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Legislation Review Committee

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

Contents

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Guide to the Digest

COMMENT ON BILLS

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

COMMENT ON REGULATIONS

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

Conclusions

PART ONE – BILLS

1. CRIMES AMENDMENT (ASSAULT OF EMERGENCY SERVICES WORKERS – 3 STRIKES SENTENCING) BILL 2020*

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

Mandatory minimum sentencing and right to a fair trial

The Bill seeks to amend Part 3, Division 8A of the *Crimes Act 1900* to establish minimum penalties for offences against emergency services workers. The Committee notes that such mandatory minimum sentencing limits judicial discretion and means that judicial officers cannot take the circumstances of individual cases into account in determining an appropriate sentence (in particular, mitigating and aggravating circumstances). The Bill may thereby impact on the right to a fair trial. The Committee refers this matter to Parliament for consideration.

2. DIVIDING FENCES AMENDMENT BILL 2020*

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

3. LIQUOR AMENDMENT (24-HOUR ECONOMY BILL) 2020

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

Strict liability offences

The *Liquor Amendment (24-hour Economy Bill) 2020* seeks to amend the *Liquor Act 2007* and the *Liquor Regulation 2018* to implement a number of reforms that are part of the NSW Government's 24 Hour Economy Strategy. Additionally, these reforms are part of the Government's broader suite of liquor law reforms, which form part of the Government's response to the report of the Joint Select Committee on Sydney's Night Time Economy.

Schedule 3 of the Bill introduces an enhanced regulatory framework for same-day delivery of alcohol. This is in response to the growth of the industry, and the lack of effective regulation dealing with this type of alcohol sale. Schedule 3 creates a number of requirements for providers of same-day delivery alcohol, which are backed by offence provisions. For example, Clause 114J requires that a person a person must not, as part of a same day delivery, supply liquor to an intoxicated person. Failure to comply attracts a maximum penalty of $11,000.

The offences so created by the Bill are strict liability ones. The Committee generally comments on strict liability offences as they depart from the common law principle that mens rea, or the mental element, is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Further, the maximum penalties for the offences are monetary, not custodial. In the circumstances, the Committee makes no further comment.

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

Commencement by proclamation

As above, the Bill proposes a range of amendments to the *Liquor Act 2007* and the *Liquor Regulation 2018* to implement the NSW Government's 24-hour Economy Strategy. These reforms include introducing an integrated demerit points and incentive scheme for venues; introducing cumulative impact statements to manage the density of licensed venues; and introducing a new regulatory framework for same day deliveries of liquor.

The proposed Act commences by proclamation. The Committee generally prefers legislation to commence on a fixed day or on assent to provide certainty for those affected. However, the Committee also notes the benefits associated with a flexible start date, particularly regarding the implementation of administrative arrangements which is likely to be a significant task in this case, given the breadth of the reform package. In the circumstances, the Committee makes no further comment.

4. PUBLIC WORKS AND PROCUREMENT AMENDMENT (WORKERS COMPENSATION NOMINAL INSURER) BILL 2020*

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

5. ROAD TRANSPORT AMENDMENT (DIGITAL LICENSING) BILL 2020

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

Right to privacy of personal information

The Bill amends the *Road Transport Act 2013* and the *Licensing and Registration (Uniform Procedures) Act 2002* to extend the circumstances in which a digital driver licence can be used. Schedule 2 of the Bill permits information-access arrangements to be made between licensing authorities and service providers for the purposes of sharing licence information to comply with licence application requirements. In sharing this licence information, personal details of individuals may be shared including their name, date of birth, address and photograph. The sharing of this personal information may impact on the privacy of the affected person.

However, the Committee notes that the Bill contains specific privacy safeguards as sharing of this information may only be done to comply with a lawful requirement to provide such information for a licence application and the sharing of information with service providers and public sector agencies is subject to the privacy principles contained in the *Privacy and Personal Information Protection Act 1998.* In these circumstances, the Committee makes no further comment.

6. SPORTING VENUES AUTHORITIES AMENDMENT (VENUES NSW) BILL 2020

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

Employment rights

The Bill amends the *Sporting Venues Authorities Act 2008* to provide that an employee under the *Sydney Cricket and Sports Ground Act 1978* in the Sydney Cricket and Sports Ground Trust will be transferred to the employment of the reconstituted Venues NSW. As transfer of employment does not require the consent of the employee, this clause may impact on the employment rights of affected employees. However, the Committee notes that the provision is intended to align the legislation under which the persons are employed to the reconstituted Venues NSW, and that all previous conditions of employment, industrial instruments and

employee entitlements will remain the same. In these circumstances, the Committee makes no further comment.

Freedom of movement

Schedule 3.7, item 1 of the Bill amends clause 5 of the Sporting Venues Authorities Regulation 2019 to provide that a ranger or police officer may direct a person to leave land or a facility vested in or managed by a sporting venues authority if the ranger or police officer considers the person is contravening a provision of the Sporting Venues Authorities Act 2008 or the Regulation.

A person who has been given a direction to leave must not re-enter the land or facility for a period of 48 hours after the direction was given, or after removal, whichever is the later. The maximum penalty for remaining on, entering or returning to the land in contravention of a direction is a $1,100 fine.

These provisions may impact on the freedom of movement. The right to freedom of movement within the territory of a State is recognised by Article 12 of the International Covenant on Civil and Political Rights.

However, the Committee notes that the provisions are in line with similar regulations governing recreational spaces used by the public, where the site is managed by a trust or authority. The Committee also acknowledges the benefit of the provisions for the majority of those using affected land or facilities, allowing the peaceful enjoyment of the environment and amenities, and discouraging anti-social behaviour. In the circumstances, the Committee makes no further comment.

Civil remedies and rights to compensation

The Bill amends the Sydney Olympic Park Authority Act 2001 to permit the transfer of assets, rights and liabilities of the Authority by order of the Governor. Such a transfer is not to be regarded as a breach of contract, confidence or civil wrong, and no compensation is payable to a person or body in connection with such a transfer except as provided by the order. The Bill may thereby impact on the rights to obtain a civil remedy and compensation rights.

However, the Committee notes that the effect of these provisions is to ensure the effective transfer of assets, rights and liabilities from the Sydney Olympic Park Authority to another public sector agency that would carry on these assets, rights and liabilities and does not operate to remove contractual obligations, but to transfer them to a different public sector agency and accommodate the role of the reconstituted Venues NSW. In the circumstances, the Committee makes no further comment.

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

Ill-defined power to approve developments

The Bill amends the *Sporting Venues Authorities Act 2008* to insert new Divisions 2A and 2B, which provide that the Minister may approve development applications on designated land.

The Minister's approval must certify that the Minister has consulted the Ministers administering the *Public Works and Procurement Act 1912* and the *Environmental Planning and Assessment Act 1979*. However, proposed section 30AE provides that certain excluded laws do not apply to the development approvals, including the *Environmental Planning and*

Assessment Act 1979, the *Local Government Act 1993,* and an instrument in force made under the Acts. These provisions may thereby grant the Minister a broad power to approve developments without complying with the requirements under these Acts.

The Committee refers these provisions to Parliament to consider whether they make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers of the Minister.

7. STRONGER COMMUNITIES LEGISLATION AMENDMENT (COURTS AND CIVIL) BILL 2020

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

Open justice – restrictions on distribution of recordings

Schedule 1.2 of the Bill creates a new offence of distributing recordings of court room proceedings, with limited exceptions. This complements existing offences which prohibit the recording of sounds and images in a courtroom and also prohibit the transmission of such recordings. Like the existing offences, the new offence has a maximum penalty of $22,000 or 12 months' imprisonment.

The new prohibition on distribution of recordings may impact on the principle of open justice because it imposes a blanket restriction on the distribution of recordings of court proceedings – even if the recording itself has been authorised. This would prevent such recordings or parts of recordings of proceedings held in open court from being posted to social media or published online, in an era where information is increasingly distributed via these channels. For the same reasons, the new offence may also impact on freedom of expression because publication of a recording appears to require approval of the Court and may in practice limit the scope of media coverage.

However, principles of open justice and the right to freedom of expression may be subject to common law exceptions or otherwise limited if the restrictions imposed are reasonable and proportionate to the circumstances. The second reading speech notes that the offence is designed to protect vulnerable witnesses and prevent interference with the administration of justice although the provision on its face goes beyond that, with no express limitation. The Committee agrees that principles of open justice need to be balanced against rights to a fair trial. The Committee refers these matters to Parliament for further consideration.

Judicial independence – ability to suspend judges

The Bill amends the Judicial Officers Act 1986 to expand the circumstances in which a judicial officer, normally a judge or magistrate, may be suspended by the head of jurisdiction, normally the Chief Justice of the Court. For instance, the Chief Justice may suspend a judicial officer if of the opinion that the officer may have an impairment that affects performance of their duties. In such circumstances, the Chief Justice may request that the Judicial Commission investigate the matter. Although judicial officers are suspended with pay, there appears to be no time limit on the suspension or any rights of review.

The Committee notes that the amendment may impact on principles of judicial independence, particularly given a suspension may be indefinite and there appear to be no review rights. Suspending a judicial officer without proper cause may also impact on parties to proceedings before that officer and suspension for an indefinite period may be similar to removal, which only the Parliament can do under the Constitution.

However, judicial officers occupy a special position in the community and make daily decisions which can have significant consequences for individuals. Aside from the potential impacts on individuals, impaired judicial officers may also undermine public confidence in the justice system as a whole. It may therefore be appropriate that judicial officers can be suspended as soon as an impairment is suspected, so that an investigation is conducted by the Judicial Commission. Given these considerations, the Committee makes no further comment.

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

Matters deferred to regulations – process affecting vulnerable children

The Bill inserts new provisions into the *Children's Guardian Act 2019* which govern the surrender of accreditations by agencies which provide or arrange out-of-home care for children. For instance, the Children's Guardian may decide the date on which the surrender of a designated agency's accreditation takes effect, if the Guardian is of the opinion that it is necessary to protect the safety, welfare or wellbeing of a child or class of children. However, the date must be no more than six months after the agency notifies the Children's Guardian that it intends to surrender its accreditation. Several related matters are deferred to the regulations, including any provisions relating to the surrender.

An agency's decision to surrender their accreditation may significantly impact on the vulnerable children in their care, including by disrupting the continuity of existing care arrangements or the prospects of finding a suitable long term placement. Although the Guardian can nominate a date on which the surrender takes effect if it considers that this is necessary to protect the children involved, the legislation imposes a six month time limit on this period. The second reading speech notes that six months is sufficient time for the Department to commission other agencies to provide care to these children, in the "very rare circumstances" that this is required.

It is important the surrender process prioritises the best interests of the child, especially given the potential negative impacts to vulnerable children and the relatively short six month transition period. The Committee notes that further detail clarifying the surrender process, including any principles applying to affected children, could be set out more comprehensively in primary legislation rather than deferred to the regulations. Primary legislation is subject to a greater degree of parliamentary scrutiny. In the circumstances, the Committee refers this matter to Parliament.

Lack of clarity – criteria for registration as out-of-home care agency

Schedule 1.1 of the Bill amends the Children's Guardian Act 2019 and may contain provisions which lack sufficient clarity, including item 11. Item 11 inserts proposed section 80J into the Act. This section allows the Minister to, from time to time, approve criteria for use in deciding whether to grant an application for registration as a registered agency. A registered agency is permitted to provide voluntary out-of-home care arranged by a parent, which can include short term respite care or longer term respite care or behavioural support. Different criteria may apply to applications for different types of care. The criteria must be published on the Children's Guardian's website.

Registered agencies are likely to have vulnerable children in their care, sometimes for long periods, and may receive public funding through the National Disability Insurance Scheme or bail assistance programs. Such care is arranged by parents, who may not have as much insight into the operation of an agency as the Minister or Children's Guardian. For these reasons, it

may be important that criteria for the registration of such agencies is clear, robust and subject to an appropriate level of parliamentary scrutiny, for example in primary or subordinate or legislation. The publication of relevant criteria on the Children's Guardian website may not enable any parliamentary scrutiny. In the circumstances, the Committee refers this matter to the Parliament for consideration.

8. STRONGER COMMUNITIES LEGISLATION AMENDMENT (CRIMES) BILL 2020

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

Privacy rights

Schedule 1.15, item 7 of the Bill seeks to amend the *Surveillance Devices Act 2007* to provide a limited exception to the section 33 requirement for law enforcement officers to apply to an eligible Judge for approval after using a surveillance device without a warrant in an emergency, pursuant to section 31. The exception would apply if the law enforcement officer uses an optical surveillance device only to observe the carrying out of an activity, not to record it, and the circumstances under section 31 apply (i.e. the device has been used in an emergency situation where there is imminent threat of serious violence or substantial property damage etc).

By providing an exception to the requirement to apply for approval, this provision may impact on privacy rights. However, the Committee acknowledges that the exception is limited – it only applies where the device is used to observe an activity, not to record it. Further, it is intended to ensure that law enforcement is not deterred from using certain devices that assist them to observe activities in emergency situations e.g. hostage situations where there is an imminent threat of serious violence. Given these considerations the Committee is of the view that the privacy impacts may be reasonable in the circumstances and makes no further comment.

Expansion of police powers to use force

Section 24A of the *Terrorism (Police Powers) Act 2002* enables the Police Commissioner to declare that Part 2AAA applies to a terrorist act to which police are responding. Part 2AAA provides that a police officer does not incur any criminal liability for the use of force—including lethal force—that is authorised under part 2AAA, in good faith and reasonably necessary to defend any person threatened by a terrorist act or to prevent their unlawful deprivation of liberty.

However, currently this declaration must attach to a specific location – section 24A(2) provides it "may be made in respect of the specified location at which police officers are responding and in respect of any other related specified location".

Schedule 1.16, item 1 of the Bill seeks to amend the *Terrorism (Police Powers) Act 2002* to provide that a declaration that an incident is a terrorist act applies to each location at which police officers are responding to the incident. The Bill may thereby expand police powers to use force – including lethal force – and in turn impact on rights to bodily integrity and the right to life. However, the Committee notes that the current requirement to attach the declaration to a specific location creates operational issues for police when responding to a terrorist incident, for example, where there is a mobile terrorist offender. Further, to attract immunity from criminal liability pursuant to the declaration, the force must still be used in good faith and be reasonably necessary to defend any person threatened by a terrorist act or to prevent their unlawful deprivation of liberty. In the circumstances, the Committee makes no further comment.

Extension of limitation periods

Schedule 1.3 of the Bill amends the *Court Suppression and Non-publication Orders Act 2010* to extend the time limit for commencing summary proceedings in the Local Court for the offence of contravening a suppression order or non-publication order from within six months of the date of the alleged offence to within two years.

The Committee notes that by extending the time limits to commence a prosecution for this offence, the Bill may expose persons to convictions and penalties that could not otherwise apply. The Bill may therefore have some impact on personal rights and liberties.

However, the Committee understands that given developments in the way information can be communicated in the digital age, it can now be more complex to discover or obtain evidence of the offence in question, and the extended limitation period is intended to respond to this complexity. Further, the extended limitation period of two years is still relatively short. In the circumstances, the Committee makes no further comment.

Procedural fairness and vague and ill-defined power

Schedule 1.2, items 7 and 8 of the Bill seek to amend section 91 of the Children (Detention Centres) Act 1987 to ensure that a Children's Magistrate can withhold any document in parole proceedings from any person where he or she is of the opinion that it is in the public interest to do so, and is not required to provide information about any part of the content of a report or other document withheld from a person if of the opinion it is in the public interest and that the public interest outweighs any right to procedural fairness that may be denied by not providing the information.

In doing so, these provisions impact on the right to procedural fairness, including in youth parole proceedings. The Committee notes in particular that the power to withhold information is vague and ill-defined, based on the Magistrate's opinion as to the 'public interest'. The Committee prefers provisions affecting rights to be drafted with sufficient precision so that their scope and content is clear. The Committee refers this matter to Parliament for consideration.

Entry without warrant

Schedule 1.11 of the Bill seeks to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide that a police officer may enter premises if the police officer believes on reasonable grounds that a deceased person is on the premises, that the person's death is not the result of an offence and no other person is present on the premises to consent to the entry. The entry must be authorised by a police officer of the rank of Inspector or higher.

The Committee appreciates that the amendment is intended to allow police officers to perform necessary duties e.g. issuing a death certificate and ensuring that the deceased person is taken to the morgue; and that there must be reasonable grounds for exercising the power. However, the Committee notes that the power covers residential premises and that there is no requirement for police to obtain a warrant from an independent judicial officer before exercising it – approval can be obtained from a police officer of the rank of Inspector or above. The Committee refers this matter to Parliament to consider whether the power to enter residential premises should be independently oversighted.

Rights of youth detainees

Schedule 1.2, item 3 of the Bill seeks to amend the *Children (Detention Centres)* Act 1987 to allow national security interest detainees to be conveyed by correctional officers to or from detention centres if authorised to do so by the Commissioner of Corrective Services at the request of the Secretary of the Department of Communities and Justice.

The Committee understands that this amendment would authorise Corrective Services NSW staff to transport national security interest-designated juvenile detainees between detention centres, courts, hospitals and other places when requested by Youth Justice NSW. Further, Corrective Services staff would be able to exercise all the powers they exercise when transporting adult offenders, including the use of force that is reasonably necessary to exercise their functions, the carrying of firearms, the use of armoured vehicles and the ability to conduct searches in the same manner in which inmates are searched.

By allowing authorities to exercise powers in respect of juvenile offenders that are ordinarily only exercised in respect of adult offenders, these amendments may have some impact on the rights of juvenile offenders to be managed in custody in a manner appropriate to their age and stage of development. The Committee appreciates that the amendments would only affect the small number of juvenile detainees classified as national security interest detainees, and that the amendment is intended to address a need identified by Youth Justice staff for more security when transporting national security interest detainees. Noting the competing concerns, the Committee refers the amendments to Parliament to consider whether they are reasonable and proportionate in the circumstances.

9. SUPERANNUATION LEGISLATION AMENDMENT BILL 2020

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

Matters deferred to regulations

The Bill would enable the Government to make regulations to prescribe any other percentage figure as the trigger for reducing pension payments. The Bill currently amends the relevant legislation so that pension payments are only reduced if the Consumer Price Index for Sydney over 12 months (the Sydney CPI) falls below 1.1 per cent, as opposed to the current 1 per cent threshold. The second reading speech noted that a further power to prescribe any other percentage figure would enable the Government to respond to changing circumstances associated with the pandemic.

The Committee notes that regulations are subordinate legislation and are therefore generally subject to a lower level of parliamentary scrutiny. While the power to change the threshold trigger for reducing pension payments is administratively convenient, it could significantly affect the rights of many pensioners and may impact the budget. Although the Treasurer noted that the power was "unlikely" to be required, the Committee also notes that potentially significant changes to rights should be effected through primary legislation. The Committee refers this matter to the Parliament for consideration.

10. TRANSPORT ADMINISTRATION AMENDMENT (CLOSURE OF RAILWAY LINES IN NORTHERN RIVERS) BILL 2020

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

Part One – Bills

1. Crimes Amendment (Assault of Emergency Services Workers – 3 Strikes Sentencing) Bill 2020*

Date introduced	16 September 2020
House introduced	Legislative Council
Member responsible	The Hon. Rod Roberts MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to establish minimum penalties for assaults and certain other offences against emergency services workers.

BACKGROUND

2. In the second reading speech, the Hon. Rod Roberts MLC noted that assaults on emergency services workers are unacceptable:

> As members of the Parliament of New South Wales, it is our duty to stay informed, and to address and respond to the concerns of the people of the State. It is with this understanding that feel I can speak for the citizens of New South Wales when I say that the continued violent assaults on our frontline emergency service workers are unacceptable. The community, including my colleague Mark Latham and I, are sick and tired of seeing our emergency service workers being used as punching bags. This must stop. I am a retired detective sergeant and I have seen firsthand the violence that is directed at our emergency service workers. Their jobs are hard enough dealing with all manner of dangerous and life-threatening situations, let alone having to put up with being subjected to violent assaults as they carry out their duty of protecting and serving the community.

3. Mr Roberts noted in particular assaults on police, paramedics and nurses in NSW:

> Unfortunately, these attacks are becoming the norm in New South Wales. In 2019 there were 2,483 assaults on police officers in New South Wales. That figure represents over 50 a week. This number has remained relatively consistent over the last 10 years. It is my view that any assault on our police men and women is one too many. Unfortunately, this appalling behaviour directed at our police officers is also being experienced by other emergency service workers. It has become so bad that our paramedics face violence almost on a daily basis from patients who are fuelled by drugs such as ice. Australian Paramedics Association NSW president, Chris Kastelen, speaking on behalf of his members, described the work environment as like a battlefield…Our nurses are also bearing the brunt of violence in our hospitals, being attacked by violent patients on a daily basis. Our emergency departments are like war zones, filled with patients who are fuelled by alcohol and drugs.

4. Mr Roberts stated that the Bill aimed to prevent assaults by amending the *Crimes Act 1900* to legislate mandatory minimum sentencing for anybody who assaults an emergency services worker:

> The bill that I put to the House aims to prevent these inexcusable attacks by introducing a three-strike rule to the Crimes Act. We believe that this amendment will cause people to think twice before assaulting our emergency service workers. Recidivist offenders will be going to gaol. The deterrent effect of continual soft-sentencing has eroded respect and now we find not only are our police being assaulted but also our paramedics, nurses, midwives, doctors and even fire and rescue officers whilst carrying out essential and often life-saving duties. The lack of strong sentences sends the wrong message…To make sure community expectations are met, the bill legislates mandatory minimum sentencing for anybody who assaults an emergency service worker.

ISSUES CONSIDERED BY THE COMMITTEE

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

Mandatory minimum sentencing and right to a fair trial

5. Schedule 1[4] of the Bill seeks to amend Part 3, Division 8A of the *Crimes Act 1900* to establish three tiers of offence against emergency services workers as follows:

> (a) Tier 1 offence: assault, throw a missile at, stalk, harass or intimidate an emergency services worker while in the execution of the worker's duty, without causing actual bodily harm,
>
> (b) Tier 2 offence: assault an emergency services worker while in the execution of the worker's duty, causing actual bodily harm,
>
> (c) Tier 3 offence: wound or cause grievous bodily harm to an emergency services worker while in the execution of the worker's duty, and is reckless as to causing actual bodily harm to the worker or another person.

6. Further, schedule 1[6] and 1[12] of the Bill seek to amend Part 3, Division 8A of the *Crimes Act 1900* so that existing offences involving actions against third parties connected with 'law enforcement officers' (section 60B), and offences involving obtaining personal information about 'law enforcement officers' (section 60C) would apply more broadly to cover 'emergency services workers'.

7. Schedule 1[3] of the Bill defines 'emergency services workers' for the purposes of Part 3, Division 8A of the *Crimes Act 1900* to include persons currently covered by the definition of 'law enforcement officers', such as police officers and correctional officers, and includes new classes of persons, such as firefighters, paramedics, medical practitioners, nurses and midwives.

8. Finally, schedule 1[13] of the Bill establishes minimum penalties in relation to the abovementioned Tier 1, Tier 2 and Tier 3 offences that the Bill seeks to create, and for the offences involving actions against third parties (section 60B) and obtaining personal information (section 60C).

9. For example, where a person is found guilty of a Tier 1 offence of assault, throw a missile at, stalk, harass or intimidate an emergency services worker while in the

execution of the worker's duty, without causing actual bodily harm, the Court would be required to impose sentences of no less than the following:

- for a second offence, a period of imprisonment to be served by way of intensive correction in the community,
- for a third or subsequent offence, 3 months imprisonment.

10. Similarly, where a person is found guilty of a Tier 3 offence of wound or cause grievous bodily harm to an emergency services worker while in the execution of the worker's duty, and is reckless as to causing actual bodily harm to the worker or another person, the Court would be required to impose sentences of no less than the following:

- for a first offence, a period of imprisonment to be served by way of intensive correction in the community, or
- for a second offence, 6 months imprisonment, or
- for a third or subsequent offence, 12 months imprisonment.

The Bill seeks to amend Part 3, Division 8A of the *Crimes Act 1900* to establish minimum penalties for offences against emergency services workers. The Committee notes that such mandatory minimum sentencing limits judicial discretion and means that judicial officers cannot take the circumstances of individual cases into account in determining an appropriate sentence (in particular, mitigating and aggravating circumstances). The Bill may thereby impact on the right to a fair trial. The Committee refers this matter to Parliament for consideration.

2. Dividing Fences Amendment Bill 2020*

Date introduced	16 September 2020
House introduced	Legislative Council
Member responsible	The Hon. Mark Banasiak MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to apply the *Dividing Fences Act 1991* (the principal Act) to the Crown and other authorities.

2. Currently, the principal Act does not apply to the Crown or the following bodies—

   (a) a council,

   (b) a roads authority under the Roads Act 1993 in relation to a public road,

   (c) an irrigation corporation within the meaning of the Water Management Act 2000,

   (d) an Aboriginal Land Council in relation to certain land reserved under the National Parks and Wildlife Act 1974,

   (e) Water NSW.

3. The effect of the proposed amendment is to apply the principal Act to the Crown, councils, roads authorities and Water NSW, so that they will be liable to pay for dividing fencing work. Irrigation corporations and Aboriginal Land Councils will remain exempt from the principal Act.

BACKGROUND

4. The *Dividing Fences Act 1991* outlines the legislative framework for determining the contributions of adjoining landowners to the cost of a dividing fence.

5. In the second reading speech, the Hon. Mark Banasiak MLC highlighted that under the *Dividing Fences Act 1991*, certain government bodies and authorities are not liable for the cost of fencing work. Mr Banasiak noted that the Bill is in response to the high number of destroyed fences by the "Black Summer" bushfires and the cost of reinstating these dividing fences that has fallen to landowners.

6. This Bill therefore seeks to amend the *Dividing Fences Act 1991* to ensure the Crown, councils, road authorities and Water NSW carry the liability to pay for dividing fencing work.

ISSUES CONSIDERED BY THE COMMITTEE

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

3. Liquor Amendment (24-hour Economy Bill) 2020

Date introduced	16 September 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 amend the *Liquor Act 2007* and the *Liquor Regulation 2018*. In particular, the Bill—

   (a) replaces the declared premises and minors sanctions schemes and the 3 strikes disciplinary system with an integrated demerit points and incentives scheme, and

   (b) provides for cumulative impact assessments, and

   (c) regulates same day deliveries of liquor, and

   (d) makes miscellaneous amendments of an administrative or minor nature.

BACKGROUND

2. During the Second Reading Speech the Hon. Victor Dominello MP, Minister for Customer Service, told the Parliament that:

   > The bill is part of this Government's vision for a vibrant, modern and safe 24-hour economy. When we started developing these laws late last year, we could not have predicted that a pandemic was about to sweep across the globe. As we chart a path towards economic recovery, now more than ever, we need to focus on supporting business through smarter, data-driven regulation.

3. The Minister went on to tell the Parliament that:

   > On 28 November 2019 this Government announced an important package of liquor law reforms. The initial reforms commenced on 14 January this year. They included removal of patron lockouts and drinks restrictions from venues in the Sydney CBD precinct. Those reforms represented the first stage of the Government's response to the Joint Select Committee on Sydney's Night Time Economy. Furthermore, exhibiting the Government's nuanced and considered approach to invigorating the 24-hour economy in our great city, on 14 September 2020 the Treasurer and Minister Ayres announced the 24-hour Economy Strategy.

4. The Minister stated that "the bill will implement the measures in our liquor reform package that required public consultation, targeted stakeholder discussions and legislative change".

5. When describing how the Bill will implement these reforms, the Minister told the Parliament that:

> This bill has four key components. Schedule 1 to the bill establishes an integrated incentives and sanctions system for licensed venues. Schedule 2 provides a framework to help manage and assess liquor licence applications through cumulative impact assessments. Schedule 3 enhances the regulation of same-day alcohol delivery. Schedule 4 supports small bars by making it faster and easier to begin trading and to offer more diverse family-oriented services. It also makes a range of other miscellaneous changes, including to make it easier for venues to obtain approval to offer live music and entertainment.

6. Further, the Minister told the Parliament that this reform agenda will also be utilised to "support the recovery of our economy as we come out of the COVID-19 pandemic".

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict liability offences

7. Schedule 3 of the Bill proposes amendments to the *Liquor Act 2007* and the *Liquor Regulation 2018* that introduce a revised regulatory framework for same-day alcohol delivery.

8. When describing the need for these amendments, the Minister told the Parliament that:

> Changes in technology as well as consumer demand for fast and convenient online delivery services have seen growth of the online alcohol sales market and same-day alcohol delivery options around Australia. There are clear regulatory gaps that need to be filled. The bill lifts related standards so they are more comparable to the requirements imposed on licensed premises.

9. Specifically, the Minister identified issues relating to point of sale and point of delivery, stating that:

> We know that there are currently weaknesses at the point of sale. For example, some sellers do nothing more than ask a customer to tick a box saying that they are over the age of 18. The bill helps to address this by ensuring that same-day deliveries must only be provided to an adult who has been nominated at the time the alcohol is purchased. Currently, there are few regulatory controls at the point of delivery. There is no mandatory requirement for physical ID to be checked and same-day deliveries ordered online may still be left unattended, if that is what the customer has requested. Delivery drivers also do not need to complete responsible service of alcohol [RSA] training.

10. The amendments contained in Schedule 3 of the Bill propose a number of amendments that seek to address these risks. Specifically, the amendments introduce a number of requirements for providers of same day delivery alcohol.

11. For example, Clause 114I(1) of Schedule 3 requires that a same day delivery provider must not make a same day delivery to a person, or permit an employee or agent to make a same day delivery for the provider, unless the person produces evidence of the person's identity and age in a way that complies with the requirements prescribed by the regulations. Failing to comply with this requirement attracts a maximum penalty of $5,500.

12. The amendments create a number of other requirements for providers of same day delivery alcohol, each with attached penalties for failure to comply, including:

- Clause 114J – this proposed clause requires that a person must not, as part of a same day delivery, supply liquor to an intoxicated person. Failure to comply attracts a maximum penalty of $11,000.

- Clause 114K(1) - creates requires that a person must not, as part of a same day delivery, supply liquor in a public place within an alcohol-free zone; an alcohol prohibited area; or a restricted alcohol area. A failure to comply with this requirement attracts a maximum penalty of $3,300.

The *Liquor Amendment (24-hour Economy Bill) 2020* seeks to amend the *Liquor Act 2007* and the *Liquor Regulation 2018* to implement a number of reforms that are part of the NSW Government's 24 Hour Economy Strategy. Additionally, these reforms are part of the Government's broader suite of liquor law reforms, which form part of the Government's response to the report of the Joint Select Committee on Sydney's Night Time Economy.

Schedule 3 of the Bill introduces an enhanced regulatory framework for same-day delivery of alcohol. This is in response to the growth of the industry, and the lack of effective regulation dealing with this type of alcohol sale. Schedule 3 creates a number of requirements for providers of same-day delivery alcohol, which are backed by offence provisions. For example, Clause 114J requires that a person a person must not, as part of a same day delivery, supply liquor to an intoxicated person. Failure to comply attracts a maximum penalty of $11,000.

The offences so created by the Bill are strict liability ones. The Committee generally comments on strict liability offences as they depart from the common law principle that mens rea, or the mental element, is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Further, the maximum penalties for the offences are monetary, not custodial. In the circumstances, the Committee makes no further comment.

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

Commencement by proclamation

13. As above, the Bill proposes a number of amendments to the *Liquor Act 2007* and the *Liquor Regulation 2018* to bring into effect the Government's 24-hour Economy Strategy. When describing these reforms, the Minister told the Parliament that:

> The measures in the bill provide important foundations to support and invigorate the 24-hour economy. These will be built upon significantly in future through the comprehensive initiatives in the Government's 24-hour Economy Strategy.

14. The Bill contains three broad categories of reform, which are as follows:

- introducing an integrated demerit points and incentive schemes to reward well-run venues, and minimise violence and contraventions of liquor laws (Schedule 1);

- introducing cumulative impact assessments, which will help manage the density of licensed premises in areas of concern (Schedule 2);

- introducing a new regulatory framework for same day deliveries of liquor (Schedule 3).

15. When speaking to these amendments, the Minister told the Parliament that "we plan to phase these new reforms in from December this year onwards".

As above, the Bill proposes a range of amendments to the *Liquor Act 2007* and the *Liquor Regulation 2018* to implement the NSW Government's 24-hour Economy Strategy. These reforms include introducing an integrated demerit points and incentive scheme for venues; introducing cumulative impact statements to manage the density of licensed venues; and introducing a new regulatory framework for same day deliveries of liquor.

The proposed Act commences by proclamation. The Committee generally prefers legislation to commence on a fixed day or on assent to provide certainty for those affected. However, the Committee also notes the benefits associated with a flexible start date, particularly regarding the implementation of administrative arrangements which is likely to be a significant task in this case, given the breadth of the reform package. In the circumstances, the Committee makes no further comment.

4. Public Works and Procurement Amendment (Workers Compensation Nominal Insurer) Bill 2020*

Date introduced	16 September 2020
House introduced	Legislative Council
Member responsible	Mr David Shoebridge MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the Public Works and Procurement Act 1912 and related legislation to provide that the Workers Compensation Nominal Insurer is a government agency for the purposes of Part 11 of that Act. Part 11 sets out certain obligations of government agencies in relation to the procurement of goods and services.

BACKGROUND

2. In the Second Reading Speech, Mr David Shoebridge MLC told the Parliament that:

> The Public Works and Procurement Amendment (Workers Compensation Nominal Insurer) Bill 2020 seeks to close a loophole that has allowed icare to put hundreds of millions of dollars of public money toward contracts that have been awarded without proper procurement and without transparent tender processes.

3. Mr Shoebridge described the functions of the Workers Compensation Nominal Insurer, which is a scheme managed by icare, stating that:

> The Workers Compensation Nominal Insurer is the fund that holds, on any given day, somewhere between $17 and $18 billion effectively on trust for injured workers in New South Wales. Every cent in that fund has come from employers of New South Wales.

4. When describing the reasons for the Bill, Mr Shoebridge stated that:

> The reports from multiple members in icare are that the loophole, which allows for contracts with the Nominal Insurer to be done absent of the tender and procurement requirements that apply to the public sector, has been routinely abused and used to contract for all of the services with icare, even if they apply to the services and operations of icare that are well outside of the Nominal Insurer scheme.

5. Mr Shoebridge also told the Parliament how the Bill would address this "loophole", stating that:

> It amends section 162 of the Public Works and Procurement Act 1912 to include unambiguously in the definition of "government agency" the Workers Compensation Nominal

> Insurer, established under section 154A of the Workers Compensation Act 1987—it shuts the loophole.

6. In effect, this amendment would "provide that the Workers Compensation Nominal Insurer is a government agency for the purposes of part 11 of the Public Works and Procurement Act".

7. Mr Shoebridge described Part 11 of the *Public Works and Procurement Act 1912*, telling the Parliament that:

> Part 11 is essential because for over a century that piece of legislation has put in place clear obligations on government agencies about the procurement of goods and services, such as transparent tenders and public notifications of contracts, which are essential elements to stop what otherwise can be corrupting and corrupted tender processes in New South Wales.

8. Mr Shoebridge described icare as being "in desperate need of being compelled to follow the procurement practices that all other government agencies have to follow".

9. Additionally, in the Second Reading Speech, Mr Shoebridge made reference to a transitional provision contained in the Bill that aims to avoid "contractual uncertainty". This provision, at clause 3(2) of the Bill states that:

> This Part does not apply to an agreement for the procurement of goods and services entered into by the Workers Compensation Nominal Insurer before the commencement of the Public Works and Procurement Amendment (Workers Compensation Nominal Insurer) Act 2020.

ISSUES CONSIDERED BY THE COMMITTEE

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

5. Road Transport Amendment (Digital Licensing) Bill 2020

Date introduced	16 September 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 amend the *Road Transport Act 2013* (the *RT Act*) and the *Licensing and Registration (Uniform Procedures) Act 2002* (the *LR(UP) Act*) as follows—

   (a) to give digital driver licences the same status as physical driver licences,

   (b) to extend the existing scheme to enable arrangements for the use and sharing of photographs of applicants for licences and licence holders by licensing authorities to—

   (i) other information obtained from the applicants and licence holders, and

   (ii) other kinds of licences, registrations, permits and authorisations.

BACKGROUND

2. The Bill amends the *Road Transport Act 2013* and the *Licensing and Registration (Uniform Procedures) Act 2002* in respect of the digital driver licence scheme.

3. In the second reading speech, the Hon Victor Dominello MP, Minister for Customer Service, noted that the Bill will give the digital driver licence the same status as a physical driver licence and was a significant step in advancing the Government's commitment to digital transformation. The Minister noted that the digital driver licence trail was successfully launched in October 2019, with now over 1.7 million people, or about 31 per cent of all driver licence holders, having downloaded the digital driver licence.

4. Under this scheme, individuals may register to obtain a digital version of their NSW driver licence that can be displayed on a smartphone for presentation to a police officer when driving. The Service NSW website also notes that the NSW digital driver licence is accepted by most pubs and clubs.

5. The Bill expands the range of circumstances for which a digital driver licence can be used and ensures that a customer will be able to rely on their digital driver licence to satisfy any legal requirement where they could provide their driver licence. For example, transactions purchasing goods and services that require identification such as buying pseudoephedrine or buying from a second-hand dealer.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to privacy of personal information

6. As above, the Bill amends the *Road Transport Act 2013* and the *Licensing and Registration (Uniform Procedures) Act 2002,* which outline the legislative framework for driver licence registration and the digital driver scheme. Under this scheme, individuals may register to obtain a digital version of their NSW driver licence that can be displayed on a smartphone for presentation to a police officer when driving.

7. Schedule 2 of the Bill amends the *Licensing Registration (Uniform Procedures) Act 2002* and inserts Part 4A Retention, use and protection of information. Under proposed section 80C of Part 4A Division 2, arrangements may be made for the provision of information in connection with licences (information-access arrangements) to facilitate information sharing with another licensing authority or service provider to comply with a lawful requirement to provide information for a licence application.

8. A licensing authority may only provide or share information under such an information-access agreement if the information was obtained from a licence applicant and the applicant has consented to the sharing of the information (proposed section 80C(2)-(3)). However, a licensing authority may provide or share information under an information-access arrangement without an applicant's consent if any other law provides that it is to be released or if it is releasing it to the person whose likeness is shown in the photograph (proposed section 80I(d)-(e)).

9. The Bill provides that access to and alteration of information obtained under an information-access arrangement may be provided to an individual who makes a request to access or alter their personal information held by agencies under sections 14 and 15 of the *Privacy and Personal Information Protection Act 1998* (proposed section 80J).

10. The Bill also provides that a licensing authority is not the enter into an information-access arrangement with a service provider that is not a public sector agency under the *Privacy and Personal Information Protection Act 1998* unless it is satisfied that the arrangements make appropriate provision for compliance with that Act and the *Licensing and Registration (Uniform Procedure) Act 2002* (proposed section 80K).

> **The Bill amends the *Road Transport Act 2013* and the *Licensing and Registration (Uniform Procedures) Act 2002* to extend the circumstances in which a digital driver licence can be used. Schedule 2 of the Bill permits information-access arrangements to be made between licensing authorities and service providers for the purposes of sharing licence information to comply with licence application requirements. In sharing this licence information, personal details of individuals may be shared including their name, date of birth, address and photograph. The sharing of this personal information may impact on the privacy of the affected person.**
>
> **However, the Committee notes that the Bill contains specific privacy safeguards as sharing of this information may only be done to comply with a lawful requirement to provide such information for a licence application and the sharing of information with service providers and public sector agencies is subject to the privacy principles contained in the *Privacy and Personal***

Information Protection Act 1998. **In these circumstances, the Committee makes no further comment.**

6. Sporting Venues Authorities Amendment (Venues NSW) Bill 2020

Date introduced	17 September 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Dr Geoff Lee MP
Portfolio	Sport, Multiculturalism, Seniors and Veterans

PURPOSE AND DESCRIPTION

1. The objects of this Bill are—

(a) to amend the *Sporting Venues Authorities Act 2008*—

(i) to reconstitute the regional sporting venues authority known as Venues NSW and dissolve the Sydney Cricket Ground Trust, and

(ii) to provide for the establishment of advisory committees to provide advice to the Minister or Venues NSW and enable Venues NSW to exercise its functions, and

(iii) to provide for the ownership or management of land previously administered by the Sydney Cricket Ground Trust to be transferred to Venues NSW, and

(iv) to make provisions of a savings or transitional nature to give effect to the above matters,

(b) to amend the *Sydney Olympic Park Authority Act 2001* to enable the Governor, by written order, to transfer assets, rights and liabilities from the Sydney Olympic Park Authority to another public sector agency,

(c) to make other consequential or related amendments.

BACKGROUND

2. The Bill amends the *Sporting Venues Authorities Act 2008* to reconstitute Venues NSW and dissolve the Sydney Cricket Ground Trust.

3. In the second reading speech, the Hon. Dr Geoff Lee MP, Acting Minister for Sport, Multiculturalism, Seniors and Veterans noted that the Bill brings together a number of major sporting and entertainment venues in NSW including the Sydney Cricket Ground, Sydney Football Stadium, Stadium Australia, Western Sydney Stadium, Wollongong Showground, Wollongong Entertainment Centre, Newcastle International Sports Centre and Newcastle Entertainment Centre and Showground.

4. The Minister further noted that the Bill implements a single Board and management team in collaboration with other key agencies, such as Destination NSW. The provisions of the Bill will merge the present Venues NSW and the Sydney Cricket and Sports ground

Trust into a new entity, and in doing so repeal the *Sydney Cricket and Sports Ground Act 1978* and the *Sydney Cricket Ground and Sydney Football Stadium By-law 2014*.

5. Schedule 1 of the Bill amends the *Sporting Venues Authorities Act 2008* to accommodate the reconstitution of Venues NSW as a corporation, establish the Board of Venues NSW, set out the principal functions of Venues NSW, and facilitate the transfer of employees to Venues NSW.

6. Schedule 2 of the Bill enables the Governor, by written order, to transfer assets, rights and liabilities of the Sydney Olympic Park Authority to another public sector agency.

7. Schedule 3 of the Bill makes consequential amendments to the *Sporting Venues Authorities Regulation 2019,* the *Sporting Venues (Invasions) Regulation 2016,* and various other legislative instruments.

ISSUES CONSIDERED BY THE COMMITTEE

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

Employment rights

8. The Bill inserts a new Schedule 4A to the *Sporting Venues Authorities Act 2008.* Under the proposed section 34 (within Part 6, Division 6 Employees), persons employed under the *Sydney Cricket and Sports Ground Act 1978* in the Sydney Cricket and Sports Ground Trust immediately before the repeal day are transferred to the employment of the reconstituted Venues NSW (s 34(1)). A transfer of employment under this clause does not require the consent of the employee transferred (s 34(2)).

9. Proposed section 35 also provides that the Minister may transfer to reconstituted Venues NSW a person employed in a public sector agency who is designated by the Minister to be a person required for the purposes of enabling the reconstituted Venues NSW to exercise its functions (section 35(1)). A transfer of employment under this clause does not require the consent of the employee transferred (section 35(3)).

10. Section 36 provides that employees transferred to the reconstituted Venues NSW:

- are entitled to the continuation of any superannuation scheme to which they were previously subject (section 36(1)(a)), and
- retain their rights to annual leave, extended or long service leave or sick leave accrued or accruing immediately before the transfer of employment (section 36(1)(c)).

11. Further:

- the continuity of employment of the employee is not broken by the transfer of employment (section 36(1)(d)), and
- there is a continuation of the conditions of employment applying to the employee immediately before the transfer of employment, whether under a State industrial instrument or contract of employment (section 36(1)(f)). These conditions extend to any conditions of employment in relation to probation; security and other clearances; health clearances or assessments;

requirements not to undertake other paid work without permission; and to report charges and convictions for serious offences, absences from duty, the payment of increments, fitness for duty, and the payment of allowances for temporary assignments to higher roles (section 36(2)).

12. In the second reading speech the Minister noted that upon the commencement of the Bill:

> …all staff of both agencies will move automatically into the new Venues NSW. Clause 36 provides for how the existing rights of the staff transferred in—either from the trust or the current Venues NSW—will be protected on day one. It provides that their superannuation arrangements are preserved; leave balances and entitlements are preserved; continuity of service is maintained, including recognition of prior service; and that conditions of employment in their industrial instruments at the time of transfer are carried forward, including remuneration.

The Bill amends the *Sporting Venues Authorities Act 2008* to provide that an employee under the *Sydney Cricket and Sports Ground Act 1978* in the Sydney Cricket and Sports Ground Trust will be transferred to the employment of the reconstituted Venues NSW. As transfer of employment does not require the consent of the employee, this clause may impact on the employment rights of affected employees. However, the Committee notes that the provision is intended to align the legislation under which the persons are employed to the reconstituted Venues NSW, and that all previous conditions of employment, industrial instruments and employee entitlements will remain the same. In these circumstances, the Committee makes no further comment.

Freedom of movement

13. Schedule 3.7, item 1 of the Bill amends clause 5 of the *Sporting Venues Authorities Regulation 2019* to provide that a ranger or police officer may direct a person to leave land or a facility vested in or managed by a sporting venues authority if the ranger or police officer considers the person is contravening a provision of the *Sporting Venues Authorities Act 2008* or the Regulation.

14. A person who has been given a direction to leave must not re-enter the land or facility for a period of 48 hours after the direction was given, or after removal, whichever is the later.

15. The maximum penalty for remaining on, entering or returning to the land in contravention of a direction is a $1,100 fine.

16. The Committee notes that powers directing a person to leave or restricting activities appear to be commonplace in relation to parklands or facilities used by the public and managed by a trust or authority, including Centennial Park, the Western Sydney Parklands and Sydney Olympic Park.[1]

[1] The *Centennial Park and Moore Park Trust Regulation 2014* provides that a person who trespasses, causes nuisance or inconvenience to any person, or breaches the Regulation must leave if requested, and failure to comply is an offence (clause 27). The *Western Sydney Parklands Regulation 2019* provides that a person who trespasses, causes inconvenience to any person or contravenes the Regulation must leave if directed, and failure to comply is an offence (clause 8). The *Sydney Olympic Park Authority Regulation 2018* contains powers to: prohibit categories of

Schedule 3.7, item 1 of the Bill amends clause 5 of the Sporting Venues Authorities Regulation 2019 to provide that a ranger or police officer may direct a person to leave land or a facility vested in or managed by a sporting venues authority if the ranger or police officer considers the person is contravening a provision of the Sporting Venues Authorities Act 2008 or the Regulation.

A person who has been given a direction to leave must not re-enter the land or facility for a period of 48 hours after the direction was given, or after removal, whichever is the later. The maximum penalty for remaining on, entering or returning to the land in contravention of a direction is a $1,100 fine.

These provisions may impact on the freedom of movement. The right to freedom of movement within the territory of a State is recognised by Article 12 of the International Covenant on Civil and Political Rights.

However, the Committee notes that the provisions are in line with similar regulations governing recreational spaces used by the public, where the site is managed by a trust or authority. The Committee also acknowledges the benefit of the provisions for the majority of those using affected land or facilities, allowing the peaceful enjoyment of the environment and amenities, and discouraging anti-social behaviour. In the circumstances, the Committee makes no further comment.

Civil remedies and rights to compensation

17. Schedule 2 of the Bill amends the *Sydney Olympic Park Authority Act 2001* and inserts Schedule 5 to the Act regarding the transfer of assets, rights and liabilities of the Authority. Under this schedule, the Governor may, by written order, transfer to a public sector agency any assets, rights and liabilities of the Authority specified in the order (Schedule 5 clause 2).

18. The Bill provides that the operation of such a transfer under Schedule 5 is not the be regarded as:

- a breach of contract or confidence or civil wrong; or
- a breach of a contractual provision prohibiting, restricting or regulating the assignment or transfer of assets, rights or liabilities; or
- giving rise to any remedy by a party to an instrument, or as causing or permitting the termination of any instrument, because of a change in the beneficial or legal ownership of an asset, right or liability; or
- an event of default under any contract or other instrument (clause 3(2)).

19. Further, no compensation is payable to a person or body in connection with such a transfer, except to the extent to which the order giving rise to the transfer provides (clause 3(3)).

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persons from entering the facility (clause 4); ban persons for up to 6 months (clause 11); and direct persons to leave for causing inconvenience to others (clause 25).

The Bill amends the Sydney Olympic Park Authority Act 2001 to permit the transfer of assets, rights and liabilities of the Authority by order of the Governor. Such a transfer is not to be regarded as a breach of contract, confidence or civil wrong, and no compensation is payable to a person or body in connection with such a transfer except as provided by the order. The Bill may thereby impact on the rights to obtain a civil remedy and compensation rights.

However, the Committee notes that the effect of these provisions is to ensure the effective transfer of assets, rights and liabilities from the Sydney Olympic Park Authority to another public sector agency that would carry on these assets, rights and liabilities and does not operate to remove contractual obligations, but to transfer them to a different public sector agency and accommodate the role of the reconstituted Venues NSW. In the circumstances, the Committee makes no further comment.

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

Ill-defined power to approve developments

20. Schedule 1 of the Bill amends the *Sporting Venues Authorities Act 2008* and inserts new Divisions 2A and 2B under Part 4 of the Act. New Division 2B outlines particular provisions relating to controlled land, designated land and scheduled lands under the Act. Proposed section 30AD provides that the Minister may approve the carrying out of development on designated land and plants or specifications relating to the development. The Minister's approval must certify that the Minister has consulted the Ministers administering the *Public Works and Procurement Act 1912* and the *Environmental Planning and Assessment Act 1979.*

21. Proposed section 30AE provides that certain 'excluded laws' do not apply to the development approved by the Minister and carried out by or on behalf of Venues NSW under section 30AD. Under this section, excluded laws include the *Environmental Planning and Assessment Act 1979,* the *Local Government Act 1993,* and an instrument in force made under the Acts.

The Bill amends the *Sporting Venues Authorities Act 2008* to insert new Divisions 2A and 2B, which provide that the Minister may approve development applications on designated land.

The Minister's approval must certify that the Minister has consulted the Ministers administering the *Public Works and Procurement Act 1912* and the *Environmental Planning and Assessment Act 1979*. However, proposed section 30AE provides that certain excluded laws do not apply to the development approvals, including the *Environmental Planning and Assessment Act 1979,* the *Local Government Act 1993,* and an instrument in force made under the Acts. These provisions may thereby grant the Minister a broad power to approve developments without complying with the requirements under these Acts.

The Committee refers these provisions to Parliament to consider whether they make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers of the Minister.

7. Stronger Communities Legislation Amendment (Courts and Civil) Bill 2020

Date introduced	16 September 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 various Acts and regulations relating to courts and other matters in the Communities and Justice portfolio, including as follows—

(a) to extend obligations relating to the reporting of conduct to the Children's Guardian (for example, allegations of sexual assault against a child) to third parties who provide services to children on behalf of entities that are already subject to those reporting requirements,

(b) to extend the definition of contractor for the purposes of the reportable conduct scheme under the *Children's Guardian Act 2019* to include an employee of, or a volunteer for, a third party employer,

(c) to extend the definition of employee for the purposes of the reportable conduct scheme to an individual who is the head of a third party employer in certain circumstances,

(d) to enable the transfer of existing functions and powers of the Children's Guardian under the *Children and Young Persons (Care and Protection) Act 1998* and the *Adoption Act 2000* to the *Children's Guardian Act 2019* and the regulations under that Act, including by—

(i) providing for the Children's Guardian to register and accredit agencies providing out-of-home care and to maintain relevant registers, and

(ii) providing for the accreditation of accredited adoption service providers, and

(iii) providing for conditions on an employer's authority, including a condition to comply with a Code of Practice relating to child employment, and for appropriate exemptions from the requirement to hold an authority,

(e) to provide for the surrender of a designated agency's accreditation and the withdrawal of an application for accreditation as a designated agency,

(f) to provide that the unauthorised sharing or transmission of an authorised recording of court proceedings is an offence in the same manner as it is an offence to make and transmit an unauthorised recording of court proceedings,

(g) to provide that a person who applies for employment with the Office of the Sheriff must disclose spent convictions consistent with disclosures for employment with Corrective Services and the Police,

(h) to provide that unclaimed money held by the District Court is managed consistently with fines and fees paid into the Court,

(i) to transfer provisions that enable electronic witnessing and attestation of certain documents from the *Electronic Transactions Regulation 2017* to the *Electronic Transactions Act 2000* as a pilot scheme,

(j) to transfer certain provisions relating to the administration of deceased estates from the *Imperial Acts Application Act 1969* to the *Probate and Administration Act 1898*,

(k) to provide that certain procedural functions of the Conduct Division of the Judicial Commission of NSW can be exercised by the Chairperson alone rather than 3 members of the Division together,

(l) to allow for the suspension of a judicial officer whose ability to perform the functions of the office is impaired,

(m) to provide for the Legal Services Commissioner to delegate certain of the Commissioner's powers to the Bar Council or the Law Society Council,

(n) to put beyond doubt the validity of costs assessments undertaken by the Manager, Costs Assessment, prior to 17 February 2020,

(o) to provide that the NSW Trustee may meet liabilities incurred in exercising official functions from either money appropriated from the Consolidated Fund or from the NSW Trustee and Guardian's Reserve Fund,

(p) to provide for federal judicial officers to witness statutory declarations in the same manner as state judicial officers,

(q) to provide for appeals and reviews arising from the decisions of former judges to be assigned to the Court of Appeal,

(r) to bring NSW into line with other jurisdictions by allowing the Supreme Court to vary or revoke a trust where that is in the interests of the beneficiaries and fulfils the purpose of the trust.

BACKGROUND

2. The second reading speech indicated that this Bill is one of four miscellaneous amendment bills that will be introduced in this session of Parliament.

3. The Attorney General noted that the Bill introduces miscellaneous amendments to address developments in case law, support procedural improvements and close gaps in the law relating to court and civil procedure, many of which are "technical in nature". In particular:

> … these amendments will strengthen our community through improving court processes and integrity, improving civil procedure and the administration of trusts, and clarifying provisions of

the Children's Guardian Act 2019 in relation to reportable conduct matters and the Children's Guardian's role as an independent regulator.

ISSUES CONSIDERED BY THE COMMITTEE

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

Open justice – restrictions on distribution of recordings

4. Schedule 1.2 of the Bill inserts section 9B into the *Court Security Act 2005*. It provides that a person must not transmit or distribute a recording of sounds or images (or both) of court proceedings, including part of a recording, by any means. The new offence attracts a maximum penalty of a $22,000 fine or 12 months imprisonment. However, it will not be illegal to transmit or distribute such a recording in the following circumstances:

   (a) where the transmission or distribution has been expressly approved by a judicial officer,

   (b) where the transmission or distribution of a recording is for the purpose of transcribing court proceedings for the court,

   (c) where the transmission or distribution of a recording involves circumstances prescribed by the regulations.

5. It is already an offence under section 9 of the *Court Security Act 2005* to record sounds and images from a courtroom. Section 9A also makes it an offence to transmit sounds or images of court proceedings.

6. The second reading speech noted that the amendment would prohibit recordings of court proceedings being shared without authorisation, such as on social media, even where the original recording of the proceedings was authorised. For example, a recording may have been authorised for the purposes of transcription.

7. The Attorney General stated that the amendment was designed to protect vulnerable witnesses and prevent interference with the administration of justice.

8. The Attorney General also stated that the maximum penalty for the new offence of transmission or distribution is consistent with the penalties that apply to the existing related offences.

> **Schedule 1.2 of the Bill creates a new offence of distributing recordings of court room proceedings, with limited exceptions. This complements existing offences which prohibit the recording of sounds and images in a courtroom and also prohibit the transmission of such recordings. Like the existing offences, the new offence has a maximum penalty of $22,000 or 12 months' imprisonment.**
>
> **The new prohibition on distribution of recordings may impact on the principle of open justice because it imposes a blanket restriction on the distribution of recordings of court proceedings – even if the recording itself has been authorised. This would prevent such recordings or parts of recordings of proceedings held in open court from being posted to social media or published online, in an era where information is increasingly distributed via these**

channels. For the same reasons, the new offence may also impact on freedom of expression because publication of a recording appears to require approval of the Court and may in practice limit the scope of media coverage.

However, principles of open justice and the right to freedom of expression may be subject to common law exceptions or otherwise limited if the restrictions imposed are reasonable and proportionate to the circumstances. The second reading speech notes that the offence is designed to protect vulnerable witnesses and prevent interference with the administration of justice although the provision on its face goes beyond that, with no express limitation. The Committee agrees that principles of open justice need to be balanced against rights to a fair trial. The Committee refers these matters to Parliament for further consideration.

Judicial independence – ability to suspend judges

9. Schedule 1.8, item 3 of the Bill amends section 40 of the *Judicial Officers Act 1986*. According to the explanatory note, the amendment enables the head of jurisdiction of a court (for example, the Chief Justice) to suspend a judicial officer[2] if of the opinion that the officer may have an impairment that affects the officer's performance of judicial duties. An "impairment" is any mental or physical impairment. Under section 39B of the *Judicial Officers Act 1986*, a head of jurisdiction may make a "formal request" that the Judicial Commission[3] investigate a matter if they are of the opinion that a judicial officer may have an impairment that affects his or her performance of judicial or official duties. The investigation involves reviews by medical experts before the Commission issues a report to the relevant head of jurisdiction, sometimes with recommendations as to next steps: section 39G.

10. Currently, a judicial officer may only be suspended if a complaint has been made or if the Conduct Division of the Judicial Commission has published a report stating that a matter could justify parliamentary consideration of the removal of a judicial officer from office: section 40(1)(a). Judicial officers may also be suspended if they have been charged with an offence attracting a maximum penalty of more than 12 months' imprisonment, or if they have been convicted of an offence: section 40(1)(b).

11. The *Judicial Officers Act 1986* does not appear to limit the period of suspension. However, the appropriate authority,[4] generally the head of jurisdiction, may lift the suspension at any time: section 40(2). The authority may also permit the judicial officer to exercise functions to complete any specified class of matters: section 42.

12. Relevantly, a judicial officer may only be removed if both Houses of Parliament seek the removal based on proved misbehaviour or incapacity: section 53 of the *Constitution Act 1902*. Also, a judicial officer must continue to be paid while under suspension: section 54

[2] A "judicial officer" is defined to include a judge, magistrate, President of the Children's Court or Civil and Administrative Tribunal, and a member of the Industrial Relations Commission: section 3.

[3] The Judicial Commission comprises 10 members, six of which are the heads of each jurisdiction (e.g., the Chief Justice of the Supreme Court and President of the Court of Appeal), and four members appointed by the Governor on nomination of the Minister: section 5 of the *Judicial Officers Act 1986*.

[4] Section 43 of the *Judicial Officers Act 1986* provides that the "appropriate authority" for suspension is the relevant head of jurisdiction, but, in relation to a member of the Judicial Commission, the President of the Children's Court or the President of the Civil and Administrative Tribunal, the appropriate authority is the governor acting on recommendation of the Commission.

of the Constitution. However, the *Judicial Officers Act 1986* does not appear to include review rights for suspended judicial officers.

> **The Bill amends the Judicial Officers Act 1986 to expand the circumstances in which a judicial officer, normally a judge or magistrate, may be suspended by the head of jurisdiction, normally the Chief Justice of the Court. For instance, the Chief Justice may suspend a judicial officer if of the opinion that the officer may have an impairment that affects performance of their duties. In such circumstances, the Chief Justice may request that the Judicial Commission investigate the matter. Although judicial officers are suspended with pay, there appears to be no time limit on the suspension or any rights of review.**
>
> **The Committee notes that the amendment may impact on principles of judicial independence, particularly given a suspension may be indefinite and there appear to be no review rights. Suspending a judicial officer without proper cause may also impact on parties to proceedings before that officer and suspension for an indefinite period may be similar to removal, which only the Parliament can do under the Constitution.**
>
> **However, judicial officers occupy a special position in the community and make daily decisions which can have significant consequences for individuals. Aside from the potential impacts on individuals, impaired judicial officers may also undermine public confidence in the justice system as a whole. It may therefore be appropriate that judicial officers can be suspended as soon as an impairment is suspected, so that an investigation is conducted by the Judicial Commission. Given these considerations, the Committee makes no further comment.**

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

Matters deferred to regulations – process affecting vulnerable children

13. Schedule 1, item 10 of the Bill inserts sections 72(3) – (6) in the *Children's Guardian Act 2019*. The new provisions govern the circumstances in which a designated agency may have its accreditation suspended. A "designated agency" is a government or non-government organisation which is accredited to provide or arrange out-of-home care for children.

14. For instance, proposed section 72(3) enables regulations to be made regarding the surrender of a designated agency's accreditation and the withdrawal of an application for accreditation. Subsection (6) clarifies that the regulations may also treat a designated agency's failure to renew its accreditation as a surrender and may make savings and transitional provisions to provide for an accreditation to remain in force until the surrender takes effect.

15. Under proposed section 72(4), the Children's Guardian may decide the date on which the surrender of a designated agency's accreditation takes effect, if in the Children's Guardian's opinion it is necessary to protect the safety, welfare or wellbeing of a child or class of children. However, this date must be no more than 6 months after the agency notifies the Guardian of its intention to surrender the accreditation: subsection (5).

16. The second reading speech explained the purpose of the amendments:

The regulation-making power in section 72 of the Children's Guardian Act 2019 has been extended to provide for the surrender of a designated agency's accreditation and the withdrawal of an application for provisional accreditation or full accreditation. This amendment will address the gap in the legislation where a designated agency wishes to leave the sector, or cease to provide services for children in statutory out-of-home care. Limits have been placed on the Children's Guardian's ability to set a date for the surrender of the agency's accreditation, being not more than six months after the notification, where it is necessary to protect the safety, welfare or wellbeing of a child or class of children. In very rare circumstances where the department needs to make arrangements for the care of children and young people who are in the surrendering agency's care, the notice period imposed by the Children's Guardian provides a sufficient period of time for transition. The department may need to commission services from other designated agencies to take on these placements.

The Bill inserts new provisions into the *Children's Guardian Act 2019* which govern the surrender of accreditations by agencies which provide or arrange out-of-home care for children. For instance, the Children's Guardian may decide the date on which the surrender of a designated agency's accreditation takes effect, if the Guardian is of the opinion that it is necessary to protect the safety, welfare or wellbeing of a child or class of children. However, the date must be no more than six months after the agency notifies the Children's Guardian that it intends to surrender its accreditation. Several related matters are deferred to the regulations, including any provisions relating to the surrender.

An agency's decision to surrender their accreditation may significantly impact on the vulnerable children in their care, including by disrupting the continuity of existing care arrangements or the prospects of finding a suitable long term placement. Although the Guardian can nominate a date on which the surrender takes effect if it considers that this is necessary to protect the children involved, the legislation imposes a six month time limit on this period. The second reading speech notes that six months is sufficient time for the Department to commission other agencies to provide care to these children, in the "very rare circumstances" that this is required.

It is important the surrender process prioritises the best interests of the child, especially given the potential negative impacts to vulnerable children and the relatively short six month transition period. The Committee notes that further detail clarifying the surrender process, including any principles applying to affected children, could be set out more comprehensively in primary legislation rather than deferred to the regulations. Primary legislation is subject to a greater degree of parliamentary scrutiny. In the circumstances, the Committee refers this matter to Parliament.

Lack of clarity – criteria for registration as out-of-home care agency

17. Some matters relating to amendments of the *Children's Guardian Act 2019* may lack sufficient clarity. For instance, schedule 1.1, item 11 of the Bill inserts Division 2B into the *Children's Guardian Act 2019* regarding the accreditation of registered agencies. A "registered agency" is a government or non-government organisation that is registered by the Children's Guardian under a regulation to provide or arrange voluntary out-of-home care: section 73. Voluntary out-of-home care is care arranged by a parent of the child and can range from short-term respite care to longer term residential

arrangements and camps that focus on respite or behaviour support. It may be funded through the National Disability Insurance Scheme (NDIS) or bail assistance programs.[5]

18. Proposed section 80J provides that the Minister may, from time to time, approve criteria for use in deciding whether to grant an application for registration as a registered agency. The Minister may approve different criteria for deciding applications relating to different types of voluntary out-of-home care. The Children's Guardian must publish the criteria on its website.

Schedule 1.1 of the Bill amends the Children's Guardian Act 2019 and may contain provisions which lack sufficient clarity, including item 11. Item 11 inserts proposed section 80J into the Act. This section allows the Minister to, from time to time, approve criteria for use in deciding whether to grant an application for registration as a registered agency. A registered agency is permitted to provide voluntary out-of-home care arranged by a parent, which can include short term respite care or longer term respite care or behavioural support. Different criteria may apply to applications for different types of care. The criteria must be published on the Children's Guardian's website.

Registered agencies are likely to have vulnerable children in their care, sometimes for long periods, and may receive public funding through the National Disability Insurance Scheme or bail assistance programs. Such care is arranged by parents, who may not have as much insight into the operation of an agency as the Minister or Children's Guardian. For these reasons, it may be important that criteria for the registration of such agencies is clear, robust and subject to an appropriate level of parliamentary scrutiny, for example in primary or subordinate or legislation. The publication of relevant criteria on the Children's Guardian website may not enable any parliamentary scrutiny. In the circumstances, the Committee refers this matter to the Parliament for consideration.

[5] Children's Guardian, undated, *Voluntary out-of-home care*, https://www.kidsguardian.nsw.gov.au/voluntary-out-of-home-care#:~:text=Organisations%20that%20provide%20or%20arrange,before%20arranging%20or%20providing%20care.&text=Voluntary%20out%2Dof%2Dhome%20care%20covers%20care%20arrangements%20such%20as,hotel%20or%20Air%20BnB%20environment, viewed 17 September 2020.

8. Stronger Communities Legislation Amendment (Crimes) Bill 2020

Date introduced	16 September 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 various Acts relating to crimes and other matters in the Communities and Justice portfolio.

BACKGROUND

2. In the second reading speech, the Attorney General told Parliament that the Bill introduces 22 miscellaneous amendments to 16 Acts as part of the Government's regular legislative review and monitoring program:

> The Government is pleased to introduce the Stronger Communities Legislation Amendment (Crimes) Bill 2020. The bill introduces 22 miscellaneous amendments to 16 Acts. It addresses developments in case law, supports procedural improvements and closes gaps in the law that have become apparent relating to crimes. In particular, these amendments will strengthen our community through improving criminal investigation and supporting the management of young adults in custody. Miscellaneous amendment bills are typically introduced into Parliament each session as part of the Government's regular legislative review and monitoring program.

3. The Attorney General also stated that in a departure from the norm, four such miscellaneous Bills will be introduced this parliamentary session:

> …this year, owing to the disruption caused by the COVID-19 pandemic, a miscellaneous amendment bill was not able to be introduced in the budget session of Parliament. Instead, four separate miscellaneous bills are being introduced in this session. The division of the proposals into four bills is necessary to assist parliamentary consideration due to the large number of reform proposals.

ISSUES CONSIDERED BY THE COMMITTEE

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

Privacy rights

4. Schedule 1.15, item 7 of the Bill seeks to amend the *Surveillance Devices Act 2007* to provide a limited exception to the section 33 requirement for law enforcement officers to apply to an eligible Judge for approval after using a surveillance device without a warrant in an emergency, pursuant to section 31. The exception would apply if the law enforcement officer uses an optical surveillance device only to observe the carrying out of an activity, not to record it, and the circumstances under section 31 apply.

5. In the second reading speech, the Attorney General provided the following background to the amendment:

> Under section 31 of the Surveillance Devices Act a law enforcement officer may use a surveillance device without a surveillance device warrant if the law enforcement officer, on reasonable grounds, suspects or believes that, first, an imminent threat exists of serious violence to a person or substantial damage to property or that a serious narcotics offence will be committed; second, the use of a surveillance device is immediately necessary for the purpose of dealing with that threat; third, the circumstances are so serious and the matter is of such urgency that the use of a surveillance device is warranted; and, fourth, it is not practicable in the circumstances to apply for a surveillance device warrant.

6. The Attorney General also provided examples of devices that would be covered under the new exception, stating that they are devices regularly used by law enforcement officers to assist in emergency situations, and that the amendments would ensure that law enforcement officers are not deterred from doing so:

> Examples of devices that are intended to be covered by the new exception under section 33 include telescopic sights on firearms, binoculars and infrared equipment. These devices are regularly used by law enforcement officers to assist in operations—particularly in emergencies such as hostage situations, sieges and other tactical operations. The amendment will ensure that law enforcement officers are not deterred from using this kind of equipment to observe activity in an emergency situation.

Schedule 1.15, item 7 of the Bill seeks to amend the *Surveillance Devices Act 2007* to provide a limited exception to the section 33 requirement for law enforcement officers to apply to an eligible Judge for approval after using a surveillance device without a warrant in an emergency, pursuant to section 31. The exception would apply if the law enforcement officer uses an optical surveillance device only to observe the carrying out of an activity, not to record it, and the circumstances under section 31 apply (i.e. the device has been used in an emergency situation where there is imminent threat of serious violence or substantial property damage etc).

By providing an exception to the requirement to apply for approval, this provision may impact on privacy rights. However, the Committee acknowledges that the exception is limited – it only applies where the device is used to observe an activity, not to record it. Further, it is intended to ensure that law enforcement is not deterred from using certain devices that assist them to observe activities in emergency situations e.g. hostage situations where there is an imminent threat of serious violence. Given these considerations the Committee is of the view that the privacy impacts may be reasonable in the circumstances and makes no further comment.

Expansion of police powers to use force

7. Schedule 1.16, item 1 of the Bill seeks to amend the *Terrorism (Police Powers) Act 2002* to provide that a declaration that an incident is a terrorist act applies to each location at which police officers are responding to the incident, rather than requiring the declaration to relate to a specific location as is currently the case.

8. In the second reading speech, the Attorney General noted that a declaration under section 24A of the *Terrorism (Police Powers) Act 2002* means that a police officer does

not incur criminal liability for use of force, including lethal force in good faith that is reasonably necessary to defend any person threatened by a terrorist act or to prevent their unlawful deprivation of liberty:

> Section 24A of the Terrorism (Police Powers) Act enables the Commissioner of Police to declare that part 2AAA applies to a terrorist act to which police are responding. Part 2AAA provides that a police officer does not incur any criminal liability for the use of force—including lethal force—that is authorised under part 2AAA, in good faith and reasonably necessary to defend any person threatened by a terrorist act or to prevent their unlawful deprivation of liberty. Section 24A (2) currently provides that such a declaration "may be made in respect of the specified location at which police officers are responding and in respect of any other related specified location".

9. However, the Attorney General explained further that the current requirement to attach the declaration to a specific location creates operational issues for police when responding to a terrorist incident:

> The requirement to declare a specified location may not be fit for purpose for evolving police responses to terrorist actions. Specificity of location description is particularly unhelpful in a situation with a mobile terrorist offender. The current wording of section 24 (2) may mean that either broad location descriptions or unnecessarily strictly defined locations are favoured, which may cause operational confusion. This goes against Parliament's intent in introducing part 2AAA, which was to provide certainty to police officers acting in an authorised manner to respond to a terrorist incident. The amendment clarifies the intent of section 24A, which is that the declaration and the attached immunity from criminal liability applies to police officers who are responding, in a manner authorised under section 24B, to a terrorist incident.

> **Section 24A of the *Terrorism (Police Powers) Act 2002* enables the Police Commissioner to declare that Part 2AAA applies to a terrorist act to which police are responding. Part 2AAA provides that a police officer does not incur any criminal liability for the use of force—including lethal force—that is authorised under part 2AAA, in good faith and reasonably necessary to defend any person threatened by a terrorist act or to prevent their unlawful deprivation of liberty.**
>
> **However, currently this declaration must attach to a specific location – section 24A(2) provides it "may be made in respect of the specified location at which police officers are responding and in respect of any other related specified location".**
>
> **Schedule 1.16, item 1 of the Bill seeks to amend the *Terrorism (Police Powers) Act 2002* to provide that a declaration that an incident is a terrorist act applies to each location at which police officers are responding to the incident. The Bill may thereby expand police powers to use force – including lethal force – and in turn impact on rights to bodily integrity and the right to life. However, the Committee notes that the current requirement to attach the declaration to a specific location creates operational issues for police when responding to a terrorist incident, for example, where there is a mobile terrorist offender. Further, to attract immunity from criminal liability pursuant to the declaration, the force must still be used in good faith and be reasonably necessary to defend any person threatened by a terrorist act or to prevent their unlawful**

deprivation of liberty. In the circumstances, the Committee makes no further comment.

Extension of limitation periods

10. Schedule 1.3 of the Bill amends the *Court Suppression and Non-publication Orders Act 2010* to extend the time limit for commencing summary proceedings in the Local Court for the offence of contravening a suppression order or non-publication order from within six months of the date of the alleged offence to within two years.

11. In the second reading speech, the Attorney General provided the following background regarding the amendment:

> The current time limit to commence prosecutions under this Act does not reflect the myriad ways information can now be communicated and published and the resulting complexities of discovering or obtaining evidence of the offence. It is particularly difficult and time-consuming for the police to obtain the required evidence when individuals breach these orders via social media platforms, which may have headquarters overseas. This amendment will enable more effective and appropriate prosecutions. The amendment will also align the time limit for commencing a prosecution under the Court Suppression and Non-publication Orders Act 2010 with the time limit applying to similar offences under the Children (Criminal Proceedings) Act 1987 and the Crimes Act 1900.

Schedule 1.3 of the Bill amends the *Court Suppression and Non-publication Orders Act 2010* to extend the time limit for commencing summary proceedings in the Local Court for the offence of contravening a suppression order or non-publication order from within six months of the date of the alleged offence to within two years.

The Committee notes that by extending the time limits to commence a prosecution for this offence, the Bill may expose persons to convictions and penalties that could not otherwise apply. The Bill may therefore have some impact on personal rights and liberties.

However, the Committee understands that given developments in the way information can be communicated in the digital age, it can now be more complex to discover or obtain evidence of the offence in question, and the extended limitation period is intended to respond to this complexity. Further, the extended limitation period of two years is still relatively short. In the circumstances, the Committee makes no further comment.

Procedural fairness and vague and ill-defined power

12. Schedule 1.2, items 7 and 8 of the Bill seeks to amend section 91 of the *Children (Detention Centres) Act 1987* to ensure that nothing in or under the Act requires a report, document or information to be provided to a person if a Children's Magistrate is of the opinion that providing it would prejudice the public interest or cause other adverse consequences.

13. In the second reading speech, the Attorney General stated:

> [Section 91] was intended to ensure that the Children's Court may withhold any document in parole proceedings from any person where satisfied it is in the public interest to do so, and is not required to provide information about any part of the content of a report or other

document withheld from a person if it is satisfied it is in the public interest and that the public interest outweighs any right to procedural fairness that may be denied by not providing the information.

14. However, the Attorney General further explained that section 91 is not currently operating as intended and that the amendment would address this:

> Currently, the information protection provisions under section 91 apply only if a provision of Part 4C of the Children (Detention Centres) Act or the regulation, in short, an information requirement, requires a person to be provided with a copy of a report or document, or any part of the report or document, or information contained in a report or document. There is no such information requirement in the Children (Detention Centres) Act or the regulations. Consequently, section 91 has no work to do…This amendment gives the Children's Court the…discretion to withhold documents and information contained in documents in youth parole proceedings where it is in the public interest to do so.

Schedule 1.2, items 7 and 8 of the Bill seek to amend section 91 of the Children (Detention Centres) Act 1987 to ensure that a Children's Magistrate can withhold any document in parole proceedings from any person where he or she is of the opinion that it is in the public interest to do so, and is not required to provide information about any part of the content of a report or other document withheld from a person if of the opinion it is in the public interest and that the public interest outweighs any right to procedural fairness that may be denied by not providing the information.

In doing so, these provisions impact on the right to procedural fairness, including in youth parole proceedings. The Committee notes in particular that the power to withhold information is vague and ill-defined, based on the Magistrate's opinion as to the 'public interest'. The Committee prefers provisions affecting rights to be drafted with sufficient precision so that their scope and content is clear. The Committee refers this matter to Parliament for consideration.

Entry without warrant

15. Schedule 1.11 of the Bill seeks to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide that a police officer may enter premises if the police officer believes on reasonable grounds that a deceased person is on the premises, that the person's death is not the result of an offence and no other person is present on the premises to consent to the entry. The entry must be authorised by a police officer of the rank of Inspector or higher.

16. In the second reading speech, the Attorney General noted the following in relation to the amendment:

> Schedule 1.11 to the bill amends the Law Enforcement (Powers and Responsibilities) Act 2002 to enable a police officer to enter premises where they believe on reasonable grounds that a person who has died, otherwise than as a result of an offence, is on the premises and there is no occupier on the premises to consent to the entry. Before entering on these grounds, the police officer must obtain approval to do so, orally or in writing, from a police officer of or above the rank of inspector. This amendment would enable police officers to enter premises in these circumstances to perform necessary duties—for example, issuing a death certificate, notifying the family, ensuring a deceased person is taken to the morgue and securing the

premises. The amendment would not empower police officers to enter where another occupier is present and does not consent to police entering the premises.

Schedule 1.11 of the Bill seeks to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide that a police officer may enter premises if the police officer believes on reasonable grounds that a deceased person is on the premises, that the person's death is not the result of an offence and no other person is present on the premises to consent to the entry. The entry must be authorised by a police officer of the rank of Inspector or higher.

The Committee appreciates that the amendment is intended to allow police officers to perform necessary duties e.g. issuing a death certificate and ensuring that the deceased person is taken to the morgue; and that there must be reasonable grounds for exercising the power. However, the Committee notes that the power covers residential premises and that there is no requirement for police to obtain a warrant from an independent judicial officer before exercising it – approval can be obtained from a police officer of the rank of Inspector or above. The Committee refers this matter to Parliament to consider whether the power to enter residential premises should be independently oversighted.

Rights of youth detainees

17. Schedule 1.2, item 3 of the Bill seeks to amend the *Children (Detention Centres) Act 1987* to allow national security interest detainees to be conveyed by correctional officers to or from detention centres if authorised to do so by the Commissioner of Corrective Services at the request of the Secretary of the Department of Communities and Justice. Correctional officers will have, in relation to the detainees, the same functions and immunities as juvenile justice officers have when dealing with detainees, and also the same functions and immunities as correctional officers have when dealing with inmates under the *Crimes (Administration of Sentences) Act 1999*.

18. In the second reading speech, the Attorney General provided the following background about the detainees to whom these amendments would apply:

> A detainee with terrorism-related charges, convictions or associations or who has expressed support for terrorism or violent extremism may be designated as national security interest [NSI] when there is a risk that the detainee may engage in, or incite other persons to engage in, activities that constitute a serious threat to the peace, order or good government of the State or any other place. As of 27 August 2020 there were three juvenile detainees designated as NSI, all of whom are over 18 years old. This amendment would authorise Corrective Services NSW staff to transport NSI-designated juvenile detainees between detention centres, courts, hospitals and other places when requested by Youth Justice NSW.

19. The Attorney General further stated that the amendment addressed a need identified by Youth Justice staff for more security when transporting national security interest detainees:

> Corrective Services staff will be able to exercise all the powers they exercise when transporting adult offenders, including the use of force that is reasonably necessary to exercise their functions, the carrying of firearms, the use of armoured vehicles and the ability to conduct searches in the same manner in which inmates are searched. The same safeguards for conduct of searches by Corrective Services officers will apply. This amendment addresses a need

identified by Youth Justice for increased security while transporting NSI detainees. Youth Justice staff currently provide all transports and escorts for juvenile detainees. Youth Justice staff are not armed, nor do they have access to armoured vehicles. Youth Justice and Corrective Services are establishing a Joint Protocol to support the implementation of this amendment and to ensure that young adult inmates are transported safely. This amendment is necessary to address any risk posed to Youth Justice staff and to the community.

Schedule 1.2, item 3 of the Bill seeks to amend the *Children (Detention Centres)* Act 1987 to allow national security interest detainees to be conveyed by correctional officers to or from detention centres if authorised to do so by the Commissioner of Corrective Services at the request of the Secretary of the Department of Communities and Justice.

The Committee understands that this amendment would authorise Corrective Services NSW staff to transport national security interest-designated juvenile detainees between detention centres, courts, hospitals and other places when requested by Youth Justice NSW. Further, Corrective Services staff would be able to exercise all the powers they exercise when transporting adult offenders, including the use of force that is reasonably necessary to exercise their functions, the carrying of firearms, the use of armoured vehicles and the ability to conduct searches in the same manner in which inmates are searched.

By allowing authorities to exercise powers in respect of juvenile offenders that are ordinarily only exercised in respect of adult offenders, these amendments may have some impact on the rights of juvenile offenders to be managed in custody in a manner appropriate to their age and stage of development. The Committee appreciates that the amendments would only affect the small number of juvenile detainees classified as national security interest detainees, and that the amendment is intended to address a need identified by Youth Justice staff for more security when transporting national security interest detainees. Noting the competing concerns, the Committee refers the amendments to Parliament to consider whether they are reasonable and proportionate in the circumstances.

9. Superannuation Legislation Amendment Bill 2020

Date introduced	16 September 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasury

PURPOSE AND DESCRIPTION

1. The object of the Bill is to amend certain superannuation legislation to prevent superannuation pensions and allowances being reduced because of a fall in consumer prices. In particular, the Bill amends provisions in the following legislation (the general CPI provisions):

    (a) Part 4A of the *New South Wales Retirement Benefits Act 1972*,

    (b) Part 4, Division 2 of the *Police Regulation (Superannuation) Act 1906*,

    (c) Part 5 of the *State Authorities Superannuation (Ex-Snowy Mountains Hydro-Electric Authority Superannuation Fund Transfer) Regulation 2003*,

    (d) Part 5 of the *State Authorities Superannuation (Government Railways Superannuation Scheme Transfer) (Savings and Transitional) Regulation 1990*,

    (e) Part 7 of the *State Authorities Superannuation (Transitional Provisions) Regulation 1988*,

    (f) Part 4, Division 6 of the *Superannuation Act 1916*,

    (g) Part 3A of the *Transport Employees Retirement Benefits Act 1967*.

2. According to the Explanatory Note, the general CPI provisions provide for the automatic adjustment of certain superannuation pensions and allowances each October by reference to changes in the Consumer Price Index for Sydney over 12 months (the Sydney CPI). That is, if the Sydney CPI falls by less than 1 per cent, then no adjustment to the amount of the relevant pension or allowance will be made. However, if the fall is 1 per cent or more, the amount of the pension or allowance must be reduced by that percentage. The impact of the COVID-19 pandemic on the Sydney CPI is expected to result in a fall of slightly more than 1 per cent.

3. The Bill also amends Part 3D, Division 8 of the *Local Government and Other Authorities (Superannuation) Act 1927* and Schedule 6 to the *Public Authorities Superannuation Act 1985* (the Local Government CPI provisions). The Local Government CPI provisions are different as they do not use the 1 per cent threshold referred to in the general CPI provisions. According to the Explanatory Note, the effect of the Local Government CPI provisions is that pensions must be reduced if there is any fall in the Sydney CPI.

BACKGROUND

4. In the second reading speech, the Treasurer stated that the purpose of the Bill is to protect the pensions of the 67,000 members of the State's defined benefits superannuation schemes from the effects of COVID-19.

5. The Treasurer noted that the Sydney CPI had fallen by more than 1.04 per cent for the 2020 financial year, attributing this to free child care and reduced school fees:

> …one of the consequences of the fee-free child care policy was that removing this cost for households placed significant downward pressure on the Sydney CPI. The fee-free child care initiative contributed a negative change to the Sydney CPI of more than 1.4 per cent. In other words, if child care had not been made free, the CPI would have been 1.4 per cent higher than it was for the 2020 financial year. Other initiatives such as our Government's reduced preschool and primary education fees put downward pressure on the CPI. … More importantly, for the purposes of the bill, they contributed to an overall fall of 1.04 per cent in the Sydney CPI for the full year to June 2020.

6. The Treasurer concluded by saying that "the cost of living has increased over the past year for anyone who did not benefit from relief measures such as fee-free child care and preschool."

7. The Treasurer explained why a fall of more than 1 per cent in the Sydney CPI was significant for public service pensions:

> The fall of more than 1 per cent is significant because in a number of legislative instruments that govern these schemes a fall of 1 per cent or more is the threshold for a corresponding reduction in pension payments. Without action by the New South Wales Parliament, pension payments under the relevant schemes would be automatically lowered by 1 per cent beginning in October this year. The principle of indexing pensions to the Sydney CPI is sound. It is intended to match movements in retirees' pensions to movements in their cost of living. What is now clear is that the effect of COVID-19 on the Sydney CPI does not align with this legislative intention.

8. The Treasurer noted that the SAS Trustee Corporation or "State Super", which administers most of the affected schemes, "shares the Government's views that the proposed amendments reflect the original intention of the indexation mechanism and offer an effective and efficient solution to the problem that has arisen."

9. Although the Treasurer noted it was "unlikely" to be required, the proposed amendments would enable the Government to amend the Sydney CPI threshold by regulation.

10. The Bill also amends the *Local Government and Other Authorities (Superannuation) Act 1927* and the *Public Authorities Superannuation Act 1985*, where no 1 per cent threshold previously existed:

> To bring those Acts into line with the other Acts and regulations dealt with by the bill, schedules 1.1 and 1.4 to the bill amend the local government CPI provisions to provide for no adjustment to be made to superannuation pensions if the fall in the Sydney CPI is less than 1.1 per cent, or any other percentage prescribed by regulation. Those amendments will ensure the

consistent treatment of retirement incomes for New South Wales public service retirees in the future.

ISSUES CONSIDERED BY THE COMMITTEE

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

Matters deferred to regulations

11. The Bill amends a suite of legislation governing the pensions payable under defined benefit superannuation schemes for retired public sector employees. While increasing the threshold for triggering a reduction in pension payments because of a fall in the annual Consumer Price Index of Sydney (the Sydney CPI), the Bill also allows for regulations to be made in future which prescribe any other threshold.

12. For example, the Bill inserts "or any other percentage prescribed in the regulations" after "1.1%" in many of the Acts amended by the Bill: see Schedules 1.1 – 1.4, 1.9 and 1.10. Schedule 1.5 also inserts a clause which appears to have the same effect (that is, to "increase or decrease the percentage") in relation to the following regulations:

(a) *State Authorities Superannuation (Ex-Snowy Mountains Hydro-Electric Authority Superannuation Fund Transfer) Regulation 2003*,

(b) *State Authorities Superannuation (Government Railways Superannuation Scheme Transfer) (Savings and Transitional) Regulation 1990*, and

(c) *State Authorities Superannuation (Transitional Provisions) Regulation 1988*.

The Bill would enable the Government to make regulations to prescribe any other percentage figure as the trigger for reducing pension payments. The Bill currently amends the relevant legislation so that pension payments are only reduced if the Consumer Price Index for Sydney over 12 months (the Sydney CPI) falls below 1.1 per cent, as opposed to the current 1 per cent threshold. The second reading speech noted that a further power to prescribe any other percentage figure would enable the Government to respond to changing circumstances associated with the pandemic.

The Committee notes that regulations are subordinate legislation and are therefore generally subject to a lower level of parliamentary scrutiny. While the power to change the threshold trigger for reducing pension payments is administratively convenient, it could significantly affect the rights of many pensioners and may impact the budget. Although the Treasurer noted that the power was "unlikely" to be required, the Committee also notes that potentially significant changes to rights should be effected through primary legislation. The Committee refers this matter to the Parliament for consideration.

10. Transport Administration Amendment (Closure of Railway Lines in Northern Rivers) Bill 2020

Date introduced	16 September 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Toole MP
Portfolio	Minister for Regional Transport and Roads

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Transport Administration Act 1988* to authorise the closure of railway lines between Crabbes Creek and Condong and between Casino and Bentley in the Northern Rivers area and to retain the land in public ownership.

BACKGROUND

2. In the second reading speech, the Hon. Paul Toole MP stated that the Bill authorises the closure of two sections of railway line in the Northern Rivers region to enable the development of the Northern Rivers Rail Trail:

> The purpose of the Transport Administration Amendment (Closures of Railway Lines in Northern Rivers) Bill 2020 is to authorise the closure of two sections of non-operational railway line in the Northern Rivers region of New South Wales to enable the development of the Northern Rivers Rail Trail…
>
> Section 99A of the Transport Administration Act 1988 requires that before a rail infrastructure owner can close a railway line outside a greater metropolitan region, the closure must be authorised by an Act of Parliament. That includes the removal of the tracks, which is a fundamental requirement of the repurposing of the corridor into a safe trail for pedestrians and cyclists. Accordingly, the Transport Administration Amendment (Closures of Railway Lines in Northern Rivers) Bill 2020 seeks to authorise the closure of the non-operational line between Crabbes Creek and Condong and between Casino and Bentley to progress two sections of rail trail along the corridor and to keep the closed corridor sections within public ownership.

3. The Minister also stated that as the land will remain under public ownership it could be returned to Transport ownership if necessary in the future:

> I assure the House that the rail trail will remain under public ownership, which the bill specifically addresses in part 31, clause 229. Any government or public ownership model adopted will ensure that the land can easily be returned to Transport ownership, if this is ever necessary.

ISSUES CONSIDERED BY THE COMMITTEE

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

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.