of the aggrieved party to compensation may be affected as a result.

The Committee notes that this was recommended by the Australian Law Reform Commission in its 2014 report, *Serious Invasions of Privacy in the Digital Era* to reflect the fact that 'privacy is a matter of personal sensibility'. In NSW, the *Law Reform (Miscellaneous Provisions) Act 1944* provides that causes of action survive against or for the benefit of the person's estate. However, it provides for some exceptions, including for defamation. In the circumstances, the Committee makes no further comment.

⁵ ALRC, *Serious Invasions of Privacy in the Digital Era: Final report*, ALRC Report 123, June 2014, p 164.

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

Commencement by proclamation

10. Proposed section 2 provides that the Bill is to commence on a day to be appointed by proclamation.

The Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that a flexible start date may assist with the implementation of necessary administrative arrangements so that the Courts, the NSW Civil and Administrative Tribunal and the Privacy Commissioner can handle a new category of matters and complaints. In the circumstances, the Committee makes no further comment.

5. Evidence Amendment (Tendency and Coincidence) Bill 2020

Date introduced	25 February 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Evidence Act 1995* (the Act) as follows—
 - (a) to clarify that principles or rules of the common law or equity preventing or restricting the admissibility of evidence about propensity or similar fact evidence are not relevant when applying Part 3.6 of the Act,
 - (b) to provide that a court, when assessing the probative value of evidence under Part 3.6 of the Act, is not to have regard to the possibility that tendency evidence or coincidence evidence may be the result of collusion, concoction or contamination,
 - (c) to introduce a rebuttable presumption that certain tendency evidence relating to a child sexual offence is presumed to have significant probative value and to set out matters that may not ordinarily be taken into account by a court to overcome that presumption and determine that the evidence does not have significant probative value,
 - (d) to clarify that coincidence evidence includes evidence from multiple witnesses claiming they are victims of an accused person, which is used to prove, on the basis of similarities in their evidence, that the accused person did a particular act,
 - (e) to provide that tendency evidence or coincidence evidence adduced by the prosecution about a defendant is inadmissible unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant,
 - (f) to provide that the proposed Act does not affect proceedings where a hearing has already begun or notices given in proceedings.

BACKGROUND

2. In Australia, six jurisdictions have adopted the Uniform Evidence Law (UEL): NSW, Victoria, Tasmania, the Australian Capital Territory, the Northern Territory and the Commonwealth. In NSW, the UEL is adopted by the *Evidence Act 1995* (NSW) (the Act).
3. Part 3.6 of the Act sets out the tendency and coincidence rules of evidence. The tendency rule is found in section 97 which requires that evidence of the character, reputation or conduct of a person, or a tendency that person has or had, cannot be used to prove that

a person has or had a tendency to act in a particular way, or to have a particular state of mind unless:

- reasonable written notice has been given and
- the court believes that the evidence will have significant probative value.

4. The coincidence rule is set out in section 98. It provides that evidence that two or more similar events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that it is improbable that the events occurred coincidentally unless:

- reasonable written notice has been given and
- the court thinks that the evidence will have significant probative value.

5. Section 101 of the Act requires that tendency or coincidence evidence adduced by the prosecution in a criminal proceeding cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

6. The Royal Commission into Institutional Responses to Child Sexual Abuse published its final report in December 2017. The Royal Commission made a number of recommendations in relation to tendency and coincidence evidence and joint trials including:

Recommendation 44: In order to ensure justice for complainants and the community, the laws governing the admissibility of tendency and coincidence evidence in prosecutions for child sexual abuse offences should be reformed to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence and joint trials.

Recommendation 46: Common law principles or rules that restrict the admission of propensity or similar fact evidence should be explicitly abolished or excluded in relation to the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution.

Recommendation 47: Issues of concoction, collusion or contamination should not affect the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution.

7. The Bill responds to recommendations made by the Royal Commission. It facilitates the greater admissibility of tendency evidence, particularly as regards criminal proceedings for child sexual offences. It also amends rules that relate to coincidence evidence. The Attorney General noted in the second reading speech that:

Tendency and coincidence evidence about a defendant often play a particularly important role in child sexual abuse prosecutions, especially in circumstances where a defendant is alleged to have abused more than one child. The royal commission noted that child sexual offences are "generally committed in private and with no eyewitnesses [and] no medical or scientific evidence capable of confirming the abuse"... In these cases, evidence of other allegations – or convictions – of child sexual abuse perpetrated by the accused person can be valuable evidence to assist the trier of fact to determine whether it is more likely that the alleged offence or offences occurred, as the allegation is supported by evidence from other complainants or witnesses who say that the accused also sexually abused them.

8. In December 2017, the Council of Attorneys-General agreed to refer the test for the admissibility of tendency and coincidence evidence in the UEL to a working group with representatives from all relevant jurisdictions. The Attorney General noted in his second reading speech that the working group:

...developed an approach to reform that was agreed by the UEL members of the Council of Attorneys-General in June 2019. At the request of the Council of Attorneys-General, a model bill to implement the reform was prepared by the Australasian Parliamentary Counsel's Committee. The model bill was agreed by all UEL members of the Council of Attorneys-General in November 2019.

9. The Bill seeks to implement the agreed changes to the *Evidence Act 1995* (NSW), with the Attorney-General expecting that comparable bills will be introduced in Victoria, Tasmania, the Australian Capital Territory, the Northern Territory and the Commonwealth. The Attorney General stated that:

The bill does not displace the requirement that evidence be relevant, the general exclusion of tendency and coincidence evidence, and the general discretions and mandatory exclusions that apply to evidence if, for example, the evidence is unfairly prejudicial, misleading or confusing or its probative value is outweighed by the danger of unfair prejudice to the defendant. It does, however, make a number of significant changes that should encourage the evidence to be deemed admissible in appropriate circumstances.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to a fair trial

10. As above, Part 3.6 of the Act sets out the tendency and coincidence rules of evidence. Schedule 1[1] of the Bill inserts proposed section 94(5) into the Act so that a court, when determining the probative value of tendency or coincidence evidence, may not have regard to the possibility that the evidence may be the result of collusion, concoction or contamination. This is consistent with recommendation 47 of the Royal Commission.
11. Schedule 1[2] of the Bill inserts a proposed section 97A into the Act to provide for the circumstances under which tendency evidence is admissible in proceedings involving child sexual offences. It creates a presumption that tendency evidence about the sexual interest of the defendant in children, or about the defendant acting on a sexual interest in children, has significant probative value: proposed section 97A(2). This presumption extends to circumstances where the defendant has not acted on the sexual interest in children.
12. The court retains its discretion to determine that the tendency evidence does not have significant probative value: proposed section 97A(4). However, under proposed section 97A(5), the court cannot take certain matters into account in making such a determination (unless exceptional circumstances apply) including:
 - the sexual tendency sexual interest or act is different from the alleged sexual interest or act;
 - the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred;

- the personal characteristics of the subject of the tendency sexual interest or act (for example the subject's age, sex or gender) are different from those of the subject of the alleged sexual interest or act;
 - the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act;
 - the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act.
13. Schedule 1[3] of the Bill amends the coincidence rule in section 98 of the Act to clarify that coincidence evidence includes evidence from two or more witnesses claiming they are victims of offences committed by the defendant to prove on the basis of similarities that the defendant did an act in issue.
14. Schedule 1[4], the Bill amends section 101 of the Act to alter the test about the circumstances under which tendency and coincidence evidence, adduced by the prosecution, can be used against a defendant in criminal proceedings. The amended test requires that the probative value of the evidence outweighs the danger of unfair prejudice to the defendant. Under the current test, it is necessary that the probative value of the evidence *substantially* outweighs any prejudicial effect on the defendant before it can be used against the defendant in criminal proceedings. This change is designed to facilitate the admissibility of tendency and coincidence evidence, and the Attorney General told Parliament:
- Changing the test from substantially outweighs to simply outweighs seeks to address the asymmetry in the assessment of whether evidence with significant probative value should be admissible under the current test, which is disproportionately weighted towards the exclusion of such evidence. It would strike an even and appropriate balance between the competing interests of ensuring that relevant tendency and coincidence evidence with significant probative value is admissible, and in preventing unfair prejudice to defendants in criminal proceedings.
15. The Attorney-General also referred to findings of the Royal Commission that existing rules may create unnecessary hurdles in criminal proceedings:
- Firstly, the royal commission found that 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. Secondly, the existing test for admissibility of tendency and coincidence evidence unnecessarily precludes evidence from being admitted in criminal proceedings. Thirdly, the application of the rules to exclude tendency and coincidence evidence unnecessarily prevents joint trials being held.
16. The proposed changes contained in the Bill may impact on the defendant's right to a fair trial, including his or her right to be presumed innocent until guilt is proved beyond reasonable doubt. It is likely to allow evidence to be admitted that would have been excluded were it not for the changes. The Bill introduces a presumption that certain tendency evidence has significant probative value; and the court can no longer have regard to the possibility that evidence may be the result of collusion in determining the probative value of tendency and coincidence evidence. Similarly, amendments to the test in section 101 may allow evidence to be admitted that may cause unfair prejudice to the defendant, so long as it can be shown that the probative value outweighs this danger. The

current test is weighed more heavily towards excluding such evidence as it needs to be shown that the probative value of the evidence substantially outweighs any prejudicial effect to the defendant.

The Bill makes a number of changes to the *Evidence Act 1995* concerning the admissibility of tendency and coincidence evidence. These changes may impact the defendant's right to a fair trial, including the right to be presumed innocent unless guilt is proved beyond reasonable doubt. They are likely to allow evidence to be admitted that would have been excluded were it not for the changes, with the possibility that some such evidence could be unfairly prejudicial to a defendant in a given case.

For example, the Bill introduces a presumption that certain tendency evidence has significant probative value. It also relaxes the test about the circumstances under which tendency and coincidence evidence can be used against a defendant. The amended test would require that the probative value of the evidence outweighs the danger of unfair prejudice to the defendant. Under the current test, it is necessary that the probative value of the evidence *substantially* outweighs any prejudicial effect on the defendant before it can be used.

The Committee notes that some of the Bill's changes around tendency evidence apply only to criminal proceedings concerning a child sexual offence. Further, the Bill's changes implement recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. The Royal Commission noted the particular evidentiary hurdles that may be faced by victims of child sexual offences in court proceedings; that tendency and coincidence evidence plays an especially important role in such proceedings; and that the existing rules unnecessarily preclude evidence being admitted in criminal proceedings, and joint trials being held.

The Bill also includes some safeguards. The presumption that certain tendency evidence is of significant probative value is rebuttable. The Court also retains its discretion in proposed section 97A so that it may consider the matters that are generally excluded when determining whether tendency evidence has significant probative value, if the court considers that there are exceptional circumstances. In addition, even though the test has been relaxed, tendency or coincidence evidence cannot be used against a defendant unless its probative value outweighs any possible prejudicial effect to the defendant.

Notwithstanding the above considerations and safeguards, the changes may increase the risk that evidence unfairly prejudicial to a defendant is admitted in a particular case. Accordingly, the Committee refers to Parliament the matter of whether the defendant's right to a fair trial is adequately protected by the Bill.

6. Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020

Date introduced	26 February 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. David Elliott MP
Portfolio	Police and Emergency Services

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Firearms Act 1996* as follows—
 - (a) to create a new offence of knowingly taking part in the unauthorised manufacture of firearms or firearm parts and to provide that the offence will include being in possession of certain matter for the purposes of manufacturing a firearm or firearm part,
 - (b) to confer seizure powers on police officers in relation to the new offence,
 - (c) to require firearms prohibition orders to be reviewed every 10 years by the Commissioner of Police,
 - (d) to provide that the power of a police officer to search a person who is subject to a firearms prohibition order for firearms or firearm parts may also be exercised in relation to any other person who is present on the subject person's premises,
 - (e) to make it clear that the powers of a police officer in connection with firearms prohibition orders (including search powers in relation to persons other than the subject person) may only be exercised if reasonably required to determine whether the subject person has committed an offence arising out of the making of the order,
 - (f) to make other miscellaneous amendments in connection with the operation and enforcement of firearms prohibition orders, including enabling firearms prohibition orders under the law of another jurisdiction to be enforced in this State.
2. The Bill also amends the *Weapons Prohibition Act 1998* to create a similar offence of taking part in the unauthorised manufacture of prohibited weapons or parts of prohibited weapons.

BACKGROUND

3. In the second reading speech, the Hon. David Elliott MP noted that the Bill was influenced by reviews of existing firearms manufacturing offences conducted by the Ministerial Council for Police and Emergency Management and the Firearms and Weapons Policy Working Group. Those reviews acknowledged a need to broaden the offences to capture new technologies which have furthered the capacity of criminals to manufacture firearms.

4. A firearms prohibition order (FPO) under section 73 of the *Firearms Act 1996* is an order that may be made against a person who, in the opinion of the Commissioner of Police, is not fit to possess a firearm. Since 2013 police have had the power to search, without warrant, an FPO subject, their vehicle and the premises they occupy, control or manage to determine if the FPO subject has committed an offence relating to the possession of a firearm, firearm part or ammunition. The extension of the powers by the current Bill is in response to a review by the NSW Ombudsman.⁶ Mr Elliott described the utility of FPOs:

FPOs have proven a key element in suppression strategies used against outlaw motorcycle gangs and other organised criminal groups. Their imposition can allow for heightened scrutiny of those engaged in criminal enterprise and, if breached, they provide for serious penalties. Since their introduction, the use of FPOs, with the ability to undertake the searches more efficiently, have increased the positive results in removing illegal firearms from the community and in cracking down on serious crime.

ISSUES CONSIDERED BY THE COMMITTEE

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

Self-incrimination and the right to silence

5. Schedule 1[3] of the Bill inserts section 51J into the *Firearms Act 1996* to create a specific offence of taking part in the manufacture of a firearm or firearm part, knowing that the manufacture of the firearm or part is not authorised by a licence or permit. Taking part in manufacturing includes possessing a firearm "precursor", meaning any object or document capable of being used in the manufacturing process, including computer software. The new offence is intended to overcome limitations with the existing offence of unauthorised manufacture of firearms (section 50A), as explained by Mr Elliott:

...if police find an outlaw motorcycle gang clubhouse filled with machining equipment and materials, they may not be able to take action unless they could prove that a functioning firearm was the end result.

6. Proposed section 51K authorises a police officer to seize any firearm, firearm part or firearm precursor, including a computer or data storage device on which a precursor is contained, that may provide evidence of the commission of the new offence. In exercising the power, a police officer may direct a person who is in charge of, or responsible for, the item seized to provide assistance or information (including computer passwords) that may be required to access information held.
7. Schedule 2[3] of the Bill creates equivalent provisions to be inserted in the *Weapons Prohibition Act 1998* in relation to taking part in the unauthorised manufacture of prohibited weapons (section 25E) and granting police the power to seize prohibited weapons, parts or precursors (section 25F).
8. It will be an offence to fail to comply, without reasonable excuse, with a direction under section 51K of the *Firearms Act* or section 25F of the *Weapons Prohibition Act* to provide information, or to provide information knowing it is false or misleading. The maximum penalty is a fine of \$5500 and/or imprisonment for two years.

⁶ NSW Ombudsman, [Review of police use of the firearms prohibition order search powers](#), August 2016.

9. These provisions may impact on the privilege against self-incrimination. As a general principle of law, the privilege against self-incrimination allows a person to refuse to answer any question or produce any document or thing which tends to expose the person to conviction for a crime. There is a general right to silence at common law⁷ with respect to criminal proceedings, while the privilege against self-incrimination is recognised by article 14(3) of the International Covenant on Civil and Political Rights to which Australia is a signatory. The rationale for these principles is to maintain the balance between the power of the state and the rights of the individual.

The Bill proposes to create specific offences of knowingly taking part in the manufacture of firearms, firearm parts and prohibited weapons under the *Firearms Act 1996* and the *Weapons Prohibition Act 1998*. As a consequence, police are authorised to seize any firearm, prohibited weapon, parts or precursors (including computer software), and may direct a person who is in charge of, or responsible for, the item seized to provide assistance or information. It will be an offence to fail to comply.

The power to demand information on pain of penalty may impact on the privilege 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. The Committee recognises that the power contained in the Bill is intended to help suppress the manufacture of illegal firearms in NSW with attendant benefits to the community. The Committee refers the power to Parliament to consider whether its impact on the privilege against self-incrimination is reasonable in the circumstances.

Risk of arbitrary search

10. The Bill also expands the search powers relating to a firearms prohibition order (FPO) under Part 7 of the *Firearms Act 1996*. Currently under section 74A, a police officer may search a person who is subject to an FPO for any firearms, firearm parts or ammunition, and may also search premises or any vehicle, vessel or aircraft occupied by the person or under their control or management.
11. A proposed amendment (section 74A(2A)(a)) would allow a police officer who enters such premises to also search any other person present on the premises if the officer reasonably suspects the person is in possession of a firearm, firearm part or ammunition. Mr Elliott noted the purpose of the provision:

This will ensure that the FPO subject cannot quickly hand a firearm over to another person on the premises who is with them at that time to hide the firearm or ammunition to avoid the search.

12. A specific power is also created for police to search any vehicle, vessel or aircraft on the premises, not limited to those under the control or management of the person subject to the FPO: proposed section 74A(2A)(b). Mr Elliott stated:

This ensures that police are able to search these places that criminals might think are good choices to hide firearms, parts or ammunition when the police arrive at the front door.

⁷ The common law is set out in *Sanchez v R* [2009] NSWCCA 171; (2009) 196 A Crim R 472 at [48]-[52].

13. There are some limitations on the power of police to enter premises pursuant to section 74A. For example, proposed section 74A(2C) will require the police officer, before entering the premises, to announce their authority to enter and give any person present an opportunity to allow entry first. However, these requirements do not apply where the police officer reasonably believes that immediate entry is necessary to ensure the safety of a person or to ensure that the effective execution of the search is not frustrated: proposed section 74A(2D). Furthermore, a police officer may use such force as is reasonably necessary to enter the premises: proposed section 74A(2F). Mr Elliott confirmed:

This provides clarity in situations where the FPO subject attempts to prevent an officer from entering the premises, especially to try to dispose of any firearms prior to the search.

14. Further, proposed section 74A(1) provides that the search powers can only be exercised if reasonably required to determine whether a person who is the subject of an FPO has committed an offence arising out of the making of the order against the person.

The Bill proposes to expand the search powers connected to a firearms prohibition order (FPO), which is made against a person who, in the opinion of the Commissioner of Police, is not fit to possess a firearm. The existing power to search without a warrant applies to a person who is the subject of an FPO (the FPO subject), their premises and vehicles. As police are not required to obtain a warrant from an independent judicial officer to conduct such searches this may increase the risk of arbitrary search, impacting on the right to privacy and personal physical integrity.

The Bill expands the existing power by allowing police who enter the premises of the FPO subject to search any person present who is reasonably suspected of possessing a firearm, part or ammunition. This may potentially include persons who are not the subject of an FPO and are not involved in criminal activities. Similarly, the Bill allows any vehicle on the premises to be searched – it would no longer have to be controlled or managed by the FPO subject. The Bill may thereby compound the possible increased risk of arbitrary searches taking place.

The Committee acknowledges the intention behind the amendments is to prevent concealment or disposal of evidence, assisting to remove illegal firearms from the community. Further, searches are subject to reasonableness requirements. The Committee refers the expanded search powers to Parliament to consider whether they are reasonable and proportionate in the circumstances.

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

Commencement by proclamation

15. Clause 2 of the Bill provides that the Act commences on a day or days to be appointed by proclamation.

The Bill provides that the Act will commence by proclamation. The Committee prefers that an Act commences on a fixed date or on assent, as this provides certainty to anyone affected by its provisions. This is particularly the case with Bills such as this one which affect police powers and personal rights and liberties. The Committee acknowledges that there may be practical reasons for

imposing a flexible starting date, to allow for police training or other operational arrangements. The Committee refers the matter to Parliament to consider whether commencement on proclamation is reasonable in the circumstances.

7. Local Government Amendment (Disqualification from Civic Office) Bill 2020*

Date introduced	27 February 2020
House introduced	Legislative Council
Member responsible	The Hon. Walt Secord MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to disqualify real estate agents and property developers from holding a civic office, being the office of councillor or mayor of a council or, in the case of a county council, the office of chairperson or member.

BACKGROUND

2. In the second reading speech, the Hon. Walt Secord MLC stated that the Bill:

...answers a very logical question: Because ruling on high-value property development and zoning decisions is a core function of local government, would it be prudent to ensure that property developers and real estate marketers are excluded from holding the peak roles overseeing those decisions? After a moment's thought the answer would be, "Yes that is prudent"—that is just common sense.
3. Mr Secord also referred to a report⁸ by the Independent Commission Against Corruption:

The ICAC's seminal report on the issue entitled *Taking the devil out of development* ...highlighted local government as having "a unique level of corruption potential" due to the high level of decisions at hand versus the relatively limited oversight compared with State and Federal decisions.
4. In addition, Mr Secord noted that the next NSW local government elections will take place in September 2020.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to stand for public office

5. The Bill proposes to amend section 275(1) of the *Local Government Act 1993* to disqualify real estate agents and property developers from holding "civic office" as a councillor or mayor of a council or, in the case of a county council, the office of chairperson or member.

⁸ Independent Commission Against Corruption, *Taking the Devil out of Development*, 2002.

6. According to Article 25 of the International Covenant on Civil and Political Rights, to which Australia is a signatory, every citizen has the right "without unreasonable restrictions" to take part in the conduct of public affairs and to be elected at an election.
7. The Bill may impact on this right as it seeks to disqualify people in two occupational categories from holding office as a local councillor. The definitions of "property developer" and "real estate agent" relied on by proposed section 275(10) are relatively broad.⁹
8. However, there are existing limitations under section 275 of the *Local Government Act 1993* on certain categories of people holding "civic office" including judges of any court and persons disqualified from managing a corporation. Further, Mr Secord noted in the second reading speech that property developers and real estate agents would still be able to "attend and speak at council meetings...make proposals and submissions to council...and advocate, within law, to their local councillors and mayor".

The Bill proposes to disqualify real estate agents and property developers from holding the office of mayor or councillor on a local council or holding a similar position on a county council. This may impact on the right to stand for elected public office. However, the Committee notes that the Bill is intended to prevent corruption in the property and planning decisions made by local councils, and to ensure that local council representatives act for the benefit of the community. Further, there are other categories of person already disqualified from holding "civic office" under the *Local Government Act 1993*, including certain categories of person whose profession has the potential to conflict with their role as a councillor. For example, judges of any court are so excluded. In the circumstances, the Committee makes no further comment.

Retrospectivity

9. As above, the Bill proposes to disqualify real estate agents and property developers from holding the "civic office" of mayor or councillor on a local council or holding a similar position on a county council. Further, proposed section 275(8) provides that if on the commencement of these changes a real estate agent or property developer holds a "civic office", the person is not disqualified from holding that office for the balance of the person's term of office, or for the period of 6 months (whichever is the shorter period).
10. The changes thereby have the potential to have some retrospective effect. If they came into force during a period when affected councillors had more than a 6 month balance on their term of office, they would lose their right to remain in that office and serve out their term despite the fact that no laws concerning such disqualification had existed at the time they had been elected.

The Bill proposes to disqualify real estate agents and property developers from holding "civic office" under the *Local Government Act 1993*. Further, it provides that if on the commencement of these changes a real estate agent or property developer holds a "civic office", the person is not disqualified from holding that

⁹ The definition of a property developer includes "a person who is a close associate" of a property developer: section 53(1)(b) of the *Electoral Funding Act 2018*. The meaning of a real estate agent includes diverse roles for reward within that industry including auctioneering, collecting rents payable, and providing property management services: section 3 of the *Property, Stock and Business Agents Act 2002*.

office for the balance of the person's term of office, or for the period of 6 months (whichever is the shorter period). The changes thereby have the potential to have some retrospective effect. If they came into force during a period when affected councillors had more than a 6 month balance on their term of office, they would lose their right to remain in that office and serve out their term.

The Committee generally comments on retrospectivity as it runs counter to the rule of law principle that people are entitled to know the law to which they are subject at any given time. This is particularly the case where a Bill seeks to retrospectively remove rights or impose obligations. The Committee acknowledges the corruption prevention objectives of the Bill but refers this retrospectivity to Parliament to consider whether it is reasonable in the circumstances.

8. Water Management Amendment (Water Rights Transparency) Bill 2020*

Date introduced	27 February 2020
House introduced	Legislative Assembly
Member responsible	Mrs Helen Dalton MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Water Management Act 2000* (the Act), the *Water Management (General) Regulation 2018* (the Water Regulation) and the *Constitution (Disclosures by Members) Regulation 1983* as follows—
 - (a) to facilitate public access to information relating to water access licences (within the meaning of the Act) and recorded in the Water Access Licence Register established by the Act (the Access Register),
 - (b) to impose requirements relating to maintaining and updating the Access Register,
 - (c) to provide for the independent audit of the Access Register,
 - (d) to impose requirements relating to the information to be provided in applications for water access licences,
 - (e) to require Members of Parliament to publicly disclose interests in water access licences,
 - (f) to make other consequential amendments,
 - (g) to insert provisions of a transitional nature consequent on the enactment of the proposed Act.

BACKGROUND

2. The *Water Management Act 2000* (the Act) is an Act to provide for the sustainable and integrated management of the water sources of the State (section 3).
3. As part of the water management regime set down under the Act, a person may apply to the Minister for Water, Property and Housing for a water access licence (Chapter 2, Part 2). Such a licence entitles the holder:
 - to specified shares in available water within a specified water management area or from a specified water source; and

- to take water at specified times, at specified rates or in specified circumstances, and in specified areas or from specified locations (see in particular sections 56(1) and 61).
4. The Act requires the Minister to keep a Water Licence Register (Access Register) for the purposes of the Act (section 71) and certain matters relating to a water access licence must be recorded on the Register including any general dealing in the licence; and any caveat lodged in relation to the licence (section 71A).
 5. The *Constitution (Disclosures by Members) Regulation 1983* requires the pecuniary interests of Members of the NSW Parliament to be disclosed including interests in real property, sources of income and gifts (Part 3).
 6. The Bill amends the Act, and the *Constitution (Disclosures by Members) Regulation 1983*, and in her second reading speech Mrs Helen Dalton MP stated that "Water use in New South Wales has been subject to considerable controversy in the past 20 years" and that "The purpose of the bill is to end the secrecy on water ownership across the State". Mrs Dalton explained that the Bill:

...changes the pecuniary interest form for New South Wales MPs so they have to declare their water ownership...changes the application process for getting a water licence so people cannot hide their identity when they apply for the licence [and] changes the online New South Wales water register to allow people to search for the water holdings of people, companies and government departments.
 7. Regarding the Bill's proposed changes to the application process for getting a water access licence Mrs Dalton told Parliament:

...getting a water licence is easier than opening a bank account. It is possible for corporate entities to obtain a licence without disclosing the names of major shareholders, company owners, parent companies or other individuals who may directly benefit from water purchased...If a foreign or domestic corporation wants to own Australia's most valuable natural resource, then we, the Australian taxpayers, deserve to know something about them.
 8. Mrs Dalton also provided background on the Bill's proposed changes around the Access Register:

At present it is very difficult for ordinary members of the public to find out who has an entitlement to New South Wales river water, groundwater and floodplain harvesting water...The bill I have introduced proposes a number of simple changes to enable a member of the public to search for water entitlements by the names of individual people, ABNs and government department names. The information is to be available either free of charge or for a small cost via an online database.
 9. Mrs Dalton further stated that the changes around the Access Register would have benefits:

A better online water register containing more information on water licences and allowing people to identify water licence holders would increase public trust in our water system. It would also allow researchers and oversight bodies to better scrutinise water use and analyse how the allocation and trade of water could better meet the needs of agriculture, the environment and critical human need.

10. Mrs Dalton also provided further information about the Bill's proposed requirements for Members of Parliament to declare their water ownership:

[T]here is another big issue undermining transparency: Those of us in this Chamber – members of the New South Wales Parliament – are not required to disclose our water entitlements as part of our disclosures of pecuniary interests. Members are required under legislation to disclose such things as their property ownership, gifts, income sources, debts and contributions to travel but there is no requirement to disclose water entitlements.

ISSUES CONSIDERED BY THE COMMITTEE

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

Privacy Rights

11. As above, the Bill seeks to make it easier for the public to obtain information about water access entitlements.
12. Schedule 1, item 1 of the Bill proposes to amend the Act to provide that the purposes of the Access Register include creating, maintaining and updating records relating to water access licences, and facilitating public access to those records.
13. Schedule 1, item 6 of the Bill requires the Minister to make the information recorded in the Access Register publicly available through an electronic search facility on a website, and prohibits restrictions being placed on access to the information. As above, the electronic search facility would enable details of water access licences to be searched by entering a number of search terms including the name of a natural person.
14. By allowing information recorded in the Access Register to be made publicly available, including information that is attached to the name of a person, the Bill may impact on the privacy rights of affected persons. However, similar searches can already be done in NSW in respect of real property, and Mrs Dalton noted in her second reading speech: "We have a register of property and land where we can all find out who owns what and where, so why on earth do we keep water secret?"¹⁰

Under the *Water Management Act 2000* a person may apply to the Minister for a water access licence which entitles the holder to specified shares in available water within a specified water management area. The Act also requires the Minister to keep a Water Licence Register (Access Register) and certain matters relating to a water access licence must be recorded on the Access Register including any general dealing in the licence.

The Bill seeks to amend the Act to provide for information recorded in the Access Register to be made publicly available through an electronic search facility, and so that searches could be performed by entering the name of a natural person.

By allowing information recorded in the Access Register to be made publicly available, including information that is attached to the name of a person, the Bill may impact on the privacy rights of affected persons. However, the Committee notes that similar searches can already be performed in NSW in respect of real

¹⁰ See also the Property Registry website https://propertyregistry.com.au/?state=nsw&search_type=Title+Search for details of the land title searches that can be done for NSW properties for a fee. These searches include current ownership details with full name.

property. Further, by increasing the amount of publicly available information about water entitlements the proposed changes are intended to promote transparency and public trust in NSW's water management system. The Committee refers these matters to Parliament to consider whether the possible privacy impacts are reasonable in the circumstances.

Retrospectivity

15. As above, the Bill also seeks to increase the amount of information that people and companies must provide when making an application for a water access licence under the Act.
16. Schedule 2.2, item 3 of the Bill seeks to amend the *Water Management (General) Regulation 2018* to specify information that is to be required by the approved form for an application for a water access licence under section 61(1) of the Act. This includes the applicant's name, address and contact details, and details of any existing interests in access licences held by the applicant.
17. Schedule 1, item 9 of the Bill requires the holder or co-holder of a water access licence that is in force on the day on which the proposed Act commences, or for which an application was made but not determined by that day, to provide the Minister with additional information relating to that licence. That additional information corresponds with the information that the Bill requires to be included in the approved form for a water access licence application.
18. In short, the provisions in the Bill that would require additional information to be provided when making an application for a water access licence would operate retrospectively. Further, schedule 1, item 9 provides that a failure to comply with these requirements may result in the cancellation of the relevant water access licence.

The Bill would increase the amount of information that people and companies need to provide when making an application for a water access licence under section 61(1) of the *Water Management Act 2000*. This information includes the applicant's name, address and contact details, and details of any existing interests in access licences held by the applicant. These requirements would operate retrospectively. That is, those who already held water access licences on the day on which the proposed Act commenced would have to provide the additional information to the Minister or risk having their water access licence cancelled.

The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to him or her at any given time. In this case, a person could have his or her existing water access licence cancelled if he or she did not wish to comply with retrospectively imposed requirements relating to that licence. The Committee notes that the proposed retrospective changes are intended to promote transparency and public trust in NSW's water management system. The Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

Part Two – Regulations

1. Heavy Vehicle (Adoption of National Law) Amendment (Penalties) Regulation 2020

Date tabled	25 February 2020
Disallowance date	LA: 12 May 2020 LC: 2 June 2020
Minister responsible	The Hon. Paul Toole MP
Portfolio	Regional Transport and Roads

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to ensure national consistency in the application of heavy vehicle penalties relating to fatigue offences and to clarify discrepancies between defect notices and self-clearing defect notices.
2. This Regulation is made under the *Heavy Vehicle (Adoption of National Law) Act 2013*, including sections 12(6) and 28 (the general regulation-making power).

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

Delegation of legislative powers

3. Clause 3 of the Regulation amends the *Heavy Vehicle (Adoption of National Law) Regulation 2013* to ensure national consistency in the application of heavy vehicle penalties relating to fatigue offences. The penalties in question are fines spanning \$336 to \$1,121.
4. The Regulation commences on the commencement of Part 3 of the *Heavy Vehicle National Law and Other Legislation Amendment Act 2019* of Queensland.
5. The Heavy Vehicle National Law commenced on 10 February 2014 in NSW, the ACT, Queensland, South Australia, Tasmania and Victoria.¹¹ Its object is to establish a national scheme for facilitating and regulating the use of heavy vehicles on roads in a way that:
 - promotes public safety

¹¹ National Heavy Vehicle Regulator website: <https://www.nhvr.gov.au/law-policies/heavy-vehicle-national-law-and-regulations#application-laws>.

- manages the impact of heavy vehicles on the environment, road infrastructure and public amenity
 - promotes industry productivity and efficiency in the road transport of goods and passengers by heavy vehicles, and
 - encourages and promotes productive, efficient, innovative and safe business practices (see Heavy Vehicle National Law (NSW) (s3).
6. Each of the above jurisdictions passed a law that either adopts or duplicates the Heavy Vehicle National Law, with some modifications as a law of that State or Territory. In NSW, that was the *Heavy Vehicle (Adoption of National Law) Act 2013* (the Act), and the *Heavy Vehicle (Adoption of National Law) Regulation 2013*.
 7. Section 4 of the Act provides that the Heavy Vehicle National Law, as amended from time to time, set out in the Schedule to the Queensland Act, applies as a law of NSW subject to modifications set out in Schedule 1 of the Act. Similarly, section 5 of the Act provides that each of the national regulations apply as a regulation in force for the purposes of the Heavy Vehicle National Law (NSW), subject to any modifications set out in Schedule 2 of the Act.

The Regulation amends the *Heavy Vehicle (Adoption of National Law) Regulation 2013* to ensure national consistency in the application of heavy vehicle penalties relating to fatigue offences. It commences on the commencement of Part 3 of the *Heavy Vehicle National Law and Other Legislation Amendment Act 2019* of Queensland.

The Committee prefers penalties to be included in primary, not subordinate legislation to foster an appropriate level of parliamentary oversight. It also notes that national schemes for the harmonisation of legislation, such as the Heavy Vehicle National Law, have the potential to inappropriately delegate the legislative powers of the Parliaments in participating jurisdictions.

However, the penalties set down in the Regulation are relatively minor, and not custodial. Further, in seeking to harmonise legislation across jurisdictions, the Heavy Vehicle National Law is intended to promote public safety, industry productivity, and efficiency in the road transport of goods and passengers by heavy vehicles. The scheme also allows for some variation between jurisdictions. In the circumstances, the Committee makes no further comment.

2. Local Land Services Amendment (Elections) Regulation 2019

Date tabled	LA: 4 February 2020 LC: 25 February 2020
Disallowance date	LA: 5 May 2020 LC: 2 June 2020
Minister responsible	The Hon. Adam Marshall MP
Portfolio	Agriculture and Western New South Wales

PURPOSE AND DESCRIPTION

- The object of this Regulation is to amend the *Local Land Services Regulation 2014* as follows—
 - to update terminology,
 - to preclude a person from eligibility for election or appointment as a local board member in certain circumstances,
 - to update Schedule 1 in relation to local board elections to change the voting process and remove the existing requirement of enrolment before voting.
- This Regulation is made under the *Local Land Services Act 2013*, including sections 27 and 206 (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 stand for election or appointment as a member of local board

- Local Land Services is a regionally based NSW government agency that provides services to farmers, landholders and the community, including assisting with: agricultural productivity; controlling declared pests and meeting legal obligations; and managing and improving natural resources. Each Local Land Services region has a local board. These boards consist of a combination of ministerially-appointed and elected board members whose role is to set local strategic direction, as well as focus on community engagement, advocacy and advice.
- Schedule 1[3] of the *Local Land Services Amendment (Elections) Regulation 2019* ('the Regulation') amends clause 94 of the *Local Land Services Regulation 2014* so that a person cannot be elected or appointed as a member of a local board if they have been bankrupt

in the last 15 years. This is despite bankruptcy normally lasting for three years (it may be extended in some cases for up to eight years).¹²

5. Schedule 1[3] of the Regulation also amends clause 94 so that a person is ineligible for election or appointment if they have been convicted of an offence that, if committed in NSW, would be an offence punishable by imprisonment for 12 months or more. There does not appear to be any limit to the time during which this provision is applicable.
6. This differs from other legislation as regards seriousness of disqualifying offence and timeframes. For example, section 275 of the *Local Government Act 1993* disqualifies a person from holding civic office if he or she has been convicted of an offence punishable by imprisonment for five years or more in the seven years prior to nomination for election.
7. These amendments are a significant change to the eligibility criteria as a person was previously only deemed ineligible for election or appointment to a local board if they had been removed from office as a member of a local board in the four years prior.

The Regulation tightens the eligibility criteria for membership of a local board of a Land Services region. A person is ineligible if he or she has been bankrupt in the last 15 years, whereas bankruptcy usually lasts for three years. Further, a person is ineligible if he or she has been convicted of an offence punishable by 12 months imprisonment or more, and there does not appear to be any time limit during which this provision is applicable. This differs from other legislation as regards seriousness of disqualifying offence and timeframes.

The Committee acknowledges the importance of Land Service board members being persons of good character and having a record of sound financial management skills. However, it refers to Parliament the question of whether the eligibility criteria are too restrictive in the circumstances.

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

Significant matters in subordinate legislation

8. Clause 39 of proposed Schedule 1 to the Regulation provides that the Land and Environment Court has the same powers in determining a dispute over the validity of an election as are conferred on the Court of Disputed Returns by section 225 of the *Electoral Act 2017*. Further, clause 39B provides that in disputes concerning elections, the Land and Environment Court is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate.

The Regulation provides for the powers of the Land and Environment Court in determining an election dispute concerning local board elections. It also stipulates that the Court is not bound by the rules of evidence when considering such disputes. The Committee prefers significant matters, such as the powers to be conferred on a Court, to be located in primary rather than subordinate legislation to foster an appropriate level of parliamentary oversight. The Committee acknowledges that there may be benefits to the Land and Environment Court adopting a more flexible approach when obtaining relevant

¹² *The Laws of Australia*, [para 3.13.470].

information in relation to an election dispute. However, it refers these provisions to Parliament to consider whether they would be more appropriately located in primary legislation.

3. Motor Accident Guidelines Version 5

Date tabled	LA: 4 February 2020 LC: 25 February 2020
Disallowance date	LA: 5 May 2020 LC: 2 June 2020
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. These Guidelines are published by the State Insurance Regulatory Authority (the Authority). Part of the NSW Department of Customer Service, the Authority is constituted under the *State Insurance and Care Governance Act 2015* and is responsible for regulating workers compensation insurance, motor accidents compulsory third party (CTP) insurance and home building compensation insurance in NSW.
2. The *Motor Accident Injuries Act 2017* (the Act) establishes a scheme of CTP insurance and the provision of benefits and support relating to the death of, or injury to, people injured as a consequence of motor accidents in New South Wales (NSW) on or after 1 December 2017.
3. These Guidelines are made under section 10.2 of the Act, which enables the Authority to issue Motor Accident Guidelines with respect to any matter that is authorised or required by the Act to be provided for in the Guidelines.
4. The Guidelines support delivery of the objects of the Act and the Regulation by establishing clear processes and procedures, scheme objectives and compliance requirements. In particular, the Guidelines describe and clarify expectations that apply to respective stakeholders in the scheme. The Authority expects stakeholders to comply with relevant parts of the Guidelines that apply to them.
5. Section 10.7 of the Act states that it is a condition of an insurer's licence that the insurer comply with relevant provisions of Motor Accident Guidelines.

ISSUES CONSIDERED BY THE COMMITTEE

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

Retrospectivity

6. The *Motor Accident Guidelines – Version 5* (the Guidelines) were published on 20 December 2019. However, they generally apply to motor accidents occurring on or after 1 December 2017 and thus have retrospective effect. Part 4 of the Guidelines applies to all current and future claims made on insurers in relation to accidents that occurred on or after 1 December 2017 (para 4.1). Part 6 of the Guidelines contains provisions relevant to permanent impairment, including the way in which the degree of permanent impairment

resulting from an injury caused by a motor accident on or after 1 December 2017 is to be assessed (para 6.3).

7. However, the Guidelines contain some exceptions to its retrospective application. Existing Guidelines continue to have effect in relation to the scheme established under the *Motor Accidents Compensation Act 1999* which applies to motor accidents from 5 October 1999 to 30 November 2017. The *Motor Accident Permanent Impairment Guidelines* also apply to accidents that occurred between 5 October 1999 and 30 November 2017. Further, the Guidelines do not invalidate a step previously taken under the version of the Motor Accident Guidelines that was published on 15 January 2019 or Part 8 which was published on 29 November 2019. Finally, the section of the Guidelines concerned with the determination of insurance premiums only applies to premium rate filings for all third party policies commencing on or after 15 January 2020.

The *Motor Accident Guidelines – Version 5* generally apply to motor accidents occurring on or after 1 December 2017 despite having been published on 20 December 2019. They accordingly have some retrospective effect. The Committee will usually comment about retrospectivity as it runs counter to the rule of law principle that a person is entitled to know the law that applies to him or her at any given time. The Committee notes in particular that the Guidelines apply retrospectively to the way in which the degree of permanent impairment resulting from an injury caused by a motor accident is to be assessed, and may therefore affect the rights of claimants to compensation. Accordingly, the Committee refers the matter to Parliament.

Privacy – publication of decisions

8. Section 7.50 of the Act empowers the State Insurance Regulatory Authority (SIRA) to publish the decisions of merit reviewers and claims assessors under the Act. Part 7 of the Guidelines outlines which decisions may be published. The Guidelines note that they operate under a legislative presumption in favour of publishing the decisions of claims assessors and merit reviewers (para 7.171).
9. The publication of decisions has privacy implications for the individuals involved as personal information may be revealed. The names of the persons involved in the accident may be published, as well as details of the accident itself and consequences of injuries sustained.
10. However, whilst there is a presumption in favour of publication, the Dispute Resolution Service may withhold all or part of a decision for publication if it is considered desirable to do so because of the confidential or sensitive nature of the information. A claimant may also request that the Dispute Resolution Service withhold its decision from publication.

Section 7.50 of the *Motor Accident Injuries Act 2017* empowers the State Insurance Regulatory Authority to publish the decisions of merit reviewers and claims assessors under the Act. Part 7 of the Guidelines outlines which decisions may be published. The publication of decisions may reveal the names of claimants, details of accidents, and injuries sustained which has privacy implications for the individuals involved. However, the Committee acknowledges that publishing decisions may facilitate transparency and accountability in decision making, and also improve claims management, insurer decision making,

and so minimise disputes. It also notes that the Dispute Resolution Service may withhold details of a decision where it includes information of a confidential or sensitive nature. Given these considerations, the Committee makes no further comment.

Privacy – surveillance of claimants

11. Part 4 of the Guidelines sets out the circumstances under which insurers may investigate claimants by means of surveillance. The surveillance of claimants, including by video surveillance, may affect the privacy of individuals and the right for their person, home and family to be free from arbitrary interference.
12. However, the Guidelines provide a number of safeguards. Surveillance of the claimant is limited to circumstances where there is evidence indicating that the claimant is exaggerating an aspect of the claim; providing misleading information or documents; or if the insurer reasonably believes that the claim is inconsistent with information or documents in the insurer's possession regarding the circumstances of the accident or medical evidence. In addition, surveillance is only to be conducted in places regarded as public or where the claimant could be observed by members of the public. An insurer or investigator may not engage in acts of inducement, entrapment or trespass. An insurer must also be sensitive to the privacy rights of children, including taking reasonable action to avoid unnecessary video surveillance of them.

The Guidelines set out the circumstances under which insurers can investigate claimants by means of surveillance. Surveillance investigations, including the use of video surveillance, may interfere with the privacy of claimants. However, the Committee notes that surveillance may only occur in particular circumstances, namely where there is evidence that an aspect of the claim is exaggerated, misleading or inconsistent. In addition, the Guidelines limit surveillance to public areas or where individuals can be seen by members of the public. Inducement, entrapment or trespass is not permitted. There are also requirements designed to protect children from unnecessary video surveillance. Further, the Committee acknowledges the public interest in ensuring that fraudulent claims are not successful. Accordingly, the Committee makes no further comment.

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

Restrictions on the setting of insurance premiums for third party policies

13. Section 2.22 of the Act allows SIRA to reject insurance premiums it believes are excessive or inadequate or if they do not conform to the Guidelines. Part 1 of the Guidelines provides mechanisms for the regulation of insurance premiums for third party policies. This may have an adverse impact on insurance companies as it interferes with their ability to independently set prices.
14. However, the Committee acknowledges that the third party policies to which the Guidelines relate is a compulsory scheme and there is a public interest in keeping premiums affordable and ensuring market practices are fair. The Committee also notes that SIRA does permit risk-based pricing but sets certain limits in order to achieve the object of the Act to ensure the sustainability and affordability of the scheme and fair market practices.

Part 1 of the Guidelines provides for the regulation of insurance premiums, with SIRA able to reject premiums it believes are excessive or inadequate or if they do not conform to the Guidelines. This may interfere with the autonomy of insurance companies when setting prices for their insurance products. However, the Committee notes that the Guidelines relate to the scheme of compulsory third party insurance established under the *Motor Accident Injuries Act 2017* relating to the death of, or injury to, people as a result of motor accidents in NSW. There is accordingly a public interest in ensuring that premiums are affordable and the scheme is sustainable. It further notes that risk-based pricing is permitted, within certain limits. In the circumstances, the Committee makes no further comment.

Administrative burden – business plans

15. Section 9.18 of the Act requires a licensed insurer to prepare and deliver to SIRA a motor accident business plan as soon as practicable after it is requested to do so by SIRA. Part 3 of the Guidelines sets out the requirements for business plans. Insurers must prepare a business plan each year, providing details of its institutional culture and complaints handling procedures. Self-assessment reports are also to be provided. SIRA may also request an insurer to provide information on: insurer claims manuals, policies and procedure documents; self-audit results; complaints; and training plans, amongst other things.

The Guidelines set out the requirements for the business plans, data and self-assessment reports that a licensed insurer must prepare each year. This may impose an administrative burden on insurers. However, the Committee notes that these requirements are designed to help achieve the objects of the *Motor Accident Injuries Act 2017* which include the early resolution of motor accident claims and the quick, cost effective and just resolution of disputes, as well as ensuring fair market practices. In the circumstances, the Committee makes no further comment.

4. *Professional Standards Act 1994* – Notification pursuant to section 13 – The New South Wales Bar Association Professional Standards Scheme

Date tabled	LA: 4 February 2020 LC: 25 February 2020
Disallowance date	LA: 5 May 2020 LC: 2 June 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. Pursuant to section 13 of the *Professional Standards Act 1994*, the Minister for Better Regulation and Innovation, the Hon. Kevin Anderson MP, has authorised the publication of the NSW Bar Association Professional Standards Scheme. This scheme will commence on 1 July 2020.
2. The NSW Bar Association (NSWBA) has made an application to the Professional Standards Council, appointed under the *Professional Standards Act 1994* (NSW) (the Act), for a scheme under the Act.
3. The scheme is prepared by the NSWBA for the purposes of limiting occupational liability to the extent to which such liability may be limited under the Act.
4. The scheme propounded by the NSWBA is to apply to all members of the NSWBA who hold a NSW barrister's practising certificate issued by the NSWBA and who have professional indemnity insurance that is required under law to be held by NSW barristers in order to practice.
5. The NSWBA has furnished the Councils with a detailed list of the risk management strategies intended to be implemented in respect of its members and the means by which those strategies are intended to be implemented.
6. The scheme is intended to commence on 1 July 2020 and remain in force for five (5) years from its commencement unless, prior to that time, it is revoked, its operation ceases, or it is extended pursuant to s32 of the Act.
7. The scheme is also intended to apply in Victoria, Western Australia, Australian Capital Territory, Northern Territory, Queensland, South Australia and Tasmania.

ISSUES CONSIDERED BY THE COMMITTEE

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

Consumer rights – limited liability

8. As above, the scheme that is the subject of the Minister's notification is prepared by the NSWBA for the purposes of limiting occupational liability to the extent to which such liability may be limited under the Act.
9. Clause 3.1 provides that a person against whom a cause of action relating to occupational liability is brought, is not liable in damages in relation to that cause of action for anything done or omitted on or after the commencement of the scheme above a maximum of \$1,500,000.
10. However, to benefit from this provision, the person to whom the scheme applies must be able to satisfy the court that they have the benefit of: (a) an insurance policy insuring them against that occupational liability; and (b) an insurance policy under which the amount payable in respect of the occupational liability relating to that cause of action is not less than the maximum amount of liability specified in the scheme (clause 3.3).
11. In addition, the preamble to the notification states that the NSWBA has furnished the Councils with a detailed list of the risk management strategies intended to be implemented in respect of its members and the means by which those strategies are intended to be implemented.

The NSW Bar Association (NSWBA) Professional Standards scheme limits the occupational liability of barristers covered by the scheme to a maximum of \$1.5 million. It may thereby limit the consumer rights of people who bring occupational liability actions against barristers.

However, the Committee notes that the scheme makes provision for consumers by stipulating that the barristers must have occupational liability insurance cover for a minimum of \$1.5 million to take advantage of the limited liability provisions. Further, the NSWBA has developed a detailed list of the risk management strategies intended to be implemented in respect of its members and the means by which those strategies are intended to be implemented. The scheme thereby seeks to strike a balance between consumer rights and the commercial viability of practising as a barrister in NSW, protecting consumers through insurance and risk management, not unlimited liability. The Committee also notes that unlimited liability may only be an effective consumer protection strategy if all barristers concerned had significant assets. In the circumstances, the Committee makes no further comment.

5. Property Stock and Business Agents Amendment Regulation 2019

Date tabled	LA: 4 February 2020 LC: 25 February 2020
Disallowance date	LA: 5 May 2020 LC: 2 June 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Property, Stock and Business Agents Regulation 2014* as follows—
 - (a) to prescribe the functions that may be exercised by holders of licences or certificates of registration,
 - (b) to provide rules of conduct that must be observed in the course of the carrying on of business or the exercise of functions under a licence or certificate of registration,
 - (c) to prescribe the material facts an agent must disclose when inducing a person to enter into any contract or arrangement,
 - (d) to prescribe fees payable for applications relating to licences and certificates of registration,
 - (e) to make amendments of a savings and transitional nature,
 - (f) to make minor amendments consequent on the commencement of the *Property, Stock and Business Agents Amendment (Property Industry Reform) Act 2018*.
2. This Regulation is made under the *Property, Stock and Business Agents Act 2002*, including sections 3A, 10A, 17A, 37, 52(1)(b), 216 and 230 (the general regulation-making power) and clause 1 of Schedule 1.

ISSUES CONSIDERED BY THE COMMITTEE

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

Mens Rea

3. Proposed clause 54 of the Regulation sets down the material facts that an agent who is exercising any function as a licensee or registered person under the *Property, Stock and Business Agents Act 2002* ('the Act') must disclose when inducing a person to enter into any contract or arrangement. For example, he or she must disclose where a property is

subject to significant health or safety risks; or where within the last five years a property was the scene of a crime of murder or manslaughter.

4. Failure to disclose such material facts would be an offence regardless of whether the failure to disclose is intentional, if the agent knows of the material facts, or ought reasonably to know. The maximum penalty for the offence is a \$22,000 fine (see section 52(1)(b) of the Act).

The Regulation sets down the material facts that an agent under the *Property, Stock and Business Agents Act 2002* must disclose when inducing a person to enter into any contract or arrangement. Failure to disclose would be an offence regardless of whether it is intentional, if the agent knows of the material facts, or ought reasonably to know. That is, the prosecution does not have to establish that the agent intentionally failed to disclose the material fact or that s/he knew of the material fact – only that s/he ought reasonably to have known. The maximum penalty for the offence is a \$22,000 fine.

The Committee will generally comment where significant penalties can be imposed without a requirement to establish actual knowledge on the part of the accused, noting the common law principle that the mental element of an offence is relevant to the imposition of liability. Nonetheless, the Committee notes that such provisions are not uncommon in regulatory settings to encourage compliance and strengthen offence provisions. In this case, the provisions are intended to promote disclosure of matters that may affect the value of a property, and the prosecution must prove they are matters about which the agent should reasonably have known. Given these considerations, and the fact that no custodial penalty applies, the Committee makes no further comment.

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

Date tabled	LA: 4 February 2020 LC: 25 February 2020
Disallowance date	LA: 5 May 2020 LC: 2 June 2020
Minister responsible	The Hon Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide that persons who carry out traffic control work must have completed training.

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict Liability

2. The Regulation makes various amendments to the *Work Health and Safety Regulation 2017*. It creates new offences which impose strict liability for the following failures to comply with certain duties or obligations:
 - by a person carrying out a business or undertaking, to provide traffic control work training or ensure a person has been trained before they carry out this type of work
 - by a person who carries out traffic control work, to keep certain information available for inspection
 - by a person holding a traffic control work training card, to return their card if they have received a cancellation notice (see clauses 184B, 184C and 184J of the Regulation).
3. There are various maximum penalties for these new strict liability offences with the highest penalties applying to persons carrying out a business or undertaking who fail to provide traffic control work training or ensure a person has been trained before they carry out this work. In these instances, the maximum penalties are a \$3,600 fine for an individual or an \$18,000 fine for a body corporate.

The Regulation introduces several strict liability offences. The Committee generally comments on strict liability offences as they derogate from the

common law principle that the mental element of an offence is relevant to imposition of liability. However, the Committee notes that strict liability offences are relatively common in regulatory settings to promote compliance and strengthen offence provisions. In this instance, the offences relate to obligations placed on employers and duties of their employees in relation to the health and safety of those employees. The Committee notes that the maximum penalty for a body corporate of an \$18,000 fine is reasonably high for an offence created by Regulation. However, the maximum penalty for an individual is a \$3,600 fine and no custodial penalties apply. In the circumstances, the Committee makes no further comments.

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.