Legislation Review Committee

PARLIAMENT OF NEW SOUTH WALES

Legislation Review Digest No. 44/57 - 7 June 2022

New South Wales Parliamentary Library cataloguing-in-publication data:

A catalogue record for this
book is available from the
National Library of Australia

ISSN: 1448-6954

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

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Membership

Chair	Mr Dave Layzell MP, Member for the Upper Hunter
Deputy Chair	Mr Lee Evans MP, Member for Heathcote
Members	The Hon. Scott Barrett MLC Ms Abigail Boyd MLC Mr David Mehan MP, Member for the Entrance The Hon. Shaoquett Moselmane MLC Mr Peter Sidgreaves MP, Member for Camden Mr Nathaniel Smith MP, Member for Wollondilly
Contact details	Legislation Review Committee Parliament of New South Wales 6 Macquarie Street Sydney NSW 2000
Telephone	(02) 9230 2144 / (02) 9230 2390
E-mail	Legislation.Review@parliament.nsw.gov.au
Website	www.parliament.nsw.gov.au/lrc

Guide to the Digest

Comment on Bills

1.1 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 section 8A(1)(b) of the *Legislation Review Act 1987* (**LRA**).

Comment on Regulations

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

Summary of Conclusions

PART ONE – BILLS

1. ANIMAL RESEARCH AMENDMENT (RIGHT TO RELEASE) BILL 2022*

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

Strict liability offences

The Bill would create two strict liability offences under new sections 54C(1) and 54F of the *Animal Research Act 1985*. A strict liability offence does not require the mental element (*mens rea*), such as knowledge or intent, in order to prove the offence.

Under section 54C(1), an authorised person commits an offence if they fail to take reasonable steps to rehome a relevant animal where the animal ceases to be used for research, or after 3 years – whichever occurs first in time. The maximum penalty is 30 penalty units ($3 300). The only circumstance in which failing to rehome an animal will not be an offence is when a veterinary practitioner with relevant experience provides a certificate stating the relevant animal is unsuitable for rehoming (section 54E). Under section 54F, an authorised person commits an offence if they fail to keep certain records of each relevant animal kept for research. An offence against section 54F carries a maximum penalty of 20 penalty units ($2 200).

These offences do not require the mental element to be proven and are therefore considered strict liability offences. But for the exception under section 54E, the Bill is also silent on whether any specific defences are available to negate or diminish criminal liability.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. However, the Committee notes that strict liability offences are not uncommon in regulatory contexts to encourage compliance. In the circumstances, the Committee makes no further comment.

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

Significant matters that may be included in subordinate legislation

The Bill would amend, and enable the creation of, further regulations on significant matters under various provisions. For example, Schedule 2 of the Bill proposes changes to the *Animal Research Regulation 2021* by imposing further reporting obligations on accredited research establishments and holders of animal research authorities. Proposed section 54A refers to the Regulation for guidance on the criteria which must be satisfied for a person to be deemed a 'suitable individual'. The new section 54C(2)(g) defers to the Regulation information relevant to the criteria for determining whether reasonable steps have been taken by an authorised person in rehoming an animal, and section 54C(5) provides that regulations may prescribe requirements for a database maintained under this section.

The Committee generally prefers that the prescription of significant matters, such as criteria that can give rise to the imposition of an offence under section 54C(2)(g), to be included in primary legislation. This is in order for these provisions to be subject to an appropriate level of scrutiny. However, the Committee notes that regulations may provide more flexibility and be more efficient in dealing with changes to the meaning of 'reasonable steps'. In the circumstances, the Committee makes no further comment.

2. CHILD PROTECTION (WORKING WITH CHILDREN) AMENDMENT BILL 2022; CHILDREN'S GUARDIAN AMENDMENT BILL 2022

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

Right to presumption of innocence – duty to disclose

The *Child Protection (Working with Children) Amendment Bill 2022* proposes inserting section 36C into the *Child Protection (Working with Children) Act 2012*, which would impose a duty on individuals applying for or who hold a Working with Children Check clearance, to disclose any charges, convictions or findings of guilt for criminal offences in jurisdictions outside Australia. Failure to disclose that information within 10 days of being made aware or upon making an application is an offence which carries a maximum penalty of $550.

The Bill also expands the list of prescribed criminal offences which automatically trigger a requirement for a risk assessment of an applicant under Schedule 1 of the Act to include charges, convictions or findings of guilt for similar criminal offences in overseas jurisdictions. As a consequence, applicants who are required to disclose information of overseas charges pending determination for criminal offences may be automatically subject to a risk assessment. This may mean that a person who has not yet been found guilty of an offence in an overseas jurisdiction may still have their charges considered by the Children's Guardian in considering their application for a clearance or otherwise in their suitability to continue holding such a clearance.

These provisions may thereby impact a person's right to the presumption of innocence, which protects an accused person's privilege to be presumed innocent until proved guilty according to law.

However, the Committee notes that the automatic assessment trigger under the Act does not require the Children's Guardian to make an adverse decision in respect to the individual's application or clearance, and individuals retain their right to seek an administrative review in the NSW Civil and Administrative Tribunal. It also acknowledges that these amendments are intended to implement National Standards for Working with Children Checks and enhance protections for vulnerable children in the care of the State by taking a cautious approach to past criminal offending. In the circumstances, the Committee makes no further comment in respect to the substantive provisions.

The Committee also notes that the duty of disclosure set out in proposed section 36C applies to 'a criminal offence' and thus appears to be sufficiently broad to capture all foreign criminal offending. However, subsection (6) includes a definition for 'prescribed criminal offence' which is more narrowly defined to those offences specified by the Schedules to the Act or prescribed by regulations. The Committee refers to Parliament for its consideration as to whether clarification is needed for the scope of the duty of disclosure and prescribed criminal offences as defined under that provision.

Additional punishment for historic offences

The *Child Protection (Working with Children) Amendment Bill 2022* expands the list of criminal offences prescribed under Schedule 2 of the *Child Protection (Working with Children) Act 2012* for which pending charges or a conviction disqualifies a person from holding a Working with Children Check clearance. Specifically, the amendments include two historic criminal offences under the *Crimes Act 1900*, which were repealed in 1988, as disqualifying offences. This may result in a person, who has completed their sentence for these historic offences and has since been granted a clearance, being automatically disqualified from holding that clearance or applying for any future clearance. This may amount to additional punishment for individuals who have completed their sentences for historic offences, as the ability to hold a clearance is a

requirement for many forms of employment. It may also thereby limit their employment opportunities.

However, the Committee notes that these amendments do not disentitle an affected person from applying to NCAT for an administrative review and order declaring them to not be disqualified persons. It also notes that the proposed amendments intend to protect vulnerable persons, being children. In the circumstances, the Committee makes no further comment.

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

Wide and ill-defined powers – 'Working with Children Check' clearances

The *Child Protection (Working with Children) Amendment Bill 2022* proposes amending the *Child Protection (Working with Children) Act 2012* to require the consent of the Children's Guardian to withdraw a pending application for a Working with Children Check clearance. These amendments would prohibit the Guardian from granting that consent if they consider that there is a likely risk to the safety of children if the applicant engages in child-related work. These provisions appear to require individuals to undergo the application process including any required risk assessments where the Guardian believes they likely pose a risk to the safety of children, notwithstanding an applicant's reasons for seeking to withdraw their application.

If an applicant triggers an automatic requirement for risk assessment, the refusal of consent may effectively prevent individuals from withdrawing, on the basis that the Guardian believes they meet the safety risk threshold for refusing a clearance under section 18 of the Act. Applicants who receive refusals are barred under section 13A from reapplying for a clearance within 5 years, which may prevent them from engaging in a range of employment that require a valid clearance during that period. The Bill may thereby include a wide and ill-defined administrative power that may affect the employment rights of individuals who are prevented from withdrawing their applications.

Where consent is given to withdraw an application, section 36C also sets out a requirement for the Guardian to notify employers, potential employers or any providers of child protective services residing with an applicant, of that withdrawal. This notification requirement in respect of clearance applications that have been withdrawn, and thus not refused or granted, may also impact an individual's ability to seek employment and living arrangements.

However, the Committee notes that applicants retain their right to seek an administrative review of adverse determinations of their clearance applications, or of their ineligibility to apply for a clearance, under the Act. It also acknowledges that proceeding to an adverse risk assessment by the Children's Guardian in respect to a Working with Children Check clearance is intended to enhance the protection of vulnerable children by ensuring individuals who pose safety risks cannot avoid detection. In the circumstances, the Committee makes no further comment.

Wide powers – interstate and national information-sharing regime

The *Child Protection (Working with Children) Amendment Bill 2022* seeks to amend section 36A of the *Child Protection (Working with Children) Act 2012* to repeal requirements for the exchange of Working with Children Check information, including personal information, with interstate agencies to be in accordance with privacy protocols published by the Minister. It also proposes inserting section 36D into the Act, which would impose a duty on the Children's Guardian to record information concerning adverse findings or determinations regarding an application for a clearance, including personal information, on the National Reference System database. These amendments would grant the Guardian a broad power to exchange information

with interstate agencies as well as record information on a national database accessible by interstate agencies.

The Committee previously reported on section 36A when it was first introduced, in its Digest No. 27/56 (18 October 2016). Consistent with those comments, the expanded power of the Children's Guardian to share Working with Children Check information with interstate agencies and the recording of that information on a national database without limitation of privacy standards may impact the privacy rights of affected persons.

However, the Committee acknowledges the proposed information sharing and disclosure powers are for the purpose of facilitating screening agencies in New South Wales and Australia more broadly to detect potential risks to the safety of children arising from applicants' conduct in other jurisdictions. It also acknowledges the policy objectives to remove procedural barriers and complexities informing this amendment, which is intended to facilitate a consistent nationwide approach and implement the recommendations arising out of the Royal Commission. In the circumstances, the Committee makes no further comment.

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

Commencement by proclamation

Parts of the *Child Protection (Working with Children) Amendment Bill 2022* would commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation affects individual rights or obligations. However, the Committee notes that the flexible start date may assist with the administrative arrangements required to implement the interstate information sharing regime. In the circumstances, the Committee makes no further comment.

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

Wide regulation-making power

The *Child Protection (Working with Children) Amendment Bill 2022* seeks to insert Division 7 into Part 3A of the *Child Protection (Working with Children) Act 2012*, which would regulates the provision of specialised substitute residential care for children. Proposed section 8ZD under this Division provides a general power to make regulations 'about specialised substitute residential care'.

As further specificity or limitations are not provided in relation to this regulation-making power, the Bill may thereby include a broad regulation-making power which may affect the provision of out-of-home care for vulnerable children. The Committee generally prefers regulation-making powers in principal legislation to be drafted with specificity, to allow for a sufficient level of Parliamentary oversight.

However, the Committee acknowledges that the deferral of matters to regulations is intended to build flexibility into the regulatory framework, to facilitate the efficient and responsive regulation of specialised substitute residential care. It also notes that any regulations are required to be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.

Conditions of accreditation for designated agencies and adoption service providers

The *Child Protection (Working with Children) Amendment Bill 2022* would consolidate an accreditation framework for designated agencies and adoption service providers by inserting Schedules 3A and 3B into the *Child Protection (Working with Children) Act 2012*. These amendments include provisions that would permit the Children's Guardian to impose conditions

for an accreditation and vary conditions of an accreditation at any time. The Bill may thereby include a wide and ill-defined administrative power that may affect the accreditation of these agencies, which is required under New South Wales child protection and care legislation for the provision of out-of-home care or adoption services.

However, the Committee acknowledges that these amendments consolidate and update the existing accreditation framework under regulations into primary legislation. It also acknowledges that this discretionary power is consistent with existing practice and that the amendments have been subject to stakeholder consultation. In the circumstances, the Committee makes no further comment.

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

Significant matters deferred to the regulations – accreditation criteria

The *Child Protection (Working with Children) Amendment Bill 2022* would consolidate an accreditation framework for designated agencies and adoption service providers by inserting Schedules 3A and 3B into the *Child Protection (Working with Children) Act 2012*. These provisions defer a significant number of matters in respect to the accreditation of designated agencies and adoption service providers, including grounds on which the Children's Guardian may refuse granting accreditation or cancelling accreditation as well as for finding an agency not suitable to be accredited. The Committee generally prefers substantive matters to be dealt with in principal legislation, particularly where those matters could affect the ability of agencies to provide out-of-home care and adoption services. This is to facilitate an appropriate level of parliamentary oversight.

However, the Committee acknowledges that these amendments are intended to build more flexibility into the regulatory framework and allow regulators to better respond to changing industry circumstances, and have been subject to stakeholder consultation. It also acknowledges that these amendments consolidates and updates existing practice established under regulations. The Committee further notes that any regulations are required to be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comments.

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

Incorporation of codes of practice into regulations

The *Child Protection (Working with Children) Amendment Bill 2022* seeks to insert section 8DA into the *Child Protection (Working with Children) Act 2012*, which would enable the regulations to prescribe codes of practice. This section would require entities to comply with any applicable codes of practice prescribed by regulations, and would empower the Children's Guardian to investigate and issue compliance notices for failures to comply with relevant codes. The Committee notes that, unlike subordinate legislation, there is no requirement that such a code of practice be tabled in Parliament and such code would therefore not be subject to disallowance under section 41 of the *Interpretation Act 1987*.

However, the Committee acknowledges that these amendments are intended to ensure that entities providing services to vulnerable children are compliant with Child Safe Standards set out in the Act. It also notes that the regulations prescribing these codes of practice are still required to be tabled and thus are subject to disallowance under the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.

Accreditation criteria published online

The *Child Protection (Working with Children) Amendment Bill 2022* would consolidate an accreditation framework for designated agencies and adoption service providers by inserting Schedules 3A and 3B into the *Child Protection (Working with Children) Act 2012*. These amendments provide for the approval of accreditation criteria by the Minister, against which an agency's suitability for accreditation can be assessed. Under these provisions, approved accreditation criteria and relevant notices would be published on the website of the Office of the Children's Guardian.

While the matters dealt with by the website have bearing on the accreditation of out-of-home care and adoption services providers and may be grounds for disqualification of these agencies, there does not appear to be a requirement that these publications are tabled in Parliament. The Committee generally prefers significant matters to be subject to parliamentary oversight by, for example, being dealt with by regulation. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. For these reasons, the Committee refers this matter to Parliament for its consideration.

3. DISABILITY INCLUSION AMENDMENT BILL 2022

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

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

Significant matters that may be included in subordinate legislation

The Bill seeks to amend section 24 of the *Coroners Act 2009*, regarding the jurisdiction of a senior coroner to hold an inquest into a death or suspected death, as a consequence of the Bill's proposed changes to the *Disability Inclusion Bill 2014*. It would amend section 24(1)(e) to refer to 'specialist disability accommodation' rather than 'supported group accommodation' and section 24(1)(f) to refer to a 'person in the relevant group' rather than a 'person in the target group'.

Under the amended section 24(1)(e), a senior coroner's jurisdiction extends to a person who, at the time of their death, was living in, or temporarily absent from, 'specialist disability accommodation' or an assisted boarding house. The definition of 'supported group accommodation' includes premises (or a type of premises) that is, or is not, prescribed by the regulations. The Bill would also amend the *Coroners Regulation 2021* to insert clause 4A, which prescribes such premises for the purposes of this definition.

Under the amended section 24(1)(f), a senior coroner's jurisdiction extends to a person, other than a child in care, who is a 'person in the relevant group' (as defined by the proposed section 24A of the Bill), and receives assistance of a kind prescribed by the regulations from a service provider to enable the person to live independently in the community.

The regulations would include key criteria determining a senior coroner's jurisdiction to hold an inquest into the death or suspected death of certain persons with disability. The Bill may therefore allow for significant matters to be dealt with in subordinate legislation. The Committee generally prefers for such matters to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight.

The Committee acknowledges that the matters delegated above are referred to the regulations by the current legislation, and that the Bill includes the matters referred by the proposed section 24(1)(e) for the Parliament's consideration. Further, that regulations are subject to disallowance under section 41 of the *Interpretation Act 1987*. The Committee notes in relation to both sections that flexibility may be necessary to accommodate the National Disability Insurance Scheme. In the circumstances, the Committee makes no further comment.

4. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2022

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

Wide powers of delegation

The Bill amends the *Public Works and Procurement Act 1912* to enable the Minister or the Constructing Authority to delegate any of their functions under the Act to a government agency, government agency employee or such other persons authorised by the regulations.

The Committee notes that there are no restrictions on this power to delegate. For example, restricting delegation to employees with a certain level of seniority or expertise. It also notes that the functions which may be delegated under the Act includes broad powers to acquire or take land for public works, enter and use land to carry out public works, close public works proclaimed national works, determinate compensation claims and give directions to the NSW Procurement Board.

The Committee acknowledges that the delegation of legislative functions is a common practice intended to facilitate cost effective and efficient administration, and that the amendments are intended to modernise the Act to align with existing governance practices. However, the Committee generally prefers provisions about the persons and classes of persons to whom legislative functions can be delegated to, be drafted with more specificity. In this case, the agencies, persons or class of persons to whom functions can be delegated is quite broad. Additionally, the Committee generally prefers such persons be included in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight. For these reasons, the Committee refers the matter to Parliament for its consideration.

Matters deferred to regulations

The Bill provides a general regulation-making power to make provisions of a savings or transitional nature consequent on the enactment of the Bill as an Act. It also provides that such regulatory provisions may take effect from the date of assent of the Bill as an Act, which would be earlier than the date of publication of those regulations.

The Committee generally prefers substantive matters to be set out in the Act where they can be subjected to a greater level of parliamentary scrutiny. In particular, where the matters may have retrospective application which may run counter to the rule of law principle that people are entitled to know the law to which they are subject at any given time.

It also notes that the regulatory provisions taken to have effect prior to publication may run counter to section 39 of the *Interpretation Act 1987*, which provides that statutory rules commence on the day they are published or else a later specified date. The Committee generally comments where provisions may be contrary to other laws as this may make it hard for individuals to ascertain and understand the law applicable to them at any given time, again running counter to the rule of law principle.

However, the Committee acknowledges that the regulation-making power is limited to provisions of a savings or transitional nature consequent on the enactment of the provisions in the Bill. In the circumstances, the Committee makes no further comment.

5. WATER MANAGEMENT AMENDMENT (FLOODPLAIN HARVESTING LICENCES COMPENSATION) BILL 2022*

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

Exclusion of compensation

The Bill amends the *Water Management Act 2000* to exclude floodplain harvesting access licences from certain compensation. Specifically, it excludes these licence holders from compensation schemes for reduction in water allocations permitted by those licences. This amendment may preclude individuals from receiving compensation for loss of water access.

The Committee notes that these amendments are intended to address the potential public costs burden for administering such licences. However, the provisions do not appear to offer alternative avenues for individuals to seek compensation for lost access. For these reasons, the Committee refers this matter to Parliament for consideration.

Part One – Bills

1. Animal Research Amendment (Right to Release) Bill 2022*

Date introduced	18 May 2022
House introduced	Legislative Council
Member responsible	The Hon. Emma Hurst MLC
	*Private Members Bill

Purpose and description

1.1 The object of the *Animal Research Amendment (Right to Release) Bill 2022* (Bill) is to amend the *Animal Research Act 1985* and the *Animal Research Regulation 2021* (Regulation) to make provision for the rehoming of dogs and cats that have been used in animal research, and for related purposes.

Background

1.2 The *Animal Research Act 1985* (Act) prescribes standards for the protection and welfare of animals used in connection with animal research. The Act provides a framework for the welfare of animals by regulating the carrying out of animal research and the supply of animals for research. All research conducted on animals must be in accordance with the Act for it to be lawful. Research may be conducted for a number of purposes, including for teaching, testing and the production of biological products.

1.3 In June 2018 the Hon. Mark Pearson MLC introduced the first iteration of the Bill in the Legislative Council under the *Animal Research Amendment (Reduction in Deaths of Dogs and Cats Used for Research) Bill 2018*. The Bill lapsed on Prorogation in February 2019.

1.4 The Bill currently under consideration seeks to amend the Act by inserting Part 6A , 'Rehoming', the primary subject of which is the creation of greater protections for cats and dogs used in animal research. In her second reading speech, the Hon. Emma Hurst MLC stated the Bill had two key functions:

> First, it ensures efforts are made to rehome companion animals used in medical experimentation. Secondly, it introduces provisions to ensure animals have the best chance to be suitable to live in a family home and to avoid becoming institutionalised.

1.5 The Bill would amend the Act by introducing provisions which create mandatory obligations on authorised persons to take reasonable steps to ensure relevant animals (being cats and dogs) are prepared for rehoming, and are rehomed. An

authorised person under the proposed section 54A is an accredited research establishment or the holder of an animal research authority.

1.6 The proposed section 54B provides that reasonable steps must be taken in preparation for rehoming including by providing exercise, environmental enrichment, socialisation, handling and basic training. After research has concluded, the authorised person must take reasonable steps for rehoming by providing a suitable individual or animal rescue organisation with certain information for that purpose.

1.7 The proposed section 54C would also create an offence punishable by up to 30 penalty units ($3 300) if an authorised person fails to comply with those requirements, or if a person conducts research on relevant animals for a period exceeding 3 years. The only exception to the requirement to take reasonable steps towards rehoming is where a veterinary practitioner with relevant experience provides a certificate stating the relevant animal is not suitable for rehoming pursuant to new section 54E of the Bill.

1.8 Under the Bill's provisions, authorised persons would also be required to keep certain records relating to the steps taken for rehoming, such as related communications, details of suitable individuals and animal rescue organisations for rehoming, and where required, a certificate of unsuitability under new section 54E. Failure to keep these records may constitute an offence punishable by up to 20 penalty units ($2 200).

1.9 A new section 54D requires suitable individuals or animal rescue organisations to maintain confidential information relating to the identity of a person who kept the animal for animal research purposes. The Bill provides that confidentiality may be waived in certain circumstances, for example, in legal proceedings. In her second reading speech, Ms Hurst stated this provision was identified by several rescue groups as important to ensure the Bill 'receives the approval of researchers in the space'.

1.10 The Bill would amend the Act's savings provisions to include that Part 6A would only apply to research conducted by an accredited research establishment or the holder of an animal research authority on commencement of the Bill. This clause ceases to have affect 3 years after its commencement.

1.11 Further, Schedule 2 of the Bill seeks to amend the Regulation to:

(a) include further reporting obligations for accredited research establishments and holders of animal research authorities.

(b) require that a licensed animal supplier must not accept an animal for research if the animal has previously been rehomed.

Issues considered by the Committee

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

Strict liability offences

1.12 The Bill creates strict liability offences under new sections 54C(1) and 54F of the Act.

1.13 The proposed section 54C(1) creates an offence against an authorised person if the authorised person fails to take reasonable steps to rehome a relevant animal where the animal ceases to be used for research, or after 3 years – whichever occurs first in time. The maximum penalty is 30 penalty units ($3 300). It is not an offence to fail to rehome an animal where a veterinary practitioner with relevant experience provides a certificate stating the relevant animal is unsuitable for rehoming (section 54E).

1.14 The proposed section 54F creates an offence against an authorised person if that person fails to keep records of each relevant animal kept for research. Records which must be kept include:

(a) records of the reasonable steps taken under sections 54B and 54C

(b) records of all communications with suitable individuals and animal rescue organisations about rehoming the animal

(c) details of a suitable individual or an animal rescue organisation with whom the animal has been rehomed

(d) a certificate issued under section 54E.

1.15 An offence against the new section 54F carries a maximum penalty of 20 penalty units ($2 200).

The Bill would create two strict liability offences under new sections 54C(1) and 54F of the *Animal Research Act 1985*. A strict liability offence does not require the mental element (*mens rea*), such as knowledge or intent, in order to prove the offence.

Under section 54C(1), an authorised person commits an offence if they fail to take reasonable steps to rehome a relevant animal where the animal ceases to be used for research, or after 3 years – whichever occurs first in time. The maximum penalty is 30 penalty units ($3 300). The only circumstance in which failing to rehome an animal will not be an offence is when a veterinary practitioner with relevant experience provides a certificate stating the relevant animal is unsuitable for rehoming (section 54E). Under section 54F, an authorised person commits an offence if they fail to keep certain records of each relevant animal kept for research. An offence against section 54F carries a maximum penalty of 20 penalty units ($2 200).

These offences do not require the mental element to be proven and are therefore considered strict liability offences. But for the exception under section 54E, the Bill is also silent on whether any specific defences are available to negate or diminish criminal liability.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. However, the Committee notes that strict liability offences are not uncommon in regulatory contexts to encourage compliance. In the circumstances, the Committee makes no further comment.

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

Significant matters that may be included in subordinate legislation

1.16 The Bill would amend, and enable the creation of, further regulations on significant matters under various provisions.

1.17 Schedule 2 of the Bill proposes changes to the Regulation by imposing further reporting obligations on accredited research establishments and holders of animal research authorities.

1.18 Additionally, the Bill proposes a new section 54A, which refers to the Regulation in prescribing criteria in regards to who is a 'suitable individual'. Suitable individuals under the Bill are persons who agree to provide an animal with a home and appropriate care, not for the purposes of animal research.

1.19 In the new section 54C, subsection (2)(g) defers to the regulation information relevant to the criteria for determining whether reasonable steps have been taken by an authorised person in rehoming a relevant animal. Subsection (5) further provides that regulations may prescribe requirements for a database maintained under this section.

The Bill would amend, and enable the creation of, further regulations on significant matters under various provisions. For example, Schedule 2 of the Bill proposes changes to the *Animal Research Regulation 2021* by imposing further reporting obligations on accredited research establishments and holders of animal research authorities. Proposed section 54A refers to the Regulation for guidance on the criteria which must be satisfied for a person to be deemed a 'suitable individual'. The new section 54C(2)(g) defers to the Regulation information relevant to the criteria for determining whether reasonable steps have been taken by an authorised person in rehoming an animal, and section 54C(5) provides that regulations may prescribe requirements for a database maintained under this section.

The Committee generally prefers that the prescription of significant matters, such as criteria that can give rise to the imposition of an offence under section 54C(2)(g), to be included in primary legislation. This is in order for these provisions to be subject to an appropriate level of scrutiny. However, the Committee notes that regulations may provide more flexibility and be more efficient in dealing with changes to the meaning of 'reasonable steps'. In the circumstances, the Committee makes no further comment.

2. Child Protection (Working with Children) Amendment Bill 2022; Children's Guardian Amendment Bill 2022

Date introduced	19 May 2022
House introduced	Legislative Council
Minister responsible	The Hon. Natasha Maclaren-Jones MLC
Member introducing	The Hon. Taylor Martin MLC
Portfolio	Families and Communities

Purpose and description

Child Protection (Working with Children) Amendment Bill 2022

2.1 The object of this Bill is to amend the *Child Protection (Working with Children) Act 2012* as follows—

(a) to implement National Standard 11 of the *National Standards for Working with Children Checks* endorsed by the Council of Australian Governments on 12 November 2019 by requiring applicants for working with children check clearances and other prescribed persons to disclose their international criminal history,

(b) to provide for the changes in circumstances that entitle a person to make an early further application for a clearance following a refusal of an application for, or cancellation of, a clearance,

(c) to provide further grounds on which the Children's Guardian may terminate an application for a clearance,

(d) to make it clear the offence of common assault of a child operates to trigger a risk assessment of an applicant for, or holder of, a clearance only if committed by an adult,

(e) to provide that the notification of information about a negative notice by another jurisdiction triggers a risk assessment of an applicant for, or holder of, a clearance,

(f) to include certain former offences as disqualifying offences under the Act,

(g) to enable certain clearance information to be exchanged with other jurisdictions,

(h) to require the Children's Guardian to record certain information on the database known as the National Reference System.

Children's Guardian Amendment Bill 2022

2.2 This Bill amends the *Children's Guardian Act 2019* as follows—

(a) to provide for codes of practice to ensure certain child safe organisations comply with the Child Safe Standards,

(b) to provide for the nomination of a principal officer of certain child safe organisations,

(c) to remove the concepts of voluntary out-of-home care and registered agencies and replace the concept of voluntary out-of-home care with specialised substitute residential care,

(d) to update provisions relating to registers to be kept by the Children's Guardian,

(e) to update the functions of the Children's Guardian and authorised persons,

(f) to include adoption service providers and entities providing specialised substitute residential care as schedule 1 entities,

(g) to provide for the accreditation of designated agencies and adoption service providers,

(h) to update certain definitions,

(i) to include savings and transitional provisions.

2.3 It also amends the following Acts consequential on the amendments made to the *Children's Guardian Act 2019*—

(a) the *Children and Young Persons (Care and Protection) Act 1998*,

(b) the *Stronger Communities Legislation Amendment (Courts and Civil) Act 2020*,

(c) the *Stronger Communities Legislation Amendment (Miscellaneous) Act 2020*.

Background

2.4 The *Children's Guardian Amendment Bill 2022* (Guardian Bill) and the *Child Protection (Working with Children) Amendment Bill 2022* (WWC Bill) seek to give effect to various reforms to New South Wales' broader child protection regulatory framework.

2.5 In his second reading speech , the Hon. Taylor Martin MLC, Parliamentary Secretary (on behalf of the Hon. Natasha Maclaren-Jones MLC, Minister for Families and Communities) stated that these reforms intend to 'improve the safety, welfare and wellbeing of children in New South Wales'.

2.6 The Guardian Bill proposes a suite of reforms to the *Children's Guardian Act 2019* (Guardian Act), as well as consequential amendments across other child protection

and care legislation in New South Wales. Describing this broader reform package, Mr Martin highlighted that the Guardian Bill reforms address four key areas:

> Firstly, designated agencies and adoption service providers will be brought within the scope of the Child Safe Scheme, and certain child safe organisations will be required to comply with codes of practice. Secondly, concepts of voluntary out-of-home care and registered agencies will be removed and replaced with specialised substitute residential care and related provisions. Thirdly, register provisions will be clarified and updated. Fourthly, the accreditation framework for designated agencies and adoption service providers will be consolidated in the [Guardian] Act.

2.7 He further emphasised that the proposed amendments to the Guardian Act to bring designated agencies and adoption service providers into the purview of the Child Safe Scheme, comes as a result of consultation with stakeholders who expressed 'overwhelming agreement' to their inclusion within the Scheme.

2.8 The WWC Bill proposes amendments to the *Child Protection (Working with Children) Act 2012* (WWC Act), which sets out the legislative framework for applying for and granting 'Working with Children Check' (WWCC) clearances. Mr Martin highlighted in his second reading speech that these amendments are intended to implement key recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission), responding to its findings that:

> …disparate legislative and administrative worker-checking schemes across Australian jurisdictions facilitated "forum shopping" by perpetrators. … In particular, the royal commission recommended a national model for the Working with Children Check [WWCC] through consistent standards and a centralised database to facilitate cross-border information sharing.

2.9 Towards this end, Mr Martin referred to the work undertaken by the Government, in collaboration with the Commonwealth and other state and territory jurisdictions, to establish the National Standards for Working with Children Checks (National Standards) and a WWCC National Reference System database (NRS database), a centralised national database of WWCC information administered by the Australian Criminal Intelligence Commission and can be accessed by all states and territories.

2.10 Although these Bills are separate Acts when operative, the Guardian Bill and WWC Bill are cognate, meaning they were introduced and will be considered together. Therefore, in accordance with the Committee's usual practice, both Bills have been considered in the one report.

Issues considered by the Committee

Child Protection (Working with Children) Amendment Bill 2022

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

Right to presumption of innocence – duty to disclose

2.11 The WWC Bill proposes inserting section 36C into the WWC Act to establish a duty of disclosure for a 'relevant person', which is defined in subsection (6) to be an applicant for a WWCC clearance or a person prescribed by the regulations.

2.12 Relevantly, section 36C would require a relevant person to notify the Children's Guardian (the Guardian) when they apply for a WWWC clearance, or otherwise within 10 days of being made aware, that they are the subject of commenced proceedings, a conviction or a finding of guilt in respect to 'a criminal offence outside of Australia'. Subsection (2) clarifies that this duty applies 'regardless of whether the proceedings commence or the conviction or finding of guilt occurs before or after the commence of this section'.

2.13 Failure to comply with this duty of disclosure without reasonable excuse is an offence under subsection (5) which carries a maximum penalty of $550.

2.14 Schedule 1 of the WWC Act sets out the personal circumstances which would automatically trigger a requirement for the Guardian to undertake a risk assessment of an applicant for a WWCC clearance under Part 3, Division 3. The WWC Bill also proposes amending clause 1(5) of the schedule to expand the category of criminal offences which trigger this assessment requirement to include the commencement of proceedings or convictions for criminal offences in a jurisdiction outside of Australia, which are similar to those listed under subclauses (1)-(4).

2.15 The WWCC scheme under Part 4 of the WWC Act provides a right for individuals to apply to the NSW Civil and Administrative Tribunal (NCAT) for an administrative review of a decision of the Guardian to:

(a) place an interim bar under section 17, which prohibits the applicant being involved in child-related work while a risk assessment is pending,

(b) refuse their WWCC clearance application, or

(c) cancel their WWCC clearance.

2.16 In his second reading speech, Mr Martin noted that these proposed amendments to the WWC Act seek to implement National Standard 11 of the National Standards, which is intended to ensure that the Guardian 'is apprised of all relevant risk information, not only within but also outside of Australia' and 'can identify safety risks arising from relevant international criminal offending'.

2.17 Speaking to section 36C specifically, Mr Martin further described the duty imposed by that section as a duty to notify the Guardian 'in relation to a prescribed criminal offence outside of Australia'. Subsection (6) defines this term to mean:

> …an offence equivalent to an offence—
>
> (a) specified in schedule 1 or 2, or
>
> (b) prescribed by the regulations.

2.18 However, the duty of disclosure under section 36C(1) refers to 'a criminal offence outside Australia', not a 'prescribed criminal offence.'

The *Child Protection (Working with Children) Amendment Bill 2022* proposes inserting section 36C into the *Child Protection (Working with Children) Act 2012*, which would impose a duty on individuals applying for or who hold a Working

with Children Check clearance, to disclose any charges, convictions or findings of guilt for criminal offences in jurisdictions outside Australia. Failure to disclose that information within 10 days of being made aware or upon making an application is an offence which carries a maximum penalty of $550.

The Bill also expands the list of prescribed criminal offences which automatically trigger a requirement for a risk assessment of an applicant under Schedule 1 of the Act to include charges, convictions or findings of guilt for similar criminal offences in overseas jurisdictions. As a consequence, applicants who are required to disclose information of overseas charges pending determination for criminal offences may be automatically subject to a risk assessment. This may mean that a person who has not yet been found guilty of an offence in an overseas jurisdiction may still have their charges considered by the Children's Guardian in considering their application for a clearance or otherwise in their suitability to continue holding such a clearance.

These provisions may thereby impact a person's right to the presumption of innocence, which protects an accused person's privilege to be presumed innocent until proved guilty according to law.

However, the Committee notes that the automatic assessment trigger under the Act does not require the Children's Guardian to make an adverse decision in respect to the individual's application or clearance, and individuals retain their right to seek an administrative review in the NSW Civil and Administrative Tribunal. It also acknowledges that these amendments are intended to implement National Standards for Working with Children Checks and enhance protections for vulnerable children in the care of the State by taking a cautious approach to past criminal offending. In the circumstances, the Committee makes no further comment in respect to the substantive provisions.

The Committee also notes that the duty of disclosure set out in proposed section 36C applies to 'a criminal offence' and thus appears to be sufficiently broad to capture all foreign criminal offending. However, subsection (6) includes a definition for 'prescribed criminal offence' which is more narrowly defined to those offences specified by the Schedules to the Act or prescribed by regulations. The Committee refers to Parliament for its consideration as to whether clarification is needed for the scope of the duty of disclosure and prescribed criminal offences as defined under that provision.

Additional punishment for historic offences

2.19 Section 18 of the WWC Act sets out how the Guardian may determine applications for WWCC clearances. Relevantly, it sets out three categories in which an applicant should fall into, and the relevant determination which the Guardian can make in relation to that application:

(a) the applicant is a 'disqualified person', for whom the Guardian must refuse a clearance.

(b) the applicant is a person who has been subject to a risk assessment Division 3 of Part 3, for whom the Guardian must grant a clearance unless they are satisfied the applicant poses a risk to the safety of children.

(c) the applicant is not disqualified nor subject to a risk assessment, for whom the Guardian must grant a clearance.

2.20 Relevantly, subsection (1) defines a 'disqualified person' to be:

(a) a person convicted before, on or after the commencement of this section of an offence specified in Schedule 2, if the offence was committed as an adult,

(b) a person against whom proceedings for any such offence have been commenced, if the offence was committed as an adult, pending determination of the proceedings for the offence.

2.21 As noted earlier, the WWCC scheme under Part 4 of the WWC Act provides a right for individuals to apply to NCAT for an administrative review of a decision of the Guardian in respect to a WWCC clearance. However, applicants who have been convicted of or are subject to pending proceedings for certain Schedule 2 offences listed in section 26 are not entitled to apply for a review. For those applicants who are entitled to seek review, NCAT is empowered under section 28 of the WWC Act to make an order:

(a) declaring a person is not disqualified under the WWC Act in respect to an identified criminal offence, and

(b) that a person who has previously been refused a WWCC clearance application is otherwise to be treated as eligible to apply for a clearance.

2.22 The WWC Bill amends Schedule 2 to include two additional offences as disqualifying criminal offences. Specifically, it proposes inserting violent offences under sections 72A and 78M of the *Crimes Act 1900* (Crimes Act), which would disqualify individuals, who have been convicted of or are the subject of pending proceedings for the commission of these offences as adults, from holding a WWCC clearance.

2.23 The Committee notes that sections 72A and 78M of the Crimes Act are historic offences which were repealed by provisions of the *Crimes (Personal and Family Violence) Amendment Act 1987* that commenced on 21 February 1988.

The *Child Protection (Working with Children) Amendment Bill 2022* expands the list of criminal offences prescribed under Schedule 2 of the *Child Protection (Working with Children) Act 2012* for which pending charges or a conviction disqualifies a person from holding a Working with Children Check clearance. Specifically, the amendments include two historic criminal offences under the *Crimes Act 1900*, which were repealed in 1988, as disqualifying offences. This may result in a person, who has completed their sentence for these historic offences and has since been granted a clearance, being automatically disqualified from holding that clearance or applying for any future clearance. This may amount to additional punishment for individuals who have completed their sentences for historic offences, as the ability to hold a clearance is a requirement for many forms of employment. It may also thereby limit their employment opportunities.

However, the Committee notes that these amendments do not disentitle an affected person from applying to NCAT for an administrative review and order

declaring them to not be disqualified persons. It also notes that the proposed amendments intend to protect vulnerable persons, being children. In the circumstances, the Committee makes no further comment.

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

Wide and ill-defined powers – 'Working with Children Check' clearances

2.24 Under the current WWCC clearance scheme established by the WWC Act, section 18 requires the Guardian to grant a person a clearance if they are neither disqualified by reason of a conviction listed under Schedule 2 or require assessment by meeting a trigger set out in Schedule 1. However, where assessment of an applicant is triggered under Schedule 1, the Guardian must grant a clearance unless the Guardian is satisfied that the applicant poses a risk to the safety of children.

2.25 Section 13A of the WWC Act provides that, as a consequence of an application being refused or a clearance being cancelled, the applicant is barred from reapplying for clearance for a 5 year period unless they are exempted by other provisions of that section.

2.26 The WWC Bill proposes inserting section 13AA into the WWC Act, which would allow applicants for WWCC clearances to withdraw their applications only with the consent of the Guardian. Relevantly, subsection (2) limits that discretionary power of the Guardian to give consent for such a withdrawal by prohibiting consent where the Guardian 'considers there is a likely risk to the safety of children if the applicant engages in child-related work'.

2.27 Additionally, proposed section 13AA(3) requires the Guardian to give written notice of a withdrawal 'to each person the Children's Guardian reasonably believes to be a notifiable person in relation to the applicant', as soon as practicable after an application has been withdrawn. A 'notifiable person' is defined in the WWC Act to include, among others:

(a) any employer or proposed employer of the applicant

(b) if the applicant resides on the same property as an authorised carer or carer applicant or a family day care service, the designated agency or service provider respectively.

The *Child Protection (Working with Children) Amendment Bill 2022* proposes amending the *Child Protection (Working with Children) Act 2012* to require the consent of the Children's Guardian to withdraw a pending application for a Working with Children Check clearance. These amendments would prohibit the Guardian from granting that consent if they consider that there is a likely risk to the safety of children if the applicant engages in child-related work. These provisions appear to require individuals to undergo the application process including any required risk assessments where the Guardian believes they likely pose a risk to the safety of children, notwithstanding an applicant's reasons for seeking to withdraw their application.

If an applicant triggers an automatic requirement for risk assessment, the refusal of consent may effectively prevent individuals from withdrawing, on the basis that the Guardian believes they meet the safety risk threshold for refusing a clearance under section 18 of the Act. Applicants who receive refusals are barred under section 13A from reapplying for a clearance within 5 years, which may prevent them from engaging in a range of employment that require a valid clearance during that period. The Bill may thereby include a wide and ill-defined administrative power that may affect the employment rights of individuals who are prevented from withdrawing their applications.

Where consent is given to withdraw an application, section 36C also sets out a requirement for the Guardian to notify employers, potential employers or any providers of child protective services residing with an applicant, of that withdrawal. This notification requirement in respect of clearance applications that have been withdrawn, and thus not refused or granted, may also impact an individual's ability to seek employment and living arrangements.

However, the Committee notes that applicants retain their right to seek an administrative review of adverse determinations of their clearance applications, or of their ineligibility to apply for a clearance, under the Act. It also acknowledges that proceeding to an adverse risk assessment by the Children's Guardian in respect to a Working with Children Check clearance is intended to enhance the protection of vulnerable children by ensuring individuals who pose safety risks cannot avoid detection. In the circumstances, the Committee makes no further comment.

Wide powers – interstate and national information-sharing regime

2.28 Section 36A of the WWC Act provides for the exchange of information to bodies in other jurisdictions. This section permits the Guardian to exchange WWCC information with 'bodies that administer working with children check clearances in other jurisdictions'. However, that information-sharing ability is limited to only those exchanges which are in accordance with the privacy protocols published by the Minister under subsection (3).

2.29 The WWC Bill proposes amending section 36A to remove the requirement for the publication of privacy protocols for the exchange of WWCC information. Under the section as amended by the WWC Bill, the Guardian is granted a general power to exchange WWCC information with an interstate screening agency. 'Interstate screening agency' is defined in the Bill to mean a body legally authorised to conduct interstate child-related work screening within Australia. Subsection (3) further clarifies that the amended provisions would not limit an exchange of WWCC information that is otherwise permitted under the Act or any other law.

2.30 Speaking to these amendments proposed by the WWC Bill in his second reading speech, Mr Martin highlighted that these amendments are intended to facilitate information exchange by setting 'clear and robust authority to share information'. He further stated that the repeal of the protocols requirement 'addresses existing legislative barriers inhibiting information exchange by broadening the scope of information that can be shared with other Australian States and Territories and eliminating procedural complexity'.

2.31 The WWC Bill also seeks to insert section 36D into the WWC Act, which would require the Guardian to record the following information on the National Reference System (NRS) database:

(a) the name and date of birth of the person issued with the negative notice

(b) the type of negative notice

(c) a change in the status of the negative notice.

2.32 Section 36D(3) would incorporate the definition of 'interstate screening agency' from the amended section 36A. It also defines a 'negative notice' to mean any notice, issued before or after section 36D commenced, which relates to:

(a) an interim bar under section 17 which prohibits conduct involving child-related work while a risk assessment is pending, including interim bars that have ceased to have effect

(b) a disqualification

(c) the refusal of a WWCC clearance application

(d) the cancellation of a WWCC clearance.

2.33 However, where there has been a change in the status of a negative notice which has been recorded on the NRS database, subsection (2) would require the Guardian to notify each relevant interstate screening agency of the change as soon as reasonably practicable after it has been recorded.

The *Child Protection (Working with Children) Amendment Bill 2022* seeks to amend section 36A of the *Child Protection (Working with Children) Act 2012* to repeal requirements for the exchange of Working with Children Check information, including personal information, with interstate agencies to be in accordance with privacy protocols published by the Minister. It also proposes inserting section 36D into the Act, which would impose a duty on the Children's Guardian to record information concerning adverse findings or determinations regarding an application for a clearance, including personal information, on the National Reference System database. These amendments would grant the Guardian a broad power to exchange information with interstate agencies as well as record information on a national database accessible by interstate agencies.

The Committee previously reported on section 36A when it was first introduced, in its Digest No. 27/56 (18 October 2016).[1] Consistent with those comments, the expanded power of the Children's Guardian to share Working with Children Check information with interstate agencies and the recording of that information on a national database without limitation of privacy standards may impact the privacy rights of affected persons.

[1] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 27/56*, 18 October 2016.

However, the Committee acknowledges the proposed information sharing and disclosure powers are for the purpose of facilitating screening agencies in New South Wales and Australia more broadly to detect potential risks to the safety of children arising from applicants' conduct in other jurisdictions. It also acknowledges the policy objectives to remove procedural barriers and complexities informing this amendment, which is intended to facilitate a consistent nationwide approach and implement the recommendations arising out of the Royal Commission. In the circumstances, the Committee makes no further comment.

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

Commencement by proclamation

2.34 Clause 2 of the WWC Bill provides that the Bill commences (as an Act) on the date of assent, except for Schedule 1, clauses [9] and [10] which are to commence on a day appointed by proclamation.

2.35 Schedule 1, clauses [9] and [10] would amend the WWC Act by replacing section 36A and inserting sections 36C and 36D into the Act respectively. As noted above, these provisions set out the general information sharing regime between relevant interstate agencies and would establish a general duty to disclose information concerning overseas offences to the Guardian as well as a duty of the Guardian to record information regarding adverse WWC decisions on the NRS database.

Parts of the *Child Protection (Working with Children) Amendment Bill 2022* would commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation affects individual rights or obligations. However, the Committee notes that the flexible start date may assist with the administrative arrangements required to implement the interstate information sharing regime. In the circumstances, the Committee makes no further comment.

Children's Guardian Amendment Bill 2022

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

Wide regulation-making power

2.36 The Guardian Bill seeks to makes several amendments to New South Wales child protection and care legislation to introduce the concept of 'specialised substitute residential care' in place of the existing concept of 'voluntary out-of-home care' under the broader legislative framework.

2.37 This includes inserting Division 7 into Part 3A of the Guardian Act, which would regulate the provision of specialised substitute residential care for children in New South Wales. Proposed section 8ZD under this Division provides that regulations 'may be made about specialised substitute residential care'.

The *Child Protection (Working with Children) Amendment Bill 2022* seeks to insert Division 7 into Part 3A of the *Child Protection (Working with Children) Act 2012*, which would regulates the provision of specialised substitute residential

care for children. Proposed section 8ZD under this Division provides a general power to make regulations 'about specialised substitute residential care'.

As further specificity or limitations are not provided in relation to this regulation-making power, the Bill may thereby include a broad regulation-making power which may affect the provision of out-of-home care for vulnerable children. The Committee generally prefers regulation-making powers in principal legislation to be drafted with specificity, to allow for a sufficient level of Parliamentary oversight.

However, the Committee acknowledges that the deferral of matters to regulations is intended to build flexibility into the regulatory framework, to facilitate the efficient and responsive regulation of specialised substitute residential care. It also notes that any regulations are required to be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.

Conditions of accreditation for designated agencies and adoption service providers

2.38 Chapter 8 of the *Child and Young Persons (Care and Protection) Act 1998* provides for and regulates the provision of out-of-home care for children who are under the care of the State or otherwise pursuant to a care order of the Children's Court of New South Wales. Relevantly, section 136 restricts the provision of that care to only authorised carers, who are defined in section 137 as various officers or persons prescribed by the regulations of a designated agency or adoption service provider. Section 138 also limits who can make arrangements for that out-of-home care to designated agencies or the Guardian.

2.39 The Guardian Bill seeks to insert schedules 3A and 3B into the Guardian Act to give effect to a new accreditation framework for designated agencies and adoption service providers respectively under the Act. It would also amends the definition of designated agency under section 72 of the Guardian Act to mean 'an agency accredited by the Children's Guardian under Schedule 3A'. Similarly, the Bill proposes amending the definition of adoption service provided in the Dictionary to mean an 'accredited adoption service provider' under section 110A, being 'an organisation, or part of an organisation, accredited by the Children's Guardian under Schedule 3B'.

2.40 Part 3 of both Schedules 3A and 3B provide for conditions of accreditation for designated agencies and adoption service providers respectively. Clause 12(1) of both Schedules would empower the Guardian to impose conditions to which an accreditation is subject. Additionally, clause 13 of both Schedules would allow the Guardian to vary those conditions at any time, by written notice to the accreditation holder. Per subclause 13(2), that variation can include imposing or substituting a new condition, or removing or amending that condition.

2.41 Relevantly, the Guardian Bill also proposes amending section 154 of the Guardian Act to clarify that an application may be made to NCAT for administrative review of a decision or refusal by the Children's Guardian to:

(a) grant accreditation

(b) impose a condition on an accreditation or vary the conditions to which an accreditation is subject

(c) transfer an accreditation, or

(d) cancel or shorten the period of an accreditation.

2.42 In his second reading speech, Mr Martin confirmed that the provisions in the Guardian Bill concerning the conditions of accreditation are reaffirms from existing approaches in regulations and that there was 'no change in policy in relation to conditions of accreditation, or their variation'.

The *Child Protection (Working with Children) Amendment Bill 2022* would consolidate an accreditation framework for designated agencies and adoption service providers by inserting Schedules 3A and 3B into the *Child Protection (Working with Children) Act 2012*. These amendments include provisions that would permit the Children's Guardian to impose conditions for an accreditation and vary conditions of an accreditation at any time. The Bill may thereby include a wide and ill-defined administrative power that may affect the accreditation of these agencies, which is required under New South Wales child protection and care legislation for the provision of out-of-home care or adoption services.

However, the Committee acknowledges that these amendments consolidate and update the existing accreditation framework under regulations into primary legislation. It also acknowledges that this discretionary power is consistent with existing practice and that the amendments have been subject to stakeholder consultation. In the circumstances, the Committee makes no further comment.

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

Significant matters deferred to the regulations – accreditation criteria

2.43 As noted earlier, the Guardian Bill proposes inserting Schedules 3A and 3B into the Guardian Act, which sets out a new framework for the accreditation of designated agencies and adoption service providers respectively. Speaking to these Schedules in his second reading speech, Mr Martin noted that these amendments:

> …reposition existing and long-established accreditation functions from the Children and Young Persons (Care and Protection) Regulation 2012 and the Adoption Regulation 2015 in a remodelled, or contemporary, way. …The amendments either consolidate functions, clarify functions, or introduce new provisions that were considered by the sector in the consultation process.

2.44 Both schedules provide for a number of matters concerning this accreditation to be prescribed by regulations, including:

(a) grounds other than non-compliance with the Guardian Act on which the Guardian to refuse to grant accreditation to a designated agency or adoption service provider.

(b) additional grounds other than unsuitability or error on which the Guardian may cancel an accreditation or shorten the period of accreditation.

(c) other circumstances on which the Guardian may find that a designated agency or adoption service provider is not suitable to be accredited.

(d) additional matters which the accreditation criteria for designated agencies under Schedule 3A must address.

(e) what information is to be included or accompanied in an application for a grant of accreditation for designated agencies.

(f) circumstances for extending accreditation to a designated agency or adoption service provider which may be contrary to the relevant schedule.

(g) conditions of accreditation for a designated agency or adoption service provider.

(h) circumstances in which the Guardian may transfer an accreditation from one entity to another.

2.45 Furthermore, both clause 21 of Schedule 3A and clause 22 of Schedule 3B include a general regulation-making power. These provisions enable regulations to be made about accreditation, which may include applications and their withdrawal, the deferral of decisions and obligations arising from that deferral, conditions and applications for variations of conditions to accreditation, and the transfer or surrender of accreditation. In his second reading speech, Mr Martin stated that this general regulation-making power 'streamlines the current list of circumstances set out in the regulations'.

The *Child Protection (Working with Children) Amendment Bill 2022* would consolidate an accreditation framework for designated agencies and adoption service providers by inserting Schedules 3A and 3B into the *Child Protection (Working with Children) Act 2012*. These provisions defer a significant number of matters in respect to the accreditation of designated agencies and adoption service providers, including grounds on which the Children's Guardian may refuse granting accreditation or cancelling accreditation as well as for finding an agency not suitable to be accredited. The Committee generally prefers substantive matters to be dealt with in principal legislation, particularly where those matters could affect the ability of agencies to provide out-of-home care and adoption services. This is to facilitate an appropriate level of parliamentary oversight.

However, the Committee acknowledges that these amendments are intended to build more flexibility into the regulatory framework and allow regulators to better respond to changing industry circumstances, and have been subject to stakeholder consultation. It also acknowledges that these amendments consolidates and updates existing practice established under regulations. The Committee further notes that any regulations are required to be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comments.

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

Incorporation of codes of practice into regulations

2.46 The Guardian Bill proposes inserting section 8DA into the Guardian Act to make provisions for the application of codes of practice to child protective services providers listed under subsection (2). Specifically, subsection (1) would enable the regulations to prescribe codes of practice for the purposes of ensuring that these entities 'comply with the Child Safe Standards'.

2.47 Section 8DA also includes some guidance as to the matters which may or must be included in these codes of practice, such as:

(a) what entities the code applies to (subsection (3))

(b) for 'specialised substitute residential care', which provides voluntary care for minors out of the family home, requirements to complete self-assessments within specified time periods (subsection (4))

(c) mandatory steps for implementing the Child Safe Standards (subsection (6)(a))

(d) outcomes indicating compliance with the Child Safe Standards (subsection (6)(b))

(e) other matters relevant to compliance with the Child Safe Standards (subsection (6)(c))

(f) mandatory steps that must be taken to obtain and maintain accreditation under the Guardian Act (subsection (7)).

2.48 It is a requirement for entities to comply with an applicable code of practice under subsection (8), and subsection (9) provides that failure to comply is grounds for the Guardian to:

(a) conduct an investigation into an entity's implementation of the Child Safe Standards under Part 3A, Division 6, and

(b) following such an investigation, issue a compliance notice to the entity under Part 9A.[2]

2.49 Section 8DA(5) would also establish an offence for an entity failing to complete a self-assessment of its compliance with Child Safe Standards within the time specified in the code of practice, without reasonable excuse. This offence carries a maximum penalty of $1 100.

[2] The Committee notes that the provisions of the *Children's Guardian Amendment (Child Safe Scheme) Act 2021*, which inserts Part 9A into the Guardian Act, are to be commenced by proclamation and have not commenced as of the date of writing this report.

2.50 In his second reading speech, Mr Martin highlighted that this is a more prescriptive approach to regulating entities providing out-of-home care, which are recognised as situations of increased risk to children, and further stated that:

> It is critical that our child safe arrangements respond to the vulnerability of children who are living outside the family home in settings provided by designated agencies, adoption service providers and entities providing specialised substitute residential care… Children in those arrangements may have experienced trauma or be living with disability. They are particularly vulnerable, and the need for prescriptive requirements for those organisational settings is compelling. This approach will be achieved through new section 8DA, which allows codes of practice to be prescribed by regulation.

The *Child Protection (Working with Children) Amendment Bill 2022* seeks to insert section 8DA into the *Child Protection (Working with Children) Act 2012*, which would enable the regulations to prescribe codes of practice. This section would require entities to comply with any applicable codes of practice prescribed by regulations, and would empower the Children's Guardian to investigate and issue compliance notices for failures to comply with relevant codes. The Committee notes that, unlike subordinate legislation, there is no requirement that such a code of practice be tabled in Parliament and such code would therefore not be subject to disallowance under section 41 of the *Interpretation Act 1987*.

However, the Committee acknowledges that these amendments are intended to ensure that entities providing services to vulnerable children are compliant with Child Safe Standards set out in the Act. It also notes that the regulations prescribing these codes of practice are still required to be tabled and thus are subject to disallowance under the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.

Accreditation criteria published online

2.51 As noted earlier, the Guardian Bill proposes establishing a new accreditation framework for designated agencies and adoption service providers by inserting Schedules 3A and 3B respectively into the Guardian Act.

2.52 Clause 2(1) of both schedules provides that the Minister may, on the recommendation of the Guardian, approve the accreditation criteria which are to be met by a designated agency or adoption service provider, and subclause (2) clarifies that different accreditation criteria may be approved for different classes of agencies. Additionally, clause 2(7) of Schedule 3B provides that the accreditation criteria for adoption service providers must be consistent, as far as is reasonably practicable, with the accreditation criteria for designated agencies under Schedule 3A, clause 2.

2.53 Upon the approval of relevant accreditation criteria for either designated agencies or adoption service providers, the Guardian would be required to publish that criteria (schedule 3A, clause 2(4) and schedule 3B, clause 2(3)), and publish a notice setting out the entities recognised for accreditation (schedule 3A, clause 2(6) and schedule 3B, clause 2(5)) on the website of the Office of the Children's Guardian.

2.54 The new framework for accreditation under these schedules sets out provisions outlining the consequences for an agency or entity which does not meet relevant accreditation criteria. Under clause 3(1)(b) of both schedules 3A and 3B, an agency that does not wholly or substantially meet the accreditation criteria is not suitable to be accredited.

2.55 Where an agency applying for accreditation is found to not be suitable, clause 6(3) of both schedules would require the Guardian to refuse to grant that agency accreditation unless the Guardian defers its decision under clause 7. Separately, it is a ground for cancellation if a designated agency or an adoption service provider which holds accreditation is found to be not suitable under Schedule 3A, clause 18(a) and Schedule 3B, clause 19(a) respectively.

2.56 Where an accreditation holder has that accreditation cancelled, that agency would be disqualified for 2 years from being accredited under Schedule 3A, clause 20 and Schedule 3B, clause 21. Remarking on the rationale for introducing this disqualification provision into the Guardian Act in his second reading speech, Mr Martin noted the rare incidents where accreditations have been cancelled and further stated:

> It is only considered where there have been critical failures within an organisation that compromise the safety of children and where less intrusive regulatory responses have been exhausted or are inadequate. Restricting an agency from applying for accreditation for a period of two years is an appropriate safeguard.

2.57 As noted earlier, the Guardian Bill also seeks to amend section 154 of the Act to clarify that an application may be made to NCAT for administrative review of the Guardian's decision to grant, refuse, cancel or shorten an accreditation.

The *Child Protection (Working with Children) Amendment Bill 2022* would consolidate an accreditation framework for designated agencies and adoption service providers by inserting Schedules 3A and 3B into the *Child Protection (Working with Children) Act 2012*. These amendments provide for the approval of accreditation criteria by the Minister, against which an agency's suitability for accreditation can be assessed. Under these provisions, approved accreditation criteria and relevant notices would be published on the website of the Office of the Children's Guardian.

While the matters dealt with by the website have bearing on the accreditation of out-of-home care and adoption services providers and may be grounds for disqualification of these agencies, there does not appear to be a requirement that these publications are tabled in Parliament. The Committee generally prefers significant matters to be subject to parliamentary oversight by, for example, being dealt with by regulation. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. For these reasons, the Committee refers this matter to Parliament for its consideration.

3. Disability Inclusion Amendment Bill 2022

Date introduced	19 May 2022
House introduced	Legislative Council
Minister responsible	The Hon. Natasha Maclaren-Jones MLC
Member Introducing	The Hon. Martin Taylor MLC
Portfolio	Disability Services

Purpose and description

3.1 The object of this Bill is to amend the *Disability Inclusion Act 2014* (the ***principal Act***) to give effect to the recommendations for amendments arising from the statutory review of the principal Act tabled in Parliament on 20 November 2020. This is achieved as follows—

(a) by requiring State Disability Inclusion Plans and disability inclusion action plans to be remade every 4 years (***recommendation 1***),

(b) by requiring plans to be made available in one or more formats accessible to people with disability (***recommendation 2***),

(c) by repealing provisions in the principal Act no longer required due to the commencement of Commonwealth legislation relating to the National Disability Insurance Scheme (***recommendations 3 and 5***),

(d) by inserting savings and transitional provisions (***recommendation 6***),

(e) by making other minor and consequential amendments (***recommendation 3***).

Background

3.2 In his second reading speech, the Hon. Taylor Martin MLC (on behalf of the Hon. Natasha Maclaren-Jones MLC, Minister for Disability Services) advised that the Bill implements recommendations made in the 2020 report entitled 'Statutory Review of the NSW Disability Inclusion Act 2014' (Statutory Review). The recommendations addressed are set out in the Bill's overview, above. Mr Martin stated that the Bill will amend the principal Act to:

(a) ensure the State plan and public authorities' disability inclusion plans are:

(i) regularly reviewed and remade

(ii) made accessible to people with disability

(b) remove obsolete provisions following the full implementation of the National Disability Insurance Scheme (NDIS) in NSW.

3.3 Mr Taylor explained that while the principal Act requires that the disability inclusion plans of the State and public authorities are to be reviewed and reported every four years, it does not explicitly require that the plans be renewed each period. He said that, during consultation, stakeholders expressed the view that the renewal of the plans 'will enhance ongoing inclusion for people with disability'.

3.4 Schedule 1 of the Bill seeks to amend sections 11 and 14 of the principal Act to require the remaking of the State and local authorities' disability inclusion plans respectively. Each plan must take into account the recommendations of the report on the outcome of the 4-yearly review of the plan, within 12 months of that report being tabled.

3.5 Schedule 1 of the Bill would also amend sections 10 and 12 of the principal Act to require the State and local authorities' plans, respectively, to be made available 'in one or more formats accessible to people with disability'.

3.6 Additionally, Schedule 1 of the Bill proposes extending the period of review for disability action plans made or remade by a local council. Specifically, it extends the period of review for plans made or remade in 2017 so that the review would be due at the end of 30 November 2022 (in excess of the 4-year review period). In the second reading speech, Mr Martin explained that this extension is due to the postponing of local council elections by one year due to COVID-19 and serious flooding in many local government areas.

3.7 In his second reading speech, Mr Martin highlighted the Bill's provisions which would repeal parts of the Act 'no longer relevant or operational in New South Wales following the NDIS transition'. These provisions include:

(a) at Schedules 2.1 and 2.7 of the Bill, the repeal of the Ombudsman's functions to review deaths of people with disability and oversee reportable incidents in supported group accommodation. The NDIS Quality and Safeguards Commission now oversees both deaths of people with disability and reportable incidents in connection with the provision of NDIS supports and services.

(b) at Schedule 1 of the Bill, the substantial omission of Part 4 (Service standards) and 5 (Provision of supports and services) of the principal Act, with:

(i) section 20 of the principal Act, being the regulation-making power with respect to disability services, retained in the new Part 4 proposed by the Bill.

(ii) sections 37, 38 and 39 of the principal Act retained and renumbered as sections 21, 22 and 23 in the new Part 4 proposed by the Bill. These sections provide for financial assistance to government departments, local councils or other entities to promote the objects of the Act, with a related power for the Secretary to request information and protection against civil and criminal liability for a person providing information in good faith. The Committee notes that while the proposed sections amend the wording of the sections in the principal Act, they appear to remain the same in substance.

(iii) inclusion of a savings provisions within the Act to provide for continued financial assistance for a government department, local council or other entity and continued enforceability of a notice given by the Secretary under the repealed sections 37 and 38 respectively.

(iv) consequential amendments to the principal Act and other legislation resulting from these proposed changes set out in Schedules 1 and 2 of the Bill.

3.8 In his second reading speech, Mr Martin also said that sections 32 and 36 of the principal Act, relating to probity checks, are repealed by Schedule 1 as the NDIS Quality and Safeguards Commission administers NDIS worker screening protections. Additionally, that Schedule 3 deletes obsolete provisions regarding the amenities accounts of residents with disability in NSW government residential centres.

3.9 Mr Martin said that the:

> …substantive changes, along with the Act's existing and remaining provisions, will ensure that the Disability Inclusion Act continues to promote the inclusion and participation of people with disability in the community.

Issues considered by the Committee

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

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

Significant matters that may be included in subordinate legislation

3.10 Section 24 of the *Coroners Act 2009* (Coroners Act) provides that a senior coroner has jurisdiction to hold an inquest concerning the death or suspected death of a person if it appears to the coroner that the person was (or there is reasonable cause to suspect the person was) of a type set out in section 24.

3.11 The Bill would amend section 24(1)(e) and 24(1)(f) of the Coroners Act as a consequence of amendments proposed to the principal Act. Specifically, it would replace certain definitions in those clauses.

3.12 Section 24(1)(e) currently provides that the senior coroner's jurisdiction extends to 'a person (whether or not a child) who, at the time of the person's death, was living in, or was temporarily absent from, supported group accommodation or an assisted boarding house'.

3.13 The Bill seeks to repeals the definition of 'supported group accommodation' in the principal Act and, as a consequence, in section 24(1)(e) of the Coroners Act. In section 24(1)(e), that term is replaced with 'specialist disability accommodation', which means premises:

(a) 'enrolled under the National Disability Insurance Scheme (*Specialist Disability Accommodation) Rules 2020* of the Commonwealth, section 26, and

(b) that is, or is a type of premises, prescribed by the regulations to be specialist disability accommodation, and

(c) that is not, or is not a type of premises, prescribed by the regulations to not be specialist disability accommodation'.

3.14 Section 22 of the principal Act, which sets out the meaning of 'supported group accommodation', states at subsection (2) that supported group accommodation includes premises, or a type of premises, prescribed by the regulations to be supported group accommodation.

3.15 The matters referred to the regulations in section 24(1)(e) are set out in the Bill, as a new clause 4A into the *Coroners Regulation 2021*. This clause sets out the premises prescribed to be, and not to be, specialist disability accommodation.

3.16 Section 24(1)(f) currently provides that the senior coroner's jurisdiction extends to 'a person (other than a child in care) who is a person in the target group within the meaning of the *Disability Inclusion Act 2014* who receives from a service provider assistance (of a kind prescribed by the regulations) to enable the person to live independently in the community'.

3.17 The Bill repeals the definition of 'person in the target group' and in section 24(1)(f) replaces that term with 'person in the relevant group'. The definition of the latter term is set out in section 24A, which the Bill would insert into the Coroners Act. This term substantially replicates the definition of 'person in the target group'.

The Bill seeks to amend section 24 of the *Coroners Act 2009*, regarding the jurisdiction of a senior coroner to hold an inquest into a death or suspected death, as a consequence of the Bill's proposed changes to the *Disability Inclusion Bill 2014*. It would amend section 24(1)(e) to refer to 'specialist disability accommodation' rather than 'supported group accommodation' and section 24(1)(f) to refer to a 'person in the relevant group' rather than a 'person in the target group'.

Under the amended section 24(1)(e), a senior coroner's jurisdiction extends to a person who, at the time of their death, was living in, or temporarily absent from, 'specialist disability accommodation' or an assisted boarding house. The definition of 'supported group accommodation' includes premises (or a type of premises) that is, or is not, prescribed by the regulations. The Bill would also amend the *Coroners Regulation 2021* to insert clause 4A, which prescribes such premises for the purposes of this definition.

Under the amended section 24(1)(f), a senior coroner's jurisdiction extends to a person, other than a child in care, who is a 'person in the relevant group' (as defined by the proposed section 24A of the Bill), and receives assistance of a kind prescribed by the regulations from a service provider to enable the person to live independently in the community.

The regulations would include key criteria determining a senior coroner's jurisdiction to hold an inquest into the death or suspected death of certain persons with disability. The Bill may therefore allow for significant matters to be dealt with in subordinate legislation. The Committee generally prefers for such matters to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight.

The Committee acknowledges that the matters delegated above are referred to the regulations by the current legislation, and that the Bill includes the matters referred by the proposed section 24(1)(e) for the Parliament's consideration. Further, that regulations are subject to disallowance under section 41 of the *Interpretation Act 1987*. The Committee notes in relation to both sections that flexibility may be necessary to accommodate the National Disability Insurance Scheme. In the circumstances, the Committee makes no further comment.

4. Statute Law (Miscellaneous Provisions) Bill 2022

Date introduced	17 May 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Member introducing	The Hon. Gabrielle Upton MP
Portfolio	Premier

Purpose and description

4.1 The objects of this Bill are to—

(a) make minor amendments to the *Public Works and Procurement Act 1912*, the *Subordinate Legislation Act 1989* and the *Western Sydney University Act 1997*, and

(b) postpone the date on which certain regulations are automatically repealed by the *Subordinate Legislation Act 1989*, and

(c) amend certain other Acts and instruments for the purpose of effecting statute law revision (Schedule 2), and

(d) make other provisions of a consequential or ancillary nature (Schedule 3).

Background

4.2 In her second reading speech, The Hon. Gabrielle Upton MP, Parliamentary Secretary to the Premier (on behalf of the Hon. Dominic Perrottet MP), noted that the Bill 'continues the statute law revision program', which she emphasised:

> …is an effective way for making minor policy changes. It is also significant in maintaining the quality of our statute book and does important things like removing typographical errors, updating cross-references and repealing redundant provisions.

4.3 To that end, the Bill seeks to make various amendments to a number of unrelated Acts and are grouped into Schedules within the Bill in accordance with the operational nature of those provisions. Those Schedules were described by Ms Upton MP in her second reading speech as follows:

(a) Schedule 1 proposes amendments 'of a minor or non-controversial nature… that are too inconsequential to warrant the introduction of a separate amending bill' to three separate Acts: the *Public Works and Procurement Act 1912* (Public Works Act), *Subordinate Legislation Act 1989* and *Western Sydney University Act 1997*.

(b) Schedule 2 'deals purely with statute law matters consisting of minor technical changes to legislation that the Parliamentary Counsel considers appropriate for inclusion in the bill'.

(c) Schedule 3 sets out general savings, transitional and other provisions intended to 'deal with the effect of amendments on amending provisions' upon the enactment of the Bill as an Act.

4.4 In her second reading speech, Ms Upton summarised that those substantive amendments included in Schedule 1 introduce delegation powers into the Public Works Act, postpone the automatic repeal of statutory rules set out in the *Subordinate Legislation Act 1989* and require a member of the board of trustees constituted under the *Western Sydney University Act 1997* to preside at committee meetings constituted by the board.

Issues considered by the Committee

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

Wide powers of delegation

4.5 Schedule 1, clause 1.1 of the Bill amends the Public Works Act by inserting section 5B into the Act. Section 5B provides the Minister and the Constructing Authority established under that Act with the power to delegate any of their respective functions under the Act to:

(a) a government agency, or a government agency employee, or

(b) a person, or a class of persons, authorised for the purposes of this subsection by the regulations.

4.6 Relevantly, section 162 of the Public Works Act broadly defines 'government agency' to include any NSW Government agency or government sector agency under the *Government Sector Employment Act 2013*, any State owned corporation prescribed by the regulations and 'any other public authority'. It also defines 'government agency employee' as 'a person employed in or by a government agency'.

4.7 The Minister is authorised under the Public Works Act to exercise a broad range of functions and powers, including the power to:

(a) authorise the acquisition of land for public use or authorised public workers (sections 39 and 40)

(b) use powers and enjoy immunities of local councils in the exercise of certain functions relating to public works and procurement under the *Local Government Act 1993* (sections 152, 160 and 161)

(c) temporarily or permanently close a national work, which is a road, bridge, ferry, wharf, public reserve or public work proclaimed to be national work (section 156)

(d) control and give directions to the NSW Procurement Board in the exercise of the Board's functions (section 166).

4.8 Additionally, once land has been 'taken' or acquired under the Public Works Act for public works or a public purpose, Division 6 of Part 6 of that Act authorises the Constructing Authority to exercise a broad range of powers in respect to those public works. These broad powers include the power to enter land and use or perform works on that land, taking temporary possession of land acquired/taken, as well as the power to determine claims for compensation in respect to that land at first instance.

4.9 In her second reading speech to the Bill, Ms Upton emphasised that the introduction of this delegation power:

> …updates the 110-year-old Act to reflect the current legislative practice of our powers of delegation, allowing the Minister and the constructing authority to delegate functions in a way that better reflects modern governance practices.

The Bill amends the *Public Works and Procurement Act 1912* to enable the Minister or the Constructing Authority to delegate any of their functions under the Act to a government agency, government agency employee or such other persons authorised by the regulations.

The Committee notes that there are no restrictions on this power to delegate. For example, restricting delegation to employees with a certain level of seniority or expertise. It also notes that the functions which may be delegated under the Act includes broad powers to acquire or take land for public works, enter and use land to carry out public works, close public works proclaimed national works, determinate compensation claims and give directions to the NSW Procurement Board.

The Committee acknowledges that the delegation of legislative functions is a common practice intended to facilitate cost effective and efficient administration, and that the amendments are intended to modernise the Act to align with existing governance practices. However, the Committee generally prefers provisions about the persons and classes of persons to whom legislative functions can be delegated to, be drafted with more specificity. In this case, the agencies, persons or class of persons to whom functions can be delegated is quite broad. Additionally, the Committee generally prefers such persons be included in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight. For these reasons, the Committee refers the matter to Parliament for its consideration.

Matters deferred to regulations

4.10 Schedule 3, clause 5 of the Bill provides a general regulation-making power in respect to provisions of a savings or transitional nature consequent on the enactment of the Bill as an Act. Subclause (2) clarifies that such regulations may provide that its provisions may be taken to have effect from the date of assent (or a later date) of the Bill as an Act.

4.11 Relevantly, subclause (3) limits the operation of such regulatory provisions taking effect from a date earlier than the date of its publication, so that those provisions cannot operate in a way that would prejudicially affect the pre-existing rights of a

person or impose liabilities in respect to actions or omissions done before publication.

The Bill provides a general regulation-making power to make provisions of a savings or transitional nature consequent on the enactment of the Bill as an Act. It also provides that such regulatory provisions may take effect from the date of assent of the Bill as an Act, which would be earlier than the date of publication of those regulations.

The Committee generally prefers substantive matters to be set out in the Act where they can be subjected to a greater level of parliamentary scrutiny. In particular, where the matters may have retrospective application which may run counter to the rule of law principle that people are entitled to know the law to which they are subject at any given time.

It also notes that the regulatory provisions taken to have effect prior to publication may run counter to section 39 of the *Interpretation Act 1987*, which provides that statutory rules commence on the day they are published or else a later specified date. The Committee generally comments where provisions may be contrary to other laws as this may make it hard for individuals to ascertain and understand the law applicable to them at any given time, again running counter to the rule of law principle.

However, the Committee acknowledges that the regulation-making power is limited to provisions of a savings or transitional nature consequent on the enactment of the provisions in the Bill. In the circumstances, the Committee makes no further comment.

5. Water Management Amendment (Floodplain Harvesting Licences Compensation) Bill 2022*

Date introduced	19 May 2022
House introduced	Legislative Assembly
Member responsible	Mrs Helen Dalton MP
	*Private Members Bill

Purpose and description

5.1 The object of this Bill is to amend the *Water Management Act 2000*, section 87AA—

(a) to remove the entitlement of floodplain harvesting access licence holders to compensation for certain water allocation reductions, and

(b) to extinguish any existing entitlements.

Background

5.2 The *Water Management Act 2000* (Act) sets out the overarching regulatory framework for accessing water from specified sources within New South Wales, by providing for volumetric allocations of water access under a comprehensive licensing scheme subject to water managements plans. Water management plans oversee the sharing and use of water from a water management area and set caps on the total volume of water that may be accessed from that area. This overarching limit applies to the cumulative volume of water available for access by all relevant license holders. Therefore, when water management plans are varied, the allocated volumes permitted under an access licence may be consequently reduced.

5.3 The Act also regulates floodplain harvesting, which is the capture and use of water flowing across a prescribed floodplain,[3] under section 57A. That section grants a general regulation-making power for the issue of replacement floodplain harvesting access licences and defers the substance of those access licences to regulatory provisions. The Act also provides broad administrative powers to the Minister for achieving the objects of the Act, including the power to compulsorily acquire access licences where required for the public interest.

5.4 The Bill seeks to amend the Act to exclude access licences for floodplain harvesting from entitlement to compensation in circumstances where that licence is reduced due to amendments to the relevant management plan dealing with water sharing. The Bill seeks to act retrospectively to extinguish any right to compensation for

[3] NSW Government, *Floodplain harvesting licensing*, viewed 8 April 2022.

holders of all types of floodplain harvesting access licences that arose prior to the commencement of the Bill.

5.5 The Committee notes that the *Water Management (General) Amendment Regulation 2021* published on 17 December 2021 amended the *Water Management (General) Regulation 2018* to include provisions for the issue of replacement floodplain harvesting access licences, in accordance with section 57A of the Act. As reported by the Committee in Appendix Two of its Digest No. 40/57 (22 March 2022),[4] that regulation was disallowed by motion of the Legislative Council on 24 February 2022 and therefore was not reported on by the Committee.

5.6 The Committee further notes that the issue and regulation of floodplain harvesting access licences in New South Wales has not yet been implemented.[5]

Issues considered by the Committee

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

Exclusion of compensation

5.7 The Bill seeks to amend Part 2, Division 9 of the Act which provides for compensation payable in relation to access licences. Specifically, the Bill amends section 87AA to exclude floodplain harvesting access licences for eligibility for compensation for reductions in water allocations arising from a variation to the bulk access regime under a water management plan. The Bill proposes a new section 87AA(10A) which makes explicit that the Bill operates retrospectively to extinguish any right to compensation that has previously arisen.

The Bill amends the *Water Management Act 2000* to exclude floodplain harvesting access licences from certain compensation. Specifically, it excludes these licence holders from compensation schemes for reduction in water allocations permitted by those licences. This amendment may preclude individuals from receiving compensation for loss of water access.

The Committee notes that these amendments are intended to address the potential public costs burden for administering such licences. However, the provisions do not appear to offer alternative avenues for individuals to seek compensation for lost access. For these reasons, the Committee refers this matter to Parliament for consideration.

[4] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 40/57*, 22 March 2022.

[5] NSW Government, *NSW Floodplain Harvesting Policy*, viewed 8 April 2022.

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.

(1A) The Committee is not precluded from exercising its functions under subsection (1) in relation to a regulation after it has ceased to be subject to disallowance if, while it is subject to disallowance, the Committee resolves to review and report to Parliament on the regulation.

(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.

(3) The functions of the Committee with respect to regulations do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

Appendix Two – Regulations without papers

Note: at the time of writing, the Committee makes no further comment about the following regulations.

1. Biodiversity Conservation Amendment Regulation 2022

   The object of this Regulation is to provide for the content of certain biodiversity development assessment reports prepared in relation to State significant development.

2. Child Protection (Working with Children) Amendment (Miscellaneous) Regulation 2022

   This Regulation has the following objects—

   a) to enable the holder of a working with children check clearance who is applying for a new clearance to—
      i) provide proof of their identity through an online system, and
      ii) pay the application fee by an online method of payment,
   b) to permit the Children's Guardian, with the consent of a worker, to disclose information to the Secretary of certain prescribed agencies indicating that a criminal record check at the time of the verification of the worker did not disclose any criminal record in relation to the worker,
   c) to clarify that grooming of a child is considered a sexual offence for the purposes of conduct constituting an assessment requirement trigger under the Child Protection (Working with Children) Act 2012.

   This Regulation is made under the Child Protection (Working with Children) Act 2012, including sections 13(4) and 52, the general regulation-making power.

3. Children's Court Practice Note 15 – Requests for the provision of services to facilitate restoration in care proceedings (2022-185)

   The purpose of Practice Note 15 is to guide the process relating to requests by the Children's Court for the provision of services to facilitate restoration. Restoration Services mean any service provided to a child or young person or their family in order to facilitate the safe restoration of the child or young person to their family.

   The Practice Note allows the Children's Court to request for the provision of a Restoration Service for a child or their family either on application by a party or on its own motion. Further, it requires the applying party to make enquiries with services and report back to the Court on how the government department or funded non-government agency has used its best endeavours to provide the Restoration Service.

4. Conveyancing (General) Amendment (AusNet Transmission Group Pty Ltd) Regulation 2022

   This Regulation prescribes AusNet Transmission Group Pty Ltd (ACN 079 798 173) as an authority in whose favour an easement without a dominant tenement may be created that is for the purposes of, or incidental to, the supply of a utility service to the public.

This Regulation is made under the Conveyancing Act 1919, including section 88A(1), definition of *prescribed authority*, paragraph (c) and section 202 (the general regulation-making power).

5. District Court Criminal Practice Note 21—Appeals Against Conviction (2022-163)

The object of revised Practice Note 21 is to standardise the timeframes in which written submissions must be filed and served in appeals against conviction. The Practice Note applies to appeals from the Local Court to the District Court and allows the Court to exercise its discretion in deviating from the standard time frames for filing and serving of submissions.

Under the Practice Note an appellant must file and serve a written outline of submissions no later than two weeks prior to the hearing date. The Crown is to file same no later than one week prior to the hearing date. The Practice Note also provides a guide as to the length of written submissions and notes that any applications for the adducing of fresh evidence must be made in accordance with the *Crimes (Appeal and Review) Act 2001*.

6. Government Sector Finance Amendment (Annual Reporting Requirements) Regulation 2022

The object of this Regulation is to update the list of statutory bodies and departments subject to annual reporting arrangements under the *Annual Reports (Statutory Bodies) Act 1984* and *Annual Reports (Departments) Act 1985*. This is to reflect the newly created agencies and changes made to existing agencies by the *Administrative Arrangements (Second Perrottet Ministry—Transitional) Order 2021*.

This Regulation is made under the *Government Sector Finance Act 2018*, including Schedule 1, clause 1 and section 10.4, the general regulation-making power.

7. Protection of the Environment Operations (Waste) Amendment Regulation 2022

The object of this Regulation is to amend the *Protection of the Environment Operations (Waste) Regulation 2014* to continue the effect of the exemption of mixed waste organic outputs from the calculation of waste contributions payable by licensees of scheduled waste disposal facilities under the *Protection of the Environment Operations Act 1997*. The exemption is limited to waste processed at facilities approved by the Environment Protection Authority by notice published in the Gazette and not exceeding the amount of waste specified in the notice.

Specifically, the Regulation extends the exemption under clause 21A of the *Protection of the Environment Operations (Waste) Regulation 2014* so that it applies from 20 May 2022 (being the date it was published on the NSW legislation website) until 1 November 2023.

This Regulation is made under the *Protection of the Environment Operations Act 1997*, including sections 88(5), 286 and 323 (the general regulation-making power).