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Legislation Review Committee

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

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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. COSTAL MANAGEMENT AMENDMENT BILL 2021

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

2. COMPANION ANIMALS AMENDMENT (PUPPY FARMS) BILL 2021*

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

Real property rights, enforcement powers to enter and search

The Bill provides a number of powers to enforcement officers under the Bill, including the power to enter and search a premises and issue compliance notices to seize dogs or cats where there is a serious risk to the health or safety of a dog or cat or they are being kept in contravention of the Act. A person that does not comply with a notice issued by an enforcement officer may face a maximum penalty of 250 penalty units ($27 500) for a corporation or 50 ($5 500) penalty units for an individual.

Similarly, section 69L enables enforcement officers to enter property and seize dogs and cats from proprietors of companion animal businesses who have had their registration suspended or revoked, or whose registration has expired. The Bill also extended existing penalties under the Act to obstructing an enforcement officer exercising their powers under the Act. The Committee notes that these provisions provide wide powers of enforcement that may impact on the property rights of individuals.

The Committee recognises the overarching aim of the provisions to prevent animal cruelty that may occur in companion animal businesses. The Committee also notes that the powers of entry cannot be used in situations when the occupier does not provide consent, unless the enforcement officer is of the opinion that it is urgently required serious risk to the health or safety of a companion animal. Enforcement officers are also required to present identification if asked by a person affected by such enforcement powers. Penalties for non-compliance with such enforcement powers are also monetary in nature, rather than terms of imprisonment, and consistent with the regulatory setting to encourage compliance of businesses. In these circumstances the Committee makes no further comment.

Privacy

The Bill includes requirements for a council to provide the Departmental Chief Executive certain information about registration applications for a companion animal business. This includes providing details such as an applicant's name and business name, tax file number or Australian business number, and contact details. The council must also provide information on any other matter as prescribed by the regulations. This may impact on the privacy of the person to whom this information pertains.

However, the Committee acknowledges that the intent of the provision is to better regulate the conduct of businesses breeding companion animals and other companion animal businesses. The Committee also understand that such information may be protected by

privacy laws regarding personal information held by a Department. In these circumstances, the Committee makes no further comment.

Strict liability offences

The Bill contains a number of offences for non-compliance with its provisions in regards to obligations of persons conducting a companion animal business and proprietors of a companion animal breeding business or pet shop. These offences include requirements with conditions of registration, animal health and safety, and animal restrictions on breeding. These offences carry penalties, ranging from 50 to 1000 ($5 500 to $110 000) penalty units or 6 months to 2 year imprisonment, or both, for an individual, and 250 to 5000 ($27 500 to $550 000) penalty units for a corporation.

The Committee notes that these offences amount to strict liability offences. 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 acknowledges the Bill intends to toughen the NSW position on penalties for companion animal breeding. However, given the significant penalties attached to these strict liability offences, including potential imprisonment, the Committee refers the matter to the Parliament for its consideration of whether the penalties are reasonable and proportionate in the circumstances.

3. CONSTITUTION AMENDMENT (VIRTUAL ATTENDANCE) BILL 2021*

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

4. CRIMES AMENDMENT (DISPLAY OF NAZI SYMBOLS) BILL 2021*

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

Freedom of expression and association

The Bill amends the *Crimes Act 1900* to prohibit the public display of Nazi symbols. Under subsection 93ZA(1), a person who, by a public act, displays a Nazi symbol is guilty of an offence that may carry a maximum penalty of 50 penalty units ($5 500) or imprisonment for 6 months, or both, for an individual, or 500 penalty units ($55 000) for a corporation.

A public act has been broadly defined to include any form of written or visual communication to the public, including writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods, in addition to the wearing of clothes or distribution of written or vidual material to the public. The Committee notes that this is an inclusive and non-exhaustive definition. To avoid doubt, the Bill also clarifies that an act may be public even if it occurs on private land.

The Committee notes that the Bill therefore places restrictions on a person's freedom of expression and association specifically in regards to the public use of a Nazi symbol as defined by its provisions. The right to association protects a person's freedom to form and join associations to pursue a common goal, and to exchange ideas and information.

The Committee generally comments where legislation limits a person's right to expression or association, as they are core rights contained in Articles 19 and 22 of the International Covenant on Civil and Political Rights (ICCPR).

However, the Committee recognises that the Bill contains exceptions, including that this section does not apply to a swastika used in connection with Hinduism, Buddhism or Jainism, and where a public act is to be done reasonably and in good faith for academic, artistic, scientific or research purposes in the public interest, or other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

The Committee recognises that the intent of the Bill is to protect individuals from activity that may incite or amount to hate behaviour or hate crimes, and the harm such symbols have historically caused in connection with the holocaust. The Committee also recognises that lawful restrictions on the freedom of association and expression may be permitted in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. In these circumstances, and given the exceptions for a public act done in good faith for the public interest discussion and debate, and exceptions for the symbol in connection with Hinduism, Buddhism or Jainism, the Committee makes no further comment.

5. ENERGY LEGISLATION AMENDMENT BILL 2021

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

Privacy

The Bill amends the *Electricity Supply Act 1995* to establish security safeguard schemes, which sets up a register containing details of persons whose applications to be an accredited certificate provider have been refused. The register contains information including a person's name, ACN and reasons for refusal. By allowing information recorded in the register of refused applications to be made publicly available, including information that may be attached to the name of a person, the Bill may impact on the privacy rights of affected persons.

However, the Committee notes that the effect of this provision is to increase the amount of publicly available information about those who are accredited to issue certificates under the peak demand reduction scheme. The Committee also recognises that the proposed changes are intended to promote transparency and public trust in NSW's electricity management system and ensure its efficient administration. In these circumstances, the Committee makes no further comment.

Risk of arbitrary search

The Bill amends the *Electricity Supply Act 1995* to insert section 136C into Part 4A, which provides that compliance officers have broad powers to investigate compliance with the energy security safeguard scheme rules. This includes the power to enter premises used in connection with an energy savings activity for which a certificate has been created, as well as the principal place of business of an accredited certificate provider. These powers also permit compliance officers to examine and test equipment, take photographs, copies and other records, and seize anything they believe on reasonable ground is connected to an offence under Part 4A. A person who hinders or obstructs a compliance officer can incur a maximum penalty of 200 penalty units ($22 000) for a corporation and 50 ($5 500) penalty units for an individual.

By allowing authorised officers to enter private property without notice or a warrant, for the purposes of investigating compliance without evidence of suspicion of breaching Part 4A, the Bill may increase the risk of arbitrary search, impacting on the right to privacy and real property. The Committee recognises that compliance officers may not enter a part of premises used only for residential purposes without permission of the occupier. However, given the wide powers of compliance officers, the Committee refers these matters to Parliament to consider whether the possible privacy and property impacts are reasonable in the circumstances.

Reversal of onus of proof

The Bill amends the *Electricity Supply Act 1995* to insert additional provisions for offences. Proposed subsection 185(3)(3A) provides that proceedings for an offence under Schedule 4A (or associated regulations) may be commenced any time within 2 years after the date on which evidence of the alleged offence first came to the attention of the Scheme Administrator or the Scheme Regulator. If that provision is relied upon, the application or court attendance notice must contain particulars of that date.

The Bill further provides that the date submitted to the court for the purpose of the limitation periods for an offence under Schedule 4A the Act by the Scheme Administrator or Scheme Regulator is true unless proven otherwise by the defendant. This shifts the onus of proof onto the defendant.

A reverse onus may serve to undermine the presumption of innocence, particularly because the requirement for the applicant to put forward particulars justifying the specified date is poorly defined. In circumstances such as these, where the applicant may have greater access to evidence as to the correct date, it may limit the capacity of the defendant to have a fair trial. The Committee refers these matters to Parliament to consider whether the possible impact on the presumption of innocence is reasonable in the circumstances.

Liability of directors and managers for offences by corporation

The Bill inserts new executive liability offences into the *Gas Supply Act 1996* and the *Electricity Supply Act 1996*. This means that a director or certain managers of a corporation may be liable for an offence committed by the corporation.

The Committee notes that in the *Gas Supply Act 1996,* the Minister must be satisfied that the person knowingly authorised or permitted the contravention. The Committee notes that this is an example of a lower threshold for the mental element that is required to make an individual liable, however notes that this is not unusual in the regulatory context.

The Committee also notes that the liability under the *Gas Supply Act 1996* cannot exceed $50,000, cannot be a term of imprisonment, and that penalties in the Bill have been increased in line with government policy to protect and ensure the integrity of critical energy infrastructure.

The Committee also notes that the *Electricity Supply Act 199*5 requires that the scheme entity issuing a monetary penalty to an individual must conduct a process by which the impacted person can make a submission to the scheme entity issuing the penalty. The scheme entity must be satisfied on the balance of probabilities that the person contravened, or knowingly authorised or permitted the contravention of the relevant provision, and this is a higher threshold for the mental element. Further, under section 139 of the Act, the decisions of scheme administrators is subject to administrative review by the New South Wales Civil and

Administrative Tribunal providing an additional layer of due process for impacted individuals. For these reasons, the Committee makes no further comment.

Enforcement powers – direction to provide data, services or take action

The Bill amends the *Electricity Supply Act 1995,* the *Energy and Utilities Administration Act 1987,* and the *Gas Supply Act 1996* to enable the Minister to give written directions to certain involved parties for the purposes of managing cyber security incidents involving critical infrastructure, including requiring the parties to provide the Minister with specified data, or take specified actions.

The Committee generally comments where enforcement powers may be used, as they may infringe on the ordinary rights such as the right to privacy or property. In this case, the powers would allow the Minister to obtain records that are the property of certain service providers, and gives the Minister the authority to direct them to take specified actions that may not be ordinarily required.

However the Committee notes that the ability of the Minister to give directions to provide data or take action is to ensure the protection of critical infrastructure from cyber security incidents and ensure minimal disruption to the provision of electricity to the State. 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 *Energy Legislation Amendment Bill 2021* commences (as an Act) on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that the flexible start date may assist with the administrative arrangements required to implement the various amendments across five separate Acts and the related industry changes. Given 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

Ministerial directions

The Bill provides that the Minister may make declarations during a period during which an electricity supply emergency has been declared by the Premier due to a defined cyber security incident. These directions can require a relevant person to take any action the Minister considers reasonably necessary to respond to the incident and reduces its impact. This is a wide Ministerial power.

The requirement to comply with a direction has effect despite any other Act or law which would ordinarily apply to these persons, and a failure to do so carries a maximum penalty of 2,000 penalty units ($220 000) for a corporation, or 100 ($11 000) penalty units for an individual.

The Committee generally comments where there is a wide Ministerial power to give directions, as it may impact upon the rights, liberties or obligations of individuals that would be subject to those directions or approvals. A Ministerial direction also delegates legislative power to the Executive, rather than legislating through the Parliament. However, the Committee

acknowledges that responding to cyber security incidents quickly and decisively may be necessary to protect critical infrastructure, which is a key policy reason for implementing the Bill. Such Ministerial directions may provide for a flexible and timely response to these situations. In these circumstances, the Committee makes no further comment.

Declaration by the Premier

The Bill amends the *Electricity Supply Act 1995* and inserts new sections that allow the Premier to declare an electricity supply emergency without publication or public notice of this decision. During the period that the emergency is declared, which is not limited in length under the Act or Bill, the Bill provides that the Minister can issue directions under section 94BA to respond to a cyber security incident. A failure to comply with these directions carries a maximum penalty of 2,000 penalty units ($220 000) for a corporation, or 100 ($11 000) penalty units for an individual.

This declaration is not a reviewable decision, which may limit procedural fairness, particularly because the exemption from publishing or giving public notice reduces the level of scrutiny that can be applied to a declaration. Further, section 179A(1B)(a) of the Act deems that no compensation is payable by or on behalf of the state because of the enactment, making or operation of a declaration (which includes Ministerial directions), which also may impact on the rights of affected persons to seek compensation for a decision that they consider unfairly or improperly burdened them.

Matters, such as those that can be dealt with in the event that an electricity supply emergency is declared, have significant bearing on the delivery of an essential service to the State. In these circumstances, the Committee would usually prefer that, as the directions are tied to such significant monetary penalties they should be included in the regulations to ensure an appropriate level of parliamentary oversight. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. There is no such requirement for the orders of the Premier or Minister.

However, the Committee notes that the publication or giving public notice of the declaration where it has been triggered by a cyber security incident may serve to aggravate the situation, or limit the ability of the government or impacted persons to respond to the incident. Therefore the Committee refers these matters to the Parliament to determine if the exclusion of review and public oversight is justified in the circumstances.

6. ICAC AND OTHER INDEPENDENT COMMISSIONS LEGISLATION AMENDMENT (INDEPENDENT FUNDING) BILL 2021*

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.

7. LOCAL GOVERNMENT AMENDMENT (COVID-19 – ELECTIONS SPECIAL PROVISIONS) BILL 2021

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

Henry VIII

The Bill amends the *Local Government Act 1993* to provide for the conduct of the 2021 local government elections during a public health emergency caused by the COVID-19 pandemic. Specifically, it inserts section 747C which allows special provisions for the local government elections regulation-making power. This includes the ability for the regulations to modify the application of one or more provisions of the Act that apply to the 2021 ordinary elections of councillors to respond to the public health emergency caused by the COVID-19 pandemic. The regulations may also override the provisions of the Act and are not limited by the regulation-making power in the Act.

The Committee notes that this amounts to a Henry VIII clause, allowing the Executive to legislate and amend an Act by way of regulation without reference to the Parliament. Under ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by the COVID-19 pandemic, the provisions may provide flexibility to facilitate a timely and appropriate response to conduct local government elections during a public health crisis.

The Committee also recognises that this power is somewhat limited, as the Minister may only recommend to the Governor that regulations be made under this section if the proposed regulations are in accordance with advice issued by the Electoral Commissioner, and the proposed regulations are reasonable to protect the health, safety and welfare of persons from risk of harm caused by the COVID-19 pandemic. The Committee also recognises that provisions are intended to support of the COVID-19 plan developed by the NSW Electoral Commission for the purpose of facilitating the upcoming local government elections in the current COVID-19 outbreak. In these circumstances, the Committee makes no further comment.

8. MODERN SLAVERY AMENDMENT BILL 2021

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

Right to reputation – Absolute privilege

The Bill provides that absolute privilege applies to certain matters published in relation to the *Modern Slavery Act 2018*. This includes the publication of strategic plans, annual reports, referrals to Police or other agencies, reports under the *Children and Young Persons (Care and Protection) Act 1998*, and in a register under the *Modern Slavery Act 2018*.

Absolute privilege is an immunity from an action that protects a person or class of persons from a law suit, even if the action had a malicious motive or was false. In this case, the application of absolute privilege would prevent defamation action being taken in relation to the specified publications in relation to the *Modern Slavery Act 2018*. This may prevent a course of legal action for a person who has incurred damage or loss as a result of such a publication, such as the right to reputation where any allegation, assertion or inference in such a publication was false.

However, the Committee recognises the intent of the provision is to ensure that the Anti-slavery Commissioner can publish information relating to modern slavery matters without threat of legal action hindering its functions under the Act. In these circumstances, the Committee makes no further comment.

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

Police Commissioner may refuse to provide certain information regarding modern slavery

Proposed section 35 provides that the Commissioner of Police is, upon request, to provide the Anti-Slavery Commissioner with information regarding modern slavery and victims of modern slavery. The Commissioner of Police may refuse this request to provide information if they reasonably believe that it amounts to confidential police information, for example that would prejudice an investigation, coronial inquest or inquiry, or care proceedings. Other reasons for refusing to provide such information include if it would contravene legal professional privilege, or expose a confidential source, if it would endanger a person's life or physical safety, or not be in the public interest.

The Committee notes that this allows the Police Commissioner to withhold sensitive information from the Anti-Slavery Commissioner where it may compromise and investigation or be in the public interest. The Committee notes that there does not appear to be a review mechanism for the Anti-Slavery Commissioner in relation to a refusal to provide such information. It is further noted that any information received by the Anti-Slavery Commissioner under this section may not be disclosed without written consent of the Police Commissioner in any case, providing a safeguard on information that is released. Given the information pertains to issues of modern slavery, and the safeguards around this information, it may be beneficial to allow a review process where a request to provide information is refused. The Committee refers this information to the Parliament for its consideration.

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

Delegation to the regulations

The Committee notes that the Bill defers a number of matters to the regulations. The Committee generally comments where matters are deferred to the regulations rather than include them in the primary legislation to allow sufficient parliamentary scrutiny. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences.

The Committee notes that the majority of matters delegated to the regulations appear administrative in nature, may allow the regulation to specify such matters in the detail required and provide flexibility where it is required to be updated in a timely manner.

However, the Committee also recognises that the Bill allows the regulations to create offences. The Committee generally prefers significant matters, such as offences and their penalties, to be contained in the principal Act so as to provide a certain level of Parliamentary scrutiny. In these circumstances, the Committee refers this issue to Parliament for its further consideration of whether certain matters regarding offences should be contained in the primary legislation.

9. PUBLIC INTEREST DISCLOSURES BILL 2021

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

Reversal of onus of proof

The Bill inserts a number of provisions creating offences. Proposed section 33(4) and amendments to consolidate the changes made by the Bill in the *Independent Commission Against Corruption Act 1988*, the *Law Enforcement Conduct Commission Act 2016, the Police Act 1990* provide that in a prosecution for a detrimental action offence, the accused bears the onus of proof in relation to the detrimental action. The accused must prove that they did not have the suspicion, belief or awareness of the public interest disclosure (and therefore it was not a detrimental action) or that the suspicion, belief or awareness was not a contributing factor to the taking of the detrimental action. This shifts the onus of proof for the mental element of the offence onto the defendant.

The Bill also inserts sections 35(4), which reverses the onus of proof onto the defendant if the same conduct arises in a civil claim for damages.

In regards to both the civil and criminal actions, the reverse onus may undermine the presumption of innocence. Further, the legal issues surrounding the mental element of a crime or civil claim are complex and a defendant, who may be more likely than the prosecution not to obtain legal counsel, may find it challenging to appropriately articulate their case which may compromise their right to a fair trial. This is particularly relevant considering that both the civil and criminal provision have significant allowances for penalties; the civil offences provide that exemplary damages can be sought, and for the criminal offence the maximum penalty is 200 penalty units or 5 years imprisonment, or both.

The Committee refers these matters to Parliament to consider whether the possible impact on the presumption of innocence is reasonable in the circumstances.

Threshold for protections - Requirement for a voluntary public interest disclosure to members of Parliament or journalists to be substantially true

The Bill creates the requirement for voluntary public interest disclosures made to members of Parliament and journalists to be substantially true. The same requirement does not apply to disclosures to other recipients (such as integrity agencies) which requires only that a person honestly believe on reasonable grounds that the disclosure shows or tends to show serious wrongdoing.

The Committee notes that the Minister stated that the intent of this strict requirement was to prevent inaccurate matters, which may be defamatory or confidential, from being disclosed in

the public arena where it could have a lasting impact on the individuals or agency the subject of the disclosure.

However, the Committee notes that this requirement sets not only a high bar, but also may leave the disclosing individual in a state of flux where it is unclear if they will receive the protections of the Bill. This is because further investigation may be required to prove the veracity of the disclosure, or in some cases it may not be possible to make a determination as to whether a disclosure is substantially true. Therefore, this section 28(1)(a) may leave individuals without protection, which may reduce the incentive for individuals to make public interest disclosures, or expose them to civil liability. The Committee refers the matter to Parliament for further consideration as to whether this standard of belief is appropriate in the circumstances.

Self-incrimination

The Bill provides protection for makers of public interest disclosures against civil and criminal liability under section 40. However, under section 41(1), this does not extend to providing protection against liability for past conduct of the person that is disclosed while making a public interest declaration, and section 65 requires that a public official use their best endeavours to assist an investigation into a voluntary public interest disclosure. This means that someone who makes a disclosure, or assists with an investigation and also reveals information about their own conduct that is not a public interest disclosure, may incur liability for this conduct.

The Attorney-General may grant a conditional or unconditional undertaking under section 41(2) to shield the disclosing person from that evidence being raised against them in civil or criminal proceedings. Further, section 9 provides that the Bill does affect a person's privilege against self-incrimination, be it at common law or under statute.

However, there may be circumstances where neither an undertaking nor the common law or statutory protections against self-incrimination are a complete shield from liability for the disclosing person. This may be appropriate in some circumstances, where the common law or other statutes do not intend to provide a shield for certain behaviour. However, the Bill may leave a person in a situation where they may hesitate to make a public interest disclosure due to a concern that they would have to rely on being granted an undertaking to shield them from liability, which would be an uncertainty prior to making the disclosure.

It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her. The Committee however recognises that the Bill does compel some individuals to make disclosures to protect against serious misconduct and malpractice, and further requires the co-operation of public officials to fully and properly investigate voluntary public interest disclosures. The Committee also notes that section 9 reinforces the primacy common law and other statutory rights protecting individuals against self-incrimination. The Committee refers the matter to Parliament to consider whether this impact on the privilege against self-incrimination is reasonable in the circumstances.

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

Power of the Attorney–General to grant an undertaking

The Bill under section 41(1) does not extend protection to makers of public interest disclosures against civil and criminal liability in regards to past conduct of the person that is disclosed

when they making a public interest declaration. This means that someone who makes a disclosure, but reveals information about their own conduct that is not a public interest disclosure, may incur liability for this conduct. The Attorney-General does have the power under section 41(2) to give an undertaking that the disclosure, including the conduct that is not a public interest disclosure, is not admissible in evidence against the person in relation to civil and criminal proceedings. This action may be recommended by an integrity commission, and can be conditional or unconditional.

The Attorney General may provide an undertaking if in their opinion it is appropriate. There is no further definition or clarification of what would constitute appropriate circumstances to grant an undertaking, nor when a conditional or unconditional undertaking would be more appropriate. The Bill may therefore grant the Attorney General an ill-defined administrative power.

The Committee acknowledges that the provisions are intended to allow the government to flexibly respond to the circumstances a disclosure arises in, which may be highly varied and unpredictable. However, the Committee prefers provisions that grant administrative power to be drafted with sufficient precision, so that their scope and content is clear. This is particularly the case in regards to protection from self-incrimination, as the criminal and civil penalties for misconduct can be significant. The Committee refer the provisions to Parliament to consider whether they contain an insufficiently defined administrative power.

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

Commencement by proclamation

The Bill commences (as an Act) on a day or days to be appointed by proclamation, and the Minister has indicated that a proclamation will be issues. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes that the flexible start, and the Minister's proposed flexible commencement clause may assist with the administrative arrangements required to implement the various amendments across other legislation and the related changes across agencies. Given the circumstances, the Committee makes no further comment.

10. VOLUNTARY ASSISTED DYING BILL 2021*

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

Right to life

The *Voluntary Assisted Dying Bill 2021* enables eligible persons with a terminal illness to voluntarily end their lives with assistance, in accordance with the legislated procedure.

The Committee considers that any voluntary assisted dying scheme should include robust legislative safeguards. In this regard, the Committee notes there are a number of safeguards included in the Bill, such as:

- a multi-stage request and assessment process in order for a person to access voluntary assisted dying,

- eligibility criteria to access voluntary assisted dying which requires, among other things, that the patient has decision-making capacity, is not acting because of pressure or duress, and will, on the balance of probabilities, die within the next 6-12 month period (depending on the type of disease, illness or condition),

- the requirement that key people involved in a person's request and assessment process must not be a family member of or know or believe they may benefit financially from the patient's death, although this does not extend to the patient's contact person,

- review by the Supreme Court of certain decisions made in the request and assessment process, including decisions relating to a person's decision-making capacity or whether they are acting voluntarily,

- creation of offences, including in relation to the unauthorised administration of a prescribed substance and inducing another person to administer a prescribed, each of which have a maximum penalty of imprisonment for life,

- oversight and monitoring of the Bill by the Voluntary Administration Board, whose own conduct may be subject of a compliant to the Ombudsman.

The Committee acknowledges and respects the wide-ranging views and discussions in relation to voluntary assisted dying. In particular, it acknowledges that the Bill may be seen to provide legislative sanction to the premature loss of life and trespass on the right to life and, alternatively, that it upholds an individual's dignity and personal autonomy in relation to end of life choices. The Committee notes this issue for the consideration of the Parliament.

Freedom of expression

The Voluntary Assisted Dying Bill 2021 makes it an offence with a maximum penalty of 12 months' imprisonment for a person to publish information about Supreme Court proceedings regarding the review of certain decisions in the voluntary assisted dying request and assessment process that discloses personal information about a party to the proceedings and other persons involved in the request and assessment process, including the patient and their medical practitioners. For the purposes of this offence, 'publish' means to disseminate to the public or a section of the public by any means, including in a newspaper or periodical publication or by radio broadcast, television, a website, an online facility or other electronic means.

This offence regulates the content that may be published by any means, including media publications, and limits the right to freedom of expression. However, this right is not absolute and can be limited to protect the rights and reputations of others. In this case, the prohibition on publishing personal information protects the right to privacy of the specified individuals, which notably includes the patient and their medical practitioners. The scope of this limitation to personal information appears to be appropriate in the circumstances, as it does not limit publication of other information about the proceedings which may be in the public or political interest to disseminate.

The Committee considers the offence to appropriately balance the right to freedom of expression and individuals' right to privacy and makes no further comment.

Offences – significant penalties and strict liability

The Bill creates offences with significant penalties. The most significant of these penalties are for the offences of administering a prescribed substance without authorisation or inducing another person to self-administer a prescribed substance, each with a maximum penalty of imprisonment for life. Custodial sentences also attach to other offences, including for example inducing a person to make a request for access, or access voluntary assisted dying, or advertising a Schedule 4 poison or Schedule 8 poison as a voluntary assisted dying substance.

The Committee notes that a court may impose a sentence on an offender under the *Crimes Sentencing Procedure (Act) 1999*, for a number of purposes including to adequately punish, to deter the offender and other persons, to make the offender accountable, to denounce the conduct of the offender and recognise harm done to the victim of crime and community. Taking into account these purposes, the seriousness of the offences created and the intent of the offences to protect against misuse of voluntary assisted dying, the Committee makes no further comment on the significance of the penalties.

The Bill creates various strict liability offences. The Committee generally comments on strict liability offences because they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. However, it notes that these offences are not uncommon in a regulatory context to encourage compliance. Compliance is important in this instance to protect against misuse of the scheme, its efficient administration and sufficient oversight. In the circumstances, the Committee makes no further comment.

Payment for work performed - interpreters

The Bill requires that people who provide professional services to the patient regarding voluntary assisted dying must not know or believe that they are a beneficiary under a will of the patient or otherwise benefit financially or in any other material way from the death of the patient.

In relation to a coordinating practitioner, consulting practitioner, administrating practitioner and a medical practitioner, psychiatrist, registered health practitioner or other person to whom the patient is referred, this requirement makes clear that those persons are able to receive reasonable fees for the provision of services or acting in the role. However, this is not made clear in relation to the provision of services by accredited interpreters.

It is therefore unclear if interpreters are able to receive reasonable fees for provision of services under the Bill. This may impact the right to payment for services performed of interpreters. The Committee notes the provision is an important safeguard as it ensures that interpreters involved do not gain financially by the patient's request and assessment for voluntary assisted dying. However the Committee also recognises that the role of an interpreter may require the engagement of professional interpreting services for a reasonable fee. Such fees do not appear to be provided for under the Bill. The Committee refers this issue 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

Definition of eligible applicant

The *Voluntary Assisted Dying Bill 2021* provides that an eligible applicant may apply to the Supreme Court for a review of certain decisions made by a patient's coordinating practitioner, consulting practitioner or the Voluntary Assisted Dying Board. Specifically, decisions regarding whether the patient satisfies certain eligibility criteria and the refusal of a voluntary assisted

dying substance authority. Under the Bill, the Court may set aside a decision of a primary decision-maker and substitute its decision for the reviewed decision.

The Committee notes that an 'eligible applicant' includes another person who has a sufficient and genuine interest in the rights and interests of a patient in relation to voluntary assisted dying. This broadens who may apply for a review of a decision beyond the person subject to a decision regarding voluntary assisted dying. The category may include, for example, a relative or close friend of the patient, which acts as a safeguard to protecting vulnerable patients. The Committee notes that the term 'sufficient and genuine interest' is not defined. The Committee refers this issue to the Parliament for consideration of whether the scope of the review provisions and broad terms may unduly impact a person subject to a decision regarding voluntary assisted dying.

11. WATER INDUSTRY COMPETITION AMENDMENT BILL 2021

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

Right to liberty and freedom from arbitrary detention

The Bill provides that a person may, 'without another warrant than this Act', be apprehended by an inspector and taken before a Magistrate or court officer to be dealt with if the person, after being required to do so under section 84G(1), refuses to state his or her name or residential address or states a name or residential address that in the opinion of the inspector is false. It provides that a Magistrate or court officer may make a bail decision under the *Bail Act 2013* about the person and, if the person has not been charged with an offence, the *Bail Act 2013* applies as if the person were accused of an offence.

The Bill appears to permit an inspector to apprehend a person pursuant to a warrant that is not subject to any external oversight, and potentially where a person provided their name and address in accordance with the requirements of section 84G, but in the opinion of the inspector the name or address provided is false. If the name or address provided by the person is not in fact false, it is unclear if the person is guilty of an offence. The inspector's opinion is not subject to a requirement of 'reasonableness'.

It also provides that a Magistrate or court officer may make a bail decision as if the person were accused of an offence, even where they have not been charged. The Committee is concerned that a person brought before a Magistrate or court officer, but not charged with an offence, may not fit within the definition of an 'accused person' or 'person accused of an offence' within the meaning of the *Bail Act 2013*. Specifically, because that person has not been charged with or convicted of an offence. Notwithstanding, a bail decision may result in a person being detained for an uncertain period of time given the delays to matters being listed, or released with or without conditions.

The Committee considers that apprehension and/or detention under section 84G may be considered arbitrary or inappropriate, particularly where a person has not been charged with an offence but the *Bail Act 2013* applies as if the person were accused of an offence, in accordance with the Bill.

The Committee considers that the right to liberty and freedom from arbitrary detention are fundamental human rights and that any legislation limiting these rights should only do so to the extent the limitation is compelled by and necessary to meet public interest objectives. Further, that such legislation must include adequate safeguards to prevent undue trespass on

individual rights. The Committee refers the question to Parliament whether there are adequate legislative safeguards to prevent people from being arbitrarily detained under section 84G and whether the application of the *Bail Act 2013* is appropriate.

Privilege against self-incrimination

The Bill explicitly abrogates the privilege against self-incrimination. Section 82A provides that a person is not excused from a requirement under the *Water Industry Competition Act 2006* to provide information or records or to answer a question on the ground that the record, information or answer might incriminate the person or make the person liable to a penalty.

The Committee acknowledges that the Bill legislates certain safeguards, including providing that:

- a person is not guilty of an offence of failing to comply with a requirement under the Act to provide information or records or to answer a question unless the person was warned on the occasion that a failure to comply is an offence, and

- information provided or answers given by natural persons in compliance with a requirement is not admissible in evidence against the person in criminal proceedings (except in proceedings for an offence for providing false or misleading information to an auditor, or to the Minister, IPART or an inspector) if the natural person objected at the time because to do so would incriminate them, or they were not informed they could object.

However, the latter safeguard does not appear to extend to records provided, or further information obtained in compliance with a requirement under the Act. Additionally, the privilege against self-incrimination is also undermined by section 84G as a person is required to provide their name and address or otherwise be apprehended and appear before a Magistrate or court officer, who can make a bail decision.

The Committee acknowledges that the powers to compel answers, information and records are intended to assist inspectors seeking information, including from directors or employees of licensees in relation to breaches or offences committed by licensees against the Act; with such answers, information and records therefore helping to protect public health and safety and the environment.

However, the privilege against self-incrimination is a well-established legal principle. The Committee therefore refers to Parliament the question of whether the explicit abrogation of this right, and the extent of this abrogation, is appropriate, necessary and reasonable in the circumstances.

Real property rights, wide power of inspectors to enter and search

The Bill provides inspectors with the power to enter land, including with the aid of a police officer and use of reasonable force, and to search and do other things on land. The power of the inspector to do things on land is particularly broad, allowing the inspector to do anything that, in their opinion, is necessary to be done for the purposes of Part 7A. These powers interfere with a person's real property rights, including their right to undisturbed enjoyment of their premises (residential or otherwise).

The Committee notes the legislated safeguards:

- An inspector may only apply for a search warrant if the inspector believes on reasonable grounds that a provision of the principal Act or the regulations is being or has been contravened on land, or there is, on land, a matter or a thing that is connected with an offence under the principal Act or the regulations. Although, the definition of 'offence' includes an offence that there are reasonable grounds for believing has been, or is to be, committed. In other words, a search warrant may be applied for on a preventative basis.

- The warrant is granted by an authorised officer, which includes a magistrate but also an employee of the Attorney General's Department authorised for that role. The provision of warrants is therefore subject to external oversight, although not judicial oversight in each case.

- The inspector is obliged to take care on the premises and an individual can be compensated for damage caused by the inspector, although not if the inspection reveals a contravention of the Act or regulations by that person.

It is also notes that the power to enter and search land is intended to investigate contraventions and offences against the Act and regulations. These include contraventions and offences impeding public health. Additionally, that the powers reflect those included in other environmental protection legislation.

The Committee refers the question to Parliament of whether the search warrant regime included in the Water Industry Competition Amendment Bill 2021 has adequate safeguards and limitations on inspectors' powers to protect persons' real property rights.

Real property rights, wide power of inspectors to enter and search

The Bill includes strict liability offences and offences with significant maximum penalties for breaches of its provisions by individuals. The most significant penalty included the Bill is for the offence of operating infrastructure to cause, directly or indirectly, actual or potential harm to the health and safety of human beings. If the operation of the infrastructure involved an act or omission by an individual that was intentional, the maximum penalty is 9000 penalty units ($990 000). If the act or omission was negligent, the maximum penalty is 5500 penalty units ($605 000). A new penalty is also imposed for continuing offences.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of the offence is relevant to the imposition of liability. It also considers the appropriateness of significant penalties applying to offences.

While the Bill includes strict liability offences, significant maximum penalties for certain offences and a new penalty for continuing offences, the Committee acknowledges that such offences and penalties are not uncommon in regulatory contexts and encourage compliance. Compliance is particularly vital in context of both this Bill, which introduces significant changes to the *Water Industry Competition Act 2006*, and the principal Act, which aims to protect public health and safety and the environment, and the interests of consumers. In the circumstances, the Committee makes no further comment.

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

Limitations on evidence considered in administrative review and appeal

The Bill purports to limit what evidence the Civil and Administrative Tribunal and the Land and Environment Court may consider in hearing an application for administrative review of a

decision and an appeal against a decision (respectively). Specifically, it excludes the consideration by the tribunal and court of new material or evidence, despite the application of provisions of other laws. In particular, section 39(3) of the *Land and Environment Court Act 1979*, which the Bill explicitly ousts, permits the consideration on appeal of fresh evidence or evidence in addition to, or in substitution of, the evidence given on the making of the decision. The Committee refers the question to Parliament of whether it is appropriate for the Bill to limit what evidence may be considered by the Civil and Administrative Tribunal and the Land and Environment Court.

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

Commencement by proclamation

The Bill commences (as an Act) on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that the flexible start date may assist with the administrative arrangements required to implement the new system of scheme and operational approvals and operator and retailer licences, and undertake consultation on the supporting regulation. Given the circumstances, the Committee makes no further comment.

Delegation of important matters to regulations

The Bill delegates important matters to the regulations throughout the Bill and explicitly provides a range of regulation-making powers for matters relating to, among other things, water quality and public health, consumer protection and fees and charges payable under the *Water Industry Competition Act 2006*. The Committee considers that the object of this legislation to facilitate innovation in the water industry with a view to encouraging innovation is likely to lead to industry advances and require a degree of flexibility in the legislative regime. The delegation of matters to the regulations helps to facilitate this.

The Bill also increases the maximum penalty for offences created by a regulation, with a maximum penalty for an individual increasing from 100 penalty units ($11 000) to 200 penalty units ($22 000). The Committee generally prefers that provisions which create offences be included in the primary and not the subordinate legislation to allow for an appropriate level of parliamentary scrutiny. However, it acknowledges that this power (for the regulations to create an offence) is currently included in the Act and provides for flexibility in the regulatory regime.

The Committee also notes the Minister's statements the supporting regulation will be released for public consultation early next year. In the circumstances, the Committee makes no further comment.

Part One – Bills
1. Costal Management Amendment Bill 2021

Date introduced	13 October 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Shelley Hancock MP
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The object of this Bill is to defer the date on which certain savings provisions cease to have effect from 1 December 2021 to 1 December 2023. The savings provisions provide that—

   a) a coastal zone management plan in force under the *Coastal Protection Act 1979* (the former Act) continues to have effect until replaced by a coastal management program prepared and adopted under the *Coastal Management Act 2016*, and

   b) certain coastal zone management plans, prepared before the repeal of the former Act and certified after the repeal, are taken to be coastal management programs prepared and adopted under the *Coastal Management Act 2016*.

BACKGROUND

2. The *Coastal Management Act 2016* (the Act) replaced the former *Coastal Protection Act 1979,* establishing a contemporary legislative framework for the management of the NSW coast. Under the Act, local governments which contain coastal areas are required to transition from using Coastal Zone Management Plans (CZMPs) to manage their coastal areas, to a new system of Coastal Management Programs (CMPs). The deadline in the Act for completing this transition is 31 December 2021.

3. This Bill extends the time for completing this transition until 31 December 2023. In her second reading speech to the Bill, the Minister for Local Government, the Hon. Shelley Hancock MP, stated that the Bill will provide local councils with additional time to implement actions in their existing coastal zone management plans. She stated that these plans will deliver the Government's commitment to better manage the costal environment for the wellbeing of the people of New South Wales.

4. Under the provisions currently in the Act, existing CZMPs will cease to have effect on 31 December 2021.

5. Minister Hancock noted that most Councils are progressing with the preparation of their CMPs, however the majority are unlikely to be ready to replace their existing CZMPs with a certified CMP by 31 December 2021.

6. Minister Hancock further noted the difficult circumstances faced by councils in recent times. Councils have been supporting their communities through bushfires, floods and

the COVID-19 pandemic, and Minister Hancock explained as a result that 'programs such as implementing and transitioning to a Coastal Management Program have taken a back seat'.

7. Under section 13 of the Act, a Council is required to have an authorised CMP in order to exercise certain powers in relation to coastal management, including implementing their coastal zone emergency action subplan (clause 15(1)(e)). Under the Act, Schedule 3 Clause 4 allows an authorised CZMP to continue to operate during the transition period (thereby permitting councils to exercise their powers in relation to coastal management) until replaced by a CMP authorised under the Act.

8. Minister Hancock noted that issues may arise if the operation of CZMPs are not extended beyond 31 December 2021, for example emergency works would not be considered exempt activities and would require more complex development approvals. Minister Hancock noted that this situation is causing concern for many coastal Councils who have made representations to her seeking an extension to CZMPs so they can continue to implement agreed actions.

9. The Committee acknowledges that those living, working and operating businesses in council areas where a CZMP is in place will continue to operate under that CZMP beyond what they may have anticipated. However, the extension provided for in the Bill is limited to 2 years, and the Act sets out a process by which CMPs must be published and authorised before they will replace the CZMP. These parameters provide a level of certainty for those individuals that are subject to the scheme's provisions to allow them to know the provisions that applies at any given time in a council area.

ISSUES CONSIDERED BY THE COMMITTEE

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

2. Companion Animals Amendment (Puppy Farms) Bill 2021*

Date introduced	13 October 2021
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 *Companion Animals Act 1998* (the Act) to—

   (a) regulate the conduct of businesses breeding companion animals and other companion animal businesses, and

   (b) provide enforcement powers for the purposes of regulating the conduct of companion animal businesses.

BACKGROUND

2. The Bill amends the *Companion Animals Act 1998*, which sets out the legislative framework for he identification and registration of companion animals and for the duties and responsibilities of their owners. The Principal object of this Act is to provide for the effective and responsible care and management of companion animals.

3. In the second reading speech, the Hon. Emma Hurst MLC, defined puppy farming as the intensive factory farming of dogs to supply to pet trade industry:

> Puppy farming is the intensive factory farming of dogs to supply the pet trade industry. Female dogs are forced to pump out litter after litter in small, barren pens until their bodies can no longer cope. Because of the lack of exercise and the pressure on their bodies to produce repeat litters, many dogs develop serious, painful health conditions. Many puppies born in these farms also suffer from behavioural and medical issues as a result of the terrible conditions.

4. Ms Hurst noted that at the current time, there are no requirements for the minimum number of dogs allowed on a puppy farm, no minimum requirements for staffing, and no caps on the number of litters that any one dog can be forced to endure.

5. Ms Hurst further noted that the size and scale of puppy farming has increased since 2017:

> We do not even know how many puppy farms there are in New South Wales because the industry is so underground and poorly regulated. But we do know that the size and scale of puppy farming in New South Wales has increased since 2017 when the Victorian Government introduced legislation effectively banning this cruel industry. Even before the legislation came into effect, there were reports of puppy farmers moving over the border in caravans to set up shop in New South Wales and take advantage of our weak laws that fail to protect dogs from

> this cruelty. This situation has only worsened as the Victorian legislation has come into force and the demand and price for puppies has skyrocketed during COVID-19 lockdowns.
>
> New South Wales is quickly becoming the puppy farming capital of Australia. We are seeing a huge influx of development applications, particularly in towns in New South Wales that are on the Victorian border.

6. Ms Hurst noted that the companion animal breeding industry in NSW does not require breeders to be registered and regularly inspected under the law. This Bills seeks to address these aspects of the existing legislative framework and improve oversight and traceability of breeders.

ISSUES CONSIDERED BY THE COMMITTEE

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

Real property rights, enforcement powers to enter and search

7. The Bill inserts Division 2 to Part 6A regarding registration of companion animal business premises. This includes provisions relating to applications to register premises (section 61F), renew premises (section 61G), and to transfer the registration of premises (section 61H).

8. Under these sections, subsection (4) provides that if the council proposes to grant the application, an authorised officer of the council must enter and inspect the premises to determine whether the person has complied with business codes of practice that apply to the business.

9. The Bill also inserts Division 3 into Part 7A that sets out powers for enforcements officers in relation to companion animal businesses.

10. Section 69I defines an *enforcement officer* as an authorised officer, a Departmental officer, or an inspector appointed by the Royal Society for the Prevention of Cruelty to Animals, New South Wales, the Animal Welfare League NSW, or the NSW Police Force. A *Departmental officer* is defined to mean an employee of, or other person engaged by, the Office of Local Government who is authorised by the Departmental Chief Executive to exercise the functions of an enforcement officer under this Division.

11. Under section 69J, such enforcement powers include the power to enter a part of residential premises if, in the opinion of the enforcement officer, entry is required urgently because of the existence or reasonable likelihood of a serious risk to the health or safety of a dog or cat, or the loss, concealment or destruction of evidence of the commission of an offence (section 69J).

12. Section 69K also provides that enforcement officers may issue compliance notices and enter property and seize any dog or cat, or all dogs or cats kept in contravention of a provision of Part 6A or a regulation made under that Part, or where, in the opinion of the enforcement officer, there is a serious risk to the health or safety of the dog or cat.

13. Subsection 69K(2) provides that before entering a property under this section, an enforcement officer must give the occupier of the property reasonable notice of the intention to enter the property unless:

- entry is made with the consent of the occupier of the property, or
- entry is, in the opinion of the enforcement officer, required urgently because of the existence or reasonable likelihood of a serious risk to the health or safety of a dog or cat, or
- the giving of the notice would, in the opinion of the enforcement officer, defeat the purpose for which it is intended to enter the property.

14. An enforcement officer may not enter a premises without permission of the occupier, except where there is a serious risk to the health or safety of a dog or cat, or the loss, concealment or destruction of evidence of the commission of an offence. A person that does not comply with a notice issued by an enforcement officer may face a maximum penalty of 250 penalty units ($27 500) for a corporation or 50 ($5 500) penalty units for an individual.

15. Similarly, section 69L enables enforcement officers to enter property and seize dogs and cats from proprietors of companion animal businesses who have had their registration suspended or revoked, or whose registration has expired.

16. Under section 69M, the same penalties will apply to actions done in relation to enforcement officers as they apply in relation to not complying with existing provisions requiring a person to state their name and address to an authorised officer or wilfully obstructing an authorised officer

17. Section 69N requires enforcement officers to be issued identification cards. When exercising a function under this Division, an enforcement officer must, if requested by a person affected by the exercise of the function, produce the officer's identification card for inspection by the person.

The Bill provides a number of powers to enforcement officers under the Bill, including the power to enter and search a premises and issue compliance notices to seize dogs or cats where there is a serious risk to the health or safety of a dog or cat or they are being kept in contravention of the Act. A person that does not comply with a notice issued by an enforcement officer may face a maximum penalty of 250 penalty units ($27 500) for a corporation or 50 ($5 500) penalty units for an individual.

Similarly, section 69L enables enforcement officers to enter property and seize dogs and cats from proprietors of companion animal businesses who have had their registration suspended or revoked, or whose registration has expired. The Bill also extended existing penalties under the Act to obstructing an enforcement officer exercising their powers under the Act. The Committee notes that these provisions provide wide powers of enforcement that may impact on the property rights of individuals.

The Committee recognises the overarching aim of the provisions to prevent animal cruelty that may occur in companion animal businesses. The Committee also notes that the powers of entry cannot be used in situations when the occupier does not provide consent, unless the enforcement officer is of the opinion that it is urgently required serious risk to the health or safety of a

companion animal. Enforcement officers are also required to present identification if asked by a person affected by such enforcement powers. Penalties for non-compliance with such enforcement powers are also monetary in nature, rather than terms of imprisonment, and consistent with the regulatory setting to encourage compliance of businesses. In these circumstances the Committee makes no further comment.

Privacy

18. The Bill inserts Division 3 under Part 6A of the Bill, and sets out provisions in relation to information about registration applications for a companion animal business. Under this Division, the council is required to provide specified information to the departmental Chief Executive about registration applications granted (section 61O), renewed or transferred (section 61P), or applications refused, suspended or revoked (section 61R).

19. The information required to be provided by the council includes the name of the applicant, the name of their companion animal business, their tax file number or Australian business number, and address and contact information as well as details of any animal cruelty offences. The council must also provide information on any other matter as prescribed by the regulations.

The Bill includes requirements for a council to provide the Departmental Chief Executive certain information about registration applications for a companion animal business. This includes providing details such as an applicant's name and business name, tax file number or Australian business number, and contact details. The council must also provide information on any other matter as prescribed by the regulations. This may impact on the privacy of the person to whom this information pertains.

However, the Committee acknowledges that the intent of the provision is to better regulate the conduct of businesses breeding companion animals and other companion animal businesses. The Committee also understand that such information may be protected by privacy laws regarding personal information held by a Department. In these circumstances, the Committee makes no further comment.

Strict liability offences

20. Under Proposed Division 6 of Part 6A, the Bill sets outs a number of the offences relating to companion animal businesses. This includes:

- that a person must not conduct companion animal businesses on unregistered premises (section 61Z)
- proprietors must comply with terms and conditions of registration (section 61ZA) and business codes of practice (section 61ZB)
- proprietors of companion animal breeding businesses must ensure dogs and cats undergo routine veterinary checks (section 61ZD), obtain veterinary certification before breeding (section 61ZE), and must not breed dogs or cats in certain circumstances (section 61ZF)

- proprietors of companion animal breeding businesses must ensure ratio of staff to companion animals kept on registered premises (section 61ZG), keep records of breeding arrangements (section 61ZH), prepare health management plans (section 61ZI), ensure ongoing safety of dogs and cats (section 61ZJ), and comply with certain requirements to cease breeding and retire and rehome dogs and cats (section 61ZK)

- In regards to pet shops, persons must not sell certain companion animals (section 61ZL), proprietors must not receive or sell dogs and cats of certain age (section 61ZN), must keep certain records (section 61ZO), and must not advertise dogs and cats for sale without source numbers (section 61ZP).

21. These offences carry penalties, ranging from 50 to 1000 ($5 500 to $110 000) penalty units or 6 months to 2 year imprisonment, or both, for an individual, and 250 to 5000 ($27 500 to $550 000) penalty units for a corporation.

The Bill contains a number of offences for non-compliance with its provisions in regards to obligations of persons conducting a companion animal business and proprietors of a companion animal breeding business or pet shop. These offences include requirements with conditions of registration, animal health and safety, and animal restrictions on breeding. These offences carry penalties, ranging from 50 to 1000 ($5 500 to $110 000) penalty units or 6 months to 2 year imprisonment, or both, for an individual, and 250 to 5000 ($27 500 to $550 000) penalty units for a corporation.

The Committee notes that these offences amount to strict liability offences. 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 acknowledges the Bill intends to toughen the NSW position on penalties for companion animal breeding. However, given the significant penalties attached to these strict liability offences, including potential imprisonment, the Committee refers the matter to the Parliament for its consideration of whether the penalties are reasonable and proportionate in the circumstances.

3. Constitution Amendment (Virtual Attendance) Bill 2021*

Date introduced	13 October 2021
House introduced	Legislative Council
Member responsible	Mr David Shoebridge MLC
	* Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Constitution Act 1902* to enable members of Parliament to attend meetings of Houses of Parliament remotely.

2. More specifically, the amendments provide that, for the purposes of provisions of the *Constitution Act 1902* relating to ascertaining a quorum for, or determining a question in, a House of Parliament, a member of Parliament is taken to be present at a meeting of the House if the member attends the meeting remotely using an audio or audio visual link, or another method of communication, in accordance with—

   (a) the standing rules and orders of the House, or

   (b) a resolution or sessional order of the House.

3. The new provision has effect for a House of Parliament only if the Presiding Officer of the House has declared that a public emergency exists, including a public health crisis, natural disaster, major accident, civil disturbance or act of terrorism, and it is not safe or practicable for Members of the House to meet in person.

4. The Bill also provides for the repeal of the amendments 5 years after the commencement of the proposed provisions.

BACKGROUND

5. The Bill amends the *Constitution Act 1902* to enable the Houses of Parliament to meet remotely using audio or audio-visual means, or other method of communication, that accords with the standing rules and orders of the House, or a resolution or sessional order of the House.

6. In the second reading speech, Mr David Shoebridge noted that the intention of the Bill was to ensure that democracy and representation can continue even during times of crisis:

> The object of the bill is to amend the Constitution Act 1902 to enable members of Parliament to attend meetings of Houses of Parliament remotely for the purposes of voting and quorum. It is to ensure that democracy and representation can continue even during times of crisis, when it is more important than ever that elected representatives do their jobs to represent their

constituents, oversight Government power and make sure we can pass the laws that are needed to deal with a crisis.

7. Specifically, the Bill inserts proposed subsections 3(2)-(4), which provide:

> (2) For sections 22H, 22I and 32, in relation to ascertaining a quorum for, or determining a question in, a House of Parliament, a Member of Parliament is taken to be present at a meeting of the House if the Member attends the meeting remotely using an audio or audio visual link, or another method of communication, in accordance with—
> (a) the Standing Rules and Orders of the House, or
> (b) a resolution or sessional order of the House.
>
> (3) Subsection (2) has effect for a House of Parliament only if the Presiding Officer of the House has declared that a public emergency exists, including a public health crisis, natural disaster, major accident, civil disturbance or act of terrorism, and it is not safe or practicable for Members of the House to meet in person.
>
> (4) Subsections (2) and (3) and this subsection are repealed 5 years after the date of commencement of the Constitution Amendment (Virtual Attendance) Act 2021.

8. Mr Shoebridge noted that the Bill was being presented after coming out of months of being in a lockdown in which the Parliament did not meet. He stated that this was a simple change that would allow parliament to continue to operate while ensuring members are able to comply with health orders and maximise the safety of members and parliamentary staff.

9. Mr Shoebridge emphasised that these provisions allows for the ongoing function of Parliament with appropriate checks and balances in place to ensure that those powers cannot be misused:

> The change creates a model that allows for the ongoing function of the Parliament, with appropriate checks and balances in place to ensure the powers cannot be misused. It is also drafted so that it does not limit the capacity of either House to have any of its existing functions performed remotely in accordance with existing custom and practice. I include in that the online committee hearings that we have, as well as the remote attendance we have been having from members today.

10. Mr Shoebridge noted that even though members currently attending parliamentary sittings remotely can contribute to debate and they can move motions, they are not considered present in the chamber when determining a minimum quorum and they are not entitled to vote because of the limitations in the constitution. He indicated that the Bill will fix this important issue.

11. Mr Shoebridge stated that the Bill contained two additional safeguards:

> It will still be possible to make other arrangements, like having reduced members present or hybrid sittings, when these are needed and appropriate. After ongoing discussions with colleagues from the Opposition and the crossbench, the bill also incorporates two additional safeguards. The first is that the remote attendance provisions will only operate if the Presiding Officer of the House—for the purposes of the upper House that is the President and for the purposes of the other place, the Legislative Assembly, it is the Speaker—has declared that a public emergency exists, including a public health crisis, natural disaster, major accident, civil disturbance or act of terrorism, and that as a result it is not safe or practical for members of the House to meet in person. That amendment is found in new section 3 (3) of the bill. That

amendment is intended so that this provision is not abused, or potentially abused, in the future to convert real-life sittings of Parliament to remote sittings if the Government of the day wanted, for some reason, to downgrade the status of Parliament.

The second safeguard is the insertion of a sunset clause that sees the new section repealed five years after commencement. Of course, it is hoped that once the section is in place, is working effectively and the sky has not fallen in, the sunset clause will be removed.

ISSUES CONSIDERED BY THE COMMITTEE

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

4. Crimes Amendment (Display of Nazi Symbols) Bill 2021*

Date introduced	13 October 2021
House introduced	Legislative Council
Member responsible	The Hon. Walt Secord MLC
	* Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to prohibit the public display of a symbol of, or associated with, the National Socialist German Workers' Party, the Third Reich or Neo-Nazism (a Nazi symbol), except in certain circumstances.

BACKGROUND

2. The Bill amends the *Crimes Act 1900*, which sets out the consolidated statutes relating to criminal law. Specifically, the Bill amends the Crimes Act to prohibit the public display of Nazi symbols.

3. In the second reading speech to the Bill, the Hon. Walt Secord MLC noted the intention of the Bill was to prohibit the public display of Nazi symbols. Mr Secord highlighted that while the Victorian Government has announced its intention to introduce a bill to prohibit the display of Nazi symbols in public, this would not be until the first half of 2022. For this reason, Mr Secord stated that this Bill has the promise of being an Australian jurisdictional first.[1]

4. However, Mr Secord noted that this would not be a world first, as many European countries have had similar laws for decades:

> We are the first Parliament to formally consider and debate banning the display of Nazi symbols in a public manner. Of course, it would not be a "world first". Many European countries have had similar laws for decades, including Germany, Austria and France where it is unlawful to publicly fly Nazi flags. Even in individual Canadian city jurisdictions the Nazi flag has been banned. In fact, in early August in Hamilton, Ontario, Canada, the city where I was born, city councillors approved a ban on the Nazi symbol. The Canadian municipal leaders also went as far as to ban the Confederate flag, which has also been used by racially motivated protestors, particularly during COVID rallies.

5. Mr Secord further stated:

> … it is still surprising and deeply distressing that we now have a real need to review the legality of flying a Nazi flag in New South Wales and in Australia. It must be recognised that this is in response to the rise of Neo-Nazi activity in Australia and its role in inciting hate behaviour and hate crimes.

[1] Secretariat note: Taken from second reading speech as broadcast by NSW Parliament Webcast livestream on 13 October 2021, subject to verification [if necessary] of Hansard transcription once available.

6. Mr Secord stated that this was a historic bill and that it followed several years of consultation, discussion and advice, and that, if passed, it would show New South Wales taking leadership on the protection of community rights.

ISSUES CONSIDERED BY THE COMMITTEE

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

Freedom of expression and association

7. The Bill amends the *Crimes Act 1900* to prohibit the public display of Nazi symbols. Specifically, the Bill inserts section 93ZA under Part 3A, Division 8 in relation to public hate crimes.

8. Subsection 93ZA(1) provides that a person who, by a public act, displays a Nazi symbol is guilty of an offence that may carry a maximum penalty of 50 penalty units ($5 500) or imprisonment for 6 months, or both, for an individual, or 500 penalty units ($55 000) for a corporation.

9. Subsection 93ZA(2) provides that this section does not apply if the President of the Anti-Discrimination Board has, by order, granted an exemption because the President is satisfied the public act is to be done reasonably and in good faith for—

   (i) academic, artistic, scientific or research purposes in the public interest, or

   (ii) other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

10. The Bill further clarifies that the *Anti-Discrimination Act 1977*, section 126(2)–(11), regarding exemptions by the President, extends to an exemption granted under this section.

11. To avoid doubt, the Bill clarifies that an act may be public even if it occurs on private land, and this section does not apply to a swastika used in connection with Hinduism, Buddhism or Jainism.

12. The Bill contains definitions of key terms. In particular, *symbol* is defined to include an insignia, emblem, banner or flag.

13. Further, a public act is defined to include:

   (a) any form of written or visual communication to the public, including writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods, and

   (b) the wearing or display of clothing, signs or symbols in a way that is observable by the public, and

   (c) the distribution or dissemination of written or visual material to the public.

The Bill amends the *Crimes Act 1900* to prohibit the public display of Nazi symbols. Under subsection 93ZA(1), a person who, by a public act, displays a Nazi symbol is guilty of an offence that may carry a maximum penalty of 50

penalty units ($5 500) or imprisonment for 6 months, or both, for an individual, or 500 penalty units ($55 000) for a corporation.

A public act has been broadly defined to include any form of written or visual communication to the public, including writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods, in addition to the wearing of clothes or distribution of written or vidual material to the public. The Committee notes that this is an inclusive and non-exhaustive definition. To avoid doubt, the Bill also clarifies that an act may be public even if it occurs on private land.

The Committee notes that the Bill therefore places restrictions on a person's freedom of expression and association specifically in regards to the public use of a Nazi symbol as defined by its provisions. The right to association protects a person's freedom to form and join associations to pursue a common goal, and to exchange ideas and information.

The Committee generally comments where legislation limits a person's right to expression or association, as they are core rights contained in Articles 19 and 22 of the International Covenant on Civil and Political Rights (ICCPR).[2]

However, the Committee recognises that the Bill contains exceptions, including that this section does not apply to a swastika used in connection with Hinduism, Buddhism or Jainism, and where a public act is to be done reasonably and in good faith for academic, artistic, scientific or research purposes in the public interest, or other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

The Committee recognises that the intent of the Bill is to protect individuals from activity that may incite or amount to hate behaviour or hate crimes, and the harm such symbols have historically caused in connection with the holocaust. The Committee also recognises that lawful restrictions on the freedom of association and expression may be permitted in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. In these circumstances, and given the exceptions for a public act done in good faith for the public interest discussion and debate, and exceptions for the symbol in connection with Hinduism, Buddhism or Jainism, the Committee makes no further comment.

[2] United Nations, International Covenant on Civil and Political Rights, 1976

5. Energy Legislation Amendment Bill 2021

Date introduced	13 October 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Matthew Kean MP
Member introducing	Felicity Wilson MP (Parliamentary Secretary for the Environment)
Portfolio	Energy and Environment

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the following Acts—

   a) Electricity Supply Act 1995;

   b) Energy and Utilities Administration Act 1987;

   c) Forestry Act 2012;

   d) Gas Supply Act 1996; and

   e) Pipelines Act 1967.

BACKGROUND

2. The Bill makes amendments to various Acts relevant to electricity and gas production, storage, transport and supply in NSW.

3. In the second reading speech, Ms Felicity Wilson MP notes that the Bill serves to improve the administration processes contained in the amended legislation, as well as making consequential amendments required to deliver the Government's energy objectives in relation to the following areas:

   a) the development of the hydrogen and biogas industries;

   b) enabling NSW to opt into the National Regulatory framework for Distribution Service Provider-led standalone power systems;

   c) improving administration of energy systems safeguards including expansion for other fuels and enhanced compliance powers;

   d) modernise the energy emergency framework;

   e) improvements to cyber security for critical infrastructure; and

   f) remove barriers to the use of state softwood plantations for renewable projects.

4. Ms Wilson discussed the policy reasons behind the significant number of changes relating to improving cyber security incident responses, which enhance the powers of

the Premier and Minister to make declarations and enforce compliance with cyber security measures within the energy sector. Ms Wilson stated that ' given the rapid evolution of cyber security risks it is important that critical energy infrastructure has the right processes and systems in place to deal with these threats'.

ISSUES CONSIDERED BY THE COMMITTEE

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

Privacy

5. The Bill amends the *Electricity Supply Act 1995* to insert section 134A into Part 4A Energy security safeguard schemes. Section 134A provides that there is to be a register, maintained by the Scheme Administrator, of persons whose application to be accredited as an accredited certificate provider under the energy security safeguard scheme is refused.

6. This register is to contain information including an individual or company name, an ACN if the person is a company, and the reasons for refusal. Under section 133, the Act requires the Scheme Administrator publish registers on their website.

> **The Bill amends the *Electricity Supply Act 1995* to establish security safeguard schemes, which sets up a register containing details of persons whose applications to be an accredited certificate provider have been refused. The register contains information including a person's name, ACN and reasons for refusal. By allowing information recorded in the register of refused applications to be made publicly available, including information that may be attached to the name of a person, the Bill may impact on the privacy rights of affected persons.**
>
> **However, the Committee notes that the effect of this provision is to increase the amount of publicly available information about those who are accredited to issue certificates under the peak demand reduction scheme. The Committee also recognises that the proposed changes are intended to promote transparency and public trust in NSW's electricity management system and ensure its efficient administration. In these circumstances, the Committee makes no further comment.**

Risk of arbitrary search

7. The Bill amends the *Electricity Supply Act 1995* to insert section 136C into Part 4A, which provides that compliance officers (who are appointed under guidelines that are issued by the Minister) have broad powers to investigate compliance with the energy security safeguard scheme rules. These powers include the power for compliance officers to enter premises that are used in connection with an energy savings activity for which a certificate has been created, as well as the principal place of business of an accredited certificate provider.

8. Compliance officers may not enter a part of premises used only for residential purposes without permission of the occupier.

9. The compliance officer may, at premises they have lawfully entered, examine and test equipment, take photographs, copies and other records, and seize anything they believe on reasonable ground is connected to an offence under Part 4A.

10. A person who hinders or obstructs a compliance officer faces a maximum penalty of 200 penalty units for a corporation, or 50 penalty units for an individual. The *Fines Act 1996* also applies under section 136D.

> **The Bill amends the *Electricity Supply Act 1995* to insert section 136C into Part 4A, which provides that compliance officers have broad powers to investigate compliance with the energy security safeguard scheme rules. This includes the power to enter premises used in connection with an energy savings activity for which a certificate has been created, as well as the principal place of business of an accredited certificate provider. These powers also permit compliance officers to examine and test equipment, take photographs, copies and other records, and seize anything they believe on reasonable ground is connected to an offence under Part 4A. A person who hinders or obstructs a compliance officer can incur a maximum penalty of 200 penalty units ($22 000) for a corporation and 50 ($5 500) penalty units for an individual.**
>
> **By allowing authorised officers to enter private property without notice or a warrant, for the purposes of investigating compliance without evidence of suspicion of breaching Part 4A, the Bill may increase the risk of arbitrary search, impacting on the right to privacy and real property. The Committee recognises that compliance officers may not enter a part of premises used only for residential purposes without permission of the occupier. However, given the wide powers of compliance officers, the Committee refers these matters to Parliament to consider whether the possible privacy and property impacts are reasonable in the circumstances.**

Reversal of onus of proof

11. The Bill amends the *Electricity Supply Act 1995* to insert sections 185(3)(3A – 3C) which regulates the proceedings for offences under Schedule 4A or any regulation made under Schedule 4A.

12. Section 185(3)(3A) provides that proceedings for an offence under Schedule 4A (or associated regulations) may be commenced any time within 2 years after the date on which evidence of the alleged offence first came to the attention of the Scheme Administrator or the Scheme Regulator.

13. Section 185(3)(3B) requires that is that provision is relied upon, the application or court attendance notice must contain particulars of that date.

14. Under section 165(3)(3C), the date which is specified in the application or court attendance notice is taken to be the date on which the evidence first came to the attention of the Scheme Administrator or Scheme Regulator unless the contrary is established. This functionally serves to reverse the onus of proof onto the person who has have the action brought against them as the court assumes that the date put forward by the applicant is correct unless the respondent can prove otherwise.

The Bill amends the *Electricity Supply Act 1995* to insert additional provisions for offences. Proposed subsection 185(3)(3A) provides that proceedings for an offence under Schedule 4A (or associated regulations) may be commenced any time within 2 years after the date on which evidence of the alleged offence first came to the attention of the Scheme Administrator or the Scheme Regulator. If that provision is relied upon, the application or court attendance notice must contain particulars of that date.

The Bill further provides that the date submitted to the court for the purpose of the limitation periods for an offence under Schedule 4A the Act by the Scheme Administrator or Scheme Regulator is true unless proven otherwise by the defendant. This shifts the onus of proof onto the defendant.

A reverse onus may serve to undermine the presumption of innocence, particularly because the requirement for the applicant to put forward particulars justifying the specified date is poorly defined. In circumstances such as these, where the applicant may have greater access to evidence as to the correct date, it may limit the capacity of the defendant to have a fair trial. The Committee refers these matters to Parliament to consider whether the possible impact on the presumption of innocence is reasonable in the circumstances.

Liability of directors and managers for offences by corporation

15. The Bill amends the *Gas Supply Act 1996* to omit and replace section 13 to allow the Minister to impose a monetary penalty on the holder of an authorisation who has knowingly contravened a requirement of the Act. The Bill provides that if the holder of the authorisation is a corporation, an additional monetary penalty not exceeding $50,000 can be imposed on a person who is a director of or concerned in the management of the corporation, only if the Minister is satisfied that the person knowingly authorised or permitted the contravention.

16. The Bill amends the *Electricity Supply Act 199*5 to include a new section 132B, which states that if a corporation is liable to pay a monetary penalty under the clause and, that if a director of the corporation or a person concerned in the management of a corporation knowingly authorised or permitted the contravention, then that person may also be ordered to pay a monetary penalty.

The Bill inserts new executive liability offences into the *Gas Supply Act 1996* and the *Electricity Supply Act 1996*. This means that a director or certain managers of a corporation may be liable for an offence committed by the corporation.

The Committee notes that in the *Gas Supply Act 1996,* the Minister must be satisfied that the person knowingly authorised or permitted the contravention. The Committee notes that this is an example of a lower threshold for the mental element that is required to make an individual liable, however notes that this is not unusual in the regulatory context.

The Committee also notes that the liability under the *Gas Supply Act 1996* cannot exceed $50,000, cannot be a term of imprisonment, and that penalties in the Bill have been increased in line with government policy to protect and ensure the integrity of critical energy infrastructure.

The Committee also notes that the *Electricity Supply Act 1995* requires that the scheme entity issuing a monetary penalty to an individual must conduct a process by which the impacted person can make a submission to the scheme entity issuing the penalty. The scheme entity must be satisfied on the balance of probabilities that the person contravened, or knowingly authorised or permitted the contravention of the relevant provision, and this is a higher threshold for the mental element. Further, under section 139 of the Act, the decisions of scheme administrators is subject to administrative review by the New South Wales Civil and Administrative Tribunal providing an additional layer of due process for impacted individuals. For these reasons, the Committee makes no further comment.

Enforcement powers – direction to provide data, services or take action

17. The Bill amends three Acts, inserting nearly identical sections that allow that Minister to give directions to a network operator, pipeline licensee, or other person specified in the regulations to take action, provide information and otherwise respond to cyber security incidents. The Acts which include these provisions for Ministerial directions in relation to cyber security incidents are:

    i. *Electricity Supply Act 1995* (see Bill Schedule 1 [16] – [23]);

    ii. *Energy and Utilities Administration Act 1987* (see Bill Schedule 2 [2])*;* and

    iii. *Gas Supply Act 1996* (see Bill Schedule 4 [14] – [15]*;*

18. Under these sections, the Bill provides that the Minister may give a written direction to a relevant party (who is the network operator, pipeline licensee or other person specified in the regulations) requiring the party to respond to the impact of a cyber security incident, take action to prevent a cyber security incident from having an impact, and provide information about the incident.

19. Failure to comply with such a direction may incur a maximum penalty of 2,000 penalty units ($220 000) for a corporation and 100 penalty units ($11 000) for an individual.

The Bill amends the *Electricity Supply Act 1995,* the *Energy and Utilities Administration Act 1987,* and the *Gas Supply Act 1996* to enable the Minister to give written directions to certain involved parties for the purposes of managing cyber security incidents involving critical infrastructure, including requiring the parties to provide the Minister with specified data, or take specified actions.

The Committee generally comments where enforcement powers may be used, as they may infringe on the ordinary rights such as the right to privacy or property. In this case, the powers would allow the Minister to obtain records that are the property of certain service providers, and gives the Minister the authority to direct them to take specified actions that may not be ordinarily required.

However the Committee notes that the ability of the Minister to give directions to provide data or take action is to ensure the protection of critical infrastructure from cyber security incidents and ensure minimal disruption to

the provision of electricity to the State. In these circumstances, the Committee makes no further comment.

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

Commencement by proclamation

20. Section 2 provides that the Bill commences (as an Act) on a day or days to be appointed by proclamation.

The *Energy Legislation Amendment Bill 2021* commences (as an Act) on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that the flexible start date may assist with the administrative arrangements required to implement the various amendments across five separate Acts and the related industry changes. Given 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

Ministerial directions

21. The Bill inserts section 94BA, which provides that the Minister may make declarations during the period an electricity supply emergency has been declared by the Premier due to a defined cyber security incident.

22. This power permits the Minister to make directions to a network operator, electricity generator or other person prescribed in the regulations to take specific action to prevent and respond to a cyber security incident. A failure to comply with a direction carries a maximum penalty of 2,000 penalty units ($220 000) for a corporation, or 100 ($11 000) penalty units for an individual, and the requirement to comply with an electricity supply emergency direction has effect despite any other act or law under section 94C(2) of the Act.

The Bill provides that the Minister may make declarations during a period during which an electricity supply emergency has been declared by the Premier due to a defined cyber security incident. These directions can require a relevant person to take any action the Minister considers reasonably necessary to respond to the incident and reduces its impact. This is a wide Ministerial power.

The requirement to comply with a direction has effect despite any other Act or law which would ordinarily apply to these persons, and a failure to do so carries a maximum penalty of 2,000 penalty units ($220 000) for a corporation, or 100 ($11 000) penalty units for an individual.

The Committee generally comments where there is a wide Ministerial power to give directions, as it may impact upon the rights, liberties or obligations of individuals that would be subject to those directions or approvals. A Ministerial direction also delegates legislative power to the Executive, rather than legislating through the Parliament. However, the Committee acknowledges that

responding to cyber security incidents quickly and decisively may be necessary to protect critical infrastructure, which is a key policy reason for implementing the Bill. Such Ministerial directions may provide for a flexible and timely response to these situations. In these circumstances, the Committee makes no further comment.

Declaration by the Premier

23. Section 94A of the *Electricity Supply Act 1995* allows the Premier to declare an electricity supply emergency if;

    i. the supply of electricity to all or any part of the State is disrupted to a significant degree, or

    ii. there is a real risk that the supply of electricity to all or any part of the State may be disrupted to a significant degree.

24. If such a declaration is made by the Premier, it must be published in the Gazette or on the NSW legislation website as soon as practicable after the declaration has been made (section 94A(4)).

25. The Bill proposes to include a new section 94A(c) to include a third circumstance in which the Premier can declare an electricity supply emergency, that is:

    (c) there is a cyber security incident that affects or is likely to affect 1 or more of the following that is responsible for a significant supply of electricity to all or part of the state-

        (i) a distribution system,

        (ii) a distributor,

        (iii) an electricity generator,

        (iv) a transmission operator,

        (v) a transmission system, or

    (d) there is a cyber security incident of a type prescribed by the regulations.

26. If a declaration of an electricity supply emergency is made on these cyber security grounds, the Bill inserts a new section 94A(5) that exempts the Premier from the obligation to publish the declaration or otherwise cause notice to be given to the public. This is particularly relevant as during a period of a declared cyber security emergency, the Bill provides the Minister with broad power under section 94BA to investigate and give directions to protect electricity supply, and failing to comply with direction of the Minister in these circumstances carries a maximum penalty of 2,000 penalty units ($220 000) for a corporation, or 100 ($11 000) penalty units for an individual.

27. The declaration of an electricity supply emergency is not reviewable, and section 179A(1B)(a) deems that no compensation is payable by or on behalf of the state because of the enactment, making or operation of part 7A (including the giving of an electricity supply emergency direction).

The Bill amends the *Electricity Supply Act 1995* and inserts new sections that allow the Premier to declare an electricity supply emergency without publication or public notice of this decision. During the period that the emergency is declared, which is not limited in length under the Act or Bill, the Bill provides that the Minister can issue directions under section 94BA to respond to a cyber security incident. A failure to comply with these directions carries a maximum penalty of 2,000 penalty units ($220 000) for a corporation, or 100 ($11 000) penalty units for an individual.

This declaration is not a reviewable decision, which may limit procedural fairness, particularly because the exemption from publishing or giving public notice reduces the level of scrutiny that can be applied to a declaration. Further, section 179A(1B)(a) of the Act deems that no compensation is payable by or on behalf of the state because of the enactment, making or operation of a declaration (which includes Ministerial directions), which also may impact on the rights of affected persons to seek compensation for a decision that they consider unfairly or improperly burdened them.

Matters, such as those that can be dealt with in the event that an electricity supply emergency is declared, have significant bearing on the delivery of an essential service to the State. In these circumstances, the Committee would usually prefer that, as the directions are tied to such significant monetary penalties they should be included in the regulations to ensure an appropriate level of parliamentary oversight. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. There is no such requirement for the orders of the Premier or Minister.

However, the Committee notes that the publication or giving public notice of the declaration where it has been triggered by a cyber security incident may serve to aggravate the situation, or limit the ability of the government or impacted persons to respond to the incident. Therefore the Committee refers these matters to the Parliament to determine if the exclusion of review and public oversight is justified in the circumstances.

6. ICAC and Other Independent Commissions Legislation Amendment (Independent Funding) Bill 2021*

Date introduced	13 October 2021
House introduced	Legislative Council
Member responsible	The Hon. Robert Borsak MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. A Bill for an Act to make amendments to various Acts to facilitate the administrative independence of the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the New South Wales Electoral Commission and the Ombudsman's Office; 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 was to provide further parliamentary oversight regarding the funding of oversight bodies:

> 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 that this is not a money bill. We are again expecting the Government to object to this bill based on the 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 for the ICAC, which has pleaded for adequate ongoing funding and independence so that it can do its job without fear or favour of government.

5. The Committee notes that a previous reiteration of this Bill was introduced by Mr Borsak in 2020 and reported on by this Committee in Digest No. 24/57 (17 November 2020).[3]

[3] Legislation Review Committee, Legislation Review Digest No. 24/57, 17 November 2020.

Mr Borsak noted that the 2020 bill passed the Legislative Council without amendment, but was defeated in the Legislative Assembly.[4] This report draws upon the analysis of that 2020 bill report.

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 2 amends the *Government Sector Finance Act 2018* 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(3) 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.The Bill further provides that the Treasurer must, at the request of an agency, authorise the payment of

9. 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

[4] See footnote 1.

- 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.

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.

7. Local Government Amendment (COVID-19 – Elections Special Provisions) Bill 2021

Date introduced	13 October 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Shelley Hancock MP
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Local Government Act 1993* to make special provision for the conduct of the 2021 local government elections.

BACKGROUND

2. The Bill amends the *Local Government Act 1993*, which sets out the legislative framework for local government elections administered by the NSW Electoral Commission.

3. In the second reading speech, the Minister for Local Government, the Hon. Shelley Hancock MP stated that the Bill was intended to ensure that the local elections scheduled for 4 December 2021 are able to proceed and that the issues faced by the Electoral Commission as a result of the COVID-19 pandemic are resolved in a timely fashion.[5]

4. The Minister noted that the local election period will commence on 25 October 2021, with a close of rolls and pre-poll voting commencing on 22 November 2021, and election day scheduled for 4 December 2021. Voters will have the opportunity to cast their vote utilising traditional voting channels, namely COVID-safe attendance voting, complimented by postal and technology assisted voting.

5. The Minister further stated that the Electoral Commission had developed a COVID-safe plan for the December 2021 elections, and that regulations have been drafted to support the implementation of that plan. This includes allowing anyone to vote during the pre-poll period and additional criteria to allow voting by postal voting. Technology-assisted voting or iVote will also be made available to electors at council elections and administered by the NSW Electoral Commission for the first time. Eligibility to vote using iVote will also have the same criteria as applied at State elections.

6. The amendments made in the Bill are intended to supplement the amendment already made in the Local Government Regulations to ensure the 2021 local government elections are COVID-safe.

[5] Secretariat note: Taken from second reading speech as broadcast by NSW Parliament Webcast livestream on 13 October 2021, subject to verification [if necessary] of Hansard transcription once available.

ISSUES CONSIDERED BY THE COMMITTEE

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

Henry VIII

7. The Bill amends the *Local Government Act 1993* to provide for the conduct of the 2021 local government elections during a public health emergency caused by the COVID-19 pandemic.

8. The Bill inserts Part 1B, which outlines special provisions for the COVID-19 pandemic—local government elections regulation-making power. Under this Part, proposed section 747C provides that the regulations may modify the application of 1 or more provisions of this Act that apply to the 2021 ordinary elections of councillors for the purposes of responding to the public health emergency caused by the COVID-19 pandemic.

9. Subsection 747C(2) provides that the Minister may recommend to the Governor that regulations be made under this section only if –

> (a) the proposed regulations are in accordance with advice issued by the Electoral Commissioner, and
>
> (b) the proposed regulations are reasonable to protect the health, safety and welfare of persons from risk of harm caused by the COVID-19 pandemic.

10. Subsection 747C(3) provides that the regulations made under this section are not limited by the regulation-making power in this Act, and may override the provisions of this Act.

> **The Bill amends the *Local Government Act 1993* to provide for the conduct of the 2021 local government elections during a public health emergency caused by the COVID-19 pandemic. Specifically, it inserts section 747C which allows special provisions for the local government elections regulation-making power. This includes the ability for the regulations to modify the application of one or more provisions of the Act that apply to the 2021 ordinary elections of councillors to respond to the public health emergency caused by the COVID-19 pandemic. The regulations may also override the provisions of the Act and are not limited by the regulation-making power in the Act.**
>
> **The Committee notes that this amounts to a Henry VIII clause, allowing the Executive to legislate and amend an Act by way of regulation without reference to the Parliament. Under ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by the COVID-19 pandemic, the provisions may provide flexibility to facilitate a timely and appropriate response to conduct local government elections during a public health crisis.**
>
> **The Committee also recognises that this power is somewhat limited, as the Minister may only recommend to the Governor that regulations be made under this section if the proposed regulations are in accordance with advice issued by the Electoral Commissioner, and the proposed regulations are reasonable to protect the health, safety and welfare of persons from risk of harm caused by the COVID-19 pandemic. The Committee also recognises that provisions are**

intended to support of the COVID-19 plan developed by the NSW Electoral Commission for the purpose of facilitating the upcoming local government elections in the current COVID-19 outbreak. In these circumstances, the Committee makes no further comment.

8. Modern Slavery Amendment Bill 2021

Date introduced	14 October 2021
House introduced	Legislative Council
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Public Service and Employee Relations

PURPOSE AND DESCRIPTION

1. The object of this Bill is to make miscellaneous amendments to the *Modern Slavery Act 2018* (the **Principal Act**) to combat modern slavery and provide assistance and support for victims of modern slavery. In particular, the Bill makes further provision to deal with the following—

(a) the date of commencement of the Principal Act,

(b) the functions of the Anti-slavery Commissioner,

(c) co-operation between the Anti-slavery Commissioner and other agencies, including the Commissioner of Police,

(d) reports by the Anti-slavery Commissioner,

(e) the repeal of provisions requiring commercial organisations to prepare modern slavery statements about steps taken to ensure goods and services are not products of supply chains in which modern slavery is taking place,

(f) the repeal of provisions enabling courts to make certain post-conviction orders relating to modern slavery offences,

(g) the clarification of an uncommenced offence in the Crimes Act 1900 dealing with child forced marriage,

(h) the provision of recognition payments under the Victims Rights and Support Act 2013 to certain victims of acts of modern slavery,

(i) other matters of a law revision, machinery or savings and transitional nature.

BACKGROUND

2. The Bill amends the Principal Act to make various provisions, including the date of commencement of the Principal Act on 1 January 2022.

3. In the second reading speech to the Bill, the Minister, the Hon. Don Harwin MLC, noted that the Modern Slavery Act 2018 was introduced by the Hon. Paul Green MLC in 2018

as a private member's Bill. Upon passing the Legislative Assembly, the then Premier took carriage of the Bill in the Legislative Assembly, with amendments, on 6 June 2018.[6]

4. In 2019, the Government provided a draft exposure bill, *the Modern Slavery Amendment Bill 2019,* to the Legislative Council Standing Committee on Social Issues as part of its inquiry into the Modern Slavery Act 2018.[7] The Minister introducing the Bill noted that the Committee subsequently released its report in March 2020, which made 17 recommendations.[8] The Minister noted that the Modern Slavery Amendment Bill 2021 takes into consideration many of the Committee's recommendations.

5. In regards to these amendments, the Minister noted that the Bill would ensure the intended operation of certain provisions in the Act are effective, improve the operation of the Act, enhance protection for the anti-slavery Commissioner, reduce regulatory burden on businesses in NSW, reduce legal risks posed by the Act, and ensure that victims of Modern Slavery can receive recognition payments.

6. The Legislative Review Committee reviewed the Modern Slavery Bill 2018 in Digest 51 of the 56th Parliament.[9]

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to reputation – Absolute privilege

7. The Bill inserts proposed Schedule 5.4A to the Defamation Act 2005, which provides that absolute privilege applies to certain publications arising under the *Modern Slavery Act 2018.*

8. Under this Schedule, proposed clause 35 provides that absolute privilege applies to the following matters published:

   a) to or by the Anti-slavery Commissioner or an acting Anti-slavery Commissioner in their capacity as the Anti-slavery Commissioner or an acting Anti-slavery Commissioner, or

   b) to a member of staff of the Anti-slavery Commissioner in their capacity as a member, or

   c) in a strategic plan under the *Modern Slavery Act 2018*, section 11 (regarding strategic plans), or

   d) in a report under the *Modern Slavery Act 2018*, section 13 (regarding referral of matters to police and other agencies in the State and elsewhere), section 19 (regarding annual reports) or section 20 (regarding reports under the *Children and Young Persons (Care and Protection) Act 1998)*, or

[6] Note: Taken from second reading speech as broadcast by NSW Parliament Webcast livestream on 14 October 2021 in absence of Hansard Transcript at time of writing.

[7] See Legislative Council Standing Committee on Social Issues, Inquiry into the Modern Slavery Act 2018 and associated matters, Tabled document: Consultation Draft – Modern Slavery Amendment Bill 2019, 6 August 2019.

[8] See Legislative Council Standing Committee on Social Issues, Inquiry into the Modern Slavery Act 2018 and associated matters, Final Report No.56 - Modern Slavery Act 2018 and associated matters, 25 March 2020.

[9] Legislation Review Committee, Legislation Review Digest No 51/56, 13 March 2018.

e) in a register under the *Modern Slavery Act 2018*, or

f) in annual reporting information under the *Modern Slavery Act 2018*, section 31.

The Bill provides that absolute privilege applies to certain matters published in relation to the *Modern Slavery Act 2018*. This includes the publication of strategic plans, annual reports, referrals to Police or other agencies, reports under the *Children and Young Persons (Care and Protection) Act 1998*, and in a register under the *Modern Slavery Act 2018*.

Absolute privilege is an immunity from an action that protects a person or class of persons from a law suit, even if the action had a malicious motive or was false. In this case, the application of absolute privilege would prevent defamation action being taken in relation to the specified publications in relation to the *Modern Slavery Act 2018*. This may prevent a course of legal action for a person who has incurred damage or loss as a result of such a publication, such as the right to reputation where any allegation, assertion or inference in such a publication was false.

However, the Committee recognises the intent of the provision is to ensure that the Anti-slavery Commissioner can publish information relating to modern slavery matters without threat of legal action hindering its functions under the Act. In these circumstances, the Committee makes no further comment.

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

Police Commissioner may refuse to provide certain information regarding modern slavery

9. Proposed section 35 provides that the Commissioner of Police is, on request or in accordance with arrangements with the Anti-Slavery Commissioner, to provide the Anti-Slavery Commissioner with information regarding modern slavery and victims of modern slavery. The Anti-Slavery Commissioner is not to disclose information provided under this section except with the written consent of the Commissioner of Police.

10. However, under subsection 35(3) the Commissioner of Police is not required to provide information under this section if the Commissioner of Police reasonably believes that to do so would:

a) prejudice the investigation of a contravention, or possible contravention, of a law in a particular case, or

b) prejudice a coronial inquest or inquiry, or

c) prejudice care proceedings, or

d) contravene legal professional or client legal privilege, or

e) enable the existence or identity of a confidential source of information in relation to the enforcement or administration of a law to be ascertained, or

f) endanger a person's life or physical safety, or

g) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention, or possible contravention, of a law, or

h) not be in the public interest.

11. If the Commissioner of Police refuses to provide information in accordance with a request or arrangements under this section, they must provide the Anti-Slavery Commissioner with reasons in writing for the refusal.

> **Proposed section 35 provides that the Commissioner of Police is, upon request, to provide the Anti-Slavery Commissioner with information regarding modern slavery and victims of modern slavery. The Commissioner of Police may refuse this request to provide information if they reasonably believe that it amounts to confidential police information, for example that would prejudice an investigation, coronial inquest or inquiry, or care proceedings. Other reasons for refusing to provide such information include if it would contravene legal professional privilege, or expose a confidential source, if it would endanger a person's life or physical safety, or not be in the public interest.**
>
> **The Committee notes that this allows the Police Commissioner to withhold sensitive information from the Anti-Slavery Commissioner where it may compromise and investigation or be in the public interest. The Committee notes that there does not appear to be a review mechanism for the Anti-Slavery Commissioner in relation to a refusal to provide such information. It is further noted that any information received by the Anti-Slavery Commissioner under this section may not be disclosed without written consent of the Police Commissioner in any case, providing a safeguard on information that is released. Given the information pertains to issues of modern slavery, and the safeguards around this information, it may be beneficial to allow a review process where a request to provide information is refused. The Committee refers this information to the Parliament for its consideration.**

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

Delegation to the regulations

12. The Bill defers a number of matters to the regulations.

13. For example, proposed subsection 26(3) provides that the regulations may require government agencies to give specified information to the Commissioner for inclusion on the register, and specify the way the information is to be given to the Commissioner.

14. Proposed section 33 provides that proceedings for an offence under this Act or the regulations may be dealt with summarily before the Local Court.

15. Proposed Schedule 3 allows the regulations to contain provisions of a savings or transitional nature consequent on the commencement of a provision of this Act, or a provision amending this Act.

> **The Committee notes that the Bill defers a number of matters to the regulations. The Committee generally comments where matters are deferred to the regulations rather than include them in the primary legislation to allow**

sufficient parliamentary scrutiny. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences.

The Committee notes that the majority of matters delegated to the regulations appear administrative in nature, may allow the regulation to specify such matters in the detail required and provide flexibility where it is required to be updated in a timely manner.

However, the Committee also recognises that the Bill allows the regulations to create offences. The Committee generally prefers significant matters, such as offences and their penalties, to be contained in the principal Act so as to provide a certain level of Parliamentary scrutiny. In these circumstances, the Committee refers this issue to Parliament for its further consideration of whether certain matters regarding offences should be contained in the primary legislation.

9. Public Interest Disclosures Bill 2021

Date introduced	14 October 2021
House introduced	Legislative Council
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Public Service and Employee Relations

PURPOSE AND DESCRIPTION

1. The objects of this Bill are to provide for the protection of persons who make public interest disclosures and to provide for making and dealing with the disclosures. This Bill has been prepared in response to—

   a) the *Review of the Public Interest Disclosures Act 1994*, dated October 2017, by the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, and

   b) *the Report on the inquiry into protections for people who make voluntary disclosures to the Independent Commission Against Corruption*, dated November 2017, by the Joint Committee on the Independent Commission Against Corruption.

2. This Bill repeals and replaces the *Public Interest Disclosures Act 1994* (the Act). In particular, this Bill—

   a) defines the categories of public interest disclosure, and

   b) specifies conditions under which a disclosure is a voluntary public interest disclosure, and

   c) enables a public official to make a voluntary public interest disclosure to an agency whether or not the agency has jurisdiction to investigate the disclosure, and

   d) makes it an offence to take detrimental action against a person based on the suspicion, belief or awareness the person, or another person, has made a public interest disclosure, and

   e) protects persons who make public interest disclosures from detriment and liability in relation to the making of the disclosures, and

   f) requires agencies to adopt policies specifying their procedures for dealing with voluntary public interest disclosures, and

   g) requires agencies to carry out training in relation to the public interest disclosure scheme, and

h) specifies how agencies are to deal with voluntary public interest disclosures and respond to findings of serious wrongdoing or other misconduct, and

i) requires agencies to provide the Ombudsman with an annual return about the public interest disclosures they receive.

3. This Bill also amends certain other Acts to align the protections in this Bill with the protections available under the other Acts to persons who make voluntary disclosures in the public interest or otherwise assist agencies authorised under the other Acts to investigate wrongdoing or misconduct. In particular, this Bill amends protections available under—

a) the *Independent Commission Against Corruption Act 1988*;

b) the *Ombudsman Act 1974*;

c) the *Law Enforcement Conduct Commission Act 2016*; and

d) the *Police Act 1990.*

4. This Bill makes consequential and related amendments to other Acts and instruments.

BACKGROUND

5. This Bill repeals and replaces the *Public Interest Disclosures Act 1994* (the current Act), and sets out a modernised legislative framework for managing information exposed by public officers who make disclosures about serious misconduct or wrongdoing in the NSW public sector, and providing those officers with protection from civil and criminal legal action.

6. In the second reading speech, the Minister for the Public Service and Employee Relations, the Hon Don Harwin MLC stated that 'the Bill will increase protections for people disclosing misconduct or wrongdoing to ICAC, the Ombudsman and the Law Enforcement Conduct Commission.'[10]

7. The Bill has been drafted largely in accordance with recommendations contained in both the *Review of the Public Interest Disclosures Act 1994*, dated October 2017, by the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission (the Act Review), and the *Report on the inquiry into protections for people who make voluntary disclosures to the Independent Commission Against Corruption*, dated November 2017, by the Joint Committee on the Independent Commission Against Corruption (the ICAC Report).

8. The Act Review contained 38 recommendations, and the Minister stated that the Bill incorporates the Committee's recommendations that the disclosure process should be simplified, technicalities that cause disclosures to miss out on protections should be removed, and that the protections around detrimental actions should be enhanced.

9. The Minister stated that the ICAC Report found that the existing protections for people who make disclosures to ICAC likely only apply where a person is required to make the

[10] Note: Taken from second reading speech as broadcast by NSW Parliament Webcast livestream on 14 October 2021 in absence of Hansard Transcript at time of writing.

disclosure, and not to a voluntary disclosure, which the Report raised as an issue that may deter people from reporting corrupt conduct. The Bill has adopted this recommendation and includes protections for people who make disclosures to ICAC.

10. The Bill not only serves to adopt the recommendation of, and harmonise the work of the Committees to review the scheme, it also puts in place a new framework described by the Minister as a 'no wrong door approach' that simplifies the disclosure process and thereby enhances protections for those who make a disclosure. Under the current Act, an individual is only protected if they make their disclosure to the particular agency allocated to that type of disclosure; the Minister gave the example that corrupt conduct under the current Act can only be disclosed to ICAC, otherwise it is not a public interest disclosure and therefore cannot receive that associated protections unless it is deemed to be a misdirected disclosure. The 'no wrong door' approach allows an individual to make a disclosure to any agency and still receive the protections as if they had made the disclosure to the most relevant agency.

11. The 'no wrong door approach' is further supported by the Bill's inclusion of a broader definition of which persons can make public interest disclosures. Like the current Act, the Bill at section 14 states that public officials are persons who can make disclosures for the purposes of the Bill. However, the definition of public officials has been expanded to expressly include statutory officers, as well as contractors, sub-contractors and volunteers.

12. The Bill also provides that disclosures can be made to a broader range of recipients, including their manager, who in turn must then communicate this disclosure to a disclosure officer (this is a mandatory disclosure under the Bill). The Bill also includes Ministers as recipients of a disclosure. The Minister stated that this change is designed to acknowledge the reality that a Minister's role is different from that of a member of Parliament who cannot receive disclosures in the same circumstances. There are however additional measures that limit disclosures to a Minister, for example section 24(3)(c) requires that these disclosures must not be given orally (the effect being that they be made in writing) which is not a requirement when making a disclosure to the other recipients permitted under the Bill.

13. The Bill establishes 3 types of public interest disclosures; voluntary, witness and mandatory.

a) Voluntary disclosure is defined in section 24 as a disclosure made by a person who believes on honest and reasonable grounds that the information the subject of the disclosure reveals wrongdoing. A disclosure of this type will be protected if it is made to any of the list of agencies who can receive a disclosure under the 'no wrong door approach.'

b) Witness disclosure defined in section 22 as a disclosure made in the course of an investigation into serious wrongdoing at the request of or in response to a requirement of a person or agency investigating the serious wrongdoing. However, a disclosure is not a witness public interest disclosure if it is a mandatory public interest disclosure.

c) Mandatory disclosure is defined in section 23 as a disclosure as a disclosure about serious wrongdoing made by a public official carrying out the official's ordinary duties or under a legal obligation.

14. The Bill also increases the maximum penalties for breaches of the Bill, which the Minister stated acknowledges the serious nature of a breach as well as brings this regime in line with penalties for similar offences in the *Independent Commission Against Corruption Act 1988*.

ISSUES CONSIDERED BY THE COMMITTEE

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

Reversal of onus of proof

15. The Bill at section 33(4), and amendments to consolidate the Bill made to the *Independent Commission Against Corruption Act 1988* section 79I(4), *Law Enforcement Conduct Commission Act 2016* s97H(4), the *Police Act 1990* section 206(5) all serve to define when taking action against someone is a detrimental action. Under the Bill, this is an offence that carries a maximum penalty of 200 penalty units or 5 years imprisonment, or both.

16. In a prosecution for a detrimental action offence, the accused bears the onus of proof in relation to the detrimental action established by the prosecution to have been taken by the accused that they did not have the suspicion, belief or awareness of the public interest disclosure (and therefore it was not a detrimental action) or that the suspicion, belief or awareness was not a contributing factor to the taking of the detrimental action.

17. This functionally serves to reverse the onus of proof onto the defendant in regards to the mental element of the offence. Usually, the prosecution has to prove both the physical and mental elements of an offence, and if this is not made out, the defendant is not found guilty of the offence and does to have to resort to putting forward a defence to avoid conviction.

> **The Bill inserts a number of provisions creating offences. Proposed section 33(4) and amendments to consolidate the changes made by the Bill in the *Independent Commission Against Corruption Act 1988*, the *Law Enforcement Conduct Commission Act 2016, the Police Act 1990* provide that in a prosecution for a detrimental action offence, the accused bears the onus of proof in relation to the detrimental action. The accused must prove that they did not have the suspicion, belief or awareness of the public interest disclosure (and therefore it was not a detrimental action) or that the suspicion, belief or awareness was not a contributing factor to the taking of the detrimental action. This shifts the onus of proof for the mental element of the offence onto the defendant.**
>
> **The Bill also inserts sections 35(4), which reverses the onus of proof onto the defendant if the same conduct arises in a civil claim for damages.**
>
> **In regards to both the civil and criminal actions, the reverse onus may undermine the presumption of innocence. Further, the legal issues surrounding the mental element of a crime or civil claim are complex and a defendant, who may be more likely than the prosecution not to obtain legal counsel, may find it challenging to appropriately articulate their case which may compromise their**

right to a fair trial. This is particularly relevant considering that both the civil and criminal provision have significant allowances for penalties; the civil offences provide that exemplary damages can be sought, and for the criminal offence the maximum penalty is 200 penalty units or 5 years imprisonment, or both.

The Committee refers these matters to Parliament to consider whether the possible impact on the presumption of innocence is reasonable in the circumstances.

Threshold for protections - Requirement for a voluntary public interest disclosure to members of Parliament or journalists to be substantially true

18. Under section 28(1)(a), a disclosure made to a member of Parliament or a journalist is only a public interest disclosure if it is (amongst other requirements included in sections 25-28) substantially true. This means that a person who makes a disclosure to a member of Parliament or a journalist will only receive the protection afforded to voluntary public interest disclosures if they were definitely correct in their assessment that the information they disclosed both met the relevant criteria set out in the Bill and was substantially true.

19. This requirement for the disclosure to be substantially true is only required for disclosures made to members of Parliament or journalists. Disclosures made to recipients specified in the Bill are classified as voluntary public interest disclosures under section 26(1) if the maker of the disclosure honestly, and on reasonable grounds, believes the disclosures shows or tends to show serious wrongdoing. The requirement for disclosure to be based on honest and reasonable belief is a significantly lower standard than the disclosure having to be substantially true.

20. The Minister stated that NSW has a comprehensive array of integrity and other public agencies capable of investigating voluntary public interest disclosures, and therefore this section operates as an appropriate safeguard to require the disclosure to be true before conferring protections on a person disclosing what may be confidential or defamatory matter.[11] The Minister emphasised that this will only serve as 'a final safety net in the very rare circumstance where integrity agencies or other integrity agencies or other agencies are aware of misconduct but have failed [to investigate]'.[12]

21. However, the Act Review recommended that the requirement be brought into line with disclosures to other recipients, as the higher threshold for MPs and journalists may discourage disclosures and may not be necessary considering the other actions an individual must take to disclose the matter to an integrity or other agency and allow that agency due time to undertake an investigation prior to the disclosure to a member of Parliament or a journalist.[13]

The Bill creates the requirement for voluntary public interest disclosures made to members of Parliament and journalists to be substantially true. The same requirement does not apply to disclosures to other recipients (such as integrity

[11] See note 1.

[12] See note 1.

[13] Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, *Review of the Public Interest Disclosures Act 1994* tabled 19 April 2018, p 15.

agencies) which requires only that a person honestly believe on reasonable grounds that the disclosure shows or tends to show serious wrongdoing.

The Committee notes that the Minister stated that the intent of this strict requirement was to prevent inaccurate matters, which may be defamatory or confidential, from being disclosed in the public arena where it could have a lasting impact on the individuals or agency the subject of the disclosure.

However, the Committee notes that this requirement sets not only a high bar, but also may leave the disclosing individual in a state of flux where it is unclear if they will receive the protections of the Bill. This is because further investigation may be required to prove the veracity of the disclosure, or in some cases it may not be possible to make a determination as to whether a disclosure is substantially true. Therefore, this section 28(1)(a) may leave individuals without protection, which may reduce the incentive for individuals to make public interest disclosures, or expose them to civil liability. The Committee refers the matter to Parliament for further consideration as to whether this standard of belief is appropriate in the circumstances.

Self-incrimination

22. The Bill under section 41(1) (and amendments consolidating this section to the *Independent Commission Against Corruption Act 1988* section 79O, and the *Law Enforcement Conduct Commission Act 2016* section 97N) does not extend protection to makers of public interest disclosures against civil and criminal liability in regards to past conduct of the person that is disclosed when making a public interest declaration. This means that someone who makes a disclosure, but reveals information about their own conduct that is not a public interest disclosure, may incur liability for this conduct.

23. The Attorney-General does have the power under section 41(2) to give an undertaking that the disclosure, including the conduct that is not a public interest disclosure, is not admissible in evidence against the person in relation to civil and criminal proceedings, other than proceedings relating to the falsity of the disclosure. This undertaking can be conditional or unconditional, and may be recommended by an integrity agency. This may leave the person who has disclosed information about their own conduct along with a public interest disclosure in a position where they may have to incriminate themselves and then request an undertaking.

24. Further, under section 65, a public official is also required to use their best endeavours to assist in an investigation of serious wrongdoing if asked to do so by a person dealing with a voluntary public interest disclosure on behalf of an agency. If their assistance involves making a witness or mandatory public interest disclosure, they may receive protection under Part 3 of the Bill, however this is also subject to section 41(1) discussed above. Further, the information they are compelled to disclose using their best endeavours may not be considered a witness or mandatory public interest disclosure for the purposes of the Bill. This may also leave a public official in a circumstance in which they must make a disclosure in order to comply with this section that incriminates them.

25. The Act Review noted that the Ombudsman in their submission had raised concerns that 'placing a legislative requirement on reporters and other staff may result in people

involved in the reporting process incriminating themselves.'[14] However, the ICAC Report supported a discretionary approach to granting protection against self-incrimination, though the Committee notes their recommendation was for that discretion to be vested in ICAC or the Director of Public Prosecutions.[15]

26. Section 9 of the Bill provides that the Bill does not affect a person's privilege against self-incrimination, be it at common law or under statute, however this may not guarantee an individual protection against liability.

> **The Bill provides protection for makers of public interest disclosures against civil and criminal liability under section 40. However, under section 41(1), this does not extend to providing protection against liability for past conduct of the person that is disclosed while making a public interest declaration, and section 65 requires that a public official use their best endeavours to assist an investigation into a voluntary public interest disclosure. This means that someone who makes a disclosure, or assists with an investigation and also reveals information about their own conduct that is not a public interest disclosure, may incur liability for this conduct.**
>
> **The Attorney-General may grant a conditional or unconditional undertaking under section 41(2) to shield the disclosing person from that evidence being raised against them in civil or criminal proceedings. Further, section 9 provides that the Bill does affect a person's privilege against self-incrimination, be it at common law or under statute.**
>
> **However, there may be circumstances where neither an undertaking nor the common law or statutory protections against self-incrimination are a complete shield from liability for the disclosing person. This may be appropriate in some circumstances, where the common law or other statutes do not intend to provide a shield for certain behaviour. However, the Bill may leave a person in a situation where they may hesitate to make a public interest disclosure due to a concern that they would have to rely on being granted an undertaking to shield them from liability, which would be an uncertainty prior to making the disclosure.**
>
> **It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her. The Committee however recognises that the Bill does compel some individuals to make disclosures to protect against serious misconduct and malpractice, and further requires the co-operation of public officials to fully and properly investigate voluntary public interest disclosures. The Committee also notes that section 9 reinforces the primacy common law and other statutory rights protecting individuals against self-incrimination. The Committee refers the matter to Parliament to consider whether this impact on the privilege against self-incrimination is reasonable in the circumstances.**

[14] Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, *Review of the Public Interest Disclosures Act 1994* tabled 19 April 2018, p 42.

[15] Committee on the Independent Commission Against Corruption, *Protections for People who make Voluntary Disclosures to the ICAC* tabled 16 November 2017, p 24.

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

Power of the Attorney–General to grant an undertaking

27. The Bill under section 41(1) does not extend protection to makers of public interest disclosures against civil and criminal liability in regards to past conduct of the person that is disclosed when they making a public interest declaration. This means that someone who makes a disclosure, but reveals information about their own conduct that is not a public interest disclosure, may incur liability for this conduct.

28. The Attorney General does have the power under section 41(2) to give an undertaking that the disclosure, including the conduct that is not a public interest disclosure, is not admissible in evidence against the person in relation to civil and criminal proceedings, other than proceedings relating to the falsity of the disclosure if, in the Attorney-General's opinion, it is appropriate to do so. This undertaking can be conditional or unconditional, and may be recommended by an integrity agency. This may leave the person who has disclosed information about their own conduct along with a public interest disclosure in a position where their right to protection from self-incrimination is unduly dependant on the Attorney General's power to grant an undertaking, which may not be sufficiently defined.

29. The Committee notes that the ICAC Report supported a discretionary approach to granting protection against self-incrimination, though the Committee notes their recommendation was for that discretion to be vested in ICAC or the Director of Public Prosecutions, not the Attorney General as is stated in the Bill.[16] The Committee acknowledges the ICAC Report also recommended that this discretion be limited in acknowledgement that those who have committed serious misconduct are held to account, whilst acknowledging that instances such as where an informant makes a voluntary disclosure about someone else's conduct and the disclosure reveals the informant has illegally obtained evidence of that conduct, it may be appropriate to provide them with protection.[17]

> **The Bill under section 41(1) does not extend protection to makers of public interest disclosures against civil and criminal liability in regards to past conduct of the person that is disclosed when they making a public interest declaration. This means that someone who makes a disclosure, but reveals information about their own conduct that is not a public interest disclosure, may incur liability for this conduct. The Attorney-General does have the power under section 41(2) to give an undertaking that the disclosure, including the conduct that is not a public interest disclosure, is not admissible in evidence against the person in relation to civil and criminal proceedings. This action may be recommended by an integrity commission, and can be conditional or unconditional.**
>
> **The Attorney General may provide an undertaking if in their opinion it is appropriate. There is no further definition or clarification of what would**

[16] Committee on the Independent Commission Against Corruption, *Protections for People who make Voluntary Disclosures to the ICAC* tabled 16 November 2017, p 24.

[17] Committee on the Independent Commission Against Corruption, *Protections for People who make Voluntary Disclosures to the ICAC* tabled 16 November 2017, p 25.

constitute appropriate circumstances to grant an undertaking, nor when a conditional or unconditional undertaking would be more appropriate. The Bill may therefore grant the Attorney General an ill-defined administrative power.

The Committee acknowledges that the provisions are intended to allow the government to flexibly respond to the circumstances a disclosure arises in, which may be highly varied and unpredictable. However, the Committee prefers provisions that grant administrative power to be drafted with sufficient precision, so that their scope and content is clear. This is particularly the case in regards to protection from self-incrimination, as the criminal and civil penalties for misconduct can be significant. The Committee refer the provisions to Parliament to consider whether they contain an insufficiently defined administrative power.

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

Commencement by proclamation

30. Section 2 provides that the Bill commences (as an Act) on the day that is 18 months after the date of assent, or an earlier day or days to be appointed by proclamation.

31. In his second reading speech, the Minister stated that the Government intends to propose a more flexible commencement clause to ensure agencies are fully prepared to comply with the Bill because it imposes increased obligations. For example, the requirement for agencies to have public interest disclosure policies under section 42.

The Bill commences (as an Act) on a day or days to be appointed by proclamation, and the Minister has indicated that a proclamation will be issues. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes that the flexible start, and the Minister's proposed flexible commencement clause may assist with the administrative arrangements required to implement the various amendments across other legislation and the related changes across agencies. Given the circumstances, the Committee makes no further comment.

10. Voluntary Assisted Dying Bill 2021*

Date introduced	14 October 2021
House introduced	Legislative Assembly
Member responsible	Mr Alex Greenwich MP
	* Private Member's Bill

PURPOSE AND DESCRIPTION

1. The objects of the *Voluntary Assisted Dying Bill 2021* (the **Bill**) are to—

   i. enable eligible persons with a terminal illness to access voluntary assisted dying, and

   ii. establish a procedure for, and regulate access to, voluntary assisted dying, and

   iii. establish the Voluntary Assisted Dying Board and provide for the appointment of members and functions of the Board.

BACKGROUND

2. The Bill is co-sponsored by 28 members of parliament, including Mr Greenwich.

3. In the Second Reading Speech, Mr Greenwich stated that the Bill follows the same eligibility process and safeguards as bills passed in all other states.[18]

4. Mr Greenwich undertook public consultation and drew on feedback from health, aged care and regulatory stakeholders, and Australian practice, to prepare the Bill.[19]

5. The Committee notes it commented on a bill entitled *Voluntary Assisted Dying Bill 2017* in Digest No. 44/56.[20]

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to life

6. The Bill enables eligible persons to voluntarily end their lives with assistance, in accordance with the legislated procedure.

7. Section 16(1) of the Bill sets out the eligibility requirements, requiring that a person:

[18] Note: Taken from second reading speech as broadcast by NSW Parliament Webcast livestream on 14 October 2021 in absence of Hansard Transcript at time of writing.

[19] Alex Greenwich, *Voluntary Assisted Dying Bill*, 27 September 2021.

[20] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 44/56, 10 October 2017.

i. is an adult,

ii. is an Australian citizen, a permanent resident or has been a resident for at least 3 continuous years,

iii. has ordinarily been a NSW resident for at least 12 months (although an exemption may be granted if the person has a substantial connection to NSW and there are compassionate grounds),

iv. has been diagnosed with a disease, illness or medical condition that:

1. is advanced, progressive and will cause death,

2. will, on the balance of probabilities, cause death within 12 months for a neurodegenerative disease, illness or condition, or otherwise 6 months, and

3. is causing suffering to the person that cannot be relieved in a way the person considers tolerable,

v. has decision-making capacity,

vi. is not acting because of pressure or duress, which includes abuse, coercion, intimidation, threats or undue influence, and

vii. makes a request for access to voluntary assisted dying that is enduring.

8. Section 16(2) of the Bill states that a person is not eligible to access voluntary assisted dying merely because the person has a disability within the meaning of section 7(1) of the *Disability Inclusion Act 2014* or a mental impairment within the meaning of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020.*

9. The Bill includes various safeguards in relation to voluntary assisted dying, including for example:

i. a multi-stage request and assessment process in order for a person to access voluntary assisted dying, involving reviews of the person by at least two medical practitioners (being the coordinating practitioner and consulting practitioner), and at times additional reviews by other medical practitioners or persons on referral in relation to specific eligibility criteria,

ii. that a person can only be eligible to access voluntary assisted dying if they satisfy the eligibility criteria requiring, among other things, that they have decision-making capacity and are not acting because of pressure or duress,

iii. that a person assessed as meeting the eligibility criteria must be informed of treatment and palliative care options by both the coordinating practitioner and consulting practitioner as part of their independent assessments,

iv. that a person who makes a first request to a medical practitioner for access to voluntary assisted dying may at any time not continue with the request and assessment process,

v. that key people involved in a person's request and assessment process are only eligible to participate if they:

1. are not a family member of the patient, or

2. they do not know or believe they are a beneficiary under a will of the patient or may otherwise benefit financially or in any other material way from their death (other than in the case of the reasonable fees in certain cases),

vi. including their coordinating practitioner, consulting practitioner, medical practitioner or other person to whom the patient is referred, interpreter (if relevant) and witnesses to the person's written declaration requesting access to voluntary assisted dying. This eligibility requirement does not apply to the contact person, whose role is to receive the prescribed substance and, where the patient makes a self-administration decision, prepare the substance, supply it to the patient and return unused or any remaining prescribed substance to an authorised disposer,

vii. review by the Supreme Court of certain decisions made by a patient's coordinating practitioner, consulting practitioner or the Voluntary Assisted Dying Board on a number of grounds, including a decision by the consulting practitioner or coordinating practitioner that the person has or does not have the requisite decision-making capacity or is or is not acting voluntarily or because of pressure or duress,

viii. the creation of offences, including for the unauthorised administration of a prescribed substance or inducing another person to self-administer a prescribed substance, each of which have a maximum penalty of imprisonment for life, and

ix. oversight by the Voluntary Assisted Dying Board, created by the Bill, to (among other things) monitor its operation and make certain decisions as part of the request and assessment process, including about voluntary assisted dying substance authorities. The Bill amends the *Ombudsman Act 1974* to provide that the conduct of the Board may be the subject of a complaint to the Ombudsman.

10. It is also noted that the Bill includes principles which a person exercising a power or performing a function under the Bill must have regard to. These include, among others:

i. every human life has equal value, and

ii. a person's autonomy, including in relation to end of life choices, should be respected, and

iii. all persons, including health practitioners, have the right to be shown respect for their culture, religion, beliefs, values and personal characteristics. This principle is supported by provisions which allow practitioners who have a conscientious objection to voluntary assisted dying or otherwise to refuse to participate in any part of the voluntary assisted dying process.

The *Voluntary Assisted Dying Bill 2021* enables eligible persons with a terminal illness to voluntarily end their lives with assistance, in accordance with the legislated procedure.

The Committee considers that any voluntary assisted dying scheme should include robust legislative safeguards. In this regard, the Committee notes there are a number of safeguards included in the Bill, such as:

- **a multi-stage request and assessment process in order for a person to access voluntary assisted dying,**
- **eligibility criteria to access voluntary assisted dying which requires, among other things, that the patient has decision-making capacity, is not acting because of pressure or duress, and will, on the balance of probabilities, die within the next 6-12 month period (depending on the type of disease, illness or condition),**
- **the requirement that key people involved in a person's request and assessment process must not be a family member of or know or believe they may benefit financially from the patient's death, although this does not extend to the patient's contact person,**
- **review by the Supreme Court of certain decisions made in the request and assessment process, including decisions relating to a person's decision-making capacity or whether they are acting voluntarily,**
- **creation of offences, including in relation to the unauthorised administration of a prescribed substance and inducing another person to administer a prescribed, each of which have a maximum penalty of imprisonment for life,**
- **oversight and monitoring of the Bill by the Voluntary Administration Board, whose own conduct may be subject of a compliant to the Ombudsman.**

The Committee acknowledges and respects the wide-ranging views and discussions in relation to voluntary assisted dying. In particular, it acknowledges that the Bill may be seen to provide legislative sanction to the premature loss of life and trespass on the right to life and, alternatively, that it upholds an individual's dignity and personal autonomy in relation to end of life choices. The Committee notes this issue for the consideration of the Parliament.

Freedom of expression

11. The Bill provides that certain decisions made in accordance with its provisions may be reviewed by the Supreme Court. Specifically, certain decisions made by a patient's coordinating practitioner, consulting practitioner or the Voluntary Assisted Dying Board as set out in section 109.

12. Section 131 makes it an offence for a person to publish information about Supreme Court proceedings (including proceedings, decisions or orders) that discloses personal

information about a party to the proceedings and others persons involved in the request and assessment process, including the patient and their medical practitioners. A maximum penalty of imprisonment for 12 months applies.

13. For the purposes of this offence, 'publish' means to disseminate to the public or a section of the public by any means, including in a newspaper or periodical publication or by radio broadcast, television, a website, an online facility or other electronic means.

The Voluntary Assisted Dying Bill 2021 makes it an offence with a maximum penalty of 12 months' imprisonment for a person to publish information about Supreme Court proceedings regarding the review of certain decisions in the voluntary assisted dying request and assessment process that discloses personal information about a party to the proceedings and other persons involved in the request and assessment process, including the patient and their medical practitioners. For the purposes of this offence, 'publish' means to disseminate to the public or a section of the public by any means, including in a newspaper or periodical publication or by radio broadcast, television, a website, an online facility or other electronic means.

This offence regulates the content that may be published by any means, including media publications, and limits the right to freedom of expression. However, this right is not absolute and can be limited to protect the rights and reputations of others. In this case, the prohibition on publishing personal information protects the right to privacy of the specified individuals, which notably includes the patient and their medical practitioners. The scope of this limitation to personal information appears to be appropriate in the circumstances, as it does not limit publication of other information about the proceedings which may be in the public or political interest to disseminate.

The Committee considers the offence to appropriately balance the right to freedom of expression and individuals' right to privacy and makes no further comment.

Offences – significant penalties and strict liability

14. Part 7 of the Bill creates various offences, including offences which may result in imprisonment. These include, for example:

a) administering a prescribed substance without authorisation, with a maximum penalty of imprisonment for life,

b) inducing another person to self-administer a prescribed substance, with a maximum penalty of imprisonment for life,

c) inducing a person to make a request for access to voluntary assisted dying or access voluntary assisted dying, with a maximum penalty of 7 years' imprisonment or summary conviction penalty of 330 penalty units ($36 300) or 3 years' imprisonment, or both,

d) advertising a Schedule 4 poison or Schedule 8 poison as a voluntary assisted dying substance, with a maximum penalty of 330 penalty units ($36 300) or 3 years' imprisonment, or both, and

e) failure by a patient's contact person to return any unused or remaining prescribed substance to an authorised disposer as soon as practicable and not later than 14 days of the patient's revocation of their self-administration decision or death (as relevant), with a maximum penalty of 12 months' imprisonment.

15. Certain offences included in Part 7 are strict liability offences.

16. The Bill also includes other various strict liability offences resulting in a maximum penalty in each case of 100 penalty units ($11 000). For example:

a) failure by practitioners to complete approved forms as part of the request and approval process, and provide a copy to the board in the requisite time period,

b) failure of a coordinating practitioner to provide a copy of forms and documents received to the Board, including a patient's written declaration,

c) a Board member's non-disclosure of a material personal interest in a matter being considered or about to be considered by the Board, and

d) a person employed by or otherwise engaged by or acting for an official voluntary assisted dying care navigator service intentionally disclosing a copy of the list of registered health practitioners or information on that list, except in certain circumstances,

17. In the Second Reading Speech, Mr Greenwich stated that the offences protect against misuse of voluntary assisted dying and will act in addition to the safeguards that are built into the statutory process.[21]

> **The Bill creates offences with significant penalties. The most significant of these penalties are for the offences of administering a prescribed substance without authorisation or inducing another person to self-administer a prescribed substance, each with a maximum penalty of imprisonment for life. Custodial sentences also attach to other offences, including for example inducing a person to make a request for access, or access voluntary assisted dying, or advertising a Schedule 4 poison or Schedule 8 poison as a voluntary assisted dying substance.**
>
> **The Committee notes that a court may impose a sentence on an offender under the *Crimes Sentencing Procedure (Act) 1999*, for a number of purposes including to adequately punish, to deter the offender and other persons, to make the offender accountable, to denounce the conduct of the offender and recognise harm done to the victim of crime and community. Taking into account these purposes, the seriousness of the offences created and the intent of the offences to protect against misuse of voluntary assisted dying, the Committee makes no further comment on the significance of the penalties.**
>
> **The Bill creates various strict liability offences. The Committee generally comments on strict liability offences because they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. However, it notes that these offences are not uncommon in a**

[21] See footnote 1.

regulatory context to encourage compliance. Compliance is important in this instance to protect against misuse of the scheme, its efficient administration and sufficient oversight. In the circumstances, the Committee makes no further comment.

Payment for work performed - interpreters

18. Section 188 of the Bill sets out requirements for the interpreter of a patient. One of these requirements is that the interpreter must not know or believe that that they are a beneficiary under a will of the patient or that they may otherwise benefit financially or in any other material way from the death of the patient. The interpreter must also be accredited.

19. However, the corresponding eligibility requirement for a coordinating practitioner, consulting practitioner, administrating practitioner and a medical practitioner, psychiatrist, registered health practitioner or other person to whom the patient is referred carves out the right for the person to receive reasonable fees for the provision of their services or acting in the role.

The Bill requires that people who provide professional services to the patient regarding voluntary assisted dying must not know or believe that they are a beneficiary under a will of the patient or otherwise benefit financially or in any other material way from the death of the patient.

In relation to a coordinating practitioner, consulting practitioner, administrating practitioner and a medical practitioner, psychiatrist, registered health practitioner or other person to whom the patient is referred, this requirement makes clear that those persons are able to receive reasonable fees for the provision of services or acting in the role. However, this is not made clear in relation to the provision of services by accredited interpreters.

It is therefore unclear if interpreters are able to receive reasonable fees for provision of services under the Bill. This may impact the right to payment for services performed of interpreters. The Committee notes the provision is an important safeguard as it ensures that interpreters involved do not gain financially by the patient's request and assessment for voluntary assisted dying. However the Committee also recognises that the role of an interpreter may require the engagement of professional interpreting services for a reasonable fee. Such fees do not appear to be provided for under the Bill. The Committee refers this issue 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

Definition of eligible applicant

20. Section 109 allows an eligible applicant to apply to the Supreme Court for the review of certain decisions made by a patient's coordinating practitioner, consulting practitioner or the Voluntary Assisted Dying Board on a number of grounds, including a decision by the:

    i. patient's coordinating practitioner or consulting practitioner in a first assessment or consulting assessment (respectively) that the patient:

1. has or has not ordinarily been a resident of NSW for a period of at least 12 months,

2. has or does not have the requisite decision-making capacity, or

3. is or is not acting voluntarily, or because of pressure of duress, or

ii. patient's coordinating practitioner to make a statement in a final review form certifying that the practitioner is satisfied the patient:

1. has or does not have the requisite decision-making capacity, or

2. in requesting access to voluntary assisted dying, is or is not acting voluntarily, or because of pressure or duress,

iii. Board to refuse an application for a voluntary assisted dying substance authority.

21. The Supreme Court's review is to be dealt with by way of a new hearing and evidence and information may be given in addition to, or substitution for, information previously provided.

22. An 'eligible applicant' means:

i. a patient who is the subject of a decision subject to review,

ii. a person who has been appointed by the patient as their agent, or

iii. another person who has a sufficient and genuine interest in the rights and interests of the patient in relation to voluntary assisted dying.

23. The Bill also provides:

i. that the Supreme Court, in exercising its review jurisdiction, must have regard to the principles set out in section 4 of the Bill, and

ii. what the Supreme Court may decide in deciding a review application, under section 113.

24. Where the Court decides contrary to the reviewed decision that the patient satisfies the relevant eligibility criterion or that a ground to refuse to issue a voluntary assisted dying substance authority does not exist, section 114 allows the Court to set the reviewed decision aside and substitute its decision for the reviewed decision.

The *Voluntary Assisted Dying Bill 2021* provides that an eligible applicant may apply to the Supreme Court for a review of certain decisions made by a patient's coordinating practitioner, consulting practitioner or the Voluntary Assisted Dying Board. Specifically, decisions regarding whether the patient satisfies certain eligibility criteria and the refusal of a voluntary assisted dying substance authority. Under the Bill, the Court may set aside a decision of a primary decision-maker and substitute its decision for the reviewed decision.

The Committee notes that an 'eligible applicant' includes another person who has a sufficient and genuine interest in the rights and interests of a patient in

relation to voluntary assisted dying. This broadens who may apply for a review of a decision beyond the person subject to a decision regarding voluntary assisted dying. The category may include, for example, a relative or close friend of the patient, which acts as a safeguard to protecting vulnerable patients. The Committee notes that the term 'sufficient and genuine interest' is not defined. The Committee refers this issue to the Parliament for consideration of whether the scope of the review provisions and broad terms may unduly impact a person subject to a decision regarding voluntary assisted dying.

11. Water Industry Competition Amendment Bill 2021

Date introduced	13 October 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Melinda Pavey MP
Portfolio	Water, Property and Housing

PURPOSE AND DESCRIPTION

1. The object of the *Water Industry Competition Amendment Bill 2021* (the **Bill**) is to amend the *Water Industry Competition Act 2006* (the **principal Act**) as follows—

    i. to change the current licensing regime from a system of licensing private sector entities that supply water and sewerage services to a system of—

        1. scheme and operational approvals, authorising the construction and operation of certain water industry infrastructure schemes, respectively, and

        2. operator licences and retailer licences,

    ii. to clarify the types of water infrastructure to be covered by the regime,

    iii. to enable certain local councils to apply for an approval or licence,

    iv. to increase the maximum penalty for an offence against the principal Act if the operation of infrastructure causes serious potential or actual harm to public health or safety,

    v. to provide for deemed contracts for water or sewerage services between certain owners of premises and licensed operators and licensed retailers of a regulated scheme,

    vi. to establish last resort arrangements and require contingency planning for the continued provision of certain essential services under the principal Act,

    vii. to increase certain penalties for offences,

    viii. to establish enforcement powers for IPART and its inspectors,

    ix. to expand the auditing and reporting functions of IPART.

2. The Bill also makes consequential amendments to various Acts and regulations.

BACKGROUND

3. This Bill repeals and replaces the *Water Industry Competition Amendment (Review) Act 2014*.

4. In the second reading speech, the Minister stated:

> The reforms contained in the bill are designed to strengthen the regulatory framework for private utilities in light of the experience of the past 15 years. The reforms will ensure the framework is fit for purpose as the sector continues to grow, while also reducing costs and delays in the licensing process so that private utilities are in a better position to boost water recycling and urban greening, and help accelerate new housing supply.
>
> Implementing these reforms will provide certainty and reduce red tape for industry and increase protection for customers. …In 2014, following a comprehensive review, the Government enacted major reforms to the WIC Act. However, the Water Industry Competition Amendment (Review) Act 2014 has not commenced operation due to concerns about the complexity and practicality of some of its provisions.
>
> Since that time my department has been working with the Independent Pricing and Regulatory Tribunal—the regulator under the WIC Act—to simplify that regulatory framework while retaining its benefits. That work has resulted in the amending bill before us, which repeals and replaces the 2014 Water Industry Competition Amendment (Review) Act. Most of the provisions in the bill were debated and passed by Parliament in 2014. Although there are important changes to the design of the regulatory framework to make it work better, the policy objectives have not changed substantially from 2014.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to liberty and freedom from arbitrary detention

5. Section 84G of the Bill provides that an inspector may:

   i. require a person whom the inspector suspects on reasonable grounds to have committed, or to be committing, an offence against this Act or the regulations to state his or her full name and residential address, and

   ii. request a person who is required under this section to state his or her full name and residential address to provide proof of the name and address. It is not an offence to fail to comply with the request.

6. The section goes on to provide that a person may, 'without another warrant than this Act', be apprehended by the inspector and taken before a Magistrate or court officer to be dealt with according to the law if the person, after being required to do so, refuses to state his or her name or residential address or states a name or residential address that in the opinion of the inspector is false. The Magistrate or court officer may make a bail decision under the *Bail Act 2013* about the person. If the person has not been charged with an offence, the *Bail Act 2013* applies as if the person were accused of an offence.

7. Section 7 of the *Bail Act 2013* provides that bail can be granted under that Act to a person accused of an offence. 'A person accused of an offence' or an 'accused person' is defined in section 4 of that Act to include the following:

i. a person who has been charged with or convicted of an offence,

ii. a person whose conviction for an offence is stayed,

iii. a person in respect of whom proceedings on an appeal against conviction or sentence for the offence are pending,

iv. a person in respect of whom a new trial has been ordered to be held for an offence.

8. Section 82A(1) states that a person is not guilty of an offence of failing to comply with a requirement under this Act to provide information or records or to answer a question unless the person was warned on the occasion that a failure to comply is an offence.

9. The Bill inserts section 73D into Part 7 of the principal Act, setting out offences. Section 73D provides that a person must not, for the purposes of the principal Act, give an inspector (or the Minister or IPART), whether orally or in writing, information or a document that the person knows to be false or misleading in a material particular, unless the person informs the person or body of that fact. A maximum penalty of 5000 penalty units ($550 000) for an individual attaches to this offence.

The Bill provides that a person may, 'without another warrant than this Act', be apprehended by an inspector and taken before a Magistrate or court officer to be dealt with if the person, after being required to do so under section 84G(1), refuses to state his or her name or residential address or states a name or residential address that in the opinion of the inspector is false. It provides that a Magistrate or court officer may make a bail decision under the *Bail Act 2013* about the person and, if the person has not been charged with an offence, the *Bail Act 2013* applies as if the person were accused of an offence.

The Bill appears to permit an inspector to apprehend a person pursuant to a warrant that is not subject to any external oversight, and potentially where a person provided their name and address in accordance with the requirements of section 84G, but in the opinion of the inspector the name or address provided is false. If the name or address provided by the person is not in fact false, it is unclear if the person is guilty of an offence. The inspector's opinion is not subject to a requirement of 'reasonableness'.

It also provides that a Magistrate or court officer may make a bail decision as if the person were accused of an offence, even where they have not been charged. The Committee is concerned that a person brought before a Magistrate or court officer, but not charged with an offence, may not fit within the definition of an 'accused person' or 'person accused of an offence' within the meaning of the *Bail Act 2013*. Specifically, because that person has not been charged with or convicted of an offence. Notwithstanding, a bail decision may result in a person being detained for an uncertain period of time given the delays to matters being listed, or released with or without conditions.

The Committee considers that apprehension and/or detention under section 84G may be considered arbitrary or inappropriate, particularly where a person has not been charged with an offence but the *Bail Act 2013* applies as if the person were accused of an offence, in accordance with the Bill.

The Committee considers that the right to liberty and freedom from arbitrary detention are fundamental human rights and that any legislation limiting these rights should only do so to the extent the limitation is compelled by and necessary to meet public interest objectives. Further, that such legislation must include adequate safeguards to prevent undue trespass on individual rights. The Committee refers the question to Parliament whether there are adequate legislative safeguards to prevent people from being arbitrarily detained under section 84G and whether the application of the *Bail Act 2013* is appropriate.

Privilege against self-incrimination

10. The Bill inserts Part 7A into the principal Act, which provides the Minister, IPART or an inspector appointed by the Minister or IPART with various enforcement powers for specified purposes. These powers include the power of the Minister, IPART and/or an inspector (as relevant), whether or not a power of entry under the Part has been exercised, to:

    i. require a person to provide information and/or records under section 84D,

    ii. require answers to questions under section 84E, and

    iii. demand a name and address of a person under section 84G. As set out above, section 84G may result in a person being apprehended by an inspector and taken before a Magistrate or court officer if the person, after being required to do so, refuses to state his or her name or residential address or states a name or residential address that in the opinion of the inspector is false. The section states that the Magistrate or court officer may make a bail decision under the *Bail Act 2013* about the person, meaning they could be detained or released, with or without conditions.

11. Following the entry of an inspector onto land, an inspector may also require records to be produced for inspection under section 84J.

12. The Bill inserts section 82A, which provides as follows:

    (1) A person is not guilty of an offence of failing to comply with a requirement under this Act to provide information or records or to answer a question unless the person was warned on the occasion that a failure to comply is an offence.

    (2) A person is not excused from a requirement under this Act to provide information or records or to answer a question on the ground that the record, information or answer might incriminate the person or make the person liable to a penalty.

    (3) However, information provided or answer given by a natural person in compliance with a requirement under this Act is not admissible in evidence against the person in criminal proceedings, except proceedings for an offence against section 73C or 73D, if—

        (a) the person objected at the time to doing so on the ground that it might incriminate the person, or

        (b) the person was not warned on that occasion that the person may object to providing the information or giving the answer on the ground that it might incriminate the person.

(4) A record provided by a person in compliance with a requirement under this Act is not inadmissible in evidence against the person in criminal proceedings on the ground that the record might incriminate the person.

(5) Further information obtained as a result of information or a record provided or of an answer given in compliance with a requirement under this Act is not inadmissible on the ground—

(a) that the information or records had to be provided or the answer had to be given, or

(b) that the information or record provided or answer given might incriminate the person.

(6) This section extends to a requirement under this Act to state a person's name and address.

13. In the Second Reading Speech, the Hon. Melinda Pavey MP stated:

> The bill abrogates the privilege against self-incrimination in certain circumstances to strengthen the capacity of the Minister, IPART and inspectors to properly investigate breaches of the Act. The Minister, IPART and inspectors appointed by the Minister or IPART will have the power to compel persons to provide documents and information and to answer questions. A person will not be excused from complying with such a requirement because the record, information or answer might incriminate the person or make the person liable to penalty. Those provisions would mainly be used when investigators are seeking information from directors or employees of licensees in relation to breaches or offences committed by the licensees. For example, if inspectors were investigating a water contamination incident, they would be able to compel employees of a private water utility to answer questions about the incident. The abrogation of the privilege is considered appropriate and proportionate in this instance, given the serious public health and safety risks that can attach to breaches of the Act and the provision of water and sewerage services.

14. The Bill also omits section 88 of the principal Act. Section 88(1) includes that a person must not, without reasonable excuse, refuse or fail to comply with a notice served under section 87 requiring a licensee to keep specified records or furnish specified information to IPART. Section 88(2) states that, without limitation, a reasonable excuse includes that to comply with the notice might tend to incriminate a natural person or make the person liable to any forfeiture or penalty.

The Bill explicitly abrogates the privilege against self-incrimination. Section 82A provides that a person is not excused from a requirement under the *Water Industry Competition Act 2006* to provide information or records or to answer a question on the ground that the record, information or answer might incriminate the person or make the person liable to a penalty.

The Committee acknowledges that the Bill legislates certain safeguards, including providing that:

- **a person is not guilty of an offence of failing to comply with a requirement under the Act to provide information or records or to answer a question unless the person was warned on the occasion that a failure to comply is an offence, and**

- **information provided or answers given by natural persons in compliance with a requirement is not admissible in evidence against the person in criminal proceedings (except in proceedings for an offence for providing false or misleading information to an auditor, or to the Minister, IPART or an inspector) if the natural person objected at the time because to do so would incriminate them, or they were not informed they could object.**

However, the latter safeguard does not appear to extend to records provided, or further information obtained in compliance with a requirement under the Act. Additionally, the privilege against self-incrimination is also undermined by section 84G as a person is required to provide their name and address or otherwise be apprehended and appear before a Magistrate or court officer, who can make a bail decision.

The Committee acknowledges that the powers to compel answers, information and records are intended to assist inspectors seeking information, including from directors or employees of licensees in relation to breaches or offences committed by licensees against the Act; with such answers, information and records therefore helping to protect public health and safety and the environment.

However, the privilege against self-incrimination is a well-established legal principle. The Committee therefore refers to Parliament the question of whether the explicit abrogation of this right, and the extent of this abrogation, is appropriate, necessary and reasonable in the circumstances.

Real property rights, wide power of inspectors to enter and search

15. The Bill inserts Division 3, Part 7A into the principal Act, providing for the entry and search of land.

16. Under section 84H, an inspector may enter land at a reasonable time, with the aid of police officers, as the inspector considers necessary, and with the use of reasonable force. Entry may be effected to the land with the authority of a search warrant under the Division.

17. Section 84I clarifies that Division 3 does not empower an inspector to enter part of land used only for residential purposes without the permission of the occupier or the authority of a search warrant under the Division.

18. Section 84J provides that the inspector may, on land lawfully entered, do anything that in the opinion of the inspector is necessary to be done for the purposes of Part 7A, including but not limited to one or more of the following:

    i. examine and inspect works,

    ii. take and remove samples,

    iii. make examinations, inquiries and tests that the inspector considers necessary,

iv. take photographs, films, audio, video and other recordings that the inspector considers necessary,

v. require records to be produced for inspection,

vi. examine and inspect records,

vii. copy records,

viii. seize anything that the inspector has reasonable grounds for believing is connected with an offence against the principal Act or the regulations, which includes a power to seize:

1. a thing to which the commission of the offence relates, and

2. a thing that will afford evidence of the commission of the offence, and

3. a thing that was used for the purpose of committing the offence,

where a reference to an 'offence' includes reference to an offence that there are reasonable grounds for believing having been committed,

ix. for the purposes of the paragraph above, direct the occupier of the land where the thing is seized to keep it on that land or at another place under the control of the occupier, and

x. other things that the inspector is empowered to do under Part 7A.

19. Search warrants are issued under section 84K, which provides that:

i. an inspector may apply to an authorised officer for the issue of a search warrant if the inspector believes on reasonable grounds that a provision of the principal Act or the regulations is being or has been contravened on land, or there is, on land, matter or a thing that is connected with an offence under the principal Act or the regulations. An 'offence' includes an offence that there are reasonable grounds for believing has been, or is to be, committed.

ii. an authorised officer may, if satisfied there are reasonable grounds for doing so, issue a warrant authorising the named inspector to enter the land, including premises or part of premises used for residential purposes, and exercise a function of an inspector under the Division.

iii. the *Law Enforcement (Powers and Responsibilities) Act 2002*, Part 5, Division 4 applies to a search warrant issued under this section. This Division includes procedural requirements in relation to the application for and execution of search warrants, including covert search warrants.

20. An authorised officer means an authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*, being a Magistrate or Children's Magistrate, register of Local Court or an employee of the Attorney General's Department authorised by the Attorney General as an authorised officer for the

purposes of the *Law Enforcement (Powers and Responsibilities) Act 2002* as the holder of a specified office.

21. Section 84N requires an inspector to do as little damage as possible in exercising a function of entering or searching land under this Division. The Minister or IPART must compensate all interested parties for loss or damage caused by an inspector, but not for loss or damage where the inspector's inspection reveals a contravention of the principal Act or the regulations by the person that suffers loss or damage.

22. In the Second Reading Speech, the Hon. Melinda Pavey provided that the Bill gives inspectors investigative powers similar to those in the *Protection of the Environment Operations Act 1997* and the *Water Management Act 2000*, including the powers to question and identify persons, require information or records, examine equipment, enter land, undertake tests and take samples.

The Bill provides inspectors with the power to enter land, including with the aid of a police officer and use of reasonable force, and to search and do other things on land. The power of the inspector to do things on land is particularly broad, allowing the inspector to do anything that, in their opinion, is necessary to be done for the purposes of Part 7A. These powers interfere with a person's real property rights, including their right to undisturbed enjoyment of their premises (residential or otherwise).

The Committee notes the legislated safeguards:

- **An inspector may only apply for a search warrant if the inspector believes on reasonable grounds that a provision of the principal Act or the regulations is being or has been contravened on land, or there is, on land, a matter or a thing that is connected with an offence under the principal Act or the regulations. Although, the definition of 'offence' includes an offence that there are reasonable grounds for believing has been, or is to be, committed. In other words, a search warrant may be applied for on a preventative basis.**

- **The warrant is granted by an authorised officer, which includes a magistrate but also an employee of the Attorney General's Department authorised for that role. The provision of warrants is therefore subject to external oversight, although not judicial oversight in each case.**

- **The inspector is obliged to take care on the premises and an individual can be compensated for damage caused by the inspector, although not if the inspection reveals a contravention of the Act or regulations by that person.**

It is also notes that the power to enter and search land is intended to investigate contraventions and offences against the Act and regulations. These include contraventions and offences impeding public health. Additionally, that the powers reflect those included in other environmental protection legislation.

The Committee refers the question to Parliament of whether the search warrant regime included in the Water Industry Competition Amendment Bill

2021 has adequate safeguards and limitations on inspectors' powers to protect persons' real property rights.

Real property rights, wide power of inspectors to enter and search

23. The Bill includes various strict liability offences applying to individuals, for example:

    i. under section 7I(2), failure by a registered operator operating water infrastructure to comply with conditions of the relevant scheme approval, or ensure compliance by other persons engaged by it or acting on its behalf, which results in a maximum penalty of 3500 penalty units ($385 000),

    ii. under section 8J, failure by the licensee to comply with conditions of the licence, which results in a maximum penalty of 3500 penalty units ($385 000), and

    iii. under section 66A, on-selling a drinking water service to another person unless the person also supplies a sewerage service to the other person, or both services are the subject of a single contract between the person (that on-sells the service) and the other person. This results in a maximum penalty of 500 penalty units ($550).

24. The Bill also includes significant maximum monetary penalties for contraventions by individuals of its various provisions.

25. The most significant penalty included in the Bill is the maximum penalty for an offence against the principal Act if the operation of infrastructure causes serious potential or actual harm to public health or safety. The prosecution must prove the elements of the offence set out under section 82B, including that the act or omission that directly or indirectly causes the actual or potential harm was intentional or negligent. In the case of an individual, this penalty incurs a maximum penalty of:

    i. 9000 penalty units ($990 000), if the act or omission was intentional, or

    ii. 5500 penalty units ($605 000) if the act or omission was negligent.

26. The Bill also inserts section 96A which imposes an additional penalty for continuing offences. If an offence against a provision of the Act is committed by a person by reason of a continuing act or omission, a person is liable for an additional penalty up to one-tenth of the maximum penalty prescribed for the offence for each day it continues.

    The Bill includes strict liability offences and offences with significant maximum penalties for breaches of its provisions by individuals. The most significant penalty included the Bill is for the offence of operating infrastructure to cause, directly or indirectly, actual or potential harm to the health and safety of human beings. If the operation of the infrastructure involved an act or omission by an individual that was intentional, the maximum penalty is 9000 penalty units ($990 000). If the act or omission was negligent, the maximum penalty is 5500 penalty units ($605 000). A new penalty is also imposed for continuing offences.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of the offence is relevant to the imposition of liability. It also considers the appropriateness of significant penalties applying to offences.

While the Bill includes strict liability offences, significant maximum penalties for certain offences and a new penalty for continuing offences, the Committee acknowledges that such offences and penalties are not uncommon in regulatory contexts and encourage compliance. Compliance is particularly vital in context of both this Bill, which introduces significant changes to the *Water Industry Competition Act 2006*, and the principal Act, which aims to protect public health and safety and the environment, and the interests of consumers. In the circumstances, the Committee makes no further comment.

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

Limitations on evidence considered in administrative review and appeal

27. As part of the new system of scheme and operational approvals and operator and retailer licences introduced by the Bill, the Bill includes that:

    i. an application may be made to the Civil and Administrative Tribunal for an administrative review of certain decisions specified in section 11, and

    ii. appeals against certain decisions set out in section 11A may be made to the Land and Environment Court.

28. The Bill provides what material the Civil and Administrative Tribunal and the Land and Environment Court may consider.

29. Section 11(6) provides that in determining an application for an administrative review of a decision under this part, the Civil and Administrative Tribunal is to consider what the correct and preferable decision is, based on the material available to the decision-maker at the time of the decision, and disregard new material or new evidence provided by the applicant. Section 11(7) states that subsection (6) has effect despite provisions of the *Administrative Decisions Review Act 1997* and the *Civil and Administrative Tribunal Act 2013*.

30. Section 11A(4) of the Bill states that, despite section 39(3) of the *Land and Environment Court Act 1979*, in determining an appeal against a decision under this Part, the Land and Environment Court is not to have regard to new material or new evidence provided by the appellant that was not available to the person who made the decision, to which the application relates, at the time of the decision. Section 39(3) of the *Land and Environment Court Act 1979* provides that an appeal in respect of a decision shall be by way of rehearing and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given on appeal.

The Bill purports to limit what evidence the Civil and Administrative Tribunal and the Land and Environment Court may consider in hearing an application for administrative review of a decision and an appeal against a decision (respectively). Specifically, it excludes the consideration by the tribunal and

court of new material or evidence, despite the application of provisions of other laws. In particular, section 39(3) of the *Land and Environment Court Act 1979*, which the Bill explicitly ousts, permits the consideration on appeal of fresh evidence or evidence in addition to, or in substitution of, the evidence given on the making of the decision. The Committee refers the question to Parliament of whether it is appropriate for the Bill to limit what evidence may be considered by the Civil and Administrative Tribunal and the Land and Environment Court.

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

Commencement by proclamation

31. Section 2 provides that the Bill commences (as an Act) on a day or days to be appointed by proclamation.

The Bill commences (as an Act) on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that the flexible start date may assist with the administrative arrangements required to implement the new system of scheme and operational approvals and operator and retailer licences, and undertake consultation on the supporting regulation. Given the circumstances, the Committee makes no further comment.

Delegation of important matters to regulations

32. The Bill amends section 101 of the principal Act to include that the regulations may:

i. make provision for or about the matters set out in Schedule 2,

ii. create an offence punishable by a penalty not exceeding, for a corporation, 1000 penalty units ($100 000) and, for an individual, 200 penalty units ($22 000),

iii. apply, adopt or incorporate the provisions of a standard, code, specification or other document, either as in force on a particular day or as in force for the time being,

iv. provide for conditional or unconditional exemptions from specified provisions of the principal Act, and

v. make provision for or about the payment of fees by instalments.

33. Section 101 of the principal Act currently provides for the matters set out at subparagraphs (i)-(iii) above. However, the maximum penalties for an offence created by the regulations is currently lower, at 250 penalty units in the case of a corporation ($27 200) and 100 penalty units in any other case ($11 000).

34. Schedule 2 of the principal Act sets out regulation-making powers, including matters relating to:

i. water quality and public health,

ii. construction and maintenance of water industry infrastructure,

iii. consumer protection,

iv. developments,

v. access to infrastructure services,

vi. administration, and

vii. other matters.

35. The Bill amends Schedule 2 to include additional matters relating to:

i. operation of water industry infrastructure (in addition to construction and maintenance of such infrastructure),

ii. water industry audits, and

iii. fees and charges (payable under the principal Act).

36. Various matters are also delegated to the regulations by provisions of the Bill, including for example the terms and conditions of a deemed customer contract for regulated schemes under section 46AB.

37. In the Second Reading Speech, the Hon. Melinda Pavey stated that the Department will release the supporting regulation (including the terms and conditions of a deemed customer contract under section 46AB) for public consultation early next year:

> The bill also addresses a regulatory gap by providing new sewage, water recycling and stormwater harvesting schemes run by metropolitan councils under the WIC Act framework. Currently, such schemes are not regulated. The regulations will specify which new schemes proposed by metropolitan councils will be captured. The regulation will focus on stormwater harvesting and other sewage or water recycling schemes that warrant regulatory oversight to protect public health and safety. Duplication with other regulatory frameworks will be avoided. For example, the regulation will not deal with schemes involving only occupational risks because such schemes are already covered by work health and safety requirements. The Government is mindful of the need to keep regulatory costs down, particularly in relation to stormwater irrigation schemes that reduce pressure on rain-fed supplies and improve urban amenity. The department will be consulting metropolitan councils on the contents of the supporting regulation early in the new year.

The Bill delegates important matters to the regulations throughout the Bill and explicitly provides a range of regulation-making powers for matters relating to, among other things, water quality and public health, consumer protection and fees and charges payable under the *Water Industry Competition Act 2006*. The Committee considers that the object of this legislation to facilitate innovation in the water industry with a view to encouraging innovation is likely to lead to industry advances and require a degree of flexibility in the legislative regime. The delegation of matters to the regulations helps to facilitate this.

The Bill also increases the maximum penalty for offences created by a regulation, with a maximum penalty for an individual increasing from 100 penalty units ($11 000) to 200 penalty units ($22 000). The Committee generally prefers that provisions which create offences be included in the primary and not the subordinate legislation to allow for an appropriate level of parliamentary scrutiny. However, it acknowledges that this power (for the regulations to create an offence) is currently included in the Act and provides for flexibility in the regulatory regime.

The Committee also notes the Minister's statements the supporting regulation will be released for public consultation early next year. In the circumstances, the Committee makes no further comment.

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.