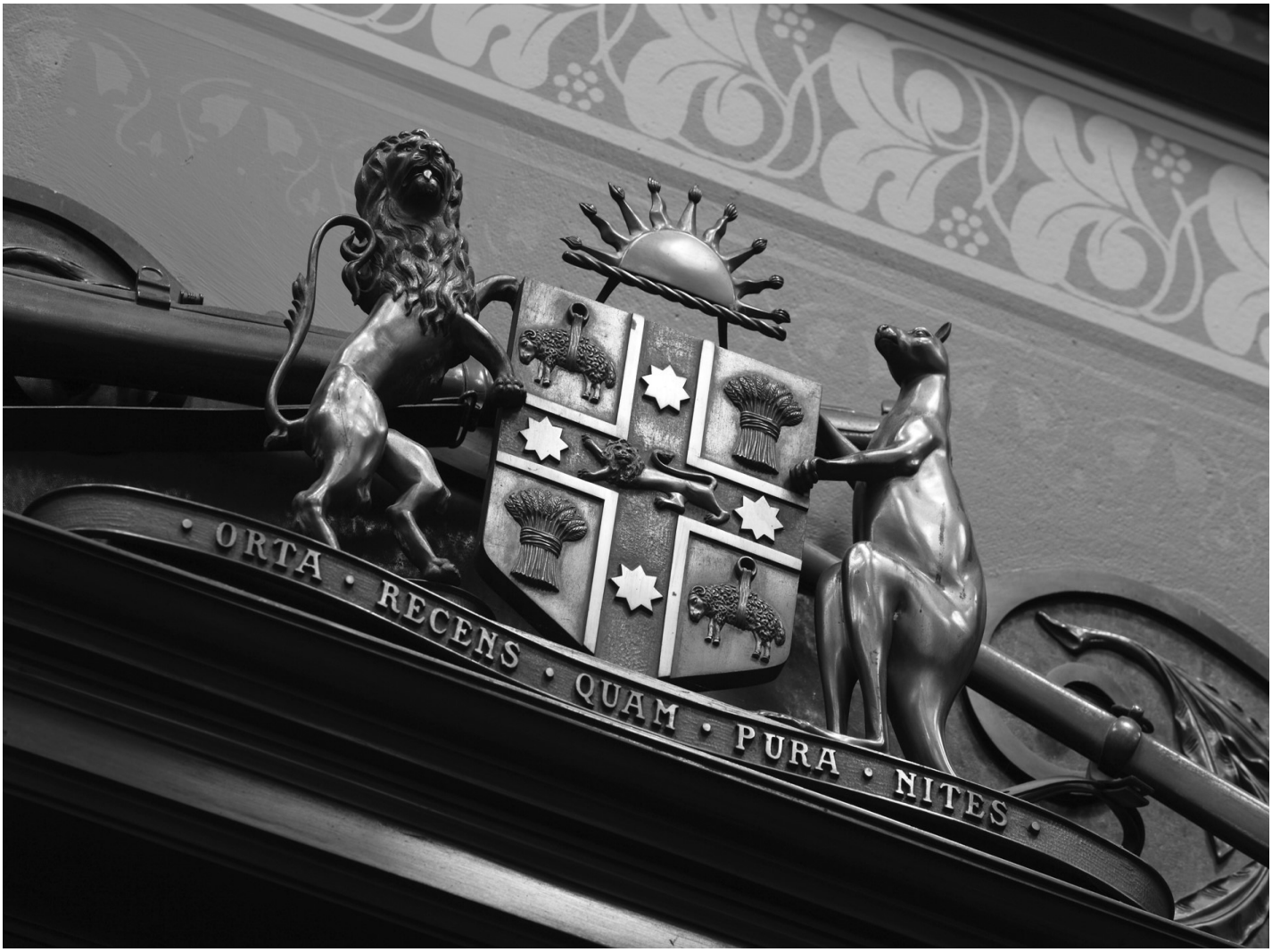
PARLIAMENT OF NEW SOUTH WALES

Legislation Review Committee

LEGISLATION REVIEW DIGEST

NO. 24/57 – 17 November 2020



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

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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. BUSHFIRES LEGISLATION AMENDMENT BILL 2020

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

Strict liability offences

The Bill doubles the maximum monetary penalty for corporations (and extends those penalties to public authorities) who do not comply with bush fire hazard reduction notices issued on them. The Bill also increases the amounts for which penalty notices may be issued for. Penalties (including a potential term of imprisonment) for individuals will remain the same. This increase in penalties and extension of those penalties to public authorities was driven by recommendations in the Final Report of the NSW Bushfire Inquiry dated 31 July 2020, pushing the idea that public authorities should be the "best neighbours possible" in terms of bushfire preparedness.

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. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the requirement is intended to provide increase the penalties for corporations (and introduce an offence for public authorities) to ensure that bushfire preparedness and compliance with bushfire hazard reduction notices are complied with. Given the substance of the offence already exists under the Rural Fires Act and remain unchanged as they relate to individuals and imprisonment, the Committee makes no further comment.

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

Commencement by proclamation

A portion of the Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that a flexible start date may provide the various Ministers responsible for preparing the Rural Boundary Clearing Code sufficient time to make the necessary administrative arrangements to draft and implement the Code while also allowing the remainder of the Bill's provisions to be implemented on assent. In the circumstances, the Committee makes no further comment.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s 8A(1)(b)(v) of the LRA

Matters not included in primary legislation - Rural Boundary Clearing Code

The Bill provides the Minister the power to create, amend or repeal a Rural Boundary Clearing Code to make provisions for the clearing of vegetation on land in a rural zone for the purpose of bushfire hazard reduction. This Code is to be made by the Minister with the agreement of the Minister for Planning and Public Spaces, the Minister for Energy and Environment and the Minister for Agriculture and Western New South Wales.

The Bill permits vegetation clearing work to be carried out under the Code despite any requirement for any licence, approval, consent or other authorisation for the work under the *Biodiversity Conservation Act 2016* or the *Environmental Planning and Assessment Act 1979* or any other Act or instrument made under an Act (other than the Code). The Bill also exempts persons from being guilty of an offence under the *Environmental Planning and Assessment Act 1979*, *Fisheries Management Act 1994*, *Heritage Act 1977*, Part 5A of the *Local Land Services Act 2013*, *Protection of the Environment Operations Act 1997* and the *Soil Conservation Act 1938*. These protections are only available if the person carries out vegetation clearing work in accordance with the Code on or within 25 metres of a land holding boundary in a rural zone, with the consent of the owner and for the purposes of bush fire hazard reduction.

The Committee notes that these provisions may permit actions that are not contained in the primary legislation and that may ordinarily require various legislative consents and approvals, and may therefore subvert parliamentary scrutiny. The Committee acknowledges the recommendations of the Final Report of the NSW Bushfire Inquiry and its emphasis on bush fire hazard reduction activities. The Committee notes the need for flexibility, the impending bushfire season and the fact that multiple Ministers must work co-operatively to produce the Code. That notwithstanding, the Committee refers the matter of whether the Bill provides sufficient Parliamentary oversight over the preparation of the Code to Parliament for its consideration.

2. CASINO CONTROL AMENDMENT (NO COMPENSATION)BILL 2020*

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

3. ELECTRICITY INFRASTRUCTURE INVESTMENT BILL 2020

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

Right to privacy – Disclosure of protected information

The Bill provides that the energy security monitor is not to disclose protected information, except to the Minister or as required by another law. The Minister must not disclose protected information, except with the consent of the person who provided the information, or to the Australian Energy Market Operator with the consent of the energy security target monitor, or for the purposes of legal proceedings arising out of this Act, or if the disclosure is, in the opinion of the Minister, appropriate.

The Committee notes that "protected information" means information that could diminish the competitive commercial value of the information to the person who provided the information to the monitor, or prejudice the legitimate business, commercial, professional or financial interests of the person who provided the information to the monitor. The Minister may only authorise the disclosure of protected information if it is appropriate to do so. That is, that is reasonably necessary to assist the Minister and the Department in considering what action, if any, the Minister intends to take in relation to a target breach, or to ensure the reliability and security of electricity supply, or to enable the energy security target to be met, and in the public interest. Despite the safeguards within the Act, the disclosure of such information may impact the right to privacy or confidentiality for individuals and corporations subject to these provisions. The Committee refers this matter to Parliament for its consideration.

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

Information gathering powers of the energy security target monitor

The Bill sets out the information gathering powers of the energy security target monitor. Under section 9, the energy security target monitor may require a person to provide information or answers to questions, by writing or in person, in relation to a relevant matter if the monitor believes on reasonable grounds that the person has knowledge of the relevant matter. A person who fails to comply with such a requirement, or provides false or misleading information, may incur a maximum penalty of 2,000 penalty units for a corporation or 100 penalty units for an individual. This is a wide information gathering power that may impact on a person's right to privacy of confidential information and may attach a significant penalty for individuals that fail to comply. However, the Committee acknowledges that this power is to ensure that the monitor can effectively assess whether there has been any breach of the Energy Security Target and related requirements under the Act. In these circumstances, the Committee makes no further comment.

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

Commencement by proclamation

The Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. The Committee notes that the Bill seeks to introduce substantial administrative changes to the legislative framework for investment generation, storage and network infrastructure. The Bill also establishes a roles of energy security target monitor, consumer trustee, financial trustee, infrastructure planner and regulator and provides for the scheme financial vehicle to be established. In these circumstances a flexible start date may assist with the implementation of necessary administrative arrangements. In the circumstances, the Committee makes no further comment.

Ministerial declarations

The Bill provides that the Minister may declare renewable energy zones and declare the access scheme that is to apply to the whole or part of a renewable energy zone. This power to make such declarations permits the Minister to rezone geographical areas under the Act upon their own initiative or on the application of the consumer trustee or another person. This may subvert the legislative power of the Parliament, or override other relevant legislation that would ordinarily apply to these geographical areas. However, the Committee notes that the declaring of a renewable energy zone would apply to the network infrastructure and requires the Minister to consider specific matters including land use planning, environmental and heritage matters, and the views of the local community in the renewable energy zone. The Committee also acknowledges the intent of these provisions to facilitate network infrastructure projects and long-term energy service agreements. In these circumstances, the Committee makes no further comment.

Matters deferred to the regulations – creation of offences

Several provisions with the Bill delegate matters to the regulations. The Committee acknowledges that it may be useful to delegate matters of an administrative nature to the regulations, especially where specific or technical information is required that is not required to be in the primary legislation.

However, the Committee notes that the subsection 72(2) Bill permits the regulations to create offences that carry a maximum penalty of 2,000 penalty units for a corporation or 500 penalty units for an individual. Subsection 72(3) also provides that the regulations may incorporate references, wholly or in part and with or without modification, to any standards, rules, codes, specifications or methods, as in force at a particular time or as in force from time to time, prescribed or published by an authority or body, whether or not it is a New South Wales authority or body.

The Committee prefers that offences be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The Committee also notes that the regulation may reference external material such as standards, rules, codes, specifications or methods, whether in force or not, published by an authority of body of NSW or another state. The Committee considers that regulations that reference other material that is subject to change, or published by a body in a different jurisdiction may impact individuals with rights or obligations subject to these provisions and regulations. The Committee refers this matter to Parliament for consideration.

Wide power of delegation

The Bill provides that the Minister and the infrastructure planner may delegate their functions, other than the power of delegation, to any person. Under the Bill, the consumer trustee, the financial trustee and the regulator may delegate any of their functions, other than this power of delegation, to a person of a class prescribed by the regulations.

The Committee notes that there are no restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. The Committee also notes that the proposed Act deals with the declaration of renewable energy zones, the construction and operation of network infrastructure, the framework for cost recovery by network operators, and certain information gathering powers.

The Committee would prefer the provisions about the persons and class of persons to whom such functions can be delegated to have been drafted with more specificity. In addition, they should be included in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight. The Committee refers the matter to Parliament for consideration.

4. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (REVIEW OF LAND DECISIONS) BILL 2020*

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

Issue Lack of clarity – rights and obligations in relation to mediation

The Bill inserts Division 8.2.A, which sets out provisions for the mediation of reviews and appeals under the Act. Under this division, an applicant that is dissatisfied with a determination or decision may request the consent authority to refer the dispute for mediation. The consent authority must refer the dispute for mediation before a mediator within 14 days after the request is made. The Bill also provides that the costs of the mediation, including the cost of the mediator, are to be paid equally by the applicant and the consent authority. Despite this provisions, the Bill outlines certain circumstances where the consent authority must pay the costs of mediation.

The Committee notes that the provision removes the discretion of the consent authority to determine whether a mediation is appropriate as it must refer the matter to mediation within 14 days. Despite this, the provisions are not clear as to when the mediation must take place – only that it must be referred within 14 days. This may impact the certainty of an individual applicant in seeking a timely resolution to their dispute. Additionally, the provision lacks clarity as to whether the applicant or consent authority are able to select a mediator of their choice despite being liable to pay half of the costs of the mediation and costs payable to the mediator. The provision does not make provision for parties to the mediation to have their own legal representative present should they choose to do so, or how this may affect the costs payable by either party. This lack of clarity may make the rights and obligations of the applicant, particularly the obligation to pay costs of the mediation, dependent upon the an insufficiently defined power of the consent authority to refer the matter to mediation. The Committee refers the matter to Parliament for its consideration.

5. ICAC AND OTHER INDEPENDENT COMMISSIONS LEGISLATION AMENDMENT (INDEPENDENT FUNDING) BILL 2020*

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

Conflict of functions of relevant Joint Committees

The Bill amends several acts in relation the Independent Commission Against Corruption, the Law Enforcement Conduct Commission and Ombudsman's Office, and the New South Wales Electoral Commission. The Bill provides that an appropriation made by the annual Appropriation Act to an agency is taken to include a contingency fund of 25% of the appropriation made. The Bill further provides that the Treasurer must, at the request of an agency, authorise the payment of a sum out of the contingency fund if the agency's appropriation for the annual reporting period has been exhausted and the relevant Joint Committee has approved the payment of the sum from the contingency fund. These relevant Joint Committees are specified as the Committee on the Independent Commission Against Corruption, the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, and the Joint Standing Committee on Electoral Matters.

The Committee notes that the primary functions of the relevant Joint Committees under the existing Acts and establishing resolution is to monitor and review the exercise by the agency of their functions under the relevant Acts, and to report to both Houses of Parliament on any matter relating to their functions that the attention of Parliament should be directed. The Committee acknowledges the NSW ICAC Special Report on the need for a new funding model for ICAC. However, the Committee notes that the power to approve a payment of a sum to an agency of which the Committee has oversight may conflict with its function to independently review the performance of the agency. The Committee refers this matter to the Parliament for its consideration of whether it involves an inappropriate delegation of legislative power to approve the appropriation of funds to agencies of which the relevant Committee has oversight.

6. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (PROPERTY DEVELOPER COMMISSIONS TO MPS) BILL 2020*

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

7. LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) AMENDMENT (DRUG DETECTION DOGS AND STRIP SEARCHES) BILL 2020*

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

Definition of immediate risk of significant harm to a person's life or safety

The Bill amends the *Law Enforcement (Powers and Responsibilities) Act 2002* to limit the circumstances in which a strip search may be carried out. Under the Bill, a strip search taking place outside of a police station may only be carried out where a police officer believes on reasonable grounds that the strip search is necessary for the purposes of the search, that there is an immediate risk of significant harm to a person's life or safety unless the strip search is carried out and a senior police officer authorises the strip search. The Bill also prohibits strip searches on children under the age of 16, and provides that strip searches must not be carried out on a persons aged 16 or 17 unless there are exceptional circumstances that justify it to protect that person or another person from immediate significant harm.

The Committee notes that the Bill does not define what constitutes an "immediate risk of significant harm to a person's life or safety". This may create uncertainty for individuals subject to these provisions about what constitutes reasonable grounds for a strip search. However, the Committee also notes the Bill provides that the fact that a person may be in possession of a small quantity of prohibited drugs or plants does not of itself constitute as an immediate risk of significant harm. The Bill also provides other safeguards for individuals such as the requirement that a senior officer needs to authorise the carrying out of the strip search, the prohibition of strip searches of children under the age of 16 and the requirement that a police officer seeking consent to a search must inform the person that they are entitled to refuse consent and there is no unfavourable inference attached not providing consent. In these circumstances, and considering the safeguards within the Bill, the Committee makes no further comment.

8. MANDATORY DISEASE TESTING BILL 2020

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

Right to Personal Physical Integrity

The Bill establishes a scheme under which a person (third party) can be ordered to provide a blood sample for testing for blood-borne diseases if the third-party's bodily fluid has come into contact with a health, emergency or public sector worker as a result of the third party's deliberate action, and the worker is at risk of contracting a blood-borne disease as a result. In carrying out the mandatory testing order, reasonable force may be used by a law enforcement officer in assisting the taking of blood and to prevent loss, destruction or contamination of a blood sample taken from the detained third party. Failure to comply with such an order constitutes an offence under the Act and may incur a maximum penalty of 100 penalty units or imprisonment of 12 months or both.

The Committee notes that the invasive nature of the procedure, the power to perform such a procedure without the person's consent and by use of reasonable force, and the requirement to submit to a procedure on pain of penalty or arrest, impacts on the right to personal physical integrity. The Committee also notes that such an order may be made in relation to a person under 18 years of age (but not younger than 14 years of age) and may apply to vulnerable persons under Part 4.

However, the Bill contains certain safeguards, such as specific timeframes and requirements apply to the making of a mandatory testing order. An application for a mandatory testing order may only be made if the worker has consulted a relevant medical practitioner within 24 hours

of the contact occurring, or 72 hours if reasonable in the circumstances. A senior officer must then determine an application within 3 business days after receiving the application, unless a longer period is necessary in the circumstances. The senior officer must also seek the third party's consent to voluntarily provide blood to be tested and provide the opportunity to make submissions and consider submissions received. A mandatory testing order may only be made if the third party does not voluntarily consent to provide blood, and if the test is justified in all the circumstances. The Bill also provides for a review process by the Chief Health Officer, and oversight of the Act by the Ombudsman. The Bill also contains a separate process for an application of a mandatory testing order for a vulnerable third party, which must be determined by a court rather than a senior officer.

While acknowledging these safeguards, the Committee notes the invasive nature of the procedure that may be performed on a person without consent, and may apply to vulnerable persons or persons under 18 years of age (but not younger than 14 years of age). The Committee refers the matter to Parliament for its consideration of the impact of the provisions on personal physical integrity.

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

Commencement by proclamation

The Committee notes that the majority of the Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. As the Bill establishes a scheme under which a person can be ordered to provide a blood sample, the Bill may impact individual rights and liberties. However the Committee notes that the delayed commencement date is to allow the agencies time to implement the policy changes and deliver appropriate staff training. In these circumstances, the Committee makes no further comment.

Matters deferred to the regulations

The Bill defers some matters to the regulations. In particular, the Bill provides that the regulations may exclude a class of person from the definition of worker in the Dictionary, and make provision for or with respect to the practice and procedure for applications for, and the conduct of, reviews by the Chief Health Officer under Part 7. The Committee generally prefers substantive clauses to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected such as the class of worker that may make an application under the Act or the procedure for applications and reviews under the Act. However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. As such the Committee makes no further comment.

Wide power of delegation

Section 34 of the Bill provides that a senior officer may delegate their functions, other than this power of delegation, to a person of a class prescribed by the regulations. The Committee notes that there are no restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. The Committee also notes that the proposed Act deals with sensitive matters relating to mandatory disease testing orders and procedures and that the functions of a senior officer therein are significant.

The Committee would prefer the provisions about the persons and class of persons to whom such functions can be delegated to have been drafted with more specificity. In addition, they should be included in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight. The Committee refers the matter to Parliament for consideration.

9. PREVENTION OF CRUELTY TO ANIMALS (INCREASED PENALTIES) BILL 2020*

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

Significant increase to penalties

The Bill introduces minimum penalties for offences of animal cruelty and aggravated animal cruelty. The Bill also significantly increases existing maximum penalties for various offences throughout the Act. In some circumstances this involves the doubling of custodial sentences for individuals and imposition of penalties 28 times larger for corporations and 10 times larger for individuals, as opposed to existing penalties under the Act.

The Committee notes that these provisions significantly increase the penalties available for a number of offences, including some strict liability offences under the Act. 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. The Bill also introduces mandatory minimum monetary penalties for certain offences under the Act. The Committee notes that mandatory penalty provisions remove judicial discretion to determine an appropriate penalty for a convicted offender.

The Committee acknowledges the Bill intends to toughen the NSW position on penalties for animal abuse offences, as indicated in the Second Reading Speech. However, given the significant increase in penalties for numerous offences under the Act, the Committee refers the matter to the Parliament for its consideration of whether the penalties are reasonable and proportionate in the circumstances.

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

Matters deferred to the regulations – creation of offences

The Bill amends the regulation making power in section 35 of the Act. The Bill allows the creation of an offence punishable by a penalty up to 1,400 penalty units for a corporation, 500 penalty units or imprisonment for 1 year (or both) for an individual. This is an increase on the existing maximum penalty of 25 penalty units. This a 56-fold increase for corporations, 20-fold increase for individuals with the introduction of a potential 12 month custodial sentence.

The Committee prefers that offences, particularly those that introduce a custodial sentence, be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The Committee refers this matter to the Parliament for its consideration.

Part One – Bills
1. Bushfires Legislation Amendment Bill 2020

Date introduced	11 November 2020
House introduced	Legislative Assembly
Minister responsible	The Hon David Elliott MP
Portfolio	Police and Emergency Services

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Rural Fires Act 1997* and other legislation in response to the Final Report of the NSW Bushfire Inquiry dated 31 July 2020.

BACKGROUND

2. The *Bushfires Legislation Amendment Bill 2020* amends the *Rural Fires Act 1997* (Rural Fires Act), the *Biodiversity Conservation Act 2016*, the *National Parks and Wildlife Act 1974* and other legislation in response to the findings and recommendations of the Final Report of the NSW Bushfire Inquiry dated 31 July 2020 (the Report).[1]

3. The Report noted:

> The Inquiry has worked to understand what happened during the 2019-20 bush fire season and how it was different to seasons that have come before. It makes 76 recommendations for future improvements to how NSW plans and prepares for, and responds to, bush fires. Some of these recommendations are for immediate action; others for actions that need to start now but will take some time to complete.

…

> The season showed us what damage megafires can do, and how dangerous they can be for communities and firefighters. And it is clear that we should expect fire seasons like 2019-20, or potentially worse, to happen again.

4. In the Bill's Second Reading Speech, the Hon. David Elliott MP stated:

> After every fire season there are lessons to be learnt, and this Government is determined to learn the lessons of the last bushfire season, arming our communities for future seasons and fostering a greater resilience to the threat of bushfire. Earlier this year the Government commissioned the NSW Independent Bushfire Inquiry, headed up by two eminently qualified persons: former Deputy Commissioner of the NSW Police Force Mr Dave Owens, APM, and former NSW Chief Scientist & Engineer Professor Mary O'Kane, AC. The inquiry heard from operational experts and community members alike, receiving nearly 2,000 submissions and holding consultations with bushfire-affected communities right across the State.

[1] Dave Owens APM and Mary O'Kane AC, 'Final Report of the NSW Bushfire Inquiry', 31 July 2020.

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict liability offences

5. Under the existing section 66 of the *Rural Fires Act*, a hazard management officer may notify an owner or occupier to carry out bush fire hazard reduction work, notwithstanding a fire permit hasn't been issued under Division 5 by the Commissioner of the NSW Rural Fire Service.

6. Section 66(8) of the *Rural Fires Act* goes on to state that an occupier or owner who is given a bush fire hazard reduction notice is guilty of an offence if they do not comply with the requirements in the reduction notice. Currently the maximum penalty for such an offence is 50 penalty units or 12 months imprisonment.

7. Schedule 1[16] of the Bill increases that maximum penalty up to 100 penalty units for a corporation or public authority, and 50 penalty units or imprisonment for 12 months for an individual. The Bill also extends penalties to public authorities, where those public authorities were not previously liable for penalties.

8. Schedule 2.1 of the Bill correspondingly increases the amount for which a penalty notice may be issued. Currently under the *Rural Fires Regulation 2013* an offence under section 66(8) may only result in a penalty notice being issued for $2,200. The Bill purports to increase that amount to $4,400 for a corporation or public authority and keep the figure at $2,200 for an individual.

9. Schedule 1[14] of the Bill also increases the minimum level of seniority for hazard management officers exercising a function under Division 2 of the Rural Fires Act to be the rank of Superintendent or above.

10. In the Bill's Second Reading Speech, the Hon. David Elliott MP stated that the new offence provision described above:

> … responds to recommendation No. 24 of the inquiry, which states that public land managers should aspire to be the "best neighbours possible" in terms of bushfire preparedness. I would go further and suggest that public land managers should not just be highly desirable neighbours but be held to a much higher standard. I believe the bill achieves this by allowing a senior RFS officer to serve bushfire hazard reduction notices on public authorities, which can currently be done to private landholders but not public landholders; introducing a penalty for public authorities and corporations that fail to comply with a bushfire hazard reduction notice of 100 penalty units, which is double the penalty applicable to an individual; and providing that land may not be excluded from requirements to repair or replace dividing fences under existing section 76, or from the recovery of costs related to repairing or replacing dividing fences damaged or destroyed by bushfire under existing section 77—because if we expect private landholders to take these actions, so too should we expect it of public landholders.
>
> **The Bill doubles the maximum monetary penalty for corporations (and extends those penalties to public authorities) who do not comply with bush fire hazard reduction notices issued on them. The Bill also increases the amounts for which penalty notices may be issued for. Penalties (including a potential term of imprisonment) for individuals will remain the same. This increase in penalties and extension of those penalties to public authorities was driven by**

recommendations in the Final Report of the NSW Bushfire Inquiry dated 31 July 2020, pushing the idea that public authorities should be the "best neighbours possible" in terms of bushfire preparedness.

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. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the requirement is intended to provide increase the penalties for corporations (and introduce an offence for public authorities) to ensure that bushfire preparedness and compliance with bushfire hazard reduction notices are complied with. Given the substance of the offence already exists under the Rural Fires Act and remain unchanged as they relate to individuals and imprisonment, the Committee makes no further comment.

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

Commencement by proclamation

11. Schedule 1[27] of the Bill provides that the provisions relating to the Rural Boundary Clearing Code are to commence on a day to be appointed by proclamation.

A portion of the Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that a flexible start date may provide the various Ministers responsible for preparing the Rural Boundary Clearing Code sufficient time to make the necessary administrative arrangements to draft and implement the Code while also allowing the remainder of the Bill's provisions to be implemented on assent. In the circumstances, the Committee makes no further comment.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s 8A(1)(b)(v) of the LRA

Matters not included in primary legislation - Rural Boundary Clearing Code

12. Schedule 1[27] of the Bill introduces a new section 100RA to the Rural Fires Act, which provides that the Minister may create, amend or repeal a Rural Boundary Clearing Code (the Code). Subsection 100RA(3) provides that the Minister cannot make, amend or appeal the Code without the agreement of the Minister for Planning and Public Spaces, the Minister for Energy and Environment and the Minister for Agriculture and Western New South Wales.

13. The Code may deal with the clearing of vegetation on land in a rural zone[2] for the purposes of bush fire hazard reduction. The Code may do that by (although is not limited to):

- specifying the type of vegetation which may or may not be cleared,

[2] Defined to include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU5 Village, and Zone RU6 Transition.

- specifying the manner of clearing vegetation,
- requiring the consent of an owner or occupier or other person as a pre-requisite to clearing vegetation,
- management of the clearing of vegetation in habitats of threatened species within the meaning of the Biodiversity Conservation Act 2016,
- specifying the clearing of vegetation in riparian corridors,
- management of soil erosion and landslip risks in connection with clearing vegetation, and
- protection of Aboriginal and other cultural heritage in connection with clearing vegetation.

14. The Bill also states that the Code may be applied either generally, in a limited way by referred to specified exceptions or factors, or differently according to specified factors. The Bill also contains wide delegation powers, authorising the Code to specify any matter or thing to be, from time to time, determined applied or regulated by any specified person or body.

15. Proposed section 100RB provides that vegetation clearing work can be carried out in accordance with the Code despite any requirement for a licence, approval, consent or other authorisation for the work under the *Biodiversity Conservation Act 2016*, the *Environmental Planning and Assessment Act 1979* or any other Act or instrument made under an Act (other than the Code). Subsection 100RB(3) also exempts persons from being guilty of an offence under a number of Acts[3] where the person was carrying out vegetation clearing work under the Code.

16. Subsection 100RB(1) provides that there are conditions on when clearing work can be conducted, in that the vegetation clearing work must be:

- carried out within 25 metres of the land holding boundary with adjoining land,
- carried out in a rural zone,
- carried out by or with the authority of the owner of land,
- done for the purposes of bush fire hazard reduction, and
- done in accordance with the Code in force under the Rural Fires Act.

17. In the Bill's Second Reading Speech, the Hon. David Elliott MP stated:

> Recommendation No. 28 of the inquiry called upon Government to review vegetation clearing policies to ensure that the processes are clear and easy to navigate for the community, and that they enable appropriate bush fire risk management by individual landowners without undue cost or complexity. In response, and to achieve greater clarity and simplicity for rural

[3] Environmental Planning and Assessment Act 1979, Fisheries Management Act 1994, Heritage Act 1977, Part 5A of the Local Land Services Act 2013, Protection of the Environment Operations Act 1997 and the Soil Conservation Act 1938.

landholders, the bill proposes at new section 100RB to empower owners and occupiers to clear vegetation on their property without the need for a licence, approval, consent or other authorisation under the Biodiversity Conservation Act 2016, the Environmental Planning and Assessment Act 1979 or any other Act or instrument.

…

The code will be published in the gazette and on the NSW Rural Fire Service website, which will provide support and guidance for landowners seeking to utilise the code.

The Bill provides the Minister the power to create, amend or repeal a Rural Boundary Clearing Code to make provisions for the clearing of vegetation on land in a rural zone for the purpose of bushfire hazard reduction. This Code is to be made by the Minister with the agreement of the Minister for Planning and Public Spaces, the Minister for Energy and Environment and the Minister for Agriculture and Western New South Wales.

The Bill permits vegetation clearing work to be carried out under the Code despite any requirement for any licence, approval, consent or other authorisation for the work under the *Biodiversity Conservation Act 2016* or the *Environmental Planning and Assessment Act 1979* or any other Act or instrument made under an Act (other than the Code). The Bill also exempts persons from being guilty of an offence under the *Environmental Planning and Assessment Act 1979*, *Fisheries Management Act 1994*, *Heritage Act 1977*, Part 5A of the *Local Land Services Act 2013*, *Protection of the Environment Operations Act 1997* and the *Soil Conservation Act 1938*. These protections are only available if the person carries out vegetation clearing work in accordance with the Code on or within 25 metres of a land holding boundary in a rural zone, with the consent of the owner and for the purposes of bush fire hazard reduction.

The Committee notes that these provisions may permit actions that are not contained in the primary legislation and that may ordinarily require various legislative consents and approvals, and may therefore subvert parliamentary scrutiny. The Committee acknowledges the recommendations of the Final Report of the NSW Bushfire Inquiry and its emphasis on bush fire hazard reduction activities. The Committee notes the need for flexibility, the impending bushfire season and the fact that multiple Ministers must work co-operatively to produce the Code. That notwithstanding, the Committee refers the matter of whether the Bill provides sufficient Parliamentary oversight over the preparation of the Code to Parliament for its consideration.

2. Casino Control Amendment (No Compensation)Bill 2020*

Date introduced	11 November 2020
House introduced	Legislative Council
Member responsible	Mr Justin Field MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Casino Control Act 1992* (the Act) to specify there is no right to compensation enforceable by the Crown Group companies against the State arising in relation to protected actions.

2. Protected actions are actions taken by the State or the Authority in connection with, or as a consequence of, the inquiry established on 14 August 2019 by the Authority under section 143 of the Act, and include the following:

   (a) an action that changes or has the effect of changing the terms or conditions of a licence granted to the Crown Group companies under the Act,

   (b) an action that has, or is likely to have, a material adverse effect on the assets, liabilities, properties, condition, operating results, operations, reputation or prospects of the Crown Group companies.

BACKGROUND

3. Pursuant to section 143 of the Act, an inquiry is currently being undertaken by the Independent Liquor and Gaming Authority in relation to the gaming licence held by Crown Sydney Gaming Pty Ltd. The terms of reference indicate that the inquiry will consider matters such as the suitability of the licensee to continue to give effect to the Barangaroo restricted gaming licence and the suitability of Crown Resorts as a close associate of the licensee. If the inquiry finds that the licensee or close associate is unsuitable, it will also consider what, if any, changes may be necessary to render those persons suitable.[4]

4. In his Second Reading Speech, Mr Justin Field MLC referred to this inquiry:

> The evidence that has been heard by the Crown Casino inquiry and by the public who have watched on very closely has, quite frankly, been shocking. …
>
> But what is more shocking potentially is that because of a deal done between Crown, the New Wales Government and the Independent Liquor & Gaming Authority [ILGA] back in 2014 both the authority and the Government may be constrained in the regulatory response to the

[4] For the full terms of reference, please see NSW Independent Liquor and Gaming Authority, undated, *Instrument of appointment to preside at an inquiry under section 143 of the Casino Control Act 1992 (NSW).*

inquiry by a compensation agreement. It could result in hundreds of millions of dollars of compensation being payable to Crown and Crown associated companies, should the regulator or this Parliament seek to act in the public interest and change casino laws and regulations in this State.

5. In relation to the compensation agreement, the Second Reading Speech further stated:

> In lay terms, if the Government or ILGA take steps to change the licence or regulations governing the operation of the casino, Crown can pursue compensation. That is the question before the commissioner and the ILGA: Should they make recommendations to change legislation or regulation or the licence conditions for Crown's Barangaroo casino?

6. Mr Field MLC summarised the intent of the Bill:

> The bill seeks to remove any question that Crown can claim compensation for its failures as a company to address the risks of its business model …
>
> The Parliament should ensure that ILGA and the Minister have the freedom to act as is necessary in the public interest without the threat of massive financial penalties to the State. They should not be constrained—and neither should the Chamber—by an agreement between a private entity and the Executive.

ISSUES CONSIDERED BY THE COMMITTEE

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

3. Electricity Infrastructure Investment Bill 2020

Date introduced	10 November 2020
House introduced	Legislative Assembly
Minister responsible	The Hon Matt Kean MP
Portfolio	Energy and Environment

PURPOSE AND DESCRIPTION

1. The objects of this Bill are—

   a) to improve the affordability, reliability, security and sustainability of electricity supply, and

   b) to co-ordinate investment in new generation, storage, network and related infrastructure, and

   c) to encourage investment in new generation, storage, network and related infrastructure by reducing risk for investors, and

   d) to foster local community support for investment in new generation, storage, network and related infrastructure, and

   e) to support economic development and manufacturing.

2. To achieve the objects, the Bill sets up a framework for investment in generation, storage and network infrastructure that includes the following main components—

   a) the assessment and monitoring of an energy security target for electricity supply for each year,

   b) renewable energy zones in particular geographical areas of the State that are made up of particular generation, storage and network infrastructure,

   c) the construction and operation of network infrastructure in renewable energy zones and other areas of the State,

   d) a framework for cost recovery by network operators who construct and operate network infrastructure,

   e) derivative arrangements for persons who construct and operate generation, storage and firming infrastructure, (f) contributions from distribution network service providers

BACKGROUND

3. In the Second Reading Speech, the Minister, the Hon Matt Kean MP, stated:

> The bill gives effect to the New South Wales Electricity Infrastructure Roadmap—an integrated policy framework to secure an affordable, reliable and clean energy future for New South Wales. It is a plan to make New South Wales an energy and economic superpower. This bill will improve the affordability, reliability, security and sustainability of electricity supply in New South Wales. It will encourage investment in new electricity generation, storage, network and related infrastructure by reducing risk for investors. It will foster local community support for investment in new energy infrastructure and it will do so in a way that supports economic development and manufacturing.

4. The Minister noted the importance of modernising the State's electricity infrastructure and further stated the long term nature of the scheme:

> The new electricity infrastructure also has long development times. It takes up to 10 years to build a renewable energy zone and eight years to build a big pumped hydro project. That is why we need to take action now—to ensure that new infrastructure is built before the existing power stations close. New South Wales has some of the best energy resources in the world. Our State is in a unique position to take advantage of those energy resources to give our local businesses and industries the competitive advantage that comes from having low-cost energy. However, the transmission system is congested and its capacity to connect new generation is limited. The regulatory framework provides no clear pathway for coordinated investment across infrastructure types. The renewable energy zones are a key feature of the bill aimed at alleviating these issues.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to privacy – Disclosure of protected information

5. Section 11 of the Bill provides that the energy security monitor must not disclose protected information, except to the Minister (under section 6 of the Bill) or as required by another law. "Protected information" is defined under the Bill as information provided to the energy security target monitor the disclosure of which could, in the opinion of the monitor, reasonably be expected to diminish the competitive commercial value of the information to the person who provided the information to the monitor, or prejudice the legitimate business, commercial, professional or financial interests of the person who provided the information to the monitor.

6. Subsection 11(2) provides that the Minister must not disclose protected information, except with the consent of the person who provided the information, or to the Australian Energy Market Operator with the consent of the energy security target monitor, or in connection with legal proceedings arising out of this Act, or to a person belonging to a class prescribed by the regulations, or if the disclosure is, in the opinion of the Minister, appropriate. The Minister is not to recommend the making of a regulation unless the disclosure of the protected information to the class of persons prescribed by the regulation is, in the opinion of the Minister, appropriate. Subsection 11(4) provides that a person must not disclose protected information, except with the authorisation of, or direction by, the Minister.

7. Subsection 11(5) provides that the Minister may authorise the disclosure of protected information under subsection (4) only if the disclosure is, in the opinion of the Minister, appropriate.

8. In this section, "appropriate" is defined as reasonably necessary to assist the Minister and the Department in considering what action, if any, the Minister intends to take in relation to a target breach identified in an energy security target monitor report, or to ensure the reliability and security of electricity supply, or to enable the energy security target to be met, and in the public interest.

9. Proposed section 68 of the Bill also provides that a person must not disclose information obtained in connection with the administration or execution of this Act unless that disclosure is made:

- with the consent of the person from whom the information was obtained, or
- in connection with the administration or execution of this Act, or
- for the purposes of legal proceedings arising out of this Act, or
- in accordance with a requirement of the Ombudsman Act 1974, or
- with other lawful excuse.

10. Disclosure of protected information may incur a maximum penalty of 2,000 penalty units for a corporation or 100 penalty units for an individual.

11. In the Second Reading Speech, the Minister noted the information gathering powers of the monitor and stated:

> The monitor, created by this bill, will be provided with information-gathering powers. These powers are necessary to ensure that the monitor can effectively assess and forecast any anticipated breach of the Energy Security Target. These powers will also ensure that the monitor can protect and give confidence to those providing information about its use and confidentiality. In particular, section 11 provides a strong confidentiality protection for this information. This is very important. The information provided by persons under this power will often be very commercially sensitive and it must be kept confidential. If it is not, then there is a risk that firms may have their legitimate commercial interest unfairly prejudiced and that investors will take their capital elsewhere. This is contrary to the purpose of the bill. For that reason, proposed section 11 is carefully crafted to identify narrow circumstances in which the Minister and others may disclose the information. This careful and nuanced drafting, especially in subsections (2) and (6), reflects the statutory purpose of setting out an exhaustive statement of the circumstances of lawful disclosure of this sensitive information.

The Bill provides that the energy security monitor is not to disclose protected information, except to the Minister or as required by another law. The Minister must not disclose protected information, except with the consent of the person who provided the information, or to the Australian Energy Market Operator with the consent of the energy security target monitor, or for the purposes of legal proceedings arising out of this Act, or if the disclosure is, in the opinion of the Minister, appropriate.

The Committee notes that "protected information" means information that could diminish the competitive commercial value of the information to the person who provided the information to the monitor, or prejudice the legitimate business, commercial, professional or financial interests of the person who provided the information to the monitor. The Minister may only

authorise the disclosure of protected information if it is appropriate to do so. That is, that is reasonably necessary to assist the Minister and the Department in considering what action, if any, the Minister intends to take in relation to a target breach, or to ensure the reliability and security of electricity supply, or to enable the energy security target to be met, and in the public interest. Despite the safeguards within the Act, the disclosure of such information may impact the right to privacy or confidentiality for individuals and corporations subject to these provisions. The Committee refers this matter to Parliament for its consideration.

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

Information gathering powers of the energy security target monitor

12. Division 2 of the Bill sets out the information gather powers of the energy security target monitor's information. Proposed section 9 provides that the energy security target monitor may, by written notice to a person, require the person to provide relevant information to the monitor. Such a notice must specify the information to be provided, the form in which it is to be provided, and the time in which it is to be provided.

13. Subsection 9(3) provides that the energy security target monitor may require a person to answer questions in relation to a relevant matter if the monitor believes on reasonable grounds that the person has knowledge of the relevant matter.

14. Subsection 9(4) provides that the energy security target monitor may, by written notice, require a person to attend at a specified place and time to answer questions if attendance at the place is reasonably required for the questions to be properly put and answered

15. Subsection 9(6) provides that, without limiting the persons who may be required to provide information or to answer questions under this section, the persons may include the following:

- a person who owns, controls or operates generation infrastructure,
- a person who owns, controls or operates network infrastructure,
- a small generation aggregator or a market small generation aggregator,
- a person who provides wholesale demand response services,
- an operator of a virtual power plant,
- an aggregator of distributed energy resources,
- a person who supplies fuel to generation infrastructure,
- a person involved in planning and designing generation infrastructure,
- other registered participants.

16. Proposed section 10 outlines the possible offences for failure to comply with a requirement under section 9. Subsection 10(10) provides that a person must not, without lawful excuse, fail to comply with a requirement made of the person under section 9. Subsection 9(2) further provides that a person must not give information that they know to be false or misleading in a material respect. Failure to do so may incur a maximum penalty of 2,000 penalty units for a corporation or 100 penalty units for an individual.

> **The Bill sets out the information gathering powers of the energy security target monitor. Under section 9, the energy security target monitor may require a person to provide information or answers to questions, by writing or in person, in relation to a relevant matter if the monitor believes on reasonable grounds that the person has knowledge of the relevant matter. A person who fails to comply with such a requirement, or provides false or misleading information, may incur a maximum penalty of 2,000 penalty units for a corporation or 100 penalty units for an individual. This is a wide information gathering power that may impact on a person's right to privacy of confidential information and may attach a significant penalty for individuals that fail to comply. However, the Committee acknowledges that this power is to ensure that the monitor can effectively assess whether there has been any breach of the Energy Security Target and related requirements under the Act. In these circumstances, the Committee makes no further comment.**

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

Commencement by proclamation

17. Section 2 of the Bill provides that the Bill commences on a day or days to be appointed by proclamation.

> **The Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. The Committee notes that the Bill seeks to introduce substantial administrative changes to the legislative framework for investment generation, storage and network infrastructure. The Bill also establishes a roles of energy security target monitor, consumer trustee, financial trustee, infrastructure planner and regulator and provides for the scheme financial vehicle to be established. In these circumstances a flexible start date may assist with the implementation of necessary administrative arrangements. In the circumstances, the Committee makes no further comment.**

Ministerial declarations

18. The Bill provides that the Minister may make declarations in relation to schemes under the Act.

19. Section 12 provides that the Minister may declare renewable energy zones. Subsection 12(2) provides that the network infrastructure that forms part of a renewable energy zone may extend outside the geographical area specified in the declaration. Subsection 12(3) provides that the Minister may make a declaration only if they are satisfied that it is consistent with the objects of the Act and has considered the existing network

infrastructure in the renewable energy zone and the rest of the State, land use planning, environmental and heritage matters, the views of the local community in the renewable energy zone, and other matters prescribed by the regulations.

20. Subsection 14(1) provides that the Minister may make such a declaration on the Minister's own initiative, or on the application of the consumer trustee or another person. Section 15 provides that the Minister may amend a declaration of a renewable energy zone only in certain circumstances, including to expand the geographical area of the zone, to specify additional infrastructure for the zone, increase network capacity, to provide further details and specifications about information contained in the declaration, or to correct a minor error or misdescription.

21. Section 17 provides that the Minister may declare the access scheme that is to apply in a renewable energy zone or part of a renewable energy zone. Subsection 17(2) provides that an access scheme is a scheme that authorises or prohibits access to, and use of, specified network infrastructure in a renewable energy zone by network operators and operators of generation and storage infrastructure. Section 21 provides that the Minister may amend a declaration of an access scheme to correct a minor error or misdescription, or, to provide further details and specifications about information contained in the declaration, or if there are no participants in the access scheme immediately before the declaration is amended, or if the amendment is made in accordance with the terms of the access scheme.

22. Divisions 2, Part 4 of the Bill outlines the directions the Minister may make to carry out network infrastructure projects.

23. In the Second Reading Speech, the Minister noted in regards to section 12:

> That section, with division 2 of part 3, part 4 and part 5, is part of a cascading process to identify renewable energy zones and then determine the infrastructure projects and the details, design and configurations of these projects. The purpose of paragraph (b) of section 12 (1) is to allow the renewable energy zone declaration to identify such infrastructure associated with the renewable energy zone which may not happen in the geographical area of the zone. This could include a transmission line upgrade elsewhere in the network reasonably necessary to support the effective operation of the zone. I want to be clear that the purpose of the REZ declaration is not to determine which projects can proceed. Such a result would undermine the competitive tension needed to protect the financial interests of consumers through the tendering for long-term energy service agreements. Protecting the financial interests of consumers is, of course, a key purpose of this bill.
>
> The declaration will necessarily describe the infrastructure at a high level. Determining the final infrastructure projects and their design is the purpose of the renewable energy zone network infrastructure components of part 4, and in this respect I refer the House specifically to proposed section 23 (2) (a), which can deal with different transmission routes, and the tender process set out in part 5. The network infrastructure does not have to be in the geographic area for renewable energy zones so that new infrastructure connecting the main transmission network can also be covered by the declaration. The REZ declaration enables other elements of the bill, such as access schemes and cost recovery for REZ network infrastructure projects, and helps direct investment into these areas through the tenders for long-term energy service agreements.

The Bill provides that the Minister may declare renewable energy zones and declare the access scheme that is to apply to the whole or part of a renewable

energy zone. This power to make such declarations permits the Minister to rezone geographical areas under the Act upon their own initiative or on the application of the consumer trustee or another person. This may subvert the legislative power of the Parliament, or override other relevant legislation that would ordinarily apply to these geographical areas. However, the Committee notes that the declaring of a renewable energy zone would apply to the network infrastructure and requires the Minister to consider specific matters including land use planning, environmental and heritage matters, and the views of the local community in the renewable energy zone. The Committee also acknowledges the intent of these provisions to facilitate network infrastructure projects and long-term energy service agreements. In these circumstances, the Committee makes no further comment.

Matters deferred to the regulations – creation of offences

24. Several provisions with the Bill delegate matters to the regulations. In particular, section 72 of the Bill provides the general regulation-making power of the Governor under the Act. Subsection 72(2) provides that the regulation may create an offence punishable by a penalty not exceeding 2,000 penalty units for a corporation or 500 penalty units for an individual.

25. Subsection 72(3) provides that the regulations may incorporate by reference, wholly or in part and with or without modification, any standards, rules, codes, specifications or methods, as in force at a particular time or as in force from time to time, prescribed or published by an authority or body, whether or not it is a New South Wales authority or body.

Several provisions with the Bill delegate matters to the regulations. The Committee acknowledges that it may be useful to delegate matters of an administrative nature to the regulations, especially where specific or technical information is required that is not required to be in the primary legislation.

However, the Committee notes that the subsection 72(2) Bill permits the regulations to create offences that carry a maximum penalty of 2,000 penalty units for a corporation or 500 penalty units for an individual. Subsection 72(3) also provides that the regulations may incorporate references, wholly or in part and with or without modification, to any standards, rules, codes, specifications or methods, as in force at a particular time or as in force from time to time, prescribed or published by an authority or body, whether or not it is a New South Wales authority or body.

The Committee prefers that offences be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The Committee also notes that the regulation may reference external material such as standards, rules, codes, specifications or methods, whether in force or not, published by an authority of body of NSW or another state. The Committee considers that regulations that reference other material that is subject to change, or published by a body in a different jurisdiction may impact individuals with rights or obligations subject to these provisions and regulations. The Committee refers this matter to Parliament for consideration.

Wide power of delegation

26. Section 64 of the Bill sets out the delegation of powers under the Act, and provides that the Minister may delegate their functions under this Act, other than this power of delegation, to any person.

27. Subsection 64(2) provides that the infrastructure planner may delegate its functions, other than this power of delegation, to any person.

28. Subsection 64(3) provides that the consumer trustee, the financial trustee and the regulator may delegate any of their functions, other than this power of delegation, to a person of a class prescribed by the regulations.

> **The Bill provides that the Minister and the infrastructure planner may delegate their functions, other than the power of delegation, to any person. Under the Bill, the consumer trustee, the financial trustee and the regulator may delegate any of their functions, other than this power of delegation, to a person of a class prescribed by the regulations.**
>
> **The Committee notes that there are no restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. The Committee also notes that the proposed Act deals with the declaration of renewable energy zones, the construction and operation of network infrastructure, the framework for cost recovery by network operators, and certain information gathering powers.**
>
> **The Committee would prefer the provisions about the persons and class of persons to whom such functions can be delegated to have been drafted with more specificity. In addition, they should be included in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight. The Committee refers the matter to Parliament for consideration.**

4. Environmental Planning and Assessment Amendment (Review of Land Decisions) Bill 2020*

Date introduced	11 November 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 amend various Acts as follows—

(a) to allow a House of Parliament to disallow environmental planning instruments,

(b) to provide for the mediation of disputes about certain determinations or decisions made under the *Environmental Planning and Assessment Act 1979*,

(c) to confer administrative review jurisdiction on the Civil and Administrative Tribunal over—

i. decisions relating to the use or value of private land, and

ii. certain determinations or decisions made under the *Environmental Planning and Assessment Act 1979*.

BACKGROUND

2. In his Second Reading Speech, the Hon. Mark Banasiak MLC noted that the *Environmental Planning and Assessment (Review of Land Decisions) Bill 2020* would provide an avenue of mediation for property owners that are dissatisfied with the determinations or decisions made by the consent authority:

> This bill will ensure that property owners can air their concerns through mediation before forking out thousands of dollars on reviews or in the court system. Schedule 1 will require that environmental planning instruments, or EPIs, like State environmental planning policies be laid before the House of Parliament and that they may be disallowed. EPIs control planning decisions, like development proposals on private land. A recent report by the Regulation Committee on delegated legislation, which includes EPIs, entitled "Making of delegated legislation in NSW", identified the impact that these types of instruments have over personal rights and that the Government should prioritise more effective ways of communicating that impact to the public.

ISSUES CONSIDERED BY THE COMMITTEE

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

Issue Lack of clarity – rights and obligations in relation to mediation

3. The Bill amends the *Environment Planning and Assessment Act 1979* (the Act) to insert Division 8.2.A, which sets out provisions for the mediation of reviews and appeals under the Act. Under this proposed division, section 8.5C provides that an applicant that is dissatisfied with a determination or decision may request the consent authority to refer the dispute about the determination or decision for mediation. Subsection 8.5C(2) provides that the consent authority must refer the dispute for mediation before a mediator within 14 days after the request is made.

4. Proposed section 8.5E provides that the costs of the mediation, including the costs payable to the mediator are payable in equal parts by the applicant and the consent authority. Despite this, subsection 8.5E(2) provides that the costs of mediation, including the costs payable to the mediator, are payable by the consent authority if—

- the applicant is the owner of the land to which the development application relates, and
- a change to land use zones or development standards in relation to the land restricts the carrying out of development on the land, and
- the dispute between the applicant and the consent authority is related to the restriction.

The Bill inserts Division 8.2.A, which sets out provisions for the mediation of reviews and appeals under the Act. Under this division, an applicant that is dissatisfied with a determination or decision may request the consent authority to refer the dispute for mediation. The consent authority must refer the dispute for mediation before a mediator within 14 days after the request is made. The Bill also provides that the costs of the mediation, including the cost of the mediator, are to be paid equally by the applicant and the consent authority. Despite this provisions, the Bill outlines certain circumstances where the consent authority must pay the costs of mediation.

The Committee notes that the provision removes the discretion of the consent authority to determine whether a mediation is appropriate as it must refer the matter to mediation within 14 days. Despite this, the provisions are not clear as to when the mediation must take place – only that it must be referred within 14 days. This may impact the certainty of an individual applicant in seeking a timely resolution to their dispute. Additionally, the provision lacks clarity as to whether the applicant or consent authority are able to select a mediator of their choice despite being liable to pay half of the costs of the mediation and costs payable to the mediator. The provision does not make provision for parties to the mediation to have their own legal representative present should they choose to do so, or how this may affect the costs payable by either party. This lack of clarity may make the rights and obligations of the applicant, particularly the obligation to pay costs of the mediation, dependent upon the an insufficiently defined power of the consent authority to refer the matter to mediation. The Committee refers the matter to Parliament for its consideration.

5. ICAC and Other Independent Commissions Legislation Amendment (Independent Funding) Bill 2020*

Date introduced	11 November 2020
House introduced	Legislative Assembly
Member responsible	The Hon. Robert Borsak MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. An Act to make amendments to various Acts to provide for further parliamentary oversight relating to the adequacy of funding for the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the New South Wales Electoral Commission and the Ombudsman's Office; to require the annual appropriation for each of those bodies to be allocated separately from other agencies and that it include a contingency amount available for use in special circumstances; to provide for further administrative independence of those bodies; and for related purposes.

BACKGROUND

2. The Bill makes amendments to several Acts establishing independent oversight bodies, including amendments to the *Government Sector Employment Act 2013*, *Government Sector Finance Act 2018, Electoral Act 2017, Commission Against Corruption Act 1988, Law Enforcement Conduct Commission Act 2016*, and the *Ombudsman Act 1974*.

3. In the Second Reading Speech, the Hon Robert Borsak MLC stated the intention of the Bill:

> The intention of this bill is to provide further parliamentary oversight relating to the adequacy of funding for the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the NSW Electoral Commission and the NSW Ombudsman by allowing the annual appropriation of these bodies to be allocated separately from other agencies and that it include a contingency amount available for use in special circumstances.

4. Mr Borsak went on to note that the Bill is not intended as a 'money bill':

> Let us also be clear: This is not a money bill. We are expecting the Government to object to this bill based on that spurious argument that somehow we are seeking to allocate or appropriate the privilege of the Government. That is not the case and this bill reflects our approach perfectly. It forces the Government to consider proper independent structures for the future funding of these bodies for adequacy and long-term resilience, especially the ICAC, which has, as recently as this week, again pleaded for adequate ongoing funding and independence so that it can do its job without fear or favour of government

5. Mr Borsak noted that the amendments contained in the Bill are in response to the recommendations of New South Wales ICAC special report, *The need for a new independent funding model for the ICAC*.[5]

ISSUES CONSIDERED BY THE COMMITTEE

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

Conflict of functions of relevant Joint Committees

6. The Bill makes several amendments to Acts in regards to specific independent oversight agencies, including the Independent Commission Against Corruption, the Law Enforcement Conduct Commission and Ombudsman's Office, and the New South Wales Electoral Commission.

7. Schedule 1 of the Bill amends the *Government Sector Finance Act 2018* to insert clause 4.6A, which provides that the appropriation made by the annual Appropriation Act to an agency is taken to include, as a contingency fund for the annual reporting period, an amount equal to 25% of the appropriation made (the contingency fund).

8. Clause 4.6A(2) provides that despite any other provision of this Act, an appropriation made by the annual Appropriation Act to an agency, including the contingency fund, must be paid out of the Consolidated Fund directly to the agency.

9. The Bill further provides that the Treasurer must, at the request of an agency, authorise the payment of a sum out of the contingency fund if—

- the appropriation made by the annual Appropriation Act for the agency for the annual reporting period has been exhausted, and
- payments authorised to be made under this section will not exceed the contingency fund, and
- the relevant Joint Committee has approved the payment of the sum, and
- any other requirements prescribed by the regulations have been met.

10. The Bill provides that the Treasurer must cause details of an authorisation to be included in the Budget Papers for the next annual reporting year for the NSW Government.

11. Under the Bill, the "relevant Joint Committee" refers to the following —

- for the Independent Commission Against Corruption—the Committee on the Independent Commission Against Corruption constituted under section 63 of the *Independent Commission Against Corruption Act 1988*,
- for the Law Enforcement Conduct Commission and the Ombudsman's Office—the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission constituted under section 31A of the *Ombudsman Act 1974*,

[5] NSW Independent Commission Against Corruption Special Report - The need for a new independent funding model for the ICAC (May 2020 - Section 75 report).

- for the New South Wales Electoral Commission—the Joint Standing Committee on Electoral Matters.

12. Schedules 3-6 of the Bill amend the *Electoral Act 2017*, *Independent Commission Against Corruption Act 1988, Law Enforcement Conduct Commission Act 2016,* and *Ombudsman Act 1974* respectively to implement these changes in regards to the function of the relevant Joint Committees to be able to approve a request for payment of a sum out of the Commission's contingency fund during an annual reporting period.

The Bill amends several acts in relation the Independent Commission Against Corruption, the Law Enforcement Conduct Commission and Ombudsman's Office, and the New South Wales Electoral Commission. The Bill provides that an appropriation made by the annual Appropriation Act to an agency is taken to include a contingency fund of 25% of the appropriation made. The Bill further provides that the Treasurer must, at the request of an agency, authorise the payment of a sum out of the contingency fund if the agency's appropriation for the annual reporting period has been exhausted and the relevant Joint Committee has approved the payment of the sum from the contingency fund. These relevant Joint Committees are specified as the Committee on the Independent Commission Against Corruption, the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, and the Joint Standing Committee on Electoral Matters.

The Committee notes that the primary functions of the relevant Joint Committees under the existing Acts and establishing resolution is to monitor and review the exercise by the agency of their functions under the relevant Acts, and to report to both Houses of Parliament on any matter relating to their functions that the attention of Parliament should be directed.[6] The Committee acknowledges the NSW ICAC Special Report on the need for a new funding model for ICAC. However, the Committee notes that the power to approve a payment of a sum to an agency of which the Committee has oversight may conflict with its function to independently review the performance of the agency. The Committee refers this matter to the Parliament for its consideration of whether it involves an inappropriate delegation of legislative power to approve the appropriation of funds to agencies of which the relevant Committee has oversight.

[6] *Law Enforcement Conduct Commission Act 2016* (NSW) s 131, *Ombudsman Act 1974* (NSW) s 31B, *Independent Commission Against Corruption Act* 1988 s64, and the resolution establishing the Joint Standing Committee on Electoral Matters

6. Independent Commission Against Corruption Amendment (Property Developer Commissions to MPs) Bill 2020*

Date introduced	12 November 2020
House introduced	Legislative Assembly
Member responsible	The Hon. Jodi McKay MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Independent Commission Against Corruption Act 1988* to prohibit a member of Parliament from seeking or accepting a payment of a commission from a property developer, directly or through a third party.

BACKGROUND

2. In the Bill's Second Reading Speech, the Hon. Jodi McKay MP stated:

> As we know, it is illegal for members of Parliament to receive donations from property developers, and it should be illegal for the very same developers to pay the very same parliamentarians a commission. To do so allows malign interests to circumvent the electoral and political laws that have been put in place to protect our democracy and to uphold the integrity of our public institutions.
>
> … this bill is necessary because something must be done to improve the standards of integrity in this Parliament. It saddens me that we have to bring this bill to the Parliament.

3. The Bill introduces relevant provisions that would render the acceptance or seeking of a commission from a 'property developer'. The Bill adopts the definition of property developer from Part 3, Division 7 of the *Electoral Funding Act 2018*.[7]

4. Subsections 9(1)(a)-(d) of the *Independent Commission Against Corruption Act 1988* (the Act) currently state that conduct does not amount to corrupt conduct unless it could constitute or involve:

   - a criminal offence, or
   - a disciplinary offence, or

[7] Section 53 of the *Electoral Funding Act 2018* defines a property developer as an individual or a corporation who carries on a business mainly concerned with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit, and, in the course of that business, 1 relevant planning application has been made by or on behalf of the individual or corporation and is pending, or 3 or more relevant planning applications made by or on behalf of the individual or corporation have been determined within the preceding 7 years. A property developer includes a person who is a close associate of an individual or a corporation referred to above.

- reasonable grounds for dismissing, or
- dispensing with the services of or otherwise terminating the services of a public official, or
- in the case of conduct of a Minister of the Crown or a member of a House of Parliament, a substantial breach of an applicable code of conduct.

5. For the purposes of section 9 of the Act, an 'applicable code of conduct means', in relation to a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown), a code of conduct adopted for the purposes of section 9 by resolution of the House concerned. This includes the *Code of Conduct for Members* adopted on 5 March 2020.[8] This Code does not contain provisions expressly related to the earning of commissions, though does detail requisite member conduct in relation to conflicts of interest[9] and receipt of gifts.[10]

6. This Bill would add another exception to the above list after subsections 9(1)(a)-(d) being, in the case of conduct by a member of Parliament, a substantial breach of the new subsection 9(7) contemplated by the Bill.

7. That proposed subsection 9(7) states that a member of Parliament must not accept or seek payment of a commission from a property developer, within the meaning of Part 3, Division 7 of the *Electoral Funding Act 2018*, either directly or through a third party. The Bill does not define what a 'commission' is for the purposes of this proposed subsection.

8.

ISSUES CONSIDERED BY THE COMMITTEE

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

[8] Code of Conduct for Members of the Legislative Assembly, adopted 5 March 2020, Accessed Online < https://www.parliament.nsw.gov.au/members/Documents/Code%20of%20Conduct%20(adopted%205%20March%202020).pdf>

[9] Members must take reasonable steps to avoid, resolve or disclose any conflict between their private interests and the public interest. The public interest is always to be favoured over any private interest of the Member.

[10] Members must take reasonable steps to disclose all gifts and benefits received in connection with their official duties, in accordance with the requirements for the disclosure of pecuniary interests. Members must not knowingly accept gifts that could reasonably be expected to give rise to a conflict of interest or could reasonably be perceived as an attempt to improperly influence the Member in the exercise of his or her duties.

7. Law Enforcement (Powers and Responsibilities) Amendment (Drug Detection Dogs and Strip Searches) Bill 2020*

Date introduced	11 November 2020
House introduced	Legislative Council
Member responsible	Mr David Shoebridge MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of the *Law Enforcement (Powers and Responsibilities) Amendment (Drug Detection Dogs and Strip Searches Bill 2020* is to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* as follows –

(a) to prohibit strip searches of children who are under 16 years old and to permit strip searches of children aged 16 and 17 years only in exceptional circumstances,

(b) to limit the circumstances in which personal searches may be carried out,

(c) to provide that a person cannot consent to a strip search and to require that a police officer seeking the consent of a person to a personal search, other than a strip search, must inform the person that no unfavourable inference may be drawn if the person refuses to consent to a search,

(d) to prohibit the imposition of quotas or targets relating to the number of personal searches carried out by police officers,

(e) to prohibit a police officer from using a dog to search a person for the purpose of detecting a drug offence,

(f) to require a warrant for the use of a dog to carry out general drug detection in a public place,

(g) to set out the matters that an authorised officer must consider in determining whether there are reasonable grounds to issue a warrant to carry out general drug detection in a public place using dogs,

(h) to further provide for the information that must be included in an application for a warrant,

(i) to require the Commissioner of Police to record information relating to, and report annually to Parliament on, the number of searches, including strip searches,

carried out by police while using dogs to carry out general drug detection under a warrant,

(j) to make other minor and consequential amendments.

BACKGROUND

2. The Bill amends the *Law Enforcement (Powers and Responsibilities) Act 2002* (the Act).

3. In the Bill's Second Reading Speech, Mr David Shoebridge MLC noted that the Bill made a series of detailed and considered changes to the Act regarding police search powers and the use of dogs for drug detection.

4. Mr Shoebridge noted his thanks to the organisations that contributed to the development of the Bill:

> We thank the following organisations for their detailed submissions about the proposal, which have helped shape the final form of the bill: the Aboriginal Legal Service, the Council for Civil Liberties, Harm Reduction Australia, the NSW Users and AIDS Association, the Redfern Legal Centre, Students for Sensible Drug Policy. We also thank Dr Peta Malins and the many lawyers, activists, academics, Greens members and general members of the community who shared their perspective with us. In addition, we took a survey on the bill and received 842 responses, 96 per cent of which were supportive of the bill. Their detailed responses and comments were invaluable to me as I sought to see whether we were on the right path with this bill.

ISSUES CONSIDERED BY THE COMMITTEE

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

Definition of immediate risk of significant harm to a person's life or safety

5. Clause 11 of the Bill omits section 31(b) of the Act and inserts instead:

> (b) in the case where the search is carried out in another place -
>
> i. the police officer believes on reasonable grounds that the strip search is necessary for the purposes of the search, and
>
> ii. the police officer believes on reasonable grounds that there is an immediate risk of significant harm to a person's life or safety unless the strip search is carried out and
>
> iii. a senior officer authorises the carrying out of the strip search having regard to the matters set out in subparagraphs (i) and (ii).

6. The Bill inserts subsection 31(2), which provides that the fact that a person may be in possession of small quantity of prohibited drug or plant within the meaning of the *Drug Misuse and Trafficking Act 1985*, does not of itself constitute an immediate risk of significant harm to a person's life or safety.

7. The Bill amends section 34 of the Act to provide that a strip search must not be carried out on a person under the age of 16 years of age, and must not be carried out on a person who is 16 or 17 unless there are exceptional circumstances that justify a strip search to protect the person, or another person, from immediate significant harm. Proposed section 34A provides that a police officer seeking consent to a strip search

must inform the person that they are entitled to refuse consent and that no unfavourable inference may be drawn if the person refuses to consent to the search.

The Bill amends the *Law Enforcement (Powers and Responsibilities) Act 2002* to limit the circumstances in which a strip search may be carried out. Under the Bill, a strip search taking place outside of a police station may only be carried out where a police officer believes on reasonable grounds that the strip search is necessary for the purposes of the search, that there is an immediate risk of significant harm to a person's life or safety unless the strip search is carried out and a senior police officer authorises the strip search. The Bill also prohibits strip searches on children under the age of 16, and provides that strip searches must not be carried out on a persons aged 16 or 17 unless there are exceptional circumstances that justify it to protect that person or another person from immediate significant harm.

The Committee notes that the Bill does not define what constitutes an "immediate risk of significant harm to a person's life or safety". This may create uncertainty for individuals subject to these provisions about what constitutes reasonable grounds for a strip search. However, the Committee also notes the Bill provides that the fact that a person may be in possession of a small quantity of prohibited drugs or plants does not of itself constitute as an immediate risk of significant harm. The Bill also provides other safeguards for individuals such as the requirement that a senior officer needs to authorise the carrying out of the strip search, the prohibition of strip searches of children under the age of 16 and the requirement that a police officer seeking consent to a search must inform the person that they are entitled to refuse consent and there is no unfavourable inference attached not providing consent. In these circumstances, and considering the safeguards within the Bill, the Committee makes no further comment.

8. Mandatory Disease Testing Bill 2020

Date introduced	11 November 2020
House introduced	Legislative Assembly
Minister responsible	The Hon David Elliott MP
Portfolio	Police and Emergency Services

PURPOSE AND DESCRIPTION

1. The object of this Bill is to establish a scheme under which a person (a third party) can be ordered to provide a blood sample for testing for blood-borne diseases if—

   (a) the third party's bodily fluid has come into contact with a health, emergency or public sector worker as a result of the third party's deliberate action, and

   (b) the worker is at risk of contracting a blood-borne disease as a result.

2. The scheme applies only to third parties who are at least 14 years of age. For third parties who are at least 14 years of age but under 18 years of age an order is made by the Children's Court. For third parties who have a mental health or cognitive impairment, an order is made by the Local Court. For all other third parties, an order is made by the worker's senior officer, who is usually the head of the agency that employs the worker.

3. An order is a mandatory testing order and a third party must not fail, without reasonable excuse, to comply with a mandatory testing order. The maximum penalty is 100 penalty units, currently $11,000, or imprisonment for 12 months, or both.

4. The Bill provides for the following matters—

   (a) the health, emergency and public sector workers to whom the proposed Act will apply,

   (b) the making of an application for a mandatory testing order,

   (c) the determination of an application for a mandatory testing order by a senior officer,

   (d) the making of a mandatory testing order by a Court,

   (e) the carrying out of the blood testing,

   (f) reviews of decisions about mandatory testing orders by the Chief Health Officer,

   (g) offences and proceedings,

   (h) the administration of the scheme and other miscellaneous matters,

   (i) consequential amendments to other Acts.

BACKGROUND

5. The Bill sets out a legislative framework to provide that a third person can be ordered to provide a blood sample for testing for blood-borne diseases where a health, emergency or public sector worker is at risk of contracting a blood-borne disease as a result of a third party's deliberate action.

6. In the Second Reading Speech to the Bill, the Minister noted the intent of the Bill's provisions:

> The bill seeks to establish a scheme under which a person can be ordered to provide a blood sample for testing if the person's bodily fluid has come into contact with a health, emergency or public sector worker as a result of the person's deliberate action, and the worker is at risk of contracting a blood-borne disease as a result. For police officers, emergency services personnel and other frontline workers such as healthcare professionals and correctional officers, involvement in confronting situations can be a routine part of the job, from responding to violent incidents to providing assistance during medical emergencies. These workers are on the front line and can be involved in dangerous situations to protect the health and safety of others and safeguard our community.

7. The Minister further stated the types of situations and formal arrangements that Bill aimed to address:

> In the course of carrying out their duties, these frontline workers can be exposed to bodily fluids of others. Where the exposure to bodily fluids gives rise to the risk of transmission of a blood-borne disease such as HIV, hepatitis B or hepatitis C, this can be the cause of significant stress and anxiety for the worker and their families. As these diseases may have window periods of three to six months during which the disease is present in the body but antibodies cannot be detected with confidence, an exposure incident can result in a long period of uncertainty for the worker before it can be confirmed whether the transmission occurred. Under NSW Ministry of Health policies, following an exposure incident involving a healthcare worker employed by NSW Health and a patient, the patient may be requested to consent to disease testing. However, the patient cannot be obliged to provide a sample.
>
> Outside NSW Health, no formal arrangements are in place to request that a person consent to disease testing, and there is currently no mechanism in New South Wales that requires or compels a person whose bodily fluids were involved in an exposure incident to be tested for infectious diseases. The *Mandatory Disease Testing Bill 2020* seeks to address this gap by introducing a scheme that allows mandatory testing orders to be made. Mandatory testing orders require a third party who has deliberately caused their bodily fluids to come into contact with a prescribed worker to provide a blood sample for testing for blood-borne diseases.

8. The Minister noted that the provisions of the Bill were intended to implement recommendations of the final report of the Inquiry into violence against emergency services personnel[11]:

> In conclusion, the Mandatory Disease Testing Bill 2020 implements recommendation 47 of the final report of the Legislative Assembly Committee on Law and Safety inquiry into violence against emergency services personnel, released in August 2017. The bill delivers on the Government's commitment in November 2019 to establish a mandatory disease testing regime for frontline workers for police officers, those working in the correctional system, emergency

[11] Legislative Assembly Committee on Law and Safety, Report of the Inquiry into Violence against emergency services personnel, 8 August 2017.

services personnel and first responders. Our police and emergency and health workers put their lives on the line to protect us every day, and this bill will help reduce some of the stress and anxiety they may suffer if exposed to the risk of a blood-borne diseases.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to Personal Physical Integrity

9. The Bill sets out a new legislative framework to provide for the mandatory blood testing of persons where a health emergency or public sector worker comes into contact with the person's bodily fluids as a result of the person's deliberate action, and where the worker is at risk of contracting a blood-borne disease as a result of the person's deliberate action.

10. Under section 5 of the Bill, a "mandatory testing order" is defined as an order that requires a third party to attend the place specified in the order as soon as practicable but no later than 2 business days after being served with the order, and provide the third party's blood to be tested for blood-borne diseases specified in the order. A mandatory testing order may be made by a senior officer, the Court, or the Chief Health Officer.

11. Part 2 of the Bill sets out the provisions for applications for a mandatory testing order. Under section 7 of this Part, a worker may apply for a mandatory testing order in relation to a person (the third party) if the worker has come into contact with the bodily fluid of the third party, and the contact occurred in the execution of the worker's duty, and as a result of a deliberate action of the third party, and without the consent of the worker. An application may not be made if the third party is under the age of 14 years.

12. Section 8 provides that an application may only be made if the worker has consulted a relevant medical practitioner in relation to the contact no later than 24 hours after the contact occurred, or up to 72 hours after the contact occurred if reasonable in the circumstances. During the consultation, the relevant medical practitioner must inform the worker about the risk of contracting a blood-borne disease from the contact, the appropriate action to be taken to mitigate the risks of contracting a blood-borne disease, and the extent to which testing the third party's blood for blood-borne diseases will assist in assessing the risk to the worker of contracting a blood-borne disease.

13. Part 3 of the Bill sets out the provisions for the determination of applications for mandatory testing orders. Section 10 of this Part provides that a senior officer is to determine an application for a mandatory testing order by making the order, or applying to the Court for such an order if the third party is a vulnerable third party, or refusing the application. The senior officer must determine an application within 3 business days after receiving the application, unless a longer period is necessary in the circumstances. Before determining an application, the senior officer must seek the third party's consent to voluntarily provide blood to be tested and provide the opportunity to make submissions and consider submissions received.

14. Under subsection 10(7), the senior officer may make a mandatory testing order for a third party only if satisfied that the third party will not voluntarily provide blood to be tested for blood-borne diseases, and that testing the third-party's blood for blood-borne diseases is justified in all the circumstances. In the case of a vulnerable third party,

subsection 10(6) provides that the senior officer may make a mandatory testing order only if satisfied that testing the third party's blood for blood-borne diseases is justified in all the circumstances.

15. Section 12 provides that a senior officer must, as soon as practicable after the determination of an application for a mandatory testing order, give written notice of the determination and the reasons for the determination to the worker, the third party, and parent or guardian of any vulnerable third party (if applicable). At the end of each quarter, the senior officer must report to the Ombudsman about any determinations of an application for a mandatory testing order made by the senior officer during that quarter, including the reasons for the determination.

16. Part 6 of the Bill sets out the provisions for the carrying out of a mandatory testing order. Under section 19 of this Part, a person taking blood from a third party under a mandatory testing order must be presented with a copy of the order, take blood in manner consistent with relevant medical and other professional standards, and not use force against the third party to take blood, other than force ordinarily required to take blood from a person.

17. Proposed section 20 provides that a law enforcement officer may assist a person to take blood from a detained third party under a mandatory testing order, and may use reasonable force in assisting the taking of blood and to prevent loss, destruction or contamination of a blood sample taken from the detained third party.

18. Part 7 of the Bill provides the review of applications and determinations of mandatory testing orders by the Chief Health Officer (CHO). Under section 22, a worker may apply to the CHO for a review of a senior officer's decision to refuse an application for a mandatory testing order. A third party may also apply to the CHO for a review of a senior officer's decision to make a mandatory testing order. The CHO must determinate such applications for review within 3 business days and may set aside or affirm the decision.

19. Part 8 of the Bill outlines the offences and proceedings relating to mandatory testing orders. Section 26 provides that a third party must comply with a mandatory testing order and failure to do so, without reasonable excuse, may result in a maximum penalty of 100 penalty units or 12 months imprisonment, or both. Section 27 provides that a worker or third party who knowingly gives false information to a senior officer or other person exercising functions under the Bill is guilty of an offence with a maximum penalty of 100 penalty units or imprisonment of 12 months or both.

20. Section 28 provides that a person must not disclose information obtained in connection with the administration of execution of the Act, unless the disclosure is made with the consent of the person or third party to which the information relates, or if the disclosure is made in connection with the administration of the Act, for the purpose of legal proceedings, or with other lawful excuse. A maximum penalty of 100 penalty units or 12 months imprisonment or both may apply for the unlawful disclosure of information under this section.

21. Section 35 of the Bill provides that the Ombudsman is to monitor the operation and administration of the Act, including the functions of persons or bodies under the Act. In their oversight of the Act, the Ombudsman is to prepare a report about the monitoring

as soon as practicable after 12 months after the commencement of the section, and every 3 years after the first report. The Ombudsman may also require the Commissioner of Police to provide information relating to an application for a mandatory testing order made by a police officer or special constable, or require a senior officer of a worker to provide information relating to an application for a mandatory testing order made by any other worker.

22. In the Second Reading Speech to the Bill, the Minister noted the purpose of these provisions:

> The bill will allow prescribed workers, including police officers, correctional officers, firefighters and employees of NSW Health, to make an application for a mandatory testing order following an incident in which a third party's bodily fluids have come into contact with them. The application is to be made to a senior officer. A senior officer may make a mandatory testing order if satisfied that the third party will not voluntarily provide blood to be tested for blood-borne diseases, and that testing the third party's blood is justified in all the circumstances If it appears to the senior officer on the information available that the third party is aged between 14 and 17 years, the senior officer must either apply to the Children's Court for a mandatory testing order or refuse the application.
>
> If the third party is above the age of 18 and appears to the senior officer on the information available to have a mental illness, mental condition, or cognitive impairment such as to significantly affect their capacity to consent to voluntarily provide blood to be tested, the senior officer must either apply to the Local Court for a mandatory testing order or refuse the application. A mandatory testing order requires the third party to attend a specified place to provide blood to be tested for blood-borne diseases, with those results to be provided to a medical practitioner specified by the worker. Failure to comply with a mandatory testing order within two business days is an offence punishable by a maximum penalty of 100 penalty units, 12 months imprisonment, or both.

The Bill establishes a scheme under which a person (third party) can be ordered to provide a blood sample for testing for blood-borne diseases if the third-party's bodily fluid has come into contact with a health, emergency or public sector worker as a result of the third party's deliberate action, and the worker is at risk of contracting a blood-borne disease as a result. In carrying out the mandatory testing order, reasonable force may be used by a law enforcement officer in assisting the taking of blood and to prevent loss, destruction or contamination of a blood sample taken from the detained third party. Failure to comply with such an order constitutes an offence under the Act and may incur a maximum penalty of 100 penalty units or imprisonment of 12 months or both.

The Committee notes that the invasive nature of the procedure, the power to perform such a procedure without the person's consent and by use of reasonable force, and the requirement to submit to a procedure on pain of penalty or arrest, impacts on the right to personal physical integrity. The Committee also notes that such an order may be made in relation to a person under 18 years of age (but not younger than 14 years of age) and may apply to vulnerable persons under Part 4.

However, the Bill contains certain safeguards, such as specific timeframes and requirements apply to the making of a mandatory testing order. An application for a mandatory testing order may only be made if the worker has consulted a

relevant medical practitioner within 24 hours of the contact occurring, or 72 hours if reasonable in the circumstances. A senior officer must then determine an application within 3 business days after receiving the application, unless a longer period is necessary in the circumstances. The senior officer must also seek the third party's consent to voluntarily provide blood to be tested and provide the opportunity to make submissions and consider submissions received. A mandatory testing order may only be made if the third party does not voluntarily consent to provide blood, and if the test is justified in all the circumstances. The Bill also provides for a review process by the Chief Health Officer, and oversight of the Act by the Ombudsman. The Bill also contains a separate process for an application of a mandatory testing order for a vulnerable third party, which must be determined by a court rather than a senior officer.

While acknowledging these safeguards, the Committee notes the invasive nature of the procedure that may be performed on a person without consent, and may apply to vulnerable persons or persons under 18 years of age (but not younger than 14 years of age). The Committee refers the matter to Parliament for its consideration of the impact of the provisions on personal physical integrity.

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

Commencement by proclamation

23. Proposed section 2 provides that the Act commences on a day or days appointed by proclamation, except in regards to Schedule 2.2 which is to commence on the day on which section 4 and 5 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* commence.

24. In the Second Reading Speech, the Minister noted:

> The commencement of the bill will be delayed to allow time for agencies to implement changes to policy and to deliver training and education to their staff.

The Committee notes that the majority of the Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. As the Bill establishes a scheme under which a person can be ordered to provide a blood sample, the Bill may impact individual rights and liberties. However the Committee notes that the delayed commencement date is to allow the agencies time to implement the policy changes and deliver appropriate staff training. In these circumstances, the Committee makes no further comment.

Matters deferred to the regulations

25. In relation to the jurisdiction of the Local Court and Children's Court, subsection 15(5) of the Bill provides that the regulations may make provision about proceedings in the Children's Court relating to applications for and the making of mandatory testing orders.

26. In relation to costs incurred under this Act, subsection 33(2) provides that the regulations may make provision for and with respect to the payment of costs incurred

under this Act in relation to applications for mandatory testing orders and the carrying out of mandatory testing orders.

27. Section 37 provides that the Governor may make regulations, not inconsistent with the Act, for or with respect to any matter that by the Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to the Act. Without limiting this section, the regulations may exclude a class of person from the definition of worker in the Dictionary, and make provision for or with respect to the practice and procedure for applications for, and the conduct of, reviews by the Chief Health Officer under Part 7.

> **The Bill defers some matters to the regulations. In particular, the Bill provides that the regulations may exclude a class of person from the definition of worker in the Dictionary, and make provision for or with respect to the practice and procedure for applications for, and the conduct of, reviews by the Chief Health Officer under Part 7. The Committee generally prefers substantive clauses to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected such as the class of worker that may make an application under the Act or the procedure for applications and reviews under the Act. However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. As such the Committee makes no further comment.**

Wide power of delegation

28. Section 34 of the Bill provides that a senior officer and the Chief Health Officer may, in accordance with the regulations, delegate their functions under the Act, other than this power of delegation, to a person of a class prescribed by the regulations.

29. A senior officer and the Chief Health Officer have significant functions under the proposed Act, including the determination of applications for a mandatory testing order.

> **Section 34 of the Bill provides that a senior officer may delegate their functions, other than this power of delegation, to a person of a class prescribed by the regulations. The Committee notes that there are no restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. The Committee also notes that the proposed Act deals with sensitive matters relating to mandatory disease testing orders and procedures and that the functions of a senior officer therein are significant.**
>
> **The Committee would prefer the provisions about the persons and class of persons to whom such functions can be delegated to have been drafted with more specificity. In addition, they should be included in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight. The Committee refers the matter to Parliament for consideration.**

9. Prevention of Cruelty to Animals (Increased Penalties) Bill 2020*

Date introduced	11 November 2020
House introduced	Legislative Council
Member responsible	The Hon Emma Hurst MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Prevention of Cruelty to Animals Act 1979* (the principal Act) to—

   (a) increase penalties for offences, and

   (b) introduce minimum penalties for the offences of cruelty to animals and aggravated cruelty to animals, and

   (c) prohibit a person convicted of the offence of aggravated cruelty to animals under the principal Act, or the offence of bestiality or serious animal cruelty against the *Crimes Act 1900*, from owning, taking custody of or having certain contact or involvement with an animal.

2. The Bill also amends the *Prevention of Cruelty to Animals Regulation 2012* to increase penalties for offences and the *Crimes Act 1900* to make consequential amendments.

BACKGROUND

3. In the Second Reading Speech to the Bill, the Hon. Emma Hurst MLC stated that the NSW position on penalisation of animal cruelty was lagging behind other states:

> Right now, New South Wales has some of the lowest statutory penalties for animal cruelty in Australia. Under the Prevention of Cruelty Animals Act 1979, an individual act of animal cruelty is punishable by a maximum of just $5,500 or six months' imprisonment, or both. An individual act of aggravated animal cruelty—one that results in the death, deformity or serious disablement of an animal, or leaves an animal so severely injured, diseased or in such a physical condition that it is cruel to keep them alive—has a maximum penalty of just $22,000 or two years' imprisonment, or both. This is far behind other States and Territories in Australia that have maximum penalties many times this size.

4. Ms Hurst noted that one of the key reasons for the introduction of the Bill was the low penalties imposed by the New South Wales Courts:

> To make matters worse, the New South Wales courts are consistently failing to impose anywhere near the maximum penalties. It seems that each week there are stories of perpetrators committing horrible acts of animal cruelty and getting off with just a slap on the wrist. There is a $600 fine for beating a puppy and uploading the footage to the internet; there

is no fine at all for beating a possum to death; and there is no fine for beating a dog, filming the act, and sending it to an ex-girlfriend as revenge. Almost nobody receives any jail time.

ISSUES CONSIDERED BY THE COMMITTEE

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

Significant increase to penalties

5. The Bill makes several amendments to the penalties that apply to offences under the *Prevention of Cruelty to Animals Act 1979* (Act).

6. The Bill introduces a minimum penalty and increases the maximum penalty for the existing offence under section 5 of the Act, which includes committing an act of cruelty, authorising the commission of such an act or failing at any time:

- to exercise care control or supervision of an animal to prevent any act of cruelty, or
- where pain is being inflicted, to take such reasonable steps as necessary to alleviate the pain, or
- where it is necessary for the animal to be provided with veterinary treatment, whether or not over a period of time, to provide it with that treatment.

7. The new minimum penalty for an offence under section 5 of the Act is 90 penalty units for a corporation and 20 penalty units for an individual. The Bill also increases the maximum penalty for such an offence. The current maximum penalty under the Act is 250 penalty units in the case of a corporation and 50 penalty units or imprisonment for 6 months (or both) in the case of an individual. The proposed maximum is 1,400 penalty units in the case of a corporation and 500 penalty units or imprisonment for 1 year, or both, for an individual.

8. The Bill amends section 6 of the Act to introduce a minimum penalty and increases the maximum penalty for the offence of committing an act of aggravated cruelty upon an animal. The new minimum penalty for this offence is 180 penalty units for a corporation and 35 penalty units for an individual. The Bill also increases the maximum penalty for this offence. The current maximum penalty under the Act is 1000 penalty units in the case of a corporation and 200 penalty units or imprisonment for 2 years (or both) in the case of an individual. The proposed maximum is 2,275 penalty units in the case of a corporation and 900 penalty units or imprisonment for 2 years (or both) for an individual.

9. Schedule 1[4] of the Bill proposes widespread increases in maximum penalties for a number of provisions in the Act[12] to 1,400 penalty units for a corporation and 500 penalty units or imprisonment for 1 year (or both) for an individual.

10. Schedule 1[5] of the Bill increases the maximum penalty under section 7(2A) of the Act. Section 7(2A) states that a person must not carry or convey a dog (other than a dog being used to work livestock), on the open back of a moving vehicle on a public street

[12] Namely, sections 7(1) and (2), 8(1), 9(1) and (3), 10(1), (2) and (3), 11, 12(1), 13, 16(2), 17, 18(1) and (2), 18A, 19, 19A(2) and (3), 20, 21A–21C, 22(1) and (3), 23(1) and (2) and 24N(2) of the Act.

unless the dog is restrained or enclosed in such a way as to prevent the dog falling from the vehicle. The proposed maximum penalty is to be increased under the Bill from 50 penalty units or imprisonment for 6 months (or both) to 500 penalty units or imprisonment for 1 year (or both).

11. Schedule 1[7] of the Bill increases the maximum penalty under section 15(2) of the Act. This section states that a person must not administer a poison, or a substance containing a poison, to a domestic animal with the intention of destroying or injuring a domestic animal, nor throw, cast, drop, leave or lay a poison, or a substance containing a poison, in any place, or have in his or her possession a poison with the intention of using it to kill or injure a domestic animal. The current maximum penalty under the Act is 1,000 penalty units in the case of a corporation and 200 penalty units or imprisonment for 2 years (or both) in the case of an individual. The Bill increases the maximum penalty to 2,275 penalty units for a corporation and 900 penalty units or imprisonment for 2 years (or both) for an individual. The Bill also applies these increased maximum penalties to offences under section 21(1) of the Act, which relate to the prevention of live baiting, coursing and other similar activities.

12. Schedule 1[8] of the Bill increases the maximum penalties under section 23A(1) and (2). These provisions require a person to advertise a regulated dog or cat for sale with their microchip identification number, the breeder or rehoming identification number and in accordance with greyhound racing rules (if they apply). Giving any of those details which are false and the person giving them knows, or ought reasonably to have known, they are false, is an offence. The current maximum penalty is 50 penalty units and the Bill increases that maximum to 1,400 penalty units for a corporation and 500 penalty units for an individual.

13. Schedule 1[9] of the Bill increases the maximum penalty under section 31(3). This section states that a person upon whom an order is made by a Court must not fail to comply with the order. The current maximum penalty is 25 penalty units and the Bill increases that maximum penalty to 500 penalty units or imprisonment for 1 year (or both).

14. The Hon. Emma Hurst MLC outlined the principles behind the Bill's imposition of minimum penalties and greater maximum penalties in the Bill's Second Reading Speech:

> First, our maximum statutory penalties for animal cruelty in New South Wales are far too low. Secondly, the New South Wales courts are consistently imposing penalties for animal cruelty that are in the lowest end of the spectrum. Of course, these problems are interconnected. The issue with having such low statutory maximum penalties for animal cruelty is that it creates a very small range for judges and magistrates to work with. Maximum penalties are meant to act as a guide to the court as to what penalty to impose in a worst-case scenario. But when penalties start with a maximum of $5,500 or six months' imprisonment, the court has almost nowhere to go.

15. Ms Hurst went further to indicate the requirement of a minimum penalty and made analogies to other States:

> The bill also takes the important step of specifying mandatory minimum monetary penalties for animal cruelty and aggravated animal cruelty offences contained in sections 5 and 6 of the Act. There is no mandatory minimum for imprisonment. This is not a step I took lightly. However, as I have outlined, the fines being imposed by magistrates and judges in New South Wales are

> woefully out of touch with community expectations. Case after case, the courts continue to impose punishments at the lowest end of the spectrum for very serious acts of violence against animals… if we were only to increase the maximum penalties then there is a real risk that courts in New South Wales would continue to impose punishments at the lower end of the spectrum—this is borne out by the research… These minimum penalties are not excessive. They are a reasonable amount and they closely mimic the mandatory minimum penalties found for animal cruelty legislation in Western Australia.

16. As outlined in the Bill's Second Reading Speech:

> These penalty increases will take New South Wales from being one of the softest States on animal cruelty to one of the toughest.
>
> **The Bill introduces minimum penalties for offences of animal cruelty and aggravated animal cruelty. The Bill also significantly increases existing maximum penalties for various offences throughout the Act. In some circumstances this involves the doubling of custodial sentences for individuals and imposition of penalties 28 times larger for corporations and 10 times larger for individuals, as opposed to existing penalties under the Act.**
>
> **The Committee notes that these provisions significantly increase the penalties available for a number of offences, including some strict liability offences under the Act. 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. The Bill also introduces mandatory minimum monetary penalties for certain offences under the Act. The Committee notes that mandatory penalty provisions remove judicial discretion to determine an appropriate penalty for a convicted offender.**
>
> **The Committee acknowledges the Bill intends to toughen the NSW position on penalties for animal abuse offences, as indicated in the Second Reading Speech. However, given the significant increase in penalties for numerous offences under the Act, the Committee refers the matter to the Parliament for its consideration of whether the penalties are reasonable and proportionate in the circumstances.**

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

Matters deferred to the regulations – creation of offences

17. The Bill amends the regulation making power in section 35 of the Act. Section 35(3) currently states that a regulation may create an offence punishable by a penalty not exceeding:

- in the case of an offence relating to animal trades or the confinement or use of laying fowl (domesticated chickens) for commercial egg production—200 penalty units for an offence committed by a corporation and 50 penalty units for an offence committed by an individual, or
- in any other case—25 penalty units.

18. The Bill amends subsection 35(3) to provide that a regulation may create an offence punishable of up to 1,400 penalty units for a corporation, 500 penalty units or imprisonment for 1 year (or both) for an individual.

19. The Bill's Second Reading Speech noted that the increased penalties were to extend to a range of offences set out in the Regulation:

> The increased penalties will apply to both the core offences of animal cruelty and aggravated animal cruelty, as set out in sections 5 and 6 of the Prevention of Cruelty to Animals Act, as well as a range of other offences concerning the treatment of animals set out in the Act and its accompanying regulations.

> **The Bill amends the regulation making power in section 35 of the Act. The Bill allows the creation of an offence punishable by a penalty up to 1,400 penalty units for a corporation, 500 penalty units or imprisonment for 1 year (or both) for an individual. This is an increase on the existing maximum penalty of 25 penalty units. This a 56-fold increase for corporations, 20-fold increase for individuals with the introduction of a potential 12 month custodial sentence.**

> **The Committee prefers that offences, particularly those that introduce a custodial sentence, be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The Committee refers this matter to the Parliament for its consideration.**

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.

Appendix Two – Letters received from Ministers and Members responding to the Committee's Comments (11 June 2020 – 12 November 2020)

Number	Digest Number	Minister/Member and Date of Letter	Bills/Regulations Covered by Letter
1.	11/57	Hon Mark Speakman SC MP - 11 June 2020	*Evidence Amendment (Tendency and Coincidence) Bill 2020*
2.	13/57	Hon Brad Hazzard MP – 5 June 2020	*Health Practitioners Regulation (NSW) Amendment (Pharmacy Fees) Regulation 2020*
3.	16/57	Hon Victor Dominello MP – 16 July 2020	*Personal Injury Commission Bill 2020*
4.	13/57	Hon Kevin Anderson MP – 22 July 2020	*Building and Development Certifiers Regulation 2020*
5.	17/57	Hon Kevin Anderson MP – 7 September 2020	*Work Health and Safety Amendment (Information Exchange) Bill 2020*, and the *Work Health and Safety Amendment (Silica) Regulation 2020*
6.	14/57	Hon Kevin Anderson MP – 25 September 2020	*Residential Tenancies Amendment (COVID-19) Regulation 2020*
7.	11/57	Hon Kevin Anderson MP – 8 October 2020	*Better Regulation Legislation Amendment Bill 2020;* the *Professional Standards* Act 1994 – Notification pursuant to section 13 – the NSW Bar Association Professional Standards Scheme; the *Property and Stock Agents Amendment Regulation 2019;* and the *Work Health and Safety Amendment (Traffic Control Work Training) Regulation 2019.*
8.	19/57	Hon Mark Speakman SC MP – 27 October 2020	*Adoption Legislation Amendment (Integrated Birth Certificates) Bill 2020*
9.	21/57	Hon Victor Dominello MP – 12 November 2020	*Workers Compensation Amendment (Consequential COVID-19 Matters) Regulation 2020*

Mark Speakman
Attorney General
Minister for the Prevention of Domestic Violence

IM20/11658
EAP20/5741

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

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

Dear Ms ~~Wilson~~ Felicity

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

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

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

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

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

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

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

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

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

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

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

> *...we do not accept the current unequal weighting of the test in favour of exclusion. That is, it is not clear why the probative value of the evidence should be required to 'substantially outweigh' the risk of unfair prejudice.*
>
> *We agree with Professor Hamer's submission in response to the Consultation Paper in this regard, that:*
>
> > *The asymmetry in s 101, skewing the test towards exclusion, appears unjustifiable...*[2]

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

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

- tendency and coincidence evidence is important in child sexual abuse matters[3];
- there have been unjust outcomes in the form of unwarranted acquittals in institutional sexual abuse prosecutions as a consequence of the exclusion of relevant evidence in the form of tendency and coincidence evidence and, further, these unjust outcomes were not limited to prosecutions in relation to child sexual abuse in an institutional context;[4]

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[2] Criminal Justice Report, p 640.
[3] Criminal Justice Report, pp 628-633.
[4] Criminal Justice Report, p 629.

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

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

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

Thank you for taking the time to write.

Yours sincerely

Mark Speakman

11/06/2020

[5] Criminal Justice Report, pp 627-628.
[6] Criminal Justice Report, p 634.
[7] Criminal Justice Report, p 634
[8] Criminal Justice Report, p 634.
[9] Criminal Justice Report, p 635.

NSW GOVERNMENT
The Hon. Brad Hazzard MP
Minister for Health and Medical Research

Ms Felicity Wilson MP
Chair
Legislation Review Committee
Email: Legislation.Review@parliament.nsw.gov.au

Your ref LAC20/007.04
Our ref H20/9517-7

Dear Ms Wilson

Thank you for your letter about the Legislation Review Committee's (Committee) consideration of the *Health Practitioners Regulation (NSW) Amendment (Pharmacy Fees) Regulation 2020* (Amending Regulation). The Amending Regulation amends the *Health Practitioner Regulation (New South Wales) Regulation 2016* to increase the fees relating to pharmacy premises applications, the annual renewal of registration of a pharmacy premises, and the registration of a financial interest.

I appreciate the role and functions of the Committee in reviewing legislation and regulation and acknowledge the Committee's concerns about the Amending Regulation.

The NSW Pharmacy Council (the Council) is entirely funded by the fees paid by pharmacists. This assists the Council in undertaking the important work of managing complaints and notifications related to the conduct, performance or health of pharmacists practising in NSW and NSW pharmacy students. The Council is also responsible for the approval and registration of pharmacy premises in NSW. The Council derives its funding from fees paid by pharmacists (via their registration fees), and pharmacy owners (via the fees relating to pharmacy premises applications, the annual renewal of registration of a pharmacy premises, and the registration of a financial interest).

The Council operates on a cost recovery basis for all its work. As a result of the continued increase in complaints and complexity in pharmacy ownership, the Council made a year-end deficit for FY2018/19 of $628,000. This compares to the FY2017/18 deficit of $271,000. The FY2019/20 budget forecast deficit is anticipated to be $779,000. These continued deficits would result in the Council becoming financially unviable, which is why the Amending Regulation seeks to make an increase to the component of the registration fee and also ownership fees.

The increase in fees set out in the Amending Regulation follow a review by the Council regarding ownership fees. The Review determined that the fees need to increase in order to support the Council's financial viability. Specifically, the fee increases will contribute to the recovery of costs to regulate pharmacies and ensure that non-pharmacy owners do not subsidise pharmacy owners. In conducting the Review, the Council consulted with all relevant NSW pharmacy stakeholders including the NSW Branch of the Pharmacy Guild, the Pharmaceutical Society of Australia and the Society of Hospital Pharmacists of Australia. Each of these bodies acknowledged that fee increases were necessary due to the increasing complexity in pharmacy ownership.

The Amending Regulation is considered to be an effective and proportional response to ensure the financial viability of the Council.

Thank you again for your letter. If you would like more information, please contact Ms Anna Read, Senior Legal Officer, NSW Ministry of Health, at anna.read@health.nsw.gov.au or on 9424 5863.

Yours sincerely

The Hon. Brad Hazzard MP
Minister for Health and Medical Research

5 JUN 2020

NSW GOVERNMENT
The Honourable Victor Dominello MP
Minister for Customer Service

Our reference: COR-04108-2020

Ms Felicity Wilson MP
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Dear Ms ~~Wilson~~ Felicity

Thank you for your correspondence about Digest No. 16/57 of the Legislation Review Committee.

Please see below responses to the issues raised by the Committee in relation to the *Personal Injury Commission Bill 2020.*

Trespasses on personal rights and liberties

Right to a fair hearing and right to an appeal or review

Under clause 52 of the Bill, the Personal Injury Commission (the Commission) may decide to resolve a matter without holding a conference or hearing, if it is satisfied that it has been provided with sufficient information. This may impact on the right of parties to a proceeding to be heard as to the matters in dispute. This is particularly the case given that decisions of the Commission under the Workers Compensation Acts are generally final and binding, and not subject to appeal or review.

The Committee acknowledges that the Bill has broader aims of facilitating the just, quick and cost effective resolution of proceedings, and the Commission must be satisfied that it has sufficient information before it makes a decision. However, given the provisions in question are coupled with limited appeal rights, the Committee refers this matter to Parliament.

Response:

Clause 52(3) of the Personal Injury Commission Bill 2020 (PIC Bill) states:

> *"If the Commission is satisfied that sufficient information has been supplied to it in connection with proceedings, the Commission may exercise functions under this Act and enabling legislation without holding any conference or formal hearing."*

This clause does not introduce new arrangements for any scheme. It is drafted in the same terms as the current s 354(6) of the *Workplace Injury Management and Workers Compensation Act* 1998, section 104(6) of the *Motor Accidents Compensation Act* 1999 and section 7.46(6) of *Motor Accident Injuries Act* 2017.

Section 354(6) of the *Workplace Injury Management and Workers Compensation Act* 1998 provides that if the Workers Compensation Commission (WCC) is satisfied that sufficient information has been supplied to it in connection with proceedings, the WCC may exercise functions under that Act without holding any conference or formal hearing. This provision applies to the WCC at both the arbitral and presidential appeal levels.

Similarly, section 104(6) of the *Motor Accidents Compensation Act* 1999 and section 7.46(6) of *Motor Accident Injuries Act* 2017, provide:

> *"If the claims assessor is satisfied that sufficient information has been supplied to him or her in connection with a claim, the assessor may exercise functions under this Act without holding any formal hearing."*

For the purposes of the single Personal Injury Commission, these separate but essentially same provisions have been preserved. They have been consolidated in one provision (Clause 52(3) of the PIC Bill 2020) which applies to proceedings in both Divisions of the Commission and this is consistent with stakeholder consultation feedback that there be minimal disruption to the existing schemes, including the dispute pathways in those schemes.

Further, Practice Direction 1 of the WCC sets out the practice and procedure of the WCC when determining matters on the basis of the documents provided (i.e. 'on the papers'), in the absence of any conference or formal hearing. This will only occur where the Presidential Member or Arbitrator (before whom the matter is listed) is satisfied sufficient information has been supplied to enable them to determine the matter 'on the papers' (in accordance with s 354(6) of the *Workplace Injury Management and Workers Compensation Act* 1998). Practice Direction 1 sets out a list of matters the WCC will consider when exercising this discretion. WCC stakeholders are familiar with this long-standing practice.

These long-standing provisions and practices have also afforded expert decision-makers a degree of flexibility when conducting proceedings, having regard to the circumstances of the cases before them. Indeed, clause 52 of the PIC Bill must be read in the context of the Bill as a whole, in particular clause 43 of the PIC Bill which provides:

> *"(1) Proceedings in any matter before the Commission are to be conducted with as little formality and technicality as the proper consideration of the matter permits.*
> *(2) The Commission is not bound by the rules of evidence but may inform itself on any matter in the manner the Commission thinks appropriate and as the proper consideration of the matter before the Commission permits.*
> *(3) The Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms."*

Further, PIC members and decision-makers must afford procedural fairness to the parties including applying the two broad administrative law principles of the rule against bias, and the hearing rule which requires a party be afforded a fair hearing and the right to be heard, as appropriate for the circumstances of the case. To ensure that disputes may be determined or considered in accordance with the PIC's objectives, it is important there is some flexibility for members when applying these principles in the PIC, having regard to the particular dispute being determined.

Right to legal representation

Under clause 48(3) of the Bill, the Commission may refuse to permit an insurer to be legally represented if the claimant in a workers compensation matter does not have legal representation. While this may impact on the right to legal representation, it is noted that this will only affect insurers and not individuals. Such a provision may also be designed to support access to justice for individual claimants and enhance the Bill's overall goal of facilitating the just, quick and cost effective resolution of Commission matters with as little formality as possible. The Committee also notes that under clause

48(5) the Commission must take into account any written submission prepared by a legal practitioner, even if the party is not legally represented at a conference or hearing. In the circumstances, the Committee makes no further comment.

Response:

Clause 48(3) of the PIC Bill is a provision principally addressing the right to a fair hearing. The clause reproduces the longstanding section 356(3) of the *Workplace Injury Management and Workers Compensation Act* 1998. This is consistent with clause 48(3) in the PIC Bill which only applies to disputes in the workers compensation jurisdiction and with stakeholder consultation feedback that there be minimal disruption to the existing schemes, including the dispute pathways in those schemes.

The clause provides a discretion to be exercised by a member to ensure a fair hearing in the workers compensation jurisdiction as the decision-maker must afford a fair hearing to the parties. In the circumstances of a case where a worker is not legally represented, it may be appropriate for the PIC member (like an Arbitrator in the WCC) to exercise the discretion.

Access to workers entitlements

Schedule 1, Part 2, Division 2, clause 4 to the Bill provides that when the Commission is established, certain positions in the WCC automatically become vacant. The schedule provides further that the relevant individuals are not entitled to remuneration or compensation because of the loss of that office. The Committee notes that Divisions 3 and 4 in Part 2 of the Schedule provide for many of these people to be automatically transferred to the Commission. Further, if a person ceases to hold office and Divisions 3 and 4 do not operate to automatically transfer them, they are eligible, if otherwise qualified, to be appointed to hold an office in the Commission.

Notwithstanding these safeguards it is unclear whether cases may eventuate where individuals are not eligible for transfer, or are not transferred, and are not entitled to compensation for loss of their office. The Committee refers these matters to Parliament for consideration.

Response:

The PIC Bill makes provision to abolish the current WCC, remove motor accident dispute resolution functions from SIRA (including the Claims Assessment and Resolution Service (CARS), Medical Assessment Service (MAS) and Dispute Resolution Service (DRS)) and establish the PIC which assumes jurisdiction from the current workers compensation and motor accident dispute resolution services.

To ensure business continuity and retention of expertise from the existing schemes into the PIC, the intention is all current office holders (excluding public servants) as described in Schedule 1 to the Bill will be transferred into the PIC as members, decision makers (medical assessors and merit reviewers) and mediators. Current office holders are those office holders who immediately before the establishment day of the PIC held the relevant office as defined in clause 2 of Schedule 1 to the PIC Bill.

The transitional arrangements in Schedule 1 to the PIC Bill do not provide for the transfer of public servants who currently also hold appointments as arbitrators in the WCC or as motor accident decision-makers in CARS, MAS or DRS because their terms and conditions of employment are subject

to the usual public sector terms and conditions governing their employment (rather than the terms of appointment for statutory and other office holders).

It is anticipated that if, by proclamation, the establishment day is later than 1 December 2020, appointments may need to be extended to ensure that current office holders are captured by the transitional provisions in the PIC Bill to ensure business continuity and retention of expertise in the schemes. If such circumstances do arise, this will be coordinated and dealt with operationally by SIRA and the WCC, through existing appointment processes.

Where a current office holder elects to cease work when the current WCC is abolished, the office holder may simply decline the appointment as a PIC member or decision-maker.

In addition to these transitional arrangements, if additional members and/or decision-makers are required in the new PIC, new appointments for decision makers may be made by the President and new members may be appointed by the responsible Minister, as provided for in the PIC Bill.

Inappropriately delegates legislative powers

Commencement by proclamation

Clause 6 of the Bill establishes the Commission on the establishment day of 1 December 2020, or any later day proclaimed by the Governor. The Governor can also revoke an earlier proclamation regarding the date of establishment. Further, clause 2 of the Bill provides that while the proposed Act generally commences on assent, schedule 5 commences on a day or days to be appointed by proclamation. The Committee generally prefers such significant legislative change to commence on a fixed date or on assent to provide certainty for affected parties.

However, the Committee acknowledges that the establishment of the new Commission is likely to involve a degree of administrative complexity, requiring some flexibility. Further, it acknowledges that schedule 5 to the Bill makes consequential amendments to certain legislation that will not be necessary until the Commission has been established. Given the circumstances, the Committee makes no further comment.

Response:

Clause 6 of the Bill is drafted in the same terms as section 7 of the *Civil and Administrative Tribunal Act* 2013 which also created a multi-division tribunal in New South Wales which amalgamated a number of existing tribunals and schemes.

Due to Parliamentary processes and the size and complexity of the reforms for the establishment of a new consolidated PIC, clause 6 of the Bill provides the appropriate flexibility to ensure that when the PIC is established it is fully operational on its establishment day.

Significant matters in regulations and Henry VIII clauses

The Bill allows certain significant matters to be set by the regulations. For example, clause 28(1)(e) of the Bill provides that the regulations can make provisions relating to substituted proceedings, that is, proceedings permitted to be heard in the District Court rather than in the Commission. The Committee prefers significant matters such as these to be dealt with in primary legislation to foster an appropriate

level of parliamentary scrutiny. Further, the Committee notes that clause 28(1)(e) also allows such regulations to modify the provisions of the proposed Act, enabling legislation or other legislation.

This is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Again, this may be an inappropriate delegation of legislative power particularly as the clause allows the modification of a broad range of legislation – not just the proposed Act itself. The Committee notes that clause 29 of the Bill contains a similarly broad Henry VIII clause. The Committee refers these matters to Parliament to consider whether any inappropriate delegation of legislative power has occurred.

Response:

The provisions dealing with Federal jurisdiction in the PIC Bill are in part, modelled on those contained in the *Civil and Administrative Tribunal Act* 2013. These provisions are required to ensure there is an appropriate forum for matters involving Federal jurisdiction.

This is a complex part of the Bill which requires co-ordination between the PIC and the New South Wales courts system, as the approach taken has the potential to impact on both. Supporting regulations and consultation are required to ensure that the regulations are effective, fair and appropriate for all stakeholders.

With respect to regulations concerning Federal proceedings, the PIC Bill is consistent with the legislative approach taken in s 34C(4) and (5) of the *Civil and Administrative Tribunal Act* 2013. Clause 28(3) of the PIC Bill states:

> *"The Minister is not to recommend the making of a regulation for the purposes of subsection (1)(e) unless the Minister certifies that—*
>
> *(a) if the proposed provisions affect the exercise of jurisdiction or functions by the Commission—the President has agreed to the provisions, and*
>
> *(b) if the proposed provisions affect the exercise of jurisdiction or functions by the District Court—the Chief Judge of the District Court has agreed to the provisions.*

Accordingly, any regulations made under clause 28(1)(e) of the PIC Bill requires agreement from the Chief Judge of the District Court and the President of the PIC, which cannot occur until the PIC Bill is passed.

Broad power to create Commission rules

Clause 20 of the Bill provides that the Rule Committee of the Commission may make rules which regulate the procedural aspects of Commission proceedings. In some cases these rules may have the potential to affect the substantive rights of those who have dealings with the Commission. However, the Committee notes that the rules must not be inconsistent with the proposed Act or the workers compensation legislation and motor accidents legislation as defined. Further, such rules can be disallowed by either House of Parliament. Owing to these safeguards, the Committee does not consider the provisions to involve an inappropriate delegation of legislative power and makes no further comment.

Response:

It is appropriate, and consistent with the practices of other NSW Courts and Tribunals, for the PIC to set its own practice and procedures. Further there are also several safeguards (in addition to the

safeguards already observed by the Committee) in the PIC Bill to ensure the Rule Committee acts appropriately, such as:

- The Rule Committee is chaired by the President of the PIC, who is an independent judicial officer and a judge of a court of record.
- The Rule Committee will include senior PIC Commission members and experts who are familiar with the detail of workers compensation and motor accidents legislation and dispute resolution procedures. This will help ensure the Rules will facilitate operations that are consistent with the objects of the PIC Bill to resolve the real issues in proceedings justly, quickly, cost effectively and with as little formality as possible.
- The Rule Committee also comprises of members drawn from the bodies that regulate the legal profession and two SIRA officers, ensuring both relevant and broad representation.
- The quorum requirements and majority voting provisions are consistent with the similar provisions in the *Civil and Administrative Tribunal Act* 2013 and ensure the Commission Rules have the support of the majority of the Committee.
- Like any rule or guideline, the Rules are ultimately subject to scrutiny and interpretation by the Court. This, together with the safeguards in the PIC Bill, operate to ensure the Rules made by the Rules Committee are within power.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny

Procedural directions not disallowable

Clause 21 of the Bill provides that the President may issue procedural directions which must be complied with, provided that those directions are publicly available on the Commission's website and consistent with the Act and the workers compensation legislation and motor accidents legislation as defined. However, unlike the Commission rules which also regulate practice and procedure, the procedural directions do not appear to be disallowable by Parliament. The substantive difference between the procedural directions and the Commission rules is unclear. Given that only the Commission rules are disallowable, the Committee refers this matter to Parliament.

Response:

To enable efficient and effective operation, courts and tribunals each have relevant legislative provisions enabling (as relevant) the Chief Justice or President to issue practice notes (as in the Supreme and District Courts), procedural directions (as in the NSW Civil and Administrative Tribunal (NCAT)) and practice directions (as in the WCC) relating to the practice and procedure of the court or tribunal.

Procedural directions differ from Commission Rules in that they provide more information on specific issues and complement the legislation and Rules. These procedural directions generally include guidance to the parties on specific matters that may arise in proceedings. They cannot be inconsistent with the PIC Bill or enabling legislation.

Further, like any current practice direction in the WCC, procedural direction in NCAT or practice notes in the Courts, they will be subject to scrutiny and interpretation by the Court.

If you have any further queries, please contact Cheri Boxoen, Principal Policy Officer of Strategy & Policy in the Office of the Secretary at the Department of Customer Service on (02) 8514 2549.

Yours sincerely

Victor Dominello MP
Minister for Customer Service

Date: 16.7.20

The Honourable Kevin Anderson MP
Minister for Better Regulation and Innovation

Our reference: COR-02744-2020

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

Dear Ms Wilson MP Felicity

Thank you for your correspondence on behalf of the Legislation Review Committee.

I have considered the Committee's comments in Digest No. 13/57 concerning the *Building and Development Certifiers Regulation 2020* (the **Regulation**).

As observed by the Committee, the Regulation does tighten the requirements for building certifiers and introduces requirements that may add to the costs of doing business in the industry. The Department considers that the proposed provisions are appropriate and notes that the Committee makes no further comments.

The Department notes the Committee's preference for the offence provision under Part 7 of the Regulation to be included in the *Building and Development Certifiers Act 2018* (the **Act**) rather than in the Regulation itself.

Extensive consultation was undertaken with the building and construction industry before finalising the regulation, including releasing an exposure draft of the regulation and holding an industry roundtable to discuss the proposed reforms.

The approach taken by Parliamentary Counsel when drafting is for substantive matters, including offences attracting significant penalties, to be set out in the principal legislation. The Act refers the framework for maintaining records to be prescribed by regulation. Subsequently the provisions under Part 7, including the penalties, were prescribed in the Regulation due to the administrative nature of the requirements. The offences have been maintained from the existing legislation and are appropriate to promote compliance and positive behaviour. The Government considers that the proposed provisions are suitable and notes the Committee makes no further comments.

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

Yours sincerely

Kevin Anderson MP
Minister for Better Regulation and Innovation

Date: 22.7.2020

NSW GOVERNMENT
The Honourable Kevin Anderson MP
Minister for Better Regulation and Innovation

Our reference: COR-05113-2020

Ms Felicity Wilson MP
Legislation Review Committee
Parliament of New South Wales
By e-mail: Legislation.Review@parliament.nsw.gov.au

Dear Ms Wilson Felicity

Thank you for providing me with the comments made by the Legislation Review Committee (the **Committee**) on Bills and Regulations in its Legislation Review Digest 17/57. I would like to take the opportunity to respond to the comments made by the Committee on the Work Health and Safety Amendment (Information Exchange) Bill 2020 (**WHS Bill**) and the *Work Health and Safety Amendment (Silica) Regulation 2020* (**Silica Regulation**).

WHS Bill

I note the Committee's concerns about the broad nature of the information-sharing power in the Bill and the absence of privacy safeguards in the Bill itself.

The Government's intention is that the information-sharing power will be used by NSW Health to share information with SafeWork NSW about cases of the occupational lung disease silicosis. There has been a sharp spike in silicosis diagnoses in NSW and this information will be crucial to SafeWork NSW's efforts to combat this preventable disease.

The information-sharing power is broad and flexible both to enable Government agencies to respond quickly to emerging health issues in our workplaces, and to leave NSW Health with discretion as to what information it shares. It is important for the protection of patients' privacy that NSW Health is not under an obligation to disclose any personal information. The information which can be shared is limited to information which NSW Health considers is necessary to enable WHS Regulators to perform their functions under the *Work Health and Safety Act 2011* (**WHS Act**).

SafeWork NSW is frequently called upon to handle workers' personal and medical information in the course of carrying out its functions under the WHS Act. It has well-established and robust procedures in place to ensure that all personal and medical information is held securely and used appropriately.

I confirm that NSW Health and SafeWork NSW will enter into a Memorandum of Understanding (**MOU**) when this Bill is law. The MOU will set out how SafeWork NSW and NSW Health will share information securely to protect patients' privacy. The MOU is being developed in consultation with the Information and Privacy Commission to ensure that all potential privacy concerns are thoroughly addressed. SafeWork NSW will publish the MOU on its website so that all affected parties understand how the information is being shared and used.

Silica Regulation

I note the Committee's concern that new offences with significant penalties should be introduced in primary, rather than subordinate legislation.

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The Silica Regulation creates a new offence of directing or allowing uncontrolled dry cutting of manufactured stone. But the conduct which constitutes the new offence was already prohibited under the WHS Act as a breach of general health and safety duties, in that it is a failure to comply with the duty to ensure, so far as is reasonably practicable, the health and safety of workers. Breaches of that duty also carry significant penalties.

The new offence makes it clear to employers and workers that uncontrolled dry cutting is prohibited, and enables SafeWork NSW inspectors to issue penalty notices for dry cutting. SafeWork NSW inspectors continue to be able to issue prohibition notices in respect of the same conduct, where appropriate.

For this reason it is appropriate that the new offence sits within the *Work Health and Safety Regulation 2017* rather than the WHS Act.

Other Legislation

I note the Committee's comments in relation to other Bills and Regulations and thank them for their detailed consideration of the legislation.

If you have further queries on the WHS Bill or Silica Regulation, I invite you to contact Gabrielle Gallagher, Director, Policy & Strategy, on 0418 654 135.

Yours sincerely

Kevin Anderson MP
Minister for Better Regulation and Innovation

Date: 7-9-2020

The Honourable Kevin Anderson MP
Minister for Better Regulation and Innovation

Our reference: COR-03095-2020

Ms Felicity Wilson MP
Member for North Shore
By email: northshore@parliament.nsw.gov.au

Dear Ms Wilson

Thank you for your correspondence conveying the Legislation Review Committee's comments in relation to the Residential Tenancies Amendment (COVID-19) Regulation 2020.

I appreciate the Committee's recognition that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, and protect the health, safety and welfare of tenants and residents.

As noted by the Committee, these sorts of changes would ordinarily be introduced through primary legislation. I appreciate Committee's recognition that the Regulation was made in order to enable a swift response to the public health emergency, when Parliamentary was not sitting.

The NSW Government is committed to helping the community navigate this difficult time and will continue to fairly balance the impacts on all stakeholders in its response to the crisis.

Thank you for conveying the Committee's findings to me.

Yours sincerely

Kevin Anderson MP
Minister for Better Regulation and Innovation

Date: 25/09/20

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The Honourable Kevin Anderson MP
Minister for Better Regulation and Innovation

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

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

Dear Ms Wilson Felicity

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

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

Better Regulation Legislation Amendment Bill 2020

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

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

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

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

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Professional Standards Act 1994

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

Property and Stock Agents Amendment Regulation 2019

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

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

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

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

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

Yours sincerely

Kevin Anderson MP
Minister for Better Regulation and Innovation

Date: 8.10.20

Encl. Department response

Mark Speakman
Attorney General
Minister for the Prevention of Domestic Violence

IM20/30852
EAP20/14372
Your ref: LA20/007.10

Hon Trevor Khan MLC
Parliament of NSW
Macquarie Street
Sydney NSW 2000

Legislation.Review@parliament.nsw.gov.au

Dear Mr Khan Trevor

Legislation Review Committee Digest No. 19/57 - Adoption Legislation Amendment (Integrated Birth Certificates) Bill 2020

Thank you for your letter, received 15 September 2020, providing a copy of Digest No. 19/57 of the Legislative Review Committee (the Committee), including the comments of the Committee in relation to the Adoptions Legislation Amendment (Integrated Birth Certificates) Bill 2020 (the Bill).

I note that the Committee made no adverse comment in relation to the Bill having regard to the factors to be considered under section 8A of the *Legislation Review Act 1987*. As you may be aware, the matters raised by the Committee regarding the commencement of the Bill were also addressed in the Parliamentary debate of the Bill, and have helped to ensure that the reasons for its commencement by proclamation are well understood by Members of Parliament and the wider community. I am now able to advise that the Bill is anticipated to commence on 16 November 2020.

I look forward to receiving future comment from the Committee on Bills and Regulations.

Thank you for taking the time to write.

Yours sincerely

Mark Speakman

27 OCT 2020

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NSW GOVERNMENT
The Honourable Victor Dominello MP
Minister for Customer Service

Our reference: COR-06988-2020
Your reference: LAC20/007.12

Mr Trevor Khan MLC
Deputy Chair
Legislation Review Committee
By email: legislation.review@parliament.nsw.gov.au

Dear Mr ~~Khan~~ Trevor

Thank you for your correspondence relating to the Legislation Review Committee's comments in the Legislation Review Digest No 21/57 considering the *Workers Compensation Amendment (Consequential COVID-19 Matters) Regulation 2020* (Regulation).

Trespasses on personal rights and liberties
Restricting right to compensation - types of prescribed employment

I note the Committee's concerns regarding the limits to the types of prescribed employment covered in section 19B of the *Workers Compensation Act 1987* (1987 Act) and clause 5D of the Regulation.

The establishment of presumptive rights to workers compensation for COVID-19 does not create any additional entitlements to workers compensation benefits. Rather, it makes it easier for workers in prescribed employment who contract COVID-19 to access workers compensation benefits to support their recovery. However, all workers who contract COVID-19 in the course of their employment are entitled to make a claim for workers compensation benefits.

Prescribed employment is defined broadly in the 1987 Act and the Regulation. For example, security and other staff involved in hotel quarantine could be covered under section 19B(9)(k) 'employment in restaurants, clubs and hotels' and warehousing/distribution services can be covered under the umbrella term the 'retail industry' (section 19B(9)(a) of the 1987 Act).

Employers and insurers are able to adopt a beneficial approach when determining claims. Equally, employers and insurers are able to rebut the presumption if they have evidence to do so. Ultimately, the Workers Compensation Commission as the independent statutory tribunal has exclusive jurisdiction to determine workers compensation claims.

Restricting right to compensation - types of tests

As identified by the Committee the medical tests in the Regulation are those listed in the Australian Register of Therapeutic Goods. These are described by the Therapeutic Goods Administration (TGA) as the 'gold standard' for diagnosing COVID-19.

I acknowledge the Committee's comments relating to emerging evidence regarding the accuracy and utility of COVID-19 tests generally. As noted above, all workers who contract COVID-19 in the course of their employment are able to bring a claim for workers compensation benefits.

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Please be assured that the State Insurance Regulatory Authority continues to work closely with state and Commonwealth health and workplace safety agencies to ensure our workers compensation scheme supports workers and employers during these unprecedented times.

I thank you and the Committee for the comments concerning the *Workers Compensation Amendment (Consequential COVID-19 Matters) Regulation 2020*. Should you have any further queries please contact Nicholas Cobb, Director Workers & Home Building Compensation Regulation at nicholas.cobb@sira.nsw.gov.au or 02 9289 1352.

Yours sincerely

Victor Dominello MP
Minister for Customer Service

Date: 12-11-20