

Legislation Review
Committee



PARLIAMENT OF
NEW SOUTH WALES

Legislation Review Digest
No. 50/57 - 8 November 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”.

Contents

MEMBERSHIP	2
GUIDE TO THE DIGEST	3
SUMMARY OF CONCLUSIONS	4
PART ONE – BILLS	17
1. CRIMES AMENDMENT (PROTECTION OF CRIMINAL DEFENCE LAWYERS) BILL 2022	17
2. DISTRICT COURT AMENDMENT BILL 2022	19
3. FISHERIES MANAGEMENT AMENDMENT (ENFORCEMENT POWERS) BILL 2022	21
4. GOVERNMENT SECTOR EMPLOYMENT AMENDMENT BILL 2022	25
5. ICAC AND OTHER INDEPENDENT COMMISSIONS LEGISLATION AMENDMENT (INDEPENDENT FUNDING) BILL 2022*	29
6. LOCAL LAND SERVICES AMENDMENT (PRIVATE NATIVE FORESTRY BILL) 2022*	31
7. MEDICINES, POISONS AND THERAPEUTIC GOODS BILL 2022	33
8. MOTOR ACCIDENT INJURIES AMENDMENT BILL 2022	47
9. PERSONAL INJURY COMMISSION AMENDMENT BILL 2022	53
10. REGISTERED CLUBS AMENDMENT BILL 2022	57
11. WATER MANAGEMENT AMENDMENT (WATER ACCESS LICENCE REGISTER) BILL 2022*	63
12. WEAPONS PROHIBITION AMENDMENT (SILENCERS) BILL 2022*	66
PART TWO – REGULATIONS	68
1. CHILDREN'S COURT OF NEW SOUTH WALES PRACTICE NOTE NO. 16 – APPLICATIONS FOR A MANDATORY TESTING ORDER	68
2. DRUG AND ALCOHOL TREATMENT REGULATION 2022	71
APPENDIX ONE – FUNCTIONS OF THE COMMITTEE	74
APPENDIX TWO – REGULATIONS WITHOUT PAPERS.....	79

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 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)*.
- 1.2 The Committee's report on a Bill introduced into Parliament includes commentary that:
 - (a) Where no issues set out in LRA section 8A(1)(b) are identified, the Committee makes no comment in respect of the issues set out in section 8A of the LRA.
 - (b) Where issues set out in LRA section 8A(1)(b) are identified, the Committee makes a distinct comment in respect to each issue identified.
- 1.3 For every issue identified by the Committee, the respective commentary will include a conclusion that either 'refers the matter to Parliament' or 'makes no further comment'.
- 1.4 Where the Committee concludes to ***refer the matter to Parliament***, the Committee considers that it requires a response or further comment by the Member with carriage of the Bill in respect to the Bill report.
- 1.5 Where the Committee concludes to ***make no further comment*** on an issue identified in the report, the Committee considers that the issue may technically engage with the criteria under LRA section 8A but, given counterbalancing considerations (e.g. safeguard provisions or reasons outlined by the Member with carriage), it is unlikely in practice to raise the issues under section 8A. The Committee invites but does not otherwise require the Member with carriage to comment on these issues raised in respect to the Bill.

Comment on Regulations

- 1.6 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. CRIMES AMENDMENT (PROTECTION OF CRIMINAL DEFENCE LAWYERS) BILL 2022

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

2. DISTRICT COURT AMENDMENT BILL 2022

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

Commencement by proclamation

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

However, the Committee notes that a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments to the District Court's jurisdictional limits. In the circumstances, the Committee makes no further comment.

3. FISHERIES MANAGEMENT AMENDMENT (ENFORCEMENT POWERS) BILL 2022

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

Personal property rights

The Bill's provisions allow fisheries officers to require a person to give a thing in their possession or under their control to the fisheries officer for examination if they have reason to believe it is in connection to a fisheries offence or necessary for the investigation, monitoring or enforcing compliance with the Act. It also allows a fisheries officer to break open and search a bag or container if that is the 'thing' that the fisheries officer has sought to examine. Under this section, a *thing* is defined to include fish, fishing gear and other equipment, but does not include a person.

As the Bill permits the giving, searching and examining of a thing which may include a person's fish, fishing gear, and other equipment, this may interfere with an individual's personal property rights. This is particularly in cases where the fisheries officer may break open a bag or container to search and examine it.

The Committee understands that the aim of the Bill is to clarify that fisheries officers can exercise their powers in locations as needed to address offences under the Act. However, the Committee notes that these powers are drafted broadly and have limited safeguards. As the Bill impacts upon personal property rights, and may incur a penalty for non-compliance, the Committee refers this issue to Parliament for its consideration.

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

Wide enforcement power

The Bill clarifies the enforcement powers of fisheries officers to specifically include that they may search for, examine, or require a person to give them a thing if the officer believes it is in

connection with a fisheries offence or necessary for the purpose of investigating, monitoring or enforcing compliance with the Act. Under this power, the thing must be given immediately or within a time period the fisheries officer allows. This time period is not defined.

It also permits the fisheries officer to use these powers anywhere including on premises or elsewhere, and that a fisheries officer is authorised to break open and search and examine a bag or container if that is the thing given to the fisheries officer under this section. A premises is defined to include land or a place, whether built or not. For example, a beach, trail, track, wharf, jetty, rock platform, riverbank and a similar location. It may also include a structure or building.

The Committee notes that this may permit a wide enforcement power that may be used in a wide number of locations and at any time where an officer has reason to believe a thing is in connection with a fisheries offence or necessary under the functions of the Act.

The Committee acknowledges that the Bill aims to clarify the powers of fisheries officers to be used in a wide range of locations to carry out their functions under the Act. However, the Committee notes that these powers are drafted broadly and have limited safeguards. As the bill impacts upon personal property rights, and may incur a penalty for non-compliance, the Committee refers this issue to Parliament for its consideration.

4. GOVERNMENT SECTOR EMPLOYMENT AMENDMENT BILL 2022

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

Information gathering and sharing powers not subject to privacy laws

The Bill provides that personal information and health privacy law does not affect the provision of information to the Secretary or DPC Secretary in specified circumstances, or their sharing of information to a head of a government sector agency or person (as applicable), under sections 83 and 16 of the GSE Act.

This limitation applies in the context of information gathering and investigatory powers, under which government sector employees' personal and sensitive health information may be provided to and shared by the Commissioner or DPC Secretary. While a safeguard limiting the public disclosure of information is legislated in relation to information obtained under section 16, it is unclear whether use of information obtained under section 83 is similarly limited, noting that the Bill permits publication of a report following a section 83 inquiry. The Bill would also prevent an individual from making a claim or bringing proceedings in relation to the publication of this report or a copy, which may limit their access to relief if their personal or health information is disclosed.

The Committee notes that the amendments allow the exchange of information for the purposes of the Commissioner's oversight powers and for the Commissioner or DPC Secretary to conduct an inquiry relating to the administration or management of a government sector agency. However, the potential impact on an individual's right to privacy resulting from the exercise of these administrative powers is unclear. The Committee therefore refers this matter to the Parliament for its consideration.

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

Commencement by proclamation

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

The Committee acknowledges that there may be practical reasons for imposing a flexible starting date, which may allow time for the necessary administrative arrangements to be implemented in order to give effect to the amendments. However, it notes that commencement by proclamation may make it difficult for public service employees to ascertain their obligations and rights under the Bill. In the circumstances, the Committee refers this matter to the Parliament for its consideration.

5. ICAC AND OTHER INDEPENDENT COMMISSIONS LEGISLATION AMENDMENT (INDEPENDENT FUNDING) BILL 2022*

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

6. LOCAL LAND SERVICES AMENDMENT (PRIVATE NATIVE FORESTRY BILL) 2022*

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

7. MEDICINES, POISONS AND THERAPEUTIC GOODS BILL 2022

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

Offence regime – strict liability offences, penalty notice offences and executive liability for offences by corporations

The Bill sets out provisions that engage with issues of strict liability, penalty notice offences and executive liability for offences by corporations.

First, the Bill establishes tiered regimes consisting of strict liability and knowledge offences for specified conduct involving dealing with scheduled substances and other prescribed therapeutic goods without authorisation. The maximum penalties carried by offences under the Bill are classified as Tier 1 to 5, where Tiers 1 and 2 maximum penalties include potential terms of imprisonment of two years and six months respectively.

Chapter 2 establishes strict liability offences for unauthorised supply or prescriptions which carry Tier 1 and Tier 2 maximum penalties. A strict liability offence of unauthorised disclosure of information under section 146 also carries a maximum Tier 2 penalty. 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.

Second, the Bill provides for regulations to prescribe penalty notice offences, which would enable authorised officers to issue a penalty notice offence if it appears to the officer that 'the person has committed a penalty notice offence'. The Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. As they may be issued a penalty notice on the grounds that an officer believes they have committed a penalty notice offence, this may also impact on a person's right to the presumption of innocence.

Third, the Bill extends criminal liability for the commission of offences by corporations to its directors or other persons concerned in its management. Specifically, it provides that such a person who knowingly authorised or permitted the contravention by the corporation is taken to have committed the same offence. A person may be prosecuted for this executive criminal liability, regardless of whether the corporation has been proceeded against or convicted. This may mean an accused person may be convicted of an offence through executive criminal liability arising from corporate criminal conduct not otherwise punished by law.

The Committee notes that the offence regimes and penalties established by the provisions are intended to reflect the seriousness of the potential harm caused by the scheduled substances and prescribed therapeutic goods. It also acknowledges that strict liability offences and executive criminal liability are not uncommon in regulatory settings to encourage compliance.

In respect to penalty notice offences, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court. It also acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice.

However, the Committee notes that individuals may be: convicted of certain strict liability offences which carry potential custodial penalties, without requiring the prosecution to prove a mental element beyond reasonable doubt; or convicted for offending by corporations due to executive liability, before or without the need to convict the corporation. It also notes that the prescription of penalty notice offences is deferred to regulations, rather than setting them out in the primary legislation where they can be subject to an appropriate level of parliamentary scrutiny. For these reasons, the Committee refers this matter to Parliament for its consideration.

Presumption of innocence – reverse onus of proof

The Bill makes amendments to the *Drug Misuse and Trafficking Act 1985* consequent to its enactment as an Act. This includes updating section 18B establishing offences for the manufacture, supply, possession and use of certain prohibited scheduled substances and inserting section 18C in respect to those offences involving the possession or supply of Schedule 4D.

Section 18C specifically provides that a person in possession of a Schedule 4D substance over a prescribed quantity is taken to have possession in offence proceedings, unless they can prove the contrary or prove it was obtained under an authorised prescription. It also provides that a person is taken to have supplied a Schedule 4D substance if they represent it as being a Schedule 4D substance, for the purposes of proceedings for an offence under section 18B.

By requiring the accused person to prove they did not have possession for the purposes of the offence or that the possession was authorised, the Bill would reverse the onus of proof. In regards to criminal actions, the reverse onus may undermine the presumption of innocence and right to procedural fairness, by presuming the person met the physical element of a supply or possession offence under section 18B, where it involves an alleged Schedule 4D substance.

The Committee acknowledges that the provisions are intended to strengthen the compliance with serious drug offences. However, it notes that offences under section 18B carry maximum penalties that include a potential 12 months term of imprisonment. For these reasons, the Committee refers this matter to Parliament for its consideration.

Application of criminal offences under Commonwealth and NSW laws

The Bill makes various provisions which applies a number of Commonwealth Acts and their subordinate legislation as laws of NSW. These Commonwealth laws include laws scheduling certain substances which would prohibit dealing with them without proper authorisation in law, as well as Commonwealth schemes for the administration, enforcement and criminal prosecution of matters under the Commonwealth laws.

The Bill also requires an offence against applied Commonwealth laws to be treated as a Commonwealth criminal offence, and to be dealt with under the Commonwealth criminal justice system. It notes that the Bill includes provisions explicitly preventing a person being charged, prosecuted and convicted of conduct as a Commonwealth offence and a NSW offence against the applied Commonwealth laws.

However, the Bill separately establishes criminal offences in NSW law for dealing with scheduled substances and prescribed therapeutic goods without proper authorisation. Conduct may constitute an offence against the Commonwealth laws applied in NSW and separately the distinct offence provisions in the Bill. The Committee notes that, in respect to this overlap, it is not clear from the Bill's provisions whether a person may be tried in both jurisdictions for the same offending conduct. For these reasons, the Committee refers this matter regarding the application of Commonwealth criminal laws to Parliament for its consideration.

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

Wide powers of enforcement and to compel evidence

The Bill provides for a number of investigation and enforcement powers, including powers to enter and search premises without warrant, seize things, require a person to provide assistance or answers, and compel certain information. It also provides for the exclusion of civil liability to pay compensation for relevant authorised persons or those acting under their direction or the State, in respect to alleged negligence, defamation or other breach of duty arising from the exercise of functions under the Bill.

Therefore, the Bill may grant authorised officers, including police officers, wide powers of enforcement. The exercise of these enforcement powers may impact an individual's rights including, for example, their property rights in respect to the power to enter premises and seize property, their right to the presumption of innocence where the exercise of functions is based on reasonable suspicions that a person has committed an offence, and their privilege from self-incrimination in respect to the power to give directions for assistance.

The Committee recognises that these provisions are intended to strengthen the enforcement and compliance of the legislative framework regulating potentially dangerous substances. However, the Committee notes that the exclusion of civil liability and the exercise of these powers without warrant may limit a person's ability to seek review or recourse. For these reasons, the Committee refers this matter to Parliament for its consideration.

Wide regulation-making power – matters 'convenient to' administration

The Bill provides a general regulation-making power under section 149. Specifically, it allows regulations to prescribe a matter that is 'necessary or convenient' for carrying out or effecting the Bill.

There appears to be no provisions which define or narrow the scope of the ordinary meaning of 'convenient'. The Bill may therefore include a wide regulation-making power. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when it commences.

The Committee recognises that the provisions allow for more flexible regulatory responses in respect to the supply, manufacturing or prescription of scheduled substances and other therapeutic goods. However, it notes that the provisions may effectively allow regulations to prescribe matters with little limit. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Wide powers of the Health Secretary to make orders

The Bill grants the Health Secretary a number of discretionary powers, including the power to issue restriction orders, supply prohibition orders or public health risk authorisation orders, and

to grant DMT authorities which authorises conduct that may otherwise constitute serious drug offences. The exercise of these powers may impact or change whether conduct is prohibited under the Bill, and thus whether a person may be committing an offence in relation to dealing with scheduled substances or other prescribed therapeutic goods.

The Committee acknowledges that many of these powers continue existing arrangements or otherwise provide emergency powers intended to allow faster and more flexible administrative responses in times of crises. It also notes that there are provisions for people to seek reviews of decisions made by the Health Secretary. However, the Committee notes that these reviews are to be done by the Secretary. It further notes that, while some orders and authorities are required to be published in the Gazette, they may commence prior to publication. It is not clear whether they are required to be tabled in Parliament, and thus subject to disallowance under section 41 of the *Interpretation Act 1987*. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Extension of administrative functions under Commonwealth laws

Chapter 4 of the Bill makes provisions which extend the functions of the Commonwealth Minister, Secretary and officers authorised or appointed under relevant Commonwealth therapeutic goods and administrative laws applied in New South Wales and as modified by regulations. As this extension is by way of a broad application of Commonwealth laws in NSW, this may amount to a wide delegation of NSW executive authority to Commonwealth officers and agencies.

The Committee acknowledges that allowing Commonwealth officers to carry out their functions in NSW would facilitate a uniform national approach to the regulation of dangerous or prohibited substances. However, the Committee notes that the functions they are authorised to carry out is legislated by the Commonwealth Parliament and otherwise modified by regulations. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. For these reasons, the Committee refers this matter to Parliament for its consideration.

Commencement by proclamation

The Bill commences by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that the flexible start date may assist with the administrative arrangements required to implement the updated legislated framework regulating the supply of scheduled substances and therapeutic goods. In the circumstances, the Committee makes no further comment.

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

Incorporation of external materials into regulations

The Bill provides that authorisations made under Chapter 3 or regulations under the Bill (as an Act) may apply, adopt or incorporate wholly or in part and with or without modification any material that is in force from time to time or at a particular time, which is prescribed or published by an authority or body (including outside of NSW).

The Committee notes that this may allow for the incorporation of extrinsic materials into NSW law with little limit. It also notes that there is no requirement under the Bill for these extrinsic materials to be tabled in Parliament, and thus subject to disallowance under section 41 of the *Interpretation Act 1987*. To ensure an appropriate level of parliamentary oversight, the

Committee usually prefers for legislative requirements to be included in primary legislation rather than separate materials.

The Committee recognises that the incorporation of extrinsic materials may allow for more responsive and flexible administration of the state regulatory framework around potentially dangerous drugs, substances and therapeutic goods. However, it notes that the extrinsic materials incorporated may impact the requirements of an individual to comply with a relevant authorisation granted to them or requirements under the regulations. Non-compliance with either may result in a person contravening the provisions of the Bill or regulations, and may also constitute an offence. For these reasons, the Committee refers this matter to Parliament for its consideration.

Matters deferred to the regulations

The Bill defers a significant number of matters to the regulations, including the modified application of Commonwealth therapeutic goods laws in NSW, prescribing circumstances where conduct would amount to an offence and penalties for offences involving unspecified scheduled substances. The Committee generally prefers substantive matters to be dealt with in the principal legislation, rather than the regulations, to facilitate an appropriate level of parliamentary oversight.

The Bill also provides that the regulations may create offences that carry a maximum penalty of 20 penalty units (\$2 200) for individuals or 100 penalty units (\$11 000) for corporations. The Committee prefers that offences, particularly those that introduce a custodial sentence, be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny.

The Committee acknowledges that these provisions are intended to build more flexibility into the regulatory framework and allow regulators to better respond to changing industry circumstances. 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*.

However, the matters deferred to the regulations relate to the authorisation of activities and other conduct dealing with scheduled substances and other prescribed therapeutic goods, which goes to the core subject matter for which the Bill seeks to regulate. It also notes that non-compliance with the regulations may constitute offending conduct or contraventions of requirements under the Bill. For these reasons, the Committee refers the matter to Parliament for its consideration.

8. MOTOR ACCIDENT INJURIES AMENDMENT BILL 2022

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

Retrospectivity

The Bill contains provisions that its amendments extend to motor accidents that occurred, or claims for statutory benefits or damages made, before the commencement of the amendment, but not before 1 December 2017. It therefore has retrospective application.

The Committee generally comments on provisions drafted to have retrospective effect, as they may impact on the rule of law principle. That is, a person is entitled to know the law to which they are subject at any given time. However, the Committee notes that the amendments appear to allow individuals greater protections under the Act, such as extending the weekly payments from 26 to 52 weeks to injured persons wholly or mostly at fault, or injured persons with a threshold injury. In the circumstances the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions (s 8A(b)(iii))

Exclusion of ground for merit review

The Bill removes two grounds for merit review that are currently set out in the Act. The Committee notes that the ground for Merit Review set out in clause 1(m) of Schedule 2 to the Act is likely made redundant by the amendments to section 3.28 of the Act. However, the Committee notes that there may still be reasons for a claimant to apply for merit review as set out in Clause 1(l) of Schedule 2 of the Act. The Committee notes that the removal of this ground for merit review may limit procedural fairness and make a claimant's rights or obligations unduly dependent upon a non-reviewable decision. In the circumstances, the Committee refers the matter to Parliament for its consideration.

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

Commencement by Proclamation

Section 2 of the Bill states that 1 Schedule 1[10]–[14], [19], [24], [25], [28], [29], [32]–[43], [49] and [50] will commence on the date of assent, and all other amendments will commence on 1 April 2023 or a later day or day appointed by proclamation.

The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. The Committee acknowledges that there may be practical reasons for imposing a flexible starting date such as allowing for implementation or administrative activities to be arranged. However the Committee refers the matter to Parliament to consider whether a set start date would provide clarity to anyone potentially impacted by the amendments.

Henry VIII Clause

The Bill amends the *Motor Accident Injuries Act 2022* to provide that, except as provided by the Regulation and the exceptions set out in Schedule 4 to the Act, all claims for statutory benefits or damages made before the commencement of the amendment, but not before 1 December 2017. This appears to be a Henry VIII clause as it allows the provision of primary legislation to be overridden by regulation, and thereby to legislate without reference to Parliament. The Committee refers this matter to Parliament for its consideration.

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

Significant matters deferred to Motor Accident Guidelines and regulations

The Bill defers a number of matters set out in the Act to the Motor Accident Guidelines and the Regulation. Matters include the adjustment of premiums and fund levies, the authorisation of weekly payments of statutory benefits where a claim is not made within 28 days of an accident, or in relation to the appointment of persons authorised to conduct certain assessments.

The Committee generally prefers substantive matters to be dealt with in the principal legislation to facilitate an appropriate level of parliamentary oversight, particularly where those matters may impact an individual's rights.

However, the Committee acknowledges that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. The Committee also notes the Motor Accident Guidelines are disallowable instruments. In the circumstances the Committee makes no further comment.

9. PERSONAL INJURY COMMISSION AMENDMENT BILL 2022

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

Wide powers to compel evidence – powers of the Commission and mediators

The Bill amends the *Personal Injury Commission Act 2020* to allow the Personal Injury Commission to summon a person who is not a party to motor accident proceedings to appear in a related hearing or conference. It also inserts section 51A into the Act to enable the Commission to direct a person appearing at a hearing to give evidence on oath or affirmation or to answer a relevant question put to them.

The Bill also amends the *Motor Accident Injuries Act 2017* to allow the President of the Commission to refer a motor accidents injury dispute to mediation. It further extends the powers of the Commission to compel the production/disclosure of evidence and to summon a person to appear before the mediator for a referred mediation.

The Bill may therefore grant the Commission and certain mediators wide powers to compel evidence from an individual. The exercise of these powers may impact individual rights, including a person's right to silence by being compelled at pain of penalty to give evidence in proceedings before the Commission or in the course of mediations referred by the Commission.

However, the Committee notes that safeguard provisions are included, so that a person cannot be compelled to give evidence that may be self-incriminating. It acknowledges that the expanded power to issue summons is intended to facilitate the administrative efficiency of the Commission's functions by allowing the summoning of witnesses without the need for court orders. It further acknowledges that the extension of powers to mediators is intended to facilitate mediations achieving conciliation between parties to a dispute. In the circumstances, the Committee makes no further comment.

Retrospectivity

The Bill makes various amendments to the *Motor Accident Injuries Act 2017* to provide for the referral of motor accident dispute claims to mediation. It also inserts savings and transitional provisions into the Acts which extend the application of these amendments to motor accidents and claims occurring before December 2017, and to certain applications for review or assessment before commencement of these amendments. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

However, the Committee acknowledges that the amendments are intended to facilitate administrative efficiency by encouraging alternative dispute resolutions. In the circumstances, the Committee makes no further comment.

10. REGISTERED CLUBS AMENDMENT BILL 2022

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

Strict Liability Offences

The Bill creates a number of strict liability offences. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and may provide a financial incentive for impacted parties to comply with their obligations under the legislation. In the circumstances, the Committee makes no further comment.

Procedural Fairness – creation of penalty notice offences

The Bill designates four offences under the Regulation as penalty notice offences. Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a court to have their matter heard. This may impact on a person's right to a fair trial. That is, to have the matter heard by an impartial decision maker in public and to put forward their side of the case.

However, the Committee acknowledges that the amendment does not remove a person's right to have their matter heard and determined by a Court. Additionally, there are practical benefits in allowing matters to be dealt with by way of a penalty notice, including cost effectiveness and ease of administration. The amount payable under a penalty notice is also lower than the maximum penalty payable if the matter were determined by a Court. In the circumstances the Committee makes no further comment.

Freedom of movement, procedural fairness and administrative review rights

The Bill would allow an 'authorised person' for a registered club to make an order excluding a person from a premises if they reasonably suspect that the person is engaging in, or has engaged in, conduct that constitutes an offence or otherwise poses a risk to the health or safety of the person or persons in the club's premises. The Bill also provides that it is an offence for an excluded person to enter or remain on the club's premises, and that the offence attracts a maximum penalty of 50 penalty units (\$5 500). These amendments effectively limit an individual's freedom of movement.

The Bill provides that an exclusion order must be in writing and issued in a form approved by the Authority. The Committee notes that it is unclear what would constitute an 'approved form' for the purposes of this amendment. Further, it is unclear whether the approved form will include reasons for why a decision to issue an exclusion order was made. While the Bill does provide an avenue for the excluded person to seek review of an exclusion order, there is no express requirement for the review body to provide reasons to the affected person for its decision. Without clear reasoning for why an order was issued, an individual may in practice find it difficult to challenge a decision.

The Committee acknowledges the intent of the provision is to prevent crime and minimise harm. However, given the potential impact on an individual's freedom of movement and uncertainty around procedural and administrative safeguards, the Committee refers the matter to Parliament for its consideration of whether the provisions trespass unduly on the right to freedom of movement.

Privacy of personal DNA information

The Bill empowers registered clubs to use technology including facial recognition technology and electronic sign-ins to fulfill several objectives under the Act. The Committee is concerned that this may encroach on the right to privacy of personal information, particularly where biometric information is stored and used by the registered club.

The Committee notes that the Bill does not contain information on key privacy protection matters such as how biometric information will be stored, how long biometric information will be stored for, and who will have access to an individual's biometric information. The Committee acknowledges that the Bill provides a requirement for facial recognition technology to be used in accordance with guidelines issued by the Secretary. However, the Committee considers the risks to personal privacy may be amplified by the fact that these guidelines are not yet in force.

The Committee acknowledges the intent of the Bill is to minimise harm and prevent crime. However, without express legislated safeguards to protect an individual's biometric information, the Committee refers the matter to Parliament for its consideration.

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

Incorporation of extrinsic material

The Bill requires registered clubs using facial recognition technology in the club's premises to comply with guidelines issued by the Secretary. The Committee notes that guidelines of this nature are not yet published.

The Bill and the Act generally, is silent on the powers of the Secretary to publish guidelines on the use of facial recognition technology. It is also unclear whether these guidelines are required to be tabled in Parliament and therefore subject to parliamentary scrutiny. The Committee acknowledges that this may provide the flexibility necessary to accommodate a developing space. However, given that the use of facial technology will likely interfere with privacy and confidentiality interests, the Committee refers the matter to Parliament for consideration.

11. WATER MANAGEMENT AMENDMENT (WATER ACCESS LICENCE REGISTER) BILL 2022*

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

Delegation to the regulations – creation of offences and incorporation of external documents

The Bill inserts section 71ZA which defers certain matters to the regulations, including that they may prescribe a code of conduct for brokers and relevant offences for failing to comply with this code. Section 400(3A) provides that the regulations may create offences that carry a maximum penalty of 100 penalty units (\$11 000).

The Committee generally prefers that substantive clauses, such as offences, are set out in the Act where they can be subject to a greater level of parliamentary scrutiny. This is particularly where offences may carry a high monetary amount or incorporate external documents (i.e. the code of conduct) that is not subject to disallowance.

However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. The Committee further notes that the penalties are monetary in nature, rather than carrying terms of imprisonment, which is not uncommon in a regulatory setting to encourage compliance. Further, the Committee notes that the provision is aimed at regulating the conduct of brokers and brokerage services, which includes providing advice about dealing or holding an access licence, investigating a prospective dealing in an access licence, and preparing and submitting documents necessary for dealing in an access licence. In the circumstances, the Committee makes no further comment.

12. WEAPONS PROHIBITION AMENDMENT (SILENCERS) BILL 2022*

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

PART TWO – REGULATIONS

1. CHILDREN'S COURT OF NEW SOUTH WALES PRACTICE NOTE NO. 16 – APPLICATIONS FOR A MANDATORY TESTING ORDER

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

Right to personal physical integrity

The Practice Note sets out details on the procedure for filing, listing, serving, notifying and hearing an application for a Mandatory Testing Order for a vulnerable third party (14 to 18 years of age), in accordance with section 14 of the *Mandatory Disease Testing Act 2021*. Under that Act, an application may be made to provide for mandatory blood testing of a person in circumstances where a health, emergency or public sector worker comes into contact with the person's bodily fluid as a result of the person's deliberate action, and where the worker is at risk of contracting a blood-borne disease as a result of the person's deliberate action.

The Committee previously considered the provisions of the Act when it was introduced as a Bill in its Digest 24/57. Consistent with the Committee's previous comments, it notes the invasive nature of the mandatory testing procedure, the power to perform such a procedure without the subject person's consent and by use of reasonable force, and the requirement to submit to a procedure may impact on an individual's right to personal physical integrity.

The Committee notes that the Practice Note provides a safeguard by requiring the Court to ensure on the first mention date that the vulnerable third party has had an opportunity to obtain legal advice and representation. It notes that this safeguard may be limited by the ability of parties to consent to continuing proceedings without hearing, particularly given potential questions of capacity of vulnerable third parties to provide informed consent.

However, the Committee acknowledges the purpose of the Act is to protect health, emergency and public sector workers that may be at risk of contracting a blood-borne disease during the course of their work. The Committee also recognises that the Practice Note sets out the process for an application to a Court for a Mandatory Testing Order, which is provided under the parent Act. However, given the Practice Note deals with issues of consent by a minor in relation to a physical procedure in the course of court proceedings, the Committee refers this matter to Parliament for its consideration of whether it unduly impacts upon a person's right to personal physical integrity.

Procedural fairness

The Practice Note permits the Court to make directions for the filing of written submissions, time limits for oral submissions or evidence, or other case management matters, where a hearing is estimated to exceed two hours. The Committee notes that these kinds of time limitations may impact upon the procedural fairness afforded to a person. However, the Committee acknowledges that it is intended to facilitate judicial efficiency by allowing the Court to deal with such matters expeditiously given the implications for the parties involved. In the circumstances, the Committee makes no further comment.

2. DRUG AND ALCOHOL TREATMENT REGULATION 2022

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

Right to security of person and personal liberty – power to restrain, search and seize and detain

The Regulation prescribes employees of St Vincent's Hospital Sydney and Northern Beaches Hospital, and the employees of or persons engaged by transport services providers contracted with those private hospitals, as 'transport officers' within the meaning of the *Drug and Alcohol Treatment Act 2007*, section 20. This would extend the functions and powers of transport officers under the Act to these private employees.

Under section 20, transport officers may use reasonable force and/or restrain a person they are transporting to a substance dependence treatment centre, and perform an ordinary or frisk search of them if the officer reasonably suspects that they are carrying a thing that would pose

a danger or be used to aid escape from custody. The Regulation may therefore extend a wide enforcement power, the exercise of which may impact a person's right to security and personal liberty.

The Committee notes that the provisions are intended to facilitate the operation of substance dependence treatment programs run in the specified hospitals. However, the provisions would allow private sector employees to use reasonable force, restrain persons and conduct searches. The Committee notes that, unlike police officers and staff members of the NSW Health service, private sector employees are not subject to the same obligations, duties and safeguards provided in NSW law. For these reasons, the Committee refers this matter to Parliament for its consideration.

Part One – Bills

1. Crimes Amendment (Protection of Criminal Defence Lawyers) Bill 2022

Date introduced	19 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

- 1.1 The object of this Bill is to extend offences protecting judges and persons connected with judicial proceedings from threats, intimidation and reprisals to also protect an Australian legal practitioner who acts—
- (a) for a defendant in a criminal matter, or
 - (b) in connection with criminal proceedings.

Background

- 1.2 The Bill seeks to amend various provisions under Part 7, Division 3 of the *Crimes Act 1900* (the **Act**), which establishes a number of offences for interfering with judicial officers and other people connected to judicial proceedings. The maximum penalties carried by offences under this Division are significant terms of imprisonment. In his second reading speech to the Bill, the Hon. Mark Speakman SC MP, Attorney General stated that the amendments are intended to:
- ... extend existing legislative protections for public justice officials against injury, detriment and threats, to lawyers acting for a defendant in a criminal matter, or acting in connection with criminal proceedings.
- 1.3 Specifically, the Bill would amend section 322 of the Act which sets out the offence of threatening, causing or doing injury or detriment to a person in respect to their involvement or connection with judicial proceedings. The amendments clarify that a person commits an offence if they threaten, cause or do injury or detriment without reasonable excuse.
- 1.4 The bill would also expand the circumstances of offending conduct to include a person threatening, causing or doing injury or detriment to a person, with the intention to influence their conduct as an Australian legal practitioner acting for a defendant in a criminal matter or in connection with criminal proceedings.

- 1.5 Further, the Bill seeks to make similar amendments to section 326 of the Act, which establishes the offence of threatening, causing or doing injury or detriment to a person on account of their lawful conduct as a judicial officer, witness, juror or public justice official in connection with any judicial proceeding. That is, it proposes to include an Australian legal practitioner acting for a defendant in a criminal matter or in connection with criminal proceedings within that list of protected persons. It would also clarify that offending conduct requires conduct 'without reasonable excuse'.
- 1.6 The Attorney General described sections 322 and 326 of the Act as protections which 'aim to maintain confidence in the justice system and its integrity by protecting key officers of the courts'. He further highlighted the need for the reforms proposed by the Bill, stating that:
- ... these protections do not presently apply to defence lawyers. This is despite the fact that defence lawyers play a critical role in the operation of the criminal justice system by representing defendants in criminal trials. Criminal defence lawyers are officers of the court who support the justice system to make fair, just decisions in criminal matters. It is important that they are free from threats, intimidation and reprisals to uphold their duties to the court, the justice system and to their clients. The reforms proposed in the bill will address this gap.
- 1.7 The bill also proposes to insert subsections into sections 322 and 326 which clarifies that a 'reasonable excuse' includes making or threatening to:
- (a) Make a complaint about a person to an official body, including a professional body, the Judicial Commission of NSW or the NSW Legal Services Commissioner.
 - (b) End a retainer of a legal practitioner.
- 1.8 Finally, the Bill proposes consequential amendments to other legislative references to the offence under section 322 of the Act.
- 1.9 The Bill seeks to extend existing legal protections to Australian legal practitioners in connection with criminal proceedings and therefore does not engage with any of the reportable issues under section 8A of the *Legislation Review Act 1987*.

Issues considered by the Committee

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

2. District Court Amendment Bill 2022

Date introduced	19 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

2.1 The object of this Bill is to increase the jurisdictional limits of the District Court.

Background

2.2 The *District Court Amendment Bill 2022* (the *Bill*) amends the *District Court Act 1973* (the **Act**), which sets out the legislative framework establishing the District Court of New South Wales, to provide for the appointment of, and the powers, authorities, duties and functions of, Judges and other officers of the Court, to empower the Court to hear and dispose of certain civil and criminal proceedings.

2.3 The Bill makes amendments to increase the general civil and equitable jurisdictional limits of the District Court.

2.4 Specifically, the Bill increases the general jurisdictional limit in civil matters from \$750,000 to \$1,250,000, and the jurisdictional limit in equity proceedings and proceedings relating to a temporary injunction for breach of a negative stipulation in contract from \$20,000 to \$100,000.

2.5 In his second reading speech to Bill, the Attorney General advised that the:

...District Court's general civil jurisdictional limit has not increased for 25 years, and its equitable jurisdictional limit has not increased for 32 years. Accordingly, the jurisdictional limits have not been adjusted for inflation, causing the real monetary value of the limits to drop substantially since they last increased.

2.6 The Attorney General also highlighted that the amendments would 'reduce court fees for litigants and increase access to justice'.

2.7 The Bill inserts a new clause 15 in Schedule 3 to the Act to provide that the amendments made by the Bill will only apply to proceedings commenced in the court after the commencement date. The Attorney General noted that this would 'ensure that there is not a transfer of large numbers of existing matters from the Supreme Court to the District Court' and assist the District Court with 'managing the additional workload' that would arise as a result of the amendments.

Issues considered by the Committee

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

Commencement by proclamation

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

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

However, the Committee notes that a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments to the District Court's jurisdictional limits. In the circumstances, the Committee makes no further comment.

3. Fisheries Management Amendment (Enforcement Powers) Bill 2022

Date introduced	19 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Dugald Saunders MP
Portfolio	Agriculture

Purpose and description

- 3.1 The object of this Bill is to amend the *Fisheries Management Act 1994* to clarify certain enforcement powers of fisheries officers under that Act.

Background

- 3.2 The Bill amends the *Fisheries Management Act* (the **Act**), which sets out the legislative framework for the conservation, development and sharing of the fisheries resources in NSW for the benefit of present and future generations. This includes, among other objects, to conserve fish stocks, conserve threatened species, and promote ecologically sustainable development.

- 3.3 When introducing the Bill, the Hon. Dugald Saunders, Minister for Agriculture and Minister for Western NSW, stated that the bill addresses issues raised in a recent District Court judgement:

The bill addresses issues raised in a recent District Court judgement that resulted in changes to the way in which certain search powers under the *Fisheries Management Act 1994* are interpreted and, therefore, exercised by fisheries officers. That also affects available powers under the *Marine Estate Management Act 2014*, as authorised officers under that Act derive their powers from the Fisheries Management Act. They are both critical pieces of legislation, and it is important that the powers available to fisheries officers under those Acts are fit for purpose and enable the effective monitoring and regulation of access to shared fisheries resources, and the ecosystems they depend on.

- 3.4 The Minister further stated that the bill seeks to remove ambiguity regarding the powers of the Fisheries office given the inconsistencies in two separate court judgements in the past 20 years. Specifically, it clarifies that fisheries officers have the ability to exercise their enforcement powers in a broad range of places:

The District Court's judgement related to what is meant by the Fisheries Management Act when it talks about premises. Under previous interpretations, which were informed by a historical Supreme Court judgement, the term "premises" was interpreted as being used to mean anyplace. Prior to the recent judgement, fisheries officers lawfully conducted compliance activities wherever it was relevant to do so, as their exercise of search powers were not contingent upon using their powers of entry to enter a space with distinguishable boundaries. However, the District Court's recent

reading of the term "premises" is narrower, indicating that in the context of the Fisheries Management Act it should be interpreted as referring to some form of structure, which could be either natural or man-made. As a result of that interpretation, powers available under section 250 of the Fisheries Management Act, which provides fisheries officers with the power to enter and search premises if they believe there is something connected with a fisheries offence there, could not be exercised in some places.

- 3.5 To that effect, Schedule 1[1] substitutes the definition of premises in the Act to clarify that it includes:
- (a) land or a place, whether built on or not—for example, a beach, trail, track, wharf, jetty, rock platform, riverbank and a similar location,
 - (b) a structure or building.
- 3.6 Schedule 1[2] inserts section 255A into the Act, which clarifies the enforcement powers of fisheries officers. Specifically that they may examine a thing if they have reason to believe it is connected with the fisheries office and it is necessary for the purpose of examining, monitoring, enforcing compliance with the Act.

Issues considered by the Committee

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

Personal property rights

- 3.7 The Bill amends the Act to clarify enforcement powers of fisheries officers.
- 3.8 It inserts section 255A, which provides that a fisheries officer may search for or examine a thing if the fisheries officer has reason to believe the thing is connected with a fisheries offence or considers it necessary for the purpose of investigating, monitoring or enforcing compliance with the Act.
- 3.9 A fisheries officer may require a person to give a thing in the possession of or under the control of the person to the fisheries officer for examination, if they have reason to believe that it is in connection with a fisheries offence.
- 3.10 A person must give the thing to the fisheries officer immediately or within a period the fisheries officer allows.
- 3.11 Subsection 255A(4) provides that, for the avoidance of doubt, these functions may be exercised anywhere, including on premises or elsewhere, and that if the thing is given to a fisheries officer is a bag or container, the fisheries officer may break open and search and examine the bag or container.
- 3.12 A *thing* is defined to include fish, fishing gear and other equipment, but does not include a person.
- 3.13 Failure to comply with this section without reasonable excuse can incur a maximum penalty of 50 penalty units (\$5 500).
- 3.14 In the Minister's second reading speech, he noted that these provisions are aimed at fisheries offences of a large scale:

Taking 70 times the allowable limit is not a case of a mistaken fisher accidentally breaching the possession limit. It is a serious offence and that type of activity places serious pressure on our precious fisheries resources. Without the clarifications provided by this bill, fisheries officers may be unable to take action in these most egregious cases, let alone the regular checks that officers need to carry out. Undoubtedly, the members of the public who are providing reports will have expectations that officers can respond to their complaints effectively.

The Bill's provisions allow fisheries officers to require a person to give a thing in their possession or under their control to the fisheries officer for examination if they have reason to believe it is in connection to a fisheries offence or necessary for the investigation, monitoring or enforcing compliance with the Act. It also allows a fisheries officer to break open and search a bag or container if that is the 'thing' that the fisheries officer has sought to examine. Under this section, a *thing* is defined to include fish, fishing gear and other equipment, but does not include a person.

As the Bill permits the giving, searching and examining of a thing which may include a person's fish, fishing gear, and other equipment, this may interfere with an individual's personal property rights. This is particularly in cases where the fisheries officer may break open a bag or container to search and examine it.

The Committee understands that the aim of the Bill is to clarify that fisheries officers can exercise their powers in locations as needed to address offences under the Act. However, the Committee notes that these powers are drafted broadly and have limited safeguards. As the Bill impacts upon personal property rights, and may incur a penalty for non-compliance, the Committee refers this issue to Parliament for its consideration.

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

Wide enforcement power

- 3.15 As noted above, the Bill inserts section 255A to clarify the enforcement powers of fisheries officers to search for, examine or give a fisheries officer a thing if the fisheries officer has reason to believe it is in connection with a fisheries offence or necessary for the purpose of investigating, monitoring or enforcing compliance with the Act. If giving a fisheries officer a thing, this must be done immediately or within a time period the fisheries officer allows. This time period is not defined.
- 3.16 These functions may be exercised anywhere, including on premises or elsewhere, and that a fisheries officer is authorised to break open and search and examine a bag or container if that is the thing given to the fisheries officer under this section.
- 3.17 A *premises* is defined to include land or a place, whether built or not. For example, a beach, trail, track, wharf, jetty, rock platform, riverbank and a similar location. It may also include a structure or building.
- 3.18 As noted earlier, a *thing* is defined to include fish, fishing gear and other equipment, but does not include a person.

3.19 Failure to comply with this section without reasonable excuse can incur a maximum penalty of 50 penalty units (\$5 500).

3.20 In the Minister's second reading speech, he noted that the bill aimed to clarify these enforcement powers:

These amendments will ensure that these investigative powers are unambiguous going forward and ensure the effective protection of fisheries resources of New South Wales, providing certainty for fisheries officers and the community alike. I re-emphasise that this bill is simply seeking to reflect the intended model of Fisheries compliance as it has been long understood. There are no other changes. It applies to all forms of fishing across New South Wales.

The Bill clarifies the enforcement powers of fisheries officers to specifically include that they may search for, examine, or require a person to give them a thing if the officer believes it is in connection with a fisheries offence or necessary for the purpose of investigating, monitoring or enforcing compliance with the Act. Under this power, the thing must be given immediately or within a time period the fisheries officer allows. This time period is not defined.

It also permits the fisheries officer to use these powers anywhere including on premises or elsewhere, and that a fisheries officer is authorised to break open and search and examine a bag or container if that is the thing given to the fisheries officer under this section. A premises is defined to include land or a place, whether built or not. For example, a beach, trail, track, wharf, jetty, rock platform, riverbank and a similar location. It may also include a structure or building.

The Committee notes that this may permit a wide enforcement power that may be used in a wide number of locations and at any time where an officer has reason to believe a thing is in connection with a fisheries offence or necessary under the functions of the Act.

The Committee acknowledges that the Bill aims to clarify the powers of fisheries officers to be used in a wide range of locations to carry out their functions under the Act. However, the Committee notes that these powers are drafted broadly and have limited safeguards. As the bill impacts upon personal property rights, and may incur a penalty for non-compliance, the Committee refers this issue to Parliament for its consideration.

4. Government Sector Employment Amendment Bill 2022

Date introduced	19 October 2022
House introduced	Legislative Assembly
Member introducing	The Hon. Alister Henskens SC MP
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Premier

Purpose and description

- 4.1 The object of this Bill is to amend the *Government Sector Employment Act 2013* (the **GSE Act**) to give effect to recommendations arising out of the following reports—
- (a) the report entitled “DPC Inquiry: Appointment of Senior Trade and Investment Commissioner to the Americas” prepared by Graeme Head AO dated 12 August 2022 (**Head Report**),
 - (b) the report entitled “Independent Review of the NSW Government Sector Employment Act 2013” prepared by the Hon Greg Pearce, Gabrielle Trainor AO and Jane Halton AO PSM dated 30 November 2020 (**Independent Review**).

Background

- 4.2 The GSE Act governs employment in the public sector. In the second reading speech, the Hon. Alister Henskens SC MP, on behalf of Premier, explained that the GSE Act 'provides for merit-based recruitment, mobility, capability development, workforce diversity and performance management'.
- 4.3 Schedule 1 of the Bill gives effect to recommendations in the Head Report. It includes a new Part 2A, which provides that the Public Service Commissioner (**Commissioner**) may adopt a code of ethics and conduct and government sector employees must comply with the code.
- 4.4 The Bill specifies that a contravention of the code, being an instrument under the GSE Act, may be misconduct for the purposes of section 69 of the Act. Consequences can include termination of employment, among other disciplinary action.
- 4.5 The Bill also amends the *Education (School Administrative and Support Staff) Act 1987* and *Teaching Service Act 1980* to provide that the meaning of misconduct includes a contravention of a code of ethics adopted under the GSE Act.
- 4.6 In the second reading speech, the Minister provided that the Head Report found deficiencies with the current practice, which achieves compliance through a Commissioner's direction to government agency heads. Minister Henskens further stated that the Bill implemented all of the Head inquiry recommendations:

The Head inquiry recommended four amendments to the Act, all of which are adopted in this bill. These amendments will clarify public servants' ethical obligations and decision-making responsibilities, specifically in the areas of recruitment and employment. These reforms will strengthen the independence and integrity of the public service.

- 4.7 Schedule 1 also:
- (a) allows the Commissioner or Secretary of the Department of Premier and Cabinet (**DPC Secretary**) to prepare and publish a report following an inquiry into a government sector agency
 - (b) requires certain government sector senior executives to seek guidance from the Commissioner if they intend to accept employment in the private sector related to any of their roles or responsibilities during the previous 2 years. The Minister said that the Public Service Commission will develop guidance on this new obligation upon commencement
 - (c) provides for monitoring and review of the Commissioner's functions under the GSE Act by the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission.
- 4.8 Schedule 2 of the Bill gives effect to recommendations in the Independent Review, being a statutory review of the GSE Act. It also includes other amendments aimed at clarifying existing provisions and supporting administrative efficiency.
- 4.9 Among other things, Schedule 2 provides that personal information or health privacy law does not prevent the provision of information, or affect a duty to give information, to the Commissioner or DPC Secretary in specified circumstances, or prevent the provision of information by the Commissioner or DPC Secretary in specified circumstances.

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

Information gathering and sharing powers not subject to privacy laws

- 4.10 The Bill provides that certain information gathering and sharing powers of the Commissioner and DPC Secretary in the GSE Act are not subject to privacy laws.
- 4.11 The Bill amends sections 16 and 83 of the GSE Act to provide that personal information and health privacy law does not prevent the provision of information to, or affect a duty to give information to, the Commissioner or DPC Secretary, or the provision of information by the Commissioner or DPC Secretary to a head of a government sector agency or person under those sections (as applicable).
- 4.12 Section 16 of the GSE Act provides that the Commissioner may require the head of a government agency to provide the Commissioner with:
- (a) a report on such matters relating to the employees of the agency, or to the employment policies and practices of the agency, and

- (b) information held by the agency in dealing with matters relating to government sector employees.
- 4.13 In accordance with section 17(5) of the GSE Act, the Commissioner must, to the extent it is reasonable and practicable, remove any personal information from any report or other document it prepares under Part 3 of the Act (including section 16) that is or will be publicly available. 'Personal information' means information about an individual whose identity is apparent, or can reasonably be ascertained, from the information.
- 4.14 Section 83 of the GSE Act provides that the Commissioner or DPC Secretary may conduct an inquiry into any matter relating to the administration or management of a government sector agency and has investigatory powers to require the production of documents and employees to answer questions.
- 4.15 The Bill also amends section 83 to allow the Commissioner or DPC Secretary to publish a report following an inquiry, if they consider it is in the public interest to do so. No civil or criminal action or proceedings may be brought regarding the publication of the report or a copy of it.
- 4.16 The Bill defines *personal information or health privacy law* as a law relating to:
- (a) the protection of personal information within the meaning of the *Privacy and Personal Information Protection Act 1998*,
 - (b) the protection of health information within the meaning of the *Health Records and Information Privacy Act 2002*.
- 4.17 In the second reading speech, the Minister provided the amendments will allow the exchange of information for the purposes of the Commissioner's oversight powers and the Commissioner or DPC Secretary conducting an inquiry.

The Bill provides that personal information and health privacy law does not affect the provision of information to the Secretary or DPC Secretary in specified circumstances, or their sharing of information to a head of a government sector agency or person (as applicable), under sections 83 and 16 of the GSE Act.

This limitation applies in the context of information gathering and investigatory powers, under which government sector employees' personal and sensitive health information may be provided to and shared by the Commissioner or DPC Secretary. While a safeguard limiting the public disclosure of information is legislated in relation to information obtained under section 16, it is unclear whether use of information obtained under section 83 is similarly limited, noting that the Bill permits publication of a report following a section 83 inquiry. The Bill would also prevent an individual from making a claim or bringing proceedings in relation to the publication of this report or a copy, which may limit their access to relief if their personal or health information is disclosed.

The Committee notes that the amendments allow the exchange of information for the purposes of the Commissioner's oversight powers and for the Commissioner or DPC Secretary to conduct an inquiry relating to the administration or management of a government sector agency. However, the

potential impact on an individual's right to privacy resulting from the exercise of these administrative powers is unclear. The Committee therefore refers this matter to the Parliament for its consideration.

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

Commencement by proclamation

4.18 The Bill provides that it commences (as an Act) on a day or days to be appointed by proclamation.

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

The Committee acknowledges that there may be practical reasons for imposing a flexible starting date, which may allow time for the necessary administrative arrangements to be implemented in order to give effect to the amendments. However, it notes that commencement by proclamation may make it difficult for public service employees to ascertain their obligations and rights under the Bill. In the circumstances, the Committee refers this matter to the Parliament for its consideration.

5. ICAC and Other Independent Commissions Legislation Amendment (Independent Funding) Bill 2022*

Date introduced	20 October 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 make amendments to various Acts—
- (a) to facilitate the administrative and financial independence of the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the New South Wales Electoral Commission, the Ombudsman's Office and the Audit Office (the relevant GSF agencies), and
 - (b) to constitute, by statute, committees to review the Budget information prepared by the Department of the Legislative Council and the Department of Parliamentary Services and to determine amounts of appropriations for inclusion in annual Appropriation Acts, and
 - (c) to extend the functions of the existing Public Accounts Committee to the review of Budget information prepared by the Audit Office and to the determination of amounts of appropriations for inclusion in relevant Appropriation Acts, and
 - (d) to require the Treasurer to make a statement of explanation if an appropriation made by an Appropriation Act is inconsistent with the determination of a Committee on the appropriation.

Background

- 5.2 The Bill amends several Acts which establish statutory oversight bodies, including the *Government Sector Audit Act 1983*, *Electoral Act 2017* and the *Independent Commission Against Corruption Act 1974*. The Bill also makes several amendments to the *Government Sector Finance Act 2018* in respect to those bodies.
- 5.3 In her second reading speech, Mrs Helen Dalton MP stated that the intention of the Bill is to:

... provide clear oversight on the adequacy of funding for the ICAC, the Law Enforcement Conduct Commission, the NSW Electoral Commission and the NSW Ombudsman. It allows annual funding to be allocated separately from other

agencies and free from political interference. It allows ICAC to make recommendations for funding priorities. That will be determined by a committee of the Parliament, not Cabinet.

- 5.4 The Bill amends the Acts establishing the respective oversight bodies. Specifically, it expands the functions of the parliamentary oversight Committees established by these Acts to monitor and review the respective oversight body or bodies. These amendments provide the committees with the jurisdiction to consider annual appropriations for the statutory bodies they oversee.
- 5.5 The Bill also amends the *Government Sector Finance Act 2018* to insert section 4.6A, which provides that the Treasurer must make a statement to Parliament when introducing the appropriations bills that includes information about whether the government adopted the recommendations of the Committees.

Issues considered by the Committee

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

6. Local Land Services Amendment (Private Native Forestry Bill) 2022*

Date introduced	19 October 2022
House introduced	Legislative Council
Member responsible	The Hon. Mark Banasiak MLC
	*Private Members Bill

Purpose and description

- 6.1 The object of this Bill is to amend section 60ZY(4) of the *Local Land Services Act 2013*. Specifically, to provide that if an approval is given by Local Land Services regarding a private native forestry plan (under Part 5B of the Act), then the *Environmental Planning and Assessment Act 1979* (Part 5) does not apply to forestry operations carried out under the plan.

Background

- 6.2 The Bill amends the *Local Land Services Act 2013*, which sets out the legislative framework establishing Local Land Services and for the management and delivery of local land services. It also amends the *Environmental Planning and Assessment Act 1979*, which sets out the legislative framework for, among other things, the promotion of the social and economic welfare of the community and a better environment through the proper management, development and conservation of the State's natural and other resources.
- 6.3 In the second reading speech to the bill, the Hon. Mark Banasiak MLC explained that the Bill was the Shooters, Fishers and Farmers Party's attempt to simplify the approval process for private native forestry, which he stated currently requires dual planning consent from multiple governing bodies.
- 6.4 The Bill's amendments remove these dual consent requirement that currently applies to Private Native Forestry Plans (**PNF**). Specifically, the Bill replaces subsection 60ZY(4) of the *Local Land Services Act 2013* to provide that where an approval for a PNF is given by Local Land Services, Part 5 of the *Environmental Planning and Assessment Act 1979* does not apply to forestry operations carried out under the plan.
- 6.5 Mr Banasiak further advised that the Legislative Council's Portfolio Committee No. 4 – Customer Service and Natural Resources conducted an inquiry into the *Long-term sustainability and future of the timber and forest products industry* and found that dual consent was unnecessary. Specifically, the Committee found:

Finding 7

Dual consent requirements are an unnecessary element in the private native forestry approval process that significantly impacts the ability of landholders to diversify and improve revenue streams from their property.

6.6 In concluding his speech, Mr Banasiak indicated that the Bill is a 'step in the right direction to incentivise landholders to get involved in private native forestry'.

6.7 The Committee considers that the Bill's amendment does not engage with the reportable issues under section 8A of the *Legislation Review Act 1987* regarding personal rights and liberties.

Issues considered by the Committee

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

7. Medicines, Poisons and Therapeutic Goods Bill 2022

Date introduced	19 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

- 7.1 The objects of this Bill are as follows—
- (a) to regulate activities involving substances specified in a Schedule of the NSW Poisons Schedules (**scheduled substances**) and other therapeutic goods to protect public health and safety,
 - (b) to use the Commonwealth Poisons Standard as the basis for classifying and regulating certain substances,
 - (c) to complement the Commonwealth laws that regulate therapeutic goods, including by providing for certain Commonwealth laws to apply as a law of New South Wales in relation to the activities of persons who are not corporations,
 - (d) to authorise certain activities involving scheduled substances and other therapeutic goods, including when the activities are prohibited under another law,
 - (e) to provide for effective administration and enforcement mechanisms in relation to scheduled substances and other therapeutic goods.

Background

- 7.2 In introducing the Bill, the Hon. Brad Hazzard MP, Minister for Health, noted in his second reading speech that the Bill primarily seeks to repeal and remake the *Poisons and Therapeutic Goods Act 1966* (the **Poisons Act**).
- 7.3 The Minister described the Poisons Act as the principal Act setting out 'the regulatory framework for the supply of medicines and poisons, known as scheduled substances, and therapeutic goods in New South Wales'. However, he noted the broader rationale for remaking the Poisons Act, stating that:

The Poisons Act is over 55 years old and requires significant updating. ... It is one of the oldest Acts in the Health portfolio and can be difficult to understand and apply in practice. It is no longer fit for purpose as it was developed at a simpler time when healthcare models were based on a patient generally having one GP and one

pharmacist. Contemporary healthcare models do not always follow that practice, and we have gained new insights from the COVID-19 pandemic and natural disasters.

7.4 Speaking to the importance of the regulatory framework proposed by the Bill, the Minister stated:

Medicines and poisons are integral to health care and industry. However, they also pose risks to patients and the community. As industry and clinical practice evolves and technology changes the way we operate, it is critical we have a flexible and contemporary framework to regulate medicines and poisons. This bill ensures that the framework is contemporary, robust and fit for purpose.

7.5 In accordance with the Committee's usual practice, all Bills introduced in Parliament are considered in their entirety, including Bills that are remakes of existing Acts.

Issues considered by the Committee

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

Offence regime – strict liability offences, penalty notice offences and executive liability for offences by corporations

7.6 Chapter 2 establishes a number of offences for carrying out the various activities, unless otherwise authorised by the Bill. These include (among others):

- wholesale or non-wholesale supplying, or otherwise causing or permitting wholesale supply of scheduled substances or other prescribed therapeutic goods (section 14 and 28),
- supplying therapeutic goods for use in or on humans which are not registered, listed or otherwise subject of an approval, authority or exemption under the *Therapeutic Goods Act 1989* (Cth), Chapters 3 or 4 (section 44),
- obtaining or attempting to obtain a scheduled substance from a person authorised to supply it by a representation they know or ought reasonably to know is false or misleading (section 47),

7.7 Offences under Chapter 2 of unauthorised supply or prescriptions, and of contravening a category 1 requirement carry Tier 1 or Tier 2 maximum penalties. Separately, disclosure of information obtained in connection with the administration or execution of the Bill not authorised under section 146 is an offence carrying a maximum Tier 2 penalty. Section 117 defines Tiers 1 to 5 maximum penalties for offences under the Bill, for which Tiers 1 and 2 maximum penalties include a possible term of imprisonment of two years and six months respectively.

7.8 The Bill also establishes a number of other strict liability offences, including (among others):

- contravening a condition of an authority issued under Part 3.5 (section 79) or failure to comply with a compliance notice issued under Part 6.1, in respect to a suspected contravention (section 115),

- removing, altering or interfering with a thing seized during a search under Part 5.2, without the approval of an authorised officer or the Health Secretary (section 110),
- obstructing or restricting in the exercise of their functions under the Bill, assaulting, abusing, threatening, encouraging the assault/abuse/threatening of, or impersonating an authorised officer (section 136).

7.9 Part 6.2 of the Bill establishes an offence regime in respect to contraventions by corporations, continuing offences and penalty notice offences. An authorised officer is also empowered under section 121 to issue a penalty notice 'if it appears to the officer the person has committed a penalty notice offence', as prescribed by the regulations.

7.10 Section 118 provides for the extension of criminal liability for contraventions by corporations. Specifically, it applies to each person who is either a director or 'concerned in the management of the corporation'. Under subsection (1), where a corporation contravenes a relevant provision, a director or manager is also taken to have committed the same contravention if they knowingly authorised or permitted the contravention by the corporation. Subsection (2) also clarifies that they may be proceeded against and convicted, whether or not the corporation has been proceeded against or convicted.

7.11 In his second reading speech, the Minister noted that Chapters 5 and 6 of the Bill 'update and modernise provisions relating to penalties, enforcement, and compliance' under the Poisons Act. He further outlined that the Bill will:

... generally increase penalties. The existing penalties in the Poisons Act relating to unauthorised supply of medicines and poisons are very low and are not commensurate to the seriousness of the offences. It will also include specific penalty amounts that apply to corporations rather than having the same penalty for individuals and corporations. Further, it will allow for the issuing of penalty notices, that is, on-the-spot fines.

The Bill sets out provisions that engage with issues of strict liability, penalty notice offences and executive liability for offences by corporations.

First, the Bill establishes tiered regimes consisting of strict liability and knowledge offences for specified conduct involving dealing with scheduled substances and other prescribed therapeutic goods without authorisation. The maximum penalties carried by offences under the Bill are classified as Tier 1 to 5, where Tiers 1 and 2 maximum penalties include potential terms of imprisonment of two years and six months respectively.

Chapter 2 establishes strict liability offences for unauthorised supply or prescriptions which carry Tier 1 and Tier 2 maximum penalties. A strict liability offence of unauthorised disclosure of information under section 146 also carries a maximum Tier 2 penalty. 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.

Second, the Bill provides for regulations to prescribe penalty notice offences, which would enable authorised officers to issue a penalty notice offence if it appears to the officer that 'the person has committed a penalty notice offence'. The Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. As they may be issued a penalty notice on the grounds that an officer believes they have committed a penalty notice offence, this may also impact on a person's right to the presumption of innocence.

Third, the Bill extends criminal liability for the commission of offences by corporations to its directors or other persons concerned in its management. Specifically, it provides that such a person who knowingly authorised or permitted the contravention by the corporation is taken to have committed the same offence. A person may be prosecuted for this executive criminal liability, regardless of whether the corporation has been proceeded against or convicted. This may mean an accused person may be convicted of an offence through executive criminal liability arising from corporate criminal conduct not otherwise punished by law.

The Committee notes that the offence regimes and penalties established by the provisions are intended to reflect the seriousness of the potential harm caused by the scheduled substances and prescribed therapeutic goods. It also acknowledges that strict liability offences and executive criminal liability are not uncommon in regulatory settings to encourage compliance.

In respect to penalty notice offences, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court. It also acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice.

However, the Committee notes that individuals may be: convicted of certain strict liability offences which carry potential custodial penalties, without requiring the prosecution to prove a mental element beyond reasonable doubt; or convicted for offending by corporations due to executive liability, before or without the need to convict the corporation. It also notes that the prescription of penalty notice offences is deferred to regulations, rather than setting them out in the primary legislation where they can be subject to an appropriate level of parliamentary scrutiny. For these reasons, the Committee refers this matter to Parliament for its consideration.

Presumption of innocence – reverse onus of proof

- 7.12 The *Drug Misuse and Trafficking Act 1985* (the **DMT Act**) establishes offences for the manufacture, supply, possession and use of certain prohibited drugs, substances and plants.
- 7.13 The Bill amends section 18B of the DMT Act, consequent on the enactment of the Bill as an Act. Specifically, it replaces section 18B to clarify the conduct and

maximum penalties for offences concerning the manufacture, production, supply or possession of 'prohibited scheduled substance'.

- 7.14 The Bill also inserts section 18C into the DMT Act, which makes provisions in respect to the possession of a Schedule 4D substance in excess of the prescribed quantity. Specifically, it provides that a person with actual possession the prescribed quantity is taken to have possession for the purposes of an offence under 18B. However, that presumption may be rebutted if the subject person either proves the contrary or proves the substance possessed was obtained in accordance with a prescription for it, that was authorised under the Bill (as an Act).
- 7.15 Subsection 18C(2) also provides that, if a substance is represented as being a particular Schedule 4D substance for the purposes of being supplied, it shall be considered as an offence against proposed section 18B involving supply of that substance.

The Bill makes amendments to the *Drug Misuse and Trafficking Act 1985* consequent to its enactment as an Act. This includes updating section 18B establishing offences for the manufacture, supply, possession and use of certain prohibited scheduled substances and inserting section 18C in respect to those offences involving the possession or supply of Schedule 4D.

Section 18C specifically provides that a person in possession of a Schedule 4D substance over a prescribed quantity is taken to have possession in offence proceedings, unless they can prove the contrary or prove it was obtained under an authorised prescription. It also provides that a person is taken to have supplied a Schedule 4D substance if they represent it as being a Schedule 4D substance, for the purposes of proceedings for an offence under section 18B.

By requiring the accused person to prove they did not have possession for the purposes of the offence or that the possession was authorised, the Bill would reverse the onus of proof. In regards to criminal actions, the reverse onus may undermine the presumption of innocence and right to procedural fairness, by presuming the person met the physical element of a supply or possession offence under section 18B, where it involves an alleged Schedule 4D substance.

The Committee acknowledges that the provisions are intended to strengthen the compliance with serious drug offences. However, it notes that offences under section 18B carry maximum penalties that include a potential 12 months term of imprisonment. For these reasons, the Committee refers this matter to Parliament for its consideration.

Application of criminal offences under Commonwealth and NSW laws

- 7.16 Chapter 4 of the Bill concerns the application of the 'Commonwealth therapeutic goods laws', being the *Therapeutic Goods Act 1989* (Cth) and its regulations, and the 'Commonwealth administrative laws', being the *Administrative Appeals Tribunal Act 1975* (Cth), the *Freedom of Information Act 1982* (Cth), the *Ombudsman Act 1976* (Cth) and the *Privacy Act 1988* (Cth) and related regulations.
- 7.17 The Minister described the application of the Commonwealth therapeutic goods laws as 'a continuation of existing arrangements' and noted that:

For constitutional reasons, the Commonwealth Act applies only to certain persons and entities such as corporations. States and Territories have enacted complementary legislation to extend the operation of the Commonwealth Act so that it applies to the areas outside the scope of its constitutional legislative power, such as to sole traders and partnerships.

- 7.18 Section 6 of the Bill also applies the Schedules to the Commonwealth Poisons Standard as modified by regulations in NSW as the 'NSW Poisons Schedules'. Section 149(4) provides that the regulations may 'apply, adopt or incorporate wholly or in part and with or without modification, an Appendix of the Commonwealth Poisons Standard'. The Minister also noted that this automatic adoption of 'the classifications in the schedules of the Poisons Standard promotes national uniformity'.
- 7.19 Where a person commits an offence against the Commonwealth therapeutic goods laws as applied in NSW, it is to be treated as an offence against a law of the Commonwealth in accordance with section 89. This includes investigating and prosecuting the offence; arrest, custody, bail, trial and conviction; related proceedings, appeals and reviews; sentencing, punishment and release; fines, penalties and forfeitures, as well as liability to make reparations and the proceeds of crime, and spent convictions.
- 7.20 Section 89 also provides that Commonwealth laws relating to the above listed matters also applies in NSW where it concerns an offence against the Commonwealth therapeutic goods laws, as applied in NSW.
- 7.21 However, section 91 clarifies that a person is not liable to be punished for an offence against the Commonwealth therapeutic goods laws, as applied in NSW, where it is an offence against both the applied provisions and the Commonwealth laws but has been punished under the Commonwealth laws. Subsections 89(4) and (5) also clarifies that an offence against the applied provisions is taken to be a Commonwealth criminal offence, not a NSW criminal offence, except where provided by regulations.

The Bill makes various provisions which applies a number of Commonwealth Acts and their subordinate legislation as laws of NSW. These Commonwealth laws include laws scheduling certain substances which would prohibit dealing with them without proper authorisation in law, as well as Commonwealth schemes for the administration, enforcement and criminal prosecution of matters under the Commonwealth laws.

The Bill also requires an offence against applied Commonwealth laws to be treated as a Commonwealth criminal offence, and to be dealt with under the Commonwealth criminal justice system. It notes that the Bill includes provisions explicitly preventing a person being charged, prosecuted and convicted of conduct as a Commonwealth offence and a NSW offence against the applied Commonwealth laws.

However, the Bill separately establishes criminal offences in NSW law for dealing with scheduled substances and prescribed therapeutic goods without proper authorisation. Conduct may constitute an offence against the Commonwealth laws applied in NSW and separately the distinct offence provisions in the Bill. The

Committee notes that, in respect to this overlap, it is not clear from the Bill's provisions whether a person may be tried in both jurisdictions for the same offending conduct. For these reasons, the Committee refers this matter regarding the application of Commonwealth criminal laws to Parliament for its consideration.

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

Wide powers of enforcement and to compel evidence

- 7.22 The Bill provides for a number of investigation and enforcement powers that may be exercised by 'authorised officers', set out under Part 7.2. Police officers are taken to be an authorised officer under section 132, other than for the exercise of powers under Part 5.1.
- 7.23 Section 131 empowers the Health Secretary to appoint a Ministry of Health employee, member of the NSW Health Service or other prescribed persons or class of persons as an authorised officer. However, those appointed officers are required under section 134 to be issued with a certificate of authority which must be produced when exercising a function of an authorised officer, if requested to do so.
- 7.24 Under section 83, the Health Secretary may require an applicant for an authorisation under Chapter 3 to provide relevant information not included in the applications, authorise a specified person to provide relevant information specified in the notice, or provide the Secretary with necessary authorities and consents to obtain relevant information, including financial and other confidential information, from other persons about the applicant. Non-compliance with such a requirement permits the Health Secretary to refuse to consider the application and, where it persists for at least 6 months, refuse the application without dealing with it further.
- 7.25 The Health Secretary is empowered under section 84 to carry out investigations on receiving an application. This includes the power to carry out investigations and inquiries the Secretary considers necessary for a proper consideration of the application, seek information or advice from people with functions under relevant Australian laws and refer an application, including supporting information, for advice to the Regulatory Advisory Committee or Clinical Advisory Committee established by the Bill.
- 7.26 Part 7.1 of the Bill provides for the establishment and functions of a 'Regulatory Advisory Committee' and 'Clinical Advisory Committee'. Section 128 provides that the functions of the Clinical Advisory Committee include making recommendations to the Health Secretary about approvals. Section 129 provides that the Committee may require a relevant body, including the Health Care Complaints Commission, to provide information which it reasonably requires. This requirement must comply with despite any provision of the *Health Care Complaints Act 1993* or the *Health Practitioner Regulation National Law (NSW)*. This includes laws which protect the disclosure of information.
- 7.27 The Bill also provides a wide range of investigation and enforcement functions under Chapter 5 for compliance purposes. Part 5.1 enables an authorised officer who is not a police officer to require a person to provide information or records to ensure

compliance with the legislation, answering questions on relevant matters (where there are reasonable grounds to suspect they have knowledge of those matters), attend a specified time and place to answer questions if reasonably required, and provide identification to the officer where it is suspected on reasonable grounds that the person has committed or is committing an offence.

- 7.28 Section 98 clarifies that a requirement under Part 5.1 does not affect a person's privilege against self-incrimination.
- 7.29 Part 5.2 sets out a number of enforcement powers involving entering premises, which may be exercised by authorised officers for compliance purposes. This includes the power to enter certain premises using reasonable force without a search warrant to conduct a search or inspect and take samples of things on that premises. It also permits the power to require the production of records or documents, seize things reasonably believed to be in connection with an offence and require a person to give identification information or to provide reasonable assistance for exercising functions under the Bill. Authorised officers may also require 'anything else authorised by or under' the Bill.
- 7.30 Subsection 101(4) clarifies these powers may be exercised without the consent of the owner of the thing. Subsection (5) clarifies that 'an offence' includes where there are reasonable grounds for believing an offence has been committed. Section 104 clarifies that an authorised officer must use 'no more force that is reasonably necessary' to exercise a power of entering or searching premises under Part 5.2.
- 7.31 It is an offence under section 112 to contravene a requirement made by an authorised officer exercising a power under Chapter 5, without reasonable excuse. However, a person is not guilty of contravening a requirement to provide records or information, or to answer a question, if they were not warned on the occasion that failure to comply is an offence.
- 7.32 Functions in relation to things seized during a search of premises is set out in Part 5.3. Section 107 allows the Health Secretary to make an order declaring the forfeiture of a seized thing, on the grounds set out in subsection (2). Where the Health Secretary is required to give notice to the apparent owner of the thing, the Secretary must consider any submissions made by the owner before the specified period expires. The Health Secretary may dispose of the forfeited thing under section 111, or a relevant enforcement agency not required by law to return the seized thing may have it destroyed (for which damages and compensation is not payable) under section 114.
- 7.33 Section 109 also allows the Supreme Court or Local Court convicting a person of an offence connected with a thing seized from them under Part 5.1, to make orders requiring them to pay the Health Secretary reasonable costs of seizing, dealing with and analysing the thing.
- 7.34 Finally, the Bill make consequential amendments to section 21 of the *Law Enforcement (Powers and Responsibilities) Act 2002* which sets out the power of police officers to stop, search, and detain persons and seize and detain things without a warrant. It expands the circumstances in which a police officer may exercise those powers to include where they suspect on reasonable grounds that

the person possesses or has under their control a Schedule 4D substance, within the meaning of and in contravention of the Bill (as an Act).

The Bill provides for a number of investigation and enforcement powers, including powers to enter and search premises without warrant, seize things, require a person to provide assistance or answers, and compel certain information. It also provides for the exclusion of civil liability to pay compensation for relevant authorised persons or those acting under their direction or the State, in respect to alleged negligence, defamation or other breach of duty arising from the exercise of functions under the Bill.

Therefore, the Bill may grant authorised officers, including police officers, wide powers of enforcement. The exercise of these enforcement powers may impact an individual's rights including, for example, their property rights in respect to the power to enter premises and seize property, their right to the presumption of innocence where the exercise of functions is based on reasonable suspicions that a person has committed an offence, and their privilege from self-incrimination in respect to the power to give directions for assistance.

The Committee recognises that these provisions are intended to strengthen the enforcement and compliance of the legislative framework regulating potentially dangerous substances. However, the Committee notes that the exclusion of civil liability and the exercise of these powers without warrant may limit a person's ability to seek review or recourse. For these reasons, the Committee refers this matter to Parliament for its consideration.

Wide regulation-making power – matters 'convenient to' administration

7.35 Section 149 provides for the power to make regulations not inconsistent with the Bill about the following matters:

- (a) matters required or permitted to be prescribed by this Act, or
- (b) matters necessary or convenient to be prescribed for carrying out or giving effect to this Act.

The Bill provides a general regulation-making power under section 149. Specifically, it allows regulations to prescribe a matter that is 'necessary or convenient' for carrying out or effecting the Bill.

There appears to be no provisions which define or narrow the scope of the ordinary meaning of 'convenient'. The Bill may therefore include a wide regulation-making power. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when it commences.

The Committee recognises that the provisions allow for more flexible regulatory responses in respect to the supply, manufacturing or prescription of scheduled substances and other therapeutic goods. However, it notes that the provisions may effectively allow regulations to prescribe matters with little limit. For these reasons, the Committee refers this matter to Parliament for its consideration.

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA*Wide powers of the Health Secretary to make orders*

- 7.36 Part 2.8 of the Bill provides for the making of *restriction orders* by the Health Secretary. Section 49 enables the Health Secretary to prohibit or restrict a person from carrying out an activity that they are otherwise authorised to do if they have been given a written restriction order under. For example, supplying, prescribing, administering or dispensing medicines. An activity is not authorised if it carried out in contravention of a restriction order and it is an offence to contravene an applicable restriction order.
- 7.37 Section 53 enables a person subject of a restriction order to apply to the Health Secretary for a review of the decision to make the order. However, the Secretary may refuse to review a decision if they are not satisfied there has been a material change in relevant circumstances.
- 7.38 The Minister spoke to the power to make restriction orders, stating that:
- This power is currently used—and would be expected to continue to be used under the bill—where, for example, an authorised practitioner has been supplying or prescribing medicines, including schedule 8 medicines, in a manner that places the public at risk. However, the bill will create express review rights in relation to this power.
- 7.39 The Health Secretary may also make a *supply prohibition order* which prohibited the supply of a specified substance, if they are satisfied it is necessary pending evaluation of its toxic or deleterious properties. This order is to be published in the Gazette 'as soon as practicable after it is made'.
- 7.40 Section 140 also permits the Health Secretary to make a *public health risk authorisation order* which would authorise a specific person or class of persons to deal with therapeutic goods or stock medicines, where the Secretary considers on reasonable grounds that a situation presents a risk to the health and safety of humans or animals and the order is necessary or convenient to deal with the risk and possible consequences. Subsection 140(5) requires the order be published in the Gazette 'as soon as practicable after it is made', however, section 141 provides that the order may commence on a day before it is published in the Gazette.
- 7.41 The Minister described section 140 as 'a new emergency power' which was intended to be flexible to deal with urgent situations:
- Recent emergencies—such as the COVID-19 pandemic, the 2019-20 bushfires and the recent floods—have highlighted the need for a flexible and transparent response to deal with urgent needs. ... There needs to be an ability to grant exemption to the usual requirements in the bill to meet the immediate needs of the public during an emergency.
- 7.42 The Health Secretary may also, on application or their own initiative, grant an authority under the DMT Act to a person or class of persons (section 76). This 'DMT authority' would enable a relevant person to possess, manufacture, supply or administer a drug, scheduled substance or plant prohibited under the DMT Act. A

DMT authority for a class of persons is granted by written notice published on the Ministry of Health's website, in accordance with subsection 76(5). Sections 79, 80 and 81 allows the Health Secretary to, subject to regulations, impose conditions, vary, suspend or revoke a DMT authority.

The Bill grants the Health Secretary a number of discretionary powers, including the power to issue restriction orders, supply prohibition orders or public health risk authorisation orders, and to grant DMT authorities which authorises conduct that may otherwise constitute serious drug offences. The exercise of these powers may impact or change whether conduct is prohibited under the Bill, and thus whether a person may be committing an offence in relation to dealing with scheduled substances or other prescribed therapeutic goods.

The Committee acknowledges that many of these powers continue existing arrangements or otherwise provide emergency powers intended to allow faster and more flexible administrative responses in times of crises. It also notes that there are provisions for people to seek reviews of decisions made by the Health Secretary. However, the Committee notes that these reviews are to be done by the Secretary. It further notes that, while some orders and authorities are required to be published in the Gazette, they may commence prior to publication. It is not clear whether they are required to be tabled in Parliament, and thus subject to disallowance under section 41 of the *Interpretation Act 1987*. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Extension of administrative functions under Commonwealth laws

- 7.43 As noted earlier, Chapter 4 of the Bill applies Commonwealth therapeutic goods laws, Commonwealth Poisons Standards and Commonwealth administrative laws, as modified by regulations, as a law of NSW.
- 7.44 Under section 87, the Commonwealth Minister and Secretary has the same functions in NSW as under the Commonwealth therapeutic goods laws, where they are applied in NSW. Subsection (5) clarifies this extends to a delegation of their function under the Commonwealth laws. Likewise, an authorised person, authorised officer or appointed official analyst under those laws also have the same functions where they are relevantly applied in NSW.
- 7.45 Sections 88 and 90 similarly extends the functions conferred under the Commonwealth administrative laws or the treatment of offences against the applied Commonwealth therapeutic goods laws as Commonwealth criminal offences to relevant officers. Specifically, section 88 confers a Commonwealth officer or authority the same functions as they would have under the Commonwealth laws, as applied in NSW. Likewise, section 90 confers the same functions granted under the Commonwealth therapeutic goods laws to a Commonwealth officer or authority relating to offences against that law, as the Commonwealth laws are applied in NSW.

Chapter 4 of the Bill makes provisions which extend the functions of the Commonwealth Minister, Secretary and officers authorised or appointed under

relevant Commonwealth therapeutic goods and administrative laws applied in New South Wales and as modified by regulations. As this extension is by way of a broad application of Commonwealth laws in NSW, this may amount to a wide delegation of NSW executive authority to Commonwealth officers and agencies.

The Committee acknowledges that allowing Commonwealth officers to carry out their functions in NSW would facilitate a uniform national approach to the regulation of dangerous or prohibited substances. However, the Committee notes that the functions they are authorised to carry out is legislated by the Commonwealth Parliament and otherwise modified by regulations. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. For these reasons, the Committee refers this matter to Parliament for its consideration.

Commencement by proclamation

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

The Bill commences by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. . However, the Committee notes that the flexible start date may assist with the administrative arrangements required to implement the updated legislated framework regulating the supply of scheduled substances and therapeutic goods. In the circumstances, the Committee makes no further comment.

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

Incorporation of external materials into regulations

- 7.47 Chapter 3 sets out the legislative framework for the following authorisations under the Bill: wholesaler licences, obtain licences, approvals, OTP registrations, and DMT authorities.

- 7.48 Section 56(5) provides that an authorisation under Chapter 3 may:

... apply, adopt or incorporate, wholly or in part and with or without modification, a standard, rule, code, specification, method or publication, as in force at a particular time or as in force from time to time, prescribed or published by an authority or body, whether or not it is a New South Wales authority or body.

- 7.49 Section 149(5) makes an identical provision in respect to application, adoption or incorporation of other materials in the regulations under the Bill.

The Bill provides that authorisations made under Chapter 3 or regulations under the Bill (as an Act) may apply, adopt or incorporate wholly or in part and with or without modification any material that is in force from time to time or at a particular time, which is prescribed or published by an authority or body (including outside of NSW).

The Committee notes that this may allow for the incorporation of extrinsic materials into NSW law with little limit. It also notes that there is no requirement under the Bill for these extrinsic materials to be tabled in Parliament, and thus subject to disallowance under section 41 of the *Interpretation Act 1987*. To ensure an appropriate level of parliamentary oversight, the Committee usually prefers for legislative requirements to be included in primary legislation rather than separate materials.

The Committee recognises that the incorporation of extrinsic materials may allow for more responsive and flexible administration of the state regulatory framework around potentially dangerous drugs, substances and therapeutic goods. However, it notes that the extrinsic materials incorporated may impact the requirements of an individual to comply with a relevant authorisation granted to them or requirements under the regulations. Non-compliance with either may result in a person contravening the provisions of the Bill or regulations, and may also constitute an offence. For these reasons, the Committee refers this matter to Parliament for its consideration.

Matters deferred to the regulations

7.50 The Bill updates the broader regulatory framework for the supply, possession and dealing of scheduled substances and therapeutic goods in NSW. It provides for the prescription of a significant number of matters by regulations. It includes, among other provisions:

- Modifications to applied Commonwealth laws, including adding or omitting substances to the Poisons Standards (sections 6, 86, 88).
- Circumstances where conduct involving a scheduled substance or certain therapeutic good amounts to an offence (sections 40, 69), as well as limitations or restrictions on carrying out authorised activities that would otherwise be prohibited or constitute an offence (sections 9, 10).
- Penalties for offences involving unspecified scheduled substances (section 14) and prescribing offences against the Bill or regulations as a penalty notice offence (section 121).
- Mandatory and discretionary grounds for suspension or cancellation of an authorisation under Chapter 3 (sections 63, 64, 73).
- Grounds for administrative forfeiture of things seized in the course of a search under Part 5.2 (section 107).
- Matters of which a certificate issued by the Health Secretary or an authorised Health certifier may be admitted as prima facie evidence in legal proceedings (section 124).

7.51 Section 149(6) also provides that the regulations may create offences, including continuing offences, which are punishable by a penalty not exceeding 20 penalty units (\$2 200) for individuals or 100 penalty units (\$11 000) for corporations.

The Bill defers a significant number of matters to the regulations, including the modified application of Commonwealth therapeutic goods laws in NSW, prescribing circumstances where conduct would amount to an offence and penalties for offences involving unspecified scheduled substances. The Committee generally prefers substantive matters to be dealt with in the principal legislation, rather than the regulations, to facilitate an appropriate level of parliamentary oversight.

The Bill also provides that the regulations may create offences that carry a maximum penalty of 20 penalty units (\$2 200) for individuals or 100 penalty units (\$11 000) for corporations. The Committee prefers that offences, particularly those that introduce a custodial sentence, be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny.

The Committee acknowledges that these provisions are intended to build more flexibility into the regulatory framework and allow regulators to better respond to changing industry circumstances. 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*.

However, the matters deferred to the regulations relate to the authorisation of activities and other conduct dealing with scheduled substances and other prescribed therapeutic goods, which goes to the core subject matter for which the Bill seeks to regulate. It also notes that non-compliance with the regulations may constitute offending conduct or contraventions of requirements under the Bill. For these reasons, the Committee refers the matter to Parliament for its consideration.

8. Motor Accident Injuries Amendment Bill 2022

Date introduced	19 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service and Digital Government

Purpose and description

- 8.1 The object of this Bill to make the following amendments to the *Motor Accident Injuries Act 2017*—
- (a) to change the terminology used in reference to soft tissue injuries, and psychological or psychiatric injuries that are not recognised psychiatric illnesses,
 - (b) to clarify the application to claims for statutory benefits of provisions of the principal Act relating to the liability of the Nominal Defendant,
 - (c) to make further provision in relation to the power of the State Insurance Regulatory Authority (the Authority) to regulate premiums for compulsory third-party policies,
 - (d) to extend, from 26 weeks to 52 weeks, the period after a motor accident for which weekly payments of statutory benefits or statutory benefits for treatment and care are payable to injured persons wholly or mostly at fault or with injuries referred to in paragraph (a),
 - (e) to make further provision in relation to the time for making claims for statutory benefits and claims for damages,
 - (f) to enable regulations under the principal Act to make provision for the determination by the Authority of amounts to be paid into the Motor Accident Injuries Treatment and Care Benefits Fund to reflect to cost of exercising certain functions of the Lifetime Care and Support Authority,
 - (g) to authorise the Authority to establish a trauma support service for members of the family of persons who have been injured or who have died as a result of motor accidents,
 - (h) to provide for funding of the amount of legal costs the Authority determines is to be reimbursed to claimants who are parties to court proceedings significantly impacting the sustainability and affordability of the motor accidents scheme under the principal Act,

- (i) to make further provision for statutory review of the principal Act,
- (j) to make further provision for guideline-making powers under the principal Act in relation to statutory benefits and assessments for the purposes of the principal Act,
- (k) to make provision for other miscellaneous matters and matters of a savings and transitional nature.

8.2 The Bill also makes consequential amendments to the *Motor Accident Injuries Act 2017*.

Background

8.3 The Bill seeks to amend the *Motor Accident Injuries Act 2017* (the **Act**) and the *Motor Accident Injuries Regulation 2017* (the **Regulation**) following the three-year statutory review of the Act (the Review). In his second reading speech to the Bill, the Hon. Victor Dominello MP, Minister for Customer Service and Digital Government stated the bill:

...prioritises extending and allowing speedier access to benefits for certain injured people; responds to feedback from scheme participants regarding the need for increased access to, and availability of, rehabilitation and trauma support for injured people; and includes other scheme and regulatory enhancements that will improve the operation of the 2017 scheme without undermining the architecture of the scheme or having material impact on premium affordability.

8.4 These amendments include changing references in the Act and Regulation from a 'minor injury' to 'threshold injury'. This change is in response to Recommendation 38 of the Review which proposed that Government consider an alternative term for 'minor injury' given the potential for the term to cause unnecessary distress.

8.5 The Bill also amends sections 3.11 and 3.28 the Act to extend from 26 to 52 weeks, weekly payments and statutory benefits for treatment and care expenses to injured persons who are wholly or mostly at fault, as well as injured persons with a threshold injury. Minister Dominello noted that these amendments respond to recommendations 37 and 40 of the Review and ensure:

...consistent financial support for both loss of earnings and for treatment and care, thus providing appropriate additional support to enable a person to return to work and their pre-accident activities.

8.6 The Bill makes several amendments which expand the guideline and regulation-making powers under the Act. These are made in respect of matters including the adjustment of premiums and fund levies, the authorisation of weekly payments of statutory benefits where a claim is not made within 28 days of an accident, and in relation to the appointment of persons authorised to conduct certain assessments.

8.7 The Bill also authorises the Authority to establish a trauma support service for the family members of persons who have been injured or who have died as a result of motor accidents. Minister Dominello advised that this amendment is consistent with recommendation 45 of the statutory review, noting that the trauma support

service will 'support people in the period after the accident and will connect and guide those who have been impacted by the incident'.

- 8.8 Schedule 2 of the Bill makes consequential amendments to the Regulation updating references to threshold injury.
- 8.9 In his concluding remarks, Minister Dominello acknowledged that the Bill was informed by stakeholder submissions to the Review and to the Standing Committee on Law and Justice's 2020 Review of the Compulsory Third Party insurance scheme.

Issues considered by the Committee

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

Retrospectivity

- 8.10 Subclause 1(1) of Schedule 4 to the Act provides that the Regulation may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends it.
- 8.11 The Bill provides that amendments related to statutory benefits after 26 weeks (Schedule 1 [16], [18], [21] or [23]) do not apply to a motor accident occurring before the commencement of the amendment.
- 8.12 The Bill also provides that amendments related to acceptance of liability (Schedule 1 [30] or [31]) do not apply to a motor accident occurring before the commencement of the amendment.
- 8.13 Further, the Bill provides that amendments related to internal review (Schedule 1 [35]) do not apply to apply to a decision of an insurer made before the commencement of the amendment about the degree of permanent impairment of an injured person.
- 8.14 In addition, it provides that, except as provided by the Regulation or the above exceptions, all amendments extend to motor accidents that occurred, or claims for statutory benefits or damages made, before the commencement of the amendment, but not before 1 December 2017. These amendments will also apply to proceedings pending before a merit reviewer, a medical or claims assessor, or a court immediately before commencement.

The Bill contains provisions that its amendments extend to motor accidents that occurred, or claims for statutory benefits or damages made, before the commencement of the amendment, but not before 1 December 2017. It therefore has retrospective application.

The Committee generally comments on provisions drafted to have retrospective effect, as they may impact on the rule of law principle. That is, a person is entitled to know the law to which they are subject at any given time. However, the Committee notes that the amendments appear to allow individuals greater protections under the Act, such as extending the weekly payments from 26 to 52 weeks to injured persons wholly or mostly at fault, or injured persons with a threshold injury. In the circumstances the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions (s 8A(b)(iii))

Exclusion of ground for merit review

8.15 Section 7.12 of the Act provides that a claimant may apply to the President of the Commission to seek a Merit Review of a reviewable decision.

8.16 Clause 1 of Schedule 2 to the Act sets out matters that are declared to be Merit Review Matters for the purposes of the Act.

8.17 The Bill removes two matters that are currently declared to be Merit Review Matters, being subclauses (1)(l) and (m) of Schedule 2 to the Act.

8.18 Subclause 1(l) of Schedule 2 to the Act provides that the following is a Merit Review Matter:

whether for the purposes of section 3.28 (Cessation of statutory benefits after 26 weeks to injured adult persons most at fault or to injured persons with minor injuries) treatment and care expenses have been incurred after the expiration of the period during which statutory benefits are payable,

8.19 Subclause 1(m) of Schedule 2 to the Act provides that the following is a Merit Review Matter:

whether for the purposes of section 3.28 (Cessation of statutory benefits after 26 weeks to injured adult persons most at fault or to injured persons with minor injuries) treatment or care is authorised by the Motor Accident Guidelines (except in circumstances referred to in clause 2 (c)),

8.20 The Bill amends section 3.28 of the Act to extend the statutory benefits period from 26 to 52 weeks, and removes the ability for the Motor Accident Guidelines to authorise statutory benefits for treatment and care expenses incurred outside the allotted weeks for threshold injuries.

The Bill removes two grounds for merit review that are currently set out in the Act. The Committee notes that the ground for Merit Review set out in clause 1(m) of Schedule 2 to the Act is likely made redundant by the amendments to section 3.28 of the Act. However, the Committee notes that there may still be reasons for a claimant to apply for merit review as set out in Clause 1(l) of Schedule 2 of the Act. The Committee notes that the removal of this ground for merit review may limit procedural fairness and make a claimant's rights or obligations unduly dependent upon a non-reviewable decision. In the circumstances, the Committee refers the matter to Parliament for its consideration.

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

Commencement by Proclamation

8.21 Section 2 of the Bill states that Schedule 1[10]–[14], [19], [24], [25], [28], [29], [32]–[43], [49] and [50] will commence on the date of assent. All other amendments will commence on 1 April 2023 or a later day or days appointed by proclamation.

Section 2 of the Bill states that 1 Schedule 1[10]–[14], [19], [24], [25], [28], [29], [32]–[43], [49] and [50] will commence on the date of assent, and all other amendments will commence on 1 April 2023 or a later day or day appointed by proclamation.

The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. The Committee acknowledges that there may be practical reasons for imposing a flexible starting date such as allowing for implementation or administrative activities to be arranged. However the Committee refers the matter to Parliament to consider whether a set start date would provide clarity to anyone potentially impacted by the amendments.

Henry VIII Clause

8.22 The Bill inserts a new Part in Schedule 4, which provides that, except as provided by the Regulation and the newly inserted exceptions at Schedule 4, all amendments made by this Bill extend to motor accidents that occurred, or claims for statutory benefits or damages made, before the commencement of the amendment, but not before 1 December 2017.

8.23 Under Part 1 of Schedule 4 to the current Act, regulations may contain savings or transitional provisions consequent on the enactment of the Act or any amending Act. Any such provision has effect despite anything contrary to Schedule 4 of the Act.

The Bill amends the *Motor Accident Injuries Act 2022* to provide that, except as provided by the Regulation and the exceptions set out in Schedule 4 to the Act, all claims for statutory benefits or damages made before the commencement of the amendment, but not before 1 December 2017. This appears to be a Henry VIII clause as it allows the provision of primary legislation to be overridden by regulation, and thereby to legislate without reference to Parliament. The Committee refers this matter to Parliament for its consideration.

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

Significant matters deferred to Motor Accident Guidelines and regulations

8.24 The Bill inserts subsection 2.25(2A) which allows the Motor Accident Guidelines to include provisions for the adjustments of both premiums and Fund levies to 'take into account innovations implemented by insurers to promote the objects of this Act'.

8.25 The Bill also inserts sub-section 3.24(3) which allows the Motor Accident Guidelines to provide for circumstances where the cost of treatment and care is taken to be reasonable, and where treatment and care is taken to be reasonable and necessary for the purpose of section 3.24(2).

8.26 Proposed subsection 6.27(1B) which allows the Motor Accident Guidelines to provide for the appointment of persons authorised to conduct rehabilitation assessments, assessments to determine attendant care needs, and assessments to

determine functional and vocational capacity, for the purposes of sub-sections 6.27(1)(b) and (c).

- 8.27 Pursuant to section 10.6 of the Act, sections 40 (Notice of statutory rules to be tabled) and section 41 (Disallowance of statutory rules) of the *Interpretation Act 1987* apply to Motor Accident Guidelines in the same way that they apply to statutory rules.
- 8.28 The Bill amends section 1.1A to clarify that the provisions of the Act relating to the liability of the Nominal Defendant in connection with a motor accident apply to a claim for statutory benefits in the same way as they apply to a claim for damages. The amendment also authorises the making of regulations modifying the application of the provisions to statutory benefits.
- 8.29 The Bill also amends section 6.13 to allow the regulations to permit payment of weekly payments of statutory benefits where a claim for statutory benefits is not made within 28 after the date of a motor accident.
- 8.30 Further, the Bill amends section 10.15 to provide for the making of regulations in relation to the determination by the Authority of amounts to be set aside for the exercise of the functions of the Lifetime Care and Support Authority relating to the administration of the Act.

The Bill defers a number of matters set out in the Act to the Motor Accident Guidelines and the Regulation. Matters include the adjustment of premiums and fund levies, the authorisation of weekly payments of statutory benefits where a claim is not made within 28 days of an accident, or in relation to the appointment of persons authorised to conduct certain assessments.

The Committee generally prefers substantive matters to be dealt with in the principal legislation to facilitate an appropriate level of parliamentary oversight, particularly where those matters may impact an individual's rights.

However, the Committee acknowledges that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. The Committee also notes the Motor Accident Guidelines are disallowable instruments. In the circumstances the Committee makes no further comment.

9. Personal Injury Commission Amendment Bill 2022

Date introduced	19 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service and Digital Government

Purpose and description

- 9.1 The object of this Bill is to make the following amendments to the *Personal Injury Commission Act 2020* and motor accidents legislation in relation to the Motor Accidents Division of the Personal Injury Commission (the **Commission**)—
- (a) to allow the Commission to issue a summons to a person who is not a party to proceedings before the Commission,
 - (b) to allow the Commission to require a person appearing in proceedings before the Commission to give evidence on oath or affirmation,
 - (c) to require the Commission to attempt conciliation in relation to a claim for damages before assessing the claim,
 - (d) to establish a new procedure for mediation of certain matters referred to the Commission for review or assessment and to provide for the appointment of mediators and the regulation of costs for legal services in relation to mediation,
 - (e) to provide for the appointment of an acting Division Head.
- 9.2 The Bill also makes an amendment to the *Motor Accidents and Workers Compensation Legislation Amendment Act 2022* to clarify the scope of an uncommenced provision permitting the making of regulations about additional compensation payable to dependants of deceased workers where a lump sum death benefit is paid to the NSW Trustee.

Background

- 9.3 In his second reading speech, the Hon. Victor Dominello MP, Minister for Customer Service and Digital Government, stated that the Bill:

... implements a suite of proposed legislative amendments to the Personal Injury Commission Act 2020... and consequential amendments to the motor accident legislation to improve efficiency in the operation of the motor accidents division of the commission and create more consistent procedures across the two divisions of the commission. ... The bill also clarifies the role of the commission in determining the amount of additional compensation payable for investing and managing lump sum

death benefit awards that are managed by the NSW Trustee and Guardian in the workers compensation scheme.

9.4 Consequently, the Bill seeks to amend the *Personal Injury Commission Act 2020 (Commission Act)* and *Motor Accident Injuries Act 2017 (Motor Accident Act)*, as well as other laws in respect to motor accident injuries. These amendments provide for the referral of proceedings of the Commission, particularly those for motor accident injury claims, to mediation as well as expand the powers of the Commission.

9.5 The Minister described the purpose of the amendments is to:

... enhance the dispute resolution capacity of the commission in the motor accident division. ... Those amendments emphasise the Government's commitment to review and revise the operation of the scheme to support parties in resolving motor accident claims in a quick, cost-effective and fair manner.

9.6 The Minister also acknowledged that the Bill was developed in consultation with 'relevant stakeholders, insurers and government agencies'.

Issues considered by the Committee

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

Wide powers to compel evidence – powers of the Commission and mediators

9.7 Part 5, Division 5.3 of the Commission Act provides for the conduct of proceedings in the Commission. Under sections 49 and 50, the Commission has the power to:

- (a) direct a person in writing to produce specified documents or information to the Commission.
- (b) provide any such information to another party, legal representative or medical practitioner in connection with proceedings before the Commission.

9.8 Section 51 also empowers the Head of a Commission Division to issue a summons requiring a person to attend any conference or hearing before the Commission in connection with proceedings. The two divisions of the Commission, the Workers Compensation Division and the Motor Accidents Division, are established under section 12.

9.9 Subsection 51(3) provides that failure to comply with a summons without reasonable excuse is an offence. This offence carries a maximum penalty of 50 penalty units (\$5 500).

9.10 The Bill amends section 51 of the Commission Act to remove the existing limitation on the power to issue summons in proceedings under the Motor Accidents Division. This would allow summons be issued in these proceedings for any person, not just a party to the proceedings.

9.11 In his second reading speech, the Minister noted that this amendment addresses the current situation whereby the Commission 'must rely on the voluntary attendance of other relevant witnesses' other than parties to the proceedings. He highlighted that:

If relevant witnesses cannot be summoned to appear, a claim may not be able to be assessed, necessitating an exemption from the commission for assessment by the District Court, resulting in unnecessary delays and limiting the commission's objective to determine the real issues in the dispute quickly and efficiently.

9.12 The Bill also inserts section 51A into Division 5.3, which empowers the Commission to require a person appearing in proceedings to:

- (a) give evidence on oath or affirmation,
- (b) answer a relevant question put to them.

9.13 Subsection (2) establishes that it is an offence for a person to refuse or fail to comply with such a requirement without reasonable excuse, carrying a maximum penalty of 50 penalty units (\$5 500). However, subsection (3) clarifies a person is not required to answer a question on grounds of self-incrimination.

9.14 The Minister spoke to proposed section 51A during his second reading speech, stating that it:

... maintains appropriate protections against self-incrimination, such that a person appearing at a hearing need not answer a question under the new provision if the answer to that question would tend to incriminate the person of an offence.

9.15 Separately, the Bill makes various amendments to the Commission Act, the Motor Accident Act, the *Motor Accident Injuries Regulation 2017* and the *Motor Accidents Compensation Act 1999* to enable the Commission to direct parties of a proceeding under the Motor Accidents Division to mediation. It also inserts provisions which require the Commission to use its best endeavours to bring parties to a dispute to an acceptable settlement.

9.16 Relevantly, the Bill inserts Division 7.3 into the Motor Accident Act, empowering the President of the Commission to refer a review or assessment of a motor accident claim to mediation. Section 7.6 sets out the powers of the mediator to a mediation referred under this Division. Specifically, section 7.6(1) provides that:

... mediator has all the functions of the Commission under the *Personal Injury Commission Act 2020*, sections 49–51 and those sections apply in relation to the mediation in the same way as they apply in relation to proceedings before the Commission.

9.17 As outlined earlier, sections 49 to 51 of the Commission Act provides for the power to direct the giving of information or documents, the provision of that information or documents to other persons connected to the proceedings and the power to summon a person to appear.

The Bill amends the *Personal Injury Commission Act 2020* to allow the Personal Injury Commission to summon a person who is not a party to motor accident proceedings to appear in a related hearing or conference. It also inserts section 51A into the Act to enable the Commission to direct a person appearing at a hearing to give evidence on oath or affirmation or to answer a relevant question put to them.

The Bill also amends the *Motor Accident Injuries Act 2017* to allow the President of the Commission to refer a motor accidents injury dispute to mediation. It further extends the powers of the Commission to compel the production/disclosure of evidence and to summon a person to appear before the mediator for a referred mediation.

The Bill may therefore grant the Commission and certain mediators wide powers to compel evidence from an individual. The exercise of these powers may impact individual rights, including a person's right to silence by being compelled at pain of penalty to give evidence in proceedings before the Commission or in the course of mediations referred by the Commission.

However, the Committee notes that safeguard provisions are included, so that a person cannot be compelled to give evidence that may be self-incriminating. It acknowledges that the expanded power to issue summons is intended to facilitate the administrative efficiency of the Commission's functions by allowing the summoning of witnesses without the need for court orders. It further acknowledges that the extension of powers to mediators is intended to facilitate mediations achieving conciliation between parties to a dispute. In the circumstances, the Committee makes no further comment.

Retrospectivity

9.18 The Bill inserts Part 7 into Schedule 4 of the Motor Accidents Act. This Part extends the application of amendments made by the Bill to a motor accident occurring or claim made before 1 December 2017. It also extends these amendments to applications for review/assessment made but not allocated to a decision-maker before the commencement of the amendments.

The Bill makes various amendments to the *Motor Accident Injuries Act 2017* to provide for the referral of motor accident dispute claims to mediation. It also inserts savings and transitional provisions into the Acts which extend the application of these amendments to motor accidents and claims occurring before December 2017, and to certain applications for review or assessment before commencement of these amendments. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

However, the Committee acknowledges that the amendments are intended to facilitate administrative efficiency by encouraging alternative dispute resolutions. In the circumstances, the Committee makes no further comment.

10. Registered Clubs Amendment Bill 2022

Date introduced	19 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Hospitality and Racing

Purpose and description

10.1 The object of this Bill is to amend the *Registered Clubs Act 1976*, the *Registered Clubs Regulation 2015*, the *Gaming and Liquor Administration Act 2007* and the *Liquor Act 2007* to—

- (a) reduce the regulatory burden on registered clubs, and
- (b) provide for reforms relating to the operation of registered clubs, including—
 - (i) reforms relating to the exclusion of persons from club premises, and (ii) reforms relating to the use of technology by a registered club to enhance the club’s ability to appropriately manage the entry and exclusion of persons on and from club premises, and
- (c) modernise and clarify provisions in the current legislation, including provisions relating to—
 - (i) the appointment of members of club governing bodies, club secretaries and managers of club premises, and
 - (ii) club amalgamations and de-amalgamations, and
 - (iii) holding functions for non-members and young persons on club premises, and
 - (iv) the retention by particular clubs of unrestricted trading hours if the club’s premises are relocated within close proximity to the club’s existing premises, and
 - (v) require that at least 1 member of the Independent Liquor and Gaming Authority be a Judge, former Judge or Australian lawyer and remove criteria for the nomination of persons for appointment as members of the Authority.

Background

10.2 The Bill amends the *Registered Clubs Act 1976* (the **Act**), the *Registered Clubs Regulation 2015* (the Regulation), the *Gaming and Liquor Administration Act 2007* and the *Liquor Act 2007* to reduce red tape, modernise industry operations, and introduce new harm minimisation and crime reduction measures.

- 10.3 In his second reading speech to the Bill, the Hon. Kevin Anderson MP, Minister for Hospitality and Racing, noted that the Bill 'modernises outdated provisions' and will 'reduce red tape and regulatory burden'. Examples of these amendments include giving new clubs three years to meet minimum membership requirements, and removing the restriction on individuals living within 5 km of the club being able to enter as temporary members.
- 10.4 The Bill expands the definition of 'employee' under the *Liquor Act 2007* to enable contract caterers and their employees to sell liquor under the club's licence. Minister Anderson noted that contract staff selling or serving liquor will be required to hold a recognised competency card or responsible service of alcohol certificate. Minister Anderson noted that the introduction of this provision would 'support clubs by providing them with additional flexibility to host and appropriately staff events to ensure clubs remain viable and connected to their communities'.
- 10.5 The Bill makes amendments to the framework for club amalgamations. The Bill amends the Regulation to increase the number of clubs that a Registered Club can amalgamate with, from 10 to 15. The Bill also provides additional safeguards to prevent the risk of 'asset stripping' such as a requirement for a parent club amalgamating with more than 10 clubs to operate the child club for at least five years after the amalgamation. Minister Anderson noted that this 'renewed approach to club amalgamations with the appropriate safeguards will support club amalgamations to help ensure that struggling clubs remain open to their communities'.
- 10.6 The Bill amends the Regulation to introduce a requirement for managers and directors to complete refresher training five years after completing their mandatory training. The Bill also introduces a monetary penalty where there is a failure to complete mandatory training. Minister Anderson advised that these amendments were intended to 'incentivise compliance to meet training requirements.'
- 10.7 The Bill introduces new crime prevention and harm-minimisation measures including a new exclusion order framework. This amendment will permit an 'authorised person' for a registered club to give a person an exclusion order prohibiting them from entering or remaining in the club's premises. Minister Anderson explained that:
- The intent of this provision is to expressly permit authorised persons to remove or exclude persons engaged in, or reasonably suspected of being engaged in, illegal activity such as, but not limited to, money laundering and other forms of crime. It is also intended to protect and support those who may be at risk of, or experiencing, gambling harm.
- 10.8 The Bill also expressly enables registered clubs to use technology including electronic sign-in and facial recognition technology. The Bill requires a club using facial recognition technology to follow guidelines issued by the Secretary. Minister Anderson clarified that:
- These guidelines will be developed to regulate the use of this technology and will provide the opportunity to place additional detailed and enforceable requirements on clubs regarding its use, such as signage, purpose of data collection, deletion time frames and other privacy protection mechanisms.

- 10.9 In his concluding statements, the Minister noted that the Bill 'will help registered clubs to recover from the impacts of the COVID-19 pandemic, shutdowns, hospitality staff shortages and inflation.'

Issues considered by the Committee

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

Strict Liability Offences

- 10.10 The Bill establishes numerous strict liability offences under the Act and the Regulation.
- 10.11 The offences relate to a variety of matters including:
- (a) A failure to notify the Authority of changes in information relating to an application for an authorisation (Subsection 19(2))
 - (b) A failure to comply with the conditions of an authorisation (Subsection 57F(3)(c))
 - (c) The holding of a function in accordance with the authorisation but not in accordance with the approval of the governing body of the club. Noting that the Bill provides a defence to a prosecution of a Secretary of a club for this offence (Subsections 23(2)-(3))
 - (d) A failure to appoint a person to act as the secretary of a club within two days after the former secretary ceases to hold office (Subsection 32(1A))
 - (e) An excluded person entering or remaining in the club's premises (Subsection 68(4))
 - (f) The failure of a member of a governing body to complete the required training or governance refresher training within the timelines (Subsection 26(1))
 - (g) The failure of a secretary or manager to complete the required training or club management refresher training within the timelines (Subsection 27(1))
- 10.12 The maximum penalty that can be issued to a registered club under the new offences is 100 penalty units.
- 10.13 The maximum penalty that can be issued to an individual under the new offences is 50 penalty units.

The Bill creates a number of strict liability offences. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and may provide a financial incentive for impacted parties to comply with their obligations under the legislation. In the circumstances, the Committee makes no further comment.

Procedural Fairness – creation of penalty notice offences

- 10.14 The Bill amends the Regulation to prescribe four new offences as penalty notice offences. Specifically, the Bill amends schedule 1 to the Regulation to provide that sections 26(1), 26(3), 26(4) of the Regulation are penalty notice offences.
- 10.15 Each penalty notice offence has a corresponding penalty of \$110. This is 10 per cent of the maximum penalty that can be issued by a court for the offence.

The Bill designates four offences under the Regulation as penalty notice offences. Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a court to have their matter heard. This may impact on a person's right to a fair trial. That is, to have the matter heard by an impartial decision maker in public and to put forward their side of the case.

However, the Committee acknowledges that the amendment does not remove a person's right to have their matter heard and determined by a Court. Additionally, there are practical benefits in allowing matters to be dealt with by way of a penalty notice, including cost effectiveness and ease of administration. The amount payable under a penalty notice is also lower than the maximum penalty payable if the matter were determined by a Court. In the circumstances the Committee makes no further comment.

Freedom of movement, procedural fairness and administrative review rights

- 10.16 The Bill inserts section 68 to the Act, which permits an 'authorised person' for a registered club to issue an exclusion order prohibiting a person from entering or remaining in the club's premises. Such an order may be made if the 'authorised person' reasonably suspects that the person is 'engaging in, or has engaged in, conduct that constitutes an offence or otherwise poses a risk to the health or safety of the person or persons in the club's premises'.
- 10.17 Subsection 68(3) requires an exclusion order to be in a form approved by the Authority.
- 10.18 Subsection 68(5) allows an 'authorised person' to use reasonable force to prevent the excluded person from entering the club's premises, or remove or cause to be removed, the excluded person from the club's premises.
- 10.19 The Bill inserts section 70 to the Act, which provides that no civil or criminal liability is incurred by a registered club or an 'authorised person' for an act or omission, done or not done in good faith and in accordance with the section 68 provisions related to excluded persons.
- 10.20 The Bill also inserts Section 69 to the Act, which establishes a process by which the person subject to an exclusion order may apply in writing to the review body for a review of the decision to subject the person to an exclusion order.
- 10.21 In his second reading speech, Minister Anderson noted that new exclusion provisions reflect stronger 'anti-money laundering and harm-minimisation measures'.

The Bill would allow an 'authorised person' for a registered club to make an order excluding a person from a premises if they reasonably suspect that the person is engaging in, or has engaged in, conduct that constitutes an offence or otherwise poses a risk to the health or safety of the person or persons in the club's premises. The Bill also provides that it is an offence for an excluded person to enter or remain on the club's premises, and that the offence attracts a maximum penalty of 50 penalty units (\$5 500). These amendments effectively limit an individual's freedom of movement.

The Bill provides that an exclusion order must be in writing and issued in a form approved by the Authority. The Committee notes that it is unclear what would constitute an 'approved form' for the purposes of this amendment. Further, it is unclear whether the approved form will include reasons for why a decision to issue an exclusion order was made. While the Bill does provide an avenue for the excluded person to seek review of an exclusion order, there is no express requirement for the review body to provide reasons to the affected person for its decision. Without clear reasoning for why an order was issued, an individual may in practice find it difficult to challenge a decision.

The Committee acknowledges the intent of the provision is to prevent crime and minimise harm. However, given the potential impact on an individual's freedom of movement and uncertainty around procedural and administrative safeguards, the Committee refers the matter to Parliament for its consideration of whether the provisions trespass unduly on the right to freedom of movement.

Privacy of personal DNA information

- 10.22 The Bill inserts Section 25 to the Act which allows a registered club to use technology for any of the following purposes:
- (a) Satisfying requirements under the Act including the requirement to keep a register of persons who enter the club's premises
 - (b) Identify, and prevent from entering the club's premises, persons excluded from the club
 - (c) Identify, and remove from the club's premises, persons who are engaging in, or have engaged in, conduct that constitutes an offence.
- 10.23 Subsection 25(2) of the Bill clarifies that technology can include both electronic sign-in, and facial recognition technology that collects biometric information from persons on the registered club's premises.
- 10.24 In his second reading speech, Minister Anderson advised that facial recognition technology would provide a 'valuable tool for clubs to detect people who are suspected of money-laundering activities and other serious crimes' and that it can also be a 'beneficial harm minimisation tool'.
- 10.25 Subsection 25(3) requires a registered club using facial recognition technology in the club's premises to comply with guidelines issued by the Secretary.

- 10.26 Minister Anderson noted that the guidelines for the use of facial recognition technology 'will be developed' and that they:

...will provide the opportunity to place additional detailed and enforceable requirements on clubs regarding its use, such as signage, purpose of data collection, deletion time frames and other privacy protection mechanisms.

The Bill empowers registered clubs to use technology including facial recognition technology and electronic sign-ins to fulfill several objectives under the Act. The Committee is concerned that this may encroach on the right to privacy of personal information, particularly where biometric information is stored and used by the registered club.

The Committee notes that the Bill does not contain information on key privacy protection matters such as how biometric information will be stored, how long biometric information will be stored for, and who will have access to an individual's biometric information. The Committee acknowledges that the Bill provides a requirement for facial recognition technology to be used in accordance with guidelines issued by the Secretary. However, the Committee considers the risks to personal privacy may be amplified by the fact that these guidelines are not yet in force.

The Committee acknowledges the intent of the Bill is to minimise harm and prevent crime. However, without express legislated safeguards to protect an individual's biometric information, the Committee refers the matter to Parliament for its consideration.

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

Incorporation of extrinsic material

- 10.27 The Bill inserts subsection 25(3) to the Act, which requires a registered club using facial recognition technology in the club's premises to comply with guidelines issued by the Secretary.

- 10.28 The Act does not contain provisions in relation to the mechanisms empowering the Secretary to issue guidelines.

The Bill requires registered clubs using facial recognition technology in the club's premises to comply with guidelines issued by the Secretary. The Committee notes that guidelines of this nature are not yet published.

The Bill and the Act generally, is silent on the powers of the Secretary to publish guidelines on the use of facial recognition technology. It is also unclear whether these guidelines are required to be tabled in Parliament and therefore subject to parliamentary scrutiny. The Committee acknowledges that this may provide the flexibility necessary to accommodate a developing space. However, given that the use of facial technology will likely interfere with privacy and confidentiality interests, the Committee refers the matter to Parliament for consideration.

11. Water Management Amendment (Water Access Licence Register) Bill 2022*

Date introduced	20 October 2022
House introduced	Legislative Assembly
Member responsible	Mrs Helen Dalton MP
	*Private Members Bill

Purpose and description

11.1 The object of this Bill is to amend the *Water Management Act 2000* (the **WM Act**), the *Constitution Act 1902* and *Constitution (Disclosures by Members) Regulation 1983* as follows—

- (a) to require holders and co-holders of water access licences to hold a UIN, a unique identification number allocated to a person for the purposes of the WM Act,
- (b) to make amendments relating to the Water Access Licence Register (the Access Register),
- (c) to impose requirements relating to the holders (WAL subsidiary holders) of rights to exercise entitlements conferred by an access licence, or a holding in an access licence, held by an irrigation corporation,
- (d) to provide for a code of conduct for brokers,
- (e) to require annual reporting of the foreign beneficiaries of trusts that have an interest in a water access licence,
- (f) to require Members of Parliament to publicly disclose interests in water access licences held by the Member or the Member's spouse,
- (g) to make other minor or consequential amendments,
- (h) to insert provisions of a savings and transitional nature.

Background

11.2 The Bill amends the WM Act, which sets out the legislative framework for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations.

11.3 The Bill seeks to create a register of water entitlements in NSW. Specifically, it will prevent the Minister from approving an application for a water access license unless

the requesting party meets the criteria for receiving a unique identification number. This number serves to link information placed on the register, and functionally prevents parties from anonymously applying for any holding water entitlements.

11.4 The Bill further requires that members of NSW Parliament declare water entitlements owned by themselves or their partners in the past five years as part of their pecuniary interest declarations.

11.5 The Bill also requires all current licence holders to provide information about company directors, major shareholders and related corporations. It will also require irrigation corporations to disclose all entities that hold water within their schemes. In her second reading speech, Mrs Helen Dalton MP stated that this is important because:

Currently, foreign companies can hide water within the bulk licence of an irrigation delivery company, which is a vehicle to potentially launder money from illegal activities. My bill will change that.

11.6 Lastly, the bill makes amendments to require that the online water access licence register be updated to allow the public to search for water holdings and access information about the parties that hold them. This register will not include personal phone numbers, email or residential addresses.

Issues considered by the Committee

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

Delegation to the regulations – creation of offences and incorporation of external documents

11.7 The Bill inserts a new clause 71ZA which provides that the regulations may prescribe a code of conduct for brokers, and that a relevant offence for failing to comply with this code may also be prescribed.

11.8 Brokers are defined in subsection 71AZ(4) as being a person who provides brokerage services to another person in return for a commission, fee or other financial benefit. Brokerage service is also further defined in subsection 71AZ(4) as including:

- (a) Providing advice about a dealing in an access licence or holding an access licence
- (b) dealing in an access licence or holding in an access licence on behalf of another person,
- (c) investigating a prospective dealing in an access licence or holding in an access licence on behalf of another person,
- (d) preparing and submitting documents necessary for a dealing in an access licence or holding in an access licence on behalf of another person

11.9 The Bill further inserts section 400(3A) which provides that the regulations may create offences with a maximum penalty of 100 penalty units (\$11 000) if the offence relates to a failure not to comply with a code of conduct or a specific provision of a code of conduct.

The Bill inserts section 71ZA which defers certain matters to the regulations, including that they may prescribe a code of conduct for brokers and relevant offences for failing to comply with this code. Section 400(3A) provides that the regulations may create offences that carry a maximum penalty of 100 penalty units (\$11 000).

The Committee generally prefers that substantive clauses, such as offences, are set out in the Act where they can be subject to a greater level of parliamentary scrutiny. This is particularly where offences may carry a high monetary amount or incorporate external documents (i.e. the code of conduct) that is not subject to disallowance.

However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. The Committee further notes that the penalties are monetary in nature, rather than carrying terms of imprisonment, which is not uncommon in a regulatory setting to encourage compliance. Further, the Committee notes that the provision is aimed at regulating the conduct of brokers and brokerage services, which includes providing advice about dealing or holding an access licence, investigating a prospective dealing in an access licence, and preparing and submitting documents necessary for dealing in an access licence. In the circumstances, the Committee makes no further comment.

12. Weapons Prohibition Amendment (Silencers) Bill 2022*

Date introduced	19 October 2022
House introduced	Legislative Council
Member responsible	The Hon. Robert Borsak MLC
	*Private Members Bill

Purpose and description

- 12.1 The object of this Bill is to amend the *Weapons Prohibition Act 1998* (the **Act**) to provide that it is a genuine reason for a person to have a silencer, or another device referred to in the Act, Schedule 1, item 4(3), for recreational/sporting purposes if the applicant provides a written recommendation from a medical practitioner or an audiologist that the applicant use a device of that kind.

Background

- 12.2 The Bill seeks to amend section 11 of the Act, which requires the Commissioner of Police to only issue a permit authorising the possession or use of a prohibited weapon, where the Commissioner believes that the applicant has a genuine reason for possessing or using the prohibited weapon.

- 12.3 Specifically, it proposes to expand the genuine reason of 'recreational/sporting purposes' set out in the table under section 11. This would permit the use of a device prohibited under Schedule 1, clause 4(3), if an applicant provides a written recommendation from a medical practitioner or an audiologist that they use such a device. Schedule 1, clause 4(3) prohibits:

Silencers or any other device designed for attachment to a firearm for the purpose of muffling, reducing or stopping the noise created by firing the firearm.

- 12.4 In his second reading speech to the Bill, the Hon. Robert Borsak MLC stated that the operation of these amendments would:

... enable licensed law-abiding firearm owners, who hold a firearms licence endorsed for recreational/sporting purposes, to be eligible to be issued a silencer permit by the New South Wales Firearms Registry upon provision of a medical certificate from a medical doctor or audiologist.

- 12.5 He also noted that the Bill seeks to improve 'the hearing protection measures available to firearm users'. Speaking further to the need for this reform to protect the health and safety of firearm users, Mr Borsak stated:

There is universal desire by firearm licence holders to have access to the best and most effective hearing protection available. Ear plugs and earmuffs are simply not fit for

purpose or appropriate to manage the short intense impulse noise generated by firearms.

- 12.6 The Committee considers that the Bill's provisions do not engage with the reportable issues under section 8A of the *Legislation Review Act 1987* regarding personal rights and liberties. Additionally, the Committee notes that the Commissioner retains the discretion to determine whether genuine reasons exist under section 11 of the Act, including those reasons set out in the table within that provision.

Issues considered by the Committee

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

Part Two – Regulations

1. Children's Court of New South Wales Practice Note No. 16 – Applications for a Mandatory Testing Order

Date tabled	LA: 9 August 2022 LC: 9 August 2022
Disallowance date	LA: 15 November 2022 LC: 15 November 2022
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

1.1 Practice Note No. 16 for the Children's Court of New South Wales No. 16 titled 'Applications for a mandatory testing order' (the **Practice Note**) was published in the NSW Government Gazette No 363 on 5 August 2022.

1.2 Clause 2.1 of the Practice Note provides:

This Practice Note applies to applications for a Mandatory Testing Order (an application) under s 14 of the Mandatory Disease Testing Act 2021 (the Act) where the vulnerable third party (respondent young person) is at least 14 years of age and under the age of 18 years.

1.3 The Committee previously commented on the introduction of the *Mandatory Disease Testing Act 2021* (the Act) as a Bill in its Digest No. 24/57 (17 November 2020).¹

Issues considered by the Committee

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

Right to personal physical integrity

1.4 The Practice Note sets out details on the procedure for filing, listing, serving, notifying and hearing an application for a Mandatory Testing Order for a vulnerable

¹ 6 Parliament of New South Wales, Legislation Review Committee, [Legislation Review Digest No. 24/57](#), 17 November 2020.

third party as provided for under section 14 of the *Mandatory Disease Testing Act 2021*.

- 1.5 Section 14 of the Act provides that an application can be made to the Children's Court of New South Wales (the **Court**) for a Mandatory Testing Order for a vulnerable third party (respondent young person) that is at least 14 years of age and under the age of 18.
- 1.6 An application may be made to provide for mandatory blood testing of a person in circumstances where a health, emergency or public sector worker (specified by the Act) comes into contact with the person's bodily fluid as a result of the person's deliberate action, and where the worker is at risk of contracting a blood-borne disease as a result of the person's deliberate action.
- 1.7 Clause 7.3 of the Practice Note provides that on the first mention date, the Court will ensure that the vulnerable third party will have had an opportunity to obtain legal advice and representation. If there has not been an opportunity, the matter may be adjourned for up to 4 weeks for that purpose.
- 1.8 Subclause 7.3(a) provides that where a vulnerable third party has not had an opportunity to obtain legal advice and representation, the Court may deal with the matters on submissions if the parties consent and time permits.

The Practice Note sets out details on the procedure for filing, listing, serving, notifying and hearing an application for a Mandatory Testing Order for a vulnerable third party (14 to 18 years of age), in accordance with section 14 of the *Mandatory Disease Testing Act 2021*. Under that Act, an application may be made to provide for mandatory blood testing of a person in circumstances where a health, emergency or public sector worker comes into contact with the person's bodily fluid as a result of the person's deliberate action, and where the worker is at risk of contracting a blood-borne disease as a result of the person's deliberate action.

The Committee previously considered the provisions of the Act when it was introduced as a Bill in its Digest 24/57.² Consistent with the Committee's previous comments, it notes the invasive nature of the mandatory testing procedure, the power to perform such a procedure without the subject person's consent and by use of reasonable force, and the requirement to submit to a procedure may impact on an individual's right to personal physical integrity.

The Committee notes that the Practice Note provides a safeguard by requiring the Court to ensure on the first mention date that the vulnerable third party has had an opportunity to obtain legal advice and representation. It notes that this safeguard may be limited by the ability of parties to consent to continuing proceedings without hearing, particularly given potential questions of capacity of vulnerable third parties to provide informed consent.

² 6 Parliament of New South Wales, Legislation Review Committee, [Legislation Review Digest No. 24/57](#), 17 November 2020.

However, the Committee acknowledges the purpose of the Act is to protect health, emergency and public sector workers that may be at risk of contracting a blood-borne disease during the course of their work. The Committee also recognises that the Practice Note sets out the process for an application to a Court for a Mandatory Testing Order, which is provided under the parent Act. However, given the Practice Note deals with issues of consent by a minor in relation to a physical procedure in the course of court proceedings, the Committee refers this matter to Parliament for its consideration of whether it unduly impacts upon a person's right to personal physical integrity.

Procedural fairness

- 1.9 Subclause 7.3(c) provides that the hearing should not exceed 2 hours, except in exceptional circumstances.
- 1.10 Subclause 7.3(d) provides that where it is anticipated that a hearing will exceed two hours, the Court may make directions for the filing of written submissions, time limits for oral submissions or evidence, or other case-management matters.
- 1.11 Clause 7.1 provides that an application for a mandatory testing order is to be dealt with expeditiously by the Court having regard to the *Chief Health Officer's guidelines for actions under the Mandatory Disease Testing Act 2021*.

The Practice Note permits the Court to make directions for the filing of written submissions, time limits for oral submissions or evidence, or other case management matters, where a hearing is estimated to exceed two hours. The Committee notes that these kinds of time limitations may impacts upon the procedural fairness afforded to a person. However, the Committee acknowledges that it is intended to facilitate judicial efficiency by allowing the Court to deal with such matters expeditiously given the implications for the parties involved. In the circumstances, the Committee makes no further comment.

2. Drug and Alcohol Treatment Regulation 2022

Date tabled	LA: 20 September 2022 LC: 20 September 2022
Disallowance date	LA: TBC ³ LC: TBC
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

- 2.1 The object of this Regulation is to repeal and remake, with 2 significant amendments, the *Drug and Alcohol Treatment Regulation 2017*, which would otherwise be repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2).
- 2.2 The amendments are to—
- (a) update the minimum number of official visitors that the principal official visitor must ensure visit a treatment centre every calendar month, to accurately reflect the requirements in the *Drug and Alcohol Treatment Act 2007*, section 29(1), and
 - (b) prescribe the following groups as a class of persons within the meaning of ***transport officer***—
 - (i) staff of St Vincent’s Hospital Sydney Limited,
 - (ii) staff of Northern Beaches Hospital,
 - (iii) persons employed or otherwise engaged by an entity that provides transport services under a contract for services with either St Vincent’s Hospital Sydney Limited or Northern Beaches Hospital.
- 2.3 This Regulation comprises or relates to matters set out in the *Subordinate Legislation Act 1989*, Schedule 3, namely matters of a machinery nature.

³ A disallowance date of 'TBC' indicates that the disallowance date falls outside the current 2022 sitting calendar, i.e. after 17 November 2022.

Issues considered by the Committee

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

Right to security of person and personal liberty – power to restrain, search and seize and detain

- 2.4 The Regulation substantially remakes and repeals the previous iteration, the *Drug and Alcohol Treatment Regulation 2017*. However, it does make new provisions in respect to official visitors and transport officers.
- 2.5 Specifically, clause 5 of the Regulation provides that for the purposes of the Act, 'transport officers' includes staff of St Vincent's Hospital Sydney and of Northern Beaches Hospital, and employees or persons otherwise engaged by a transport services provider who is contracted with either of the above named hospitals.
- 2.6 Section 20 of the Act empowers a 'transport officer' to transport a dependent person to/from a substance dependence treatment centre. Subsection (2) permits a transport officer to use 'reasonable force' in exercising that function and other functions under the Act, as well as to restrain the dependent person 'in any way that is reasonably necessary in the circumstances'. Subsections (3) and (4) further empower a transport officer to:
- (a) Carry out a frisk or ordinary search of the dependent person, if they reasonably suspect the dependent person is carrying anything that would present a danger to another, or could be used to assist the dependent person escaping custody.
 - (b) Seize and detain a thing of that kind found in such a search.
- 2.7 Subsection 20(5) of the Act defines a 'transport officer' to mean a member of staff of NSW Health Service, a police officer or otherwise a person of a class prescribed by regulations. Under the Act, a dependent person is a person who has been issued a dependency certificate by an accredited medical practitioner, who has assessed that they may be detained for substance dependence treatment.

The Regulation prescribes employees of St Vincent's Hospital Sydney and Northern Beaches Hospital, and the employees of or persons engaged by transport services providers contracted with those private hospitals, as 'transport officers' within the meaning of the *Drug and Alcohol Treatment Act 2007*, section 20. This would extend the functions and powers of transport officers under the Act to these private employees.

Under section 20, transport officers may use reasonable force and/or restrain a person they are transporting to a substance dependence treatment centre, and perform an ordinary or frisk search of them if the officer reasonably suspects that they are carrying a thing that would pose a danger or be used to aid escape from custody. The Regulation may therefore extend a wide enforcement power, the exercise of which may impact a person's right to security and personal liberty.

The Committee notes that the provisions are intended to facilitate the operation of substance dependence treatment programs run in the specified hospitals. However, the provisions would allow private sector employees to use reasonable force, restrain persons and conduct searches. The Committee notes that, unlike

police officers and staff members of the NSW Health service, private sector employees are not subject to the same obligations, duties and safeguards provided in NSW law. For these reasons, the Committee refers this matter to Parliament for its consideration.

Appendix One – Functions of the Committee

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

8A Functions with respect to Bills

- (1) The functions of the Committee with respect to Bills are:
 - (a) to consider any Bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - (i) trespasses unduly on personal rights and liberties, or
 - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - (iv) inappropriately delegates legislative powers, or
 - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.
- (2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to regulations

- (1) The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - (i) that the regulation trespasses unduly on personal rights and liberties,
 - (ii) that the regulation may have an adverse impact on the business community,
 - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
 - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

- (v) that the objective of the regulation could have been achieved by alternative and more effective means,
 - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - (vii) that the form or intention of the regulation calls for elucidation, or
 - (viii) that any of the requirements of sections 4, 5 and 6 of the [Subordinate Legislation Act 1989](#), or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (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.

Functions Regarding Bills

The Legislation Review Committee has two broad functions set out in sections 8A and 9 of the *Legislation Review Act 1987*. Section 8A requires the Committee to scrutinise all Bills introduced into Parliament while section 9 requires the scrutiny of all regulations. The Committee can only comment on the specific issues set out under these two sections.

The Committee's purpose is to assist all members of Parliament to be aware of, and make considered decisions on, the rights implications of legislation. The Committee does not make specific recommendations on Bills and does not generally comment on government policy.

The Committee's functions with respect to Bills as established under section 8A of the Act are as follows:

- (i) To consider any Bill introduced into Parliament, and
- (ii) To report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - (1) trespass unduly on personal rights and liberties, or
 - (2) makes rights, liberties and obligations unduly dependent upon insufficiently defined administrative powers, or
 - (3) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - (4) inappropriately delegates legislative powers, or
 - (5) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

The terms of section 8A are not defined. However, the types of issues the Committee typically addresses in its Digests include, but are not limited to:

Trespass unduly on personal rights and liberties:

- retrospectivity
- self-incrimination and the right to silence
- reversal of the onus of proof
- strict liability
- search and seizure without warrant
- confidential communications and privilege
- oppressive official powers
- right to vote
- equal application of laws
- non-discrimination

- freedom of speech
- freedom of religion
- privacy and protection of personal information
- rights to personal physical integrity
- excessive and disproportionate punishment
- legislative interference in standing judicial matters

Insufficiently defined administrative powers:

- ill-defined and wide powers
- vagueness or uncertainty

Non-reviewable decisions:

- excludes merits review
- excludes judicial review
- no requirement to provide reasons for an a decisions
- decisions made in private

Inappropriate delegation of legislative powers:

- provides the executive with unilateral authority to commence an Act;
- Henry VIII clauses (clauses that allow amendment of Acts by regulation)
- provide that a levy, tax or penalty be set by regulation
- allow for offences to be set by regulation
- extraterritoriality
- matters which should be set by Parliament (for example definitions)

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny

- subordinate legislation not tabled in Parliament and not subject to disallowance
- insufficient disallowance period
- providing that regulations may incorporate rules or standards of other bodies in force not subject to disallowance

Past practice of the Committee has been to highlight issues of concern it identifies in a Bill and its provisions. The Committee also evaluates the potential reasons and safeguards regarding issues of concern and determines if the provisions may be reasonable in the circumstances or should be referred to Parliament for further consideration.

Under section 8A(2) of the Act, Parliament may pass a Bill whether or not the Committee has reported on the Bill. However, this does not prevent the Committee from reporting on any passed or enacted Bill.

Functions Regarding Regulations – Review of All Regulations

Functions with respect to regulations are established under section 9 of the Act as follows:

- (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, or
 - (vii) that the form or intention of the regulation calls for elucidation.
- (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.

Unlike Bill reports, the Committee only reports on those regulations with identified issues under section 9, rather than reporting on every regulation made.

The Committee may write to the relevant Minister for further information or, as with Bills, refer particular matters to the Parliament for further consideration. As above, the Committee may also recommend that Parliament disallow a regulation that has been made.

A summary of the regulations that the Committee considers do not warrant comment are published as an appendix to the Digest.

Appendix Two – Regulations without papers

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

1. [Betting and Racing Regulation 2022](#)

The object of this Regulation is to remake, with changes, the *Betting and Racing Regulation 2012* which is repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation provides for the following—

- (a) the prescription of persons or bodies as the sports controlling body for a sporting event,
- (b) the changes a sports controlling body must notify the Minister of,
- (c) the regulation of race field information use approvals granted by the relevant racing control body to betting service providers, including by prescribing—
 - (i) requirements for fees imposed as conditions on approvals, and
 - (ii) permissible conditions that may be imposed on approvals, and
 - (iii) the grounds for cancelling or varying approvals, and
 - (iv) requirements for applications for approvals, and
 - (v) the criteria the relevant racing control body must take into account when determining applications for approvals,
- (d) the regulation of responsible gambling practices,
- (e) the prescription of certain fees payable under the Act,
- (f) the exemption of a person who is a member of the Communications Alliance from an offence prohibiting a person from providing online access to—
 - (i) unauthorised gambling operations, or
 - (ii) information about unauthorised gambling operations,
- (g) the prescription of offences for which a court may impose certain remedial orders in relation to a person found guilty of the offence,
- (h) requirements imposed on a sports controlling body that enters into certain integrity agreements,
- (i) the offences under the Gaming and Liquor Administration Act 2007, the Betting and Racing Act 1998 and this Regulation for which penalty notices may be issued, including the amounts payable.

The exemption specified at paragraph (f) is arguably made under a Henry VIII provision because the exemption impliedly amends the Betting and Racing Act 1998 by affecting the application of the Act

2. [Biofuels Regulation 2022](#)

The object of this Regulation is to repeal and remake, with amendments, the Biofuels Regulation (No 2) 2016. The Regulation provides for the following—

- (j) prescribing standards for the definition of biofuel sustainability standard,
- (k) prescribing the threshold for deeming service stations to be volume fuel service stations,
- (l) prescribing the relevant period for the Biofuels Act 2007 (the Act),
- (m) excluding certain persons from the definition of primary wholesaler,

- (n) minimum biofuel requirements, including defences to, and exemptions from, the requirements,
- (o) returns and records required to be kept or provided to the Secretary,
- (p) the offences under the Act for which penalty notices may be issued, including the amounts payable.

This Regulation comprises or relates to matters set out in the *Subordinate Legislation Act 1989*, Schedule 3, namely—

- (a) matters of a machinery nature, and
- (b) matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

Proposed section 6 of this Regulation is made under a Henry VIII provision.

Proposed section 7 of this Regulation is arguably made under a Henry VIII provision because the section impliedly amends the Act by affecting the application of the Act.

3. [Charitable Trusts Regulation 2022](#)

The object of this Regulation is to repeal and remake, without significant amendments, the Charitable Trusts Regulation 2017, which would otherwise be repealed on 1 September 2022 by the Subordinate Legislation Act 1989, section 10(2).

This Regulation prescribes trusts that are charities endorsed as exempt from income tax under the Income Tax Assessment Act 1997 of the Commonwealth, Subdivision 50-B, as a class of prescribed trust.

This Regulation comprises or relates to matters set out in the Subordinate Legislation Act 1989, Schedule 3, namely matters of a machinery nature and matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

4. [Children and Young Persons \(Care and Protection\) Amendment \(Authorised Residential Care Workers\) Regulation 2022](#)

The object of this Regulation is to amend the Children and Young Persons (Care and Protection) Regulation 2012 consequential on the commencement of the Children’s Guardian Regulation 2022 and the establishment of the residential care workers register.

5. [Civil Liability Amendment \(Authorised Carers\) Regulation 2022](#)

The object of this Regulation is to amend the Civil Liability Regulation 2019 to provide that certain persons who, for the purpose of providing residential care to children and young people in out-of-home care, are authorised carers under the Children and Young Persons (Care and Protection) Act 1998 are taken, for the purposes of the Civil Liability Act 2002, to be employees.

The amendment is consequential on the commencement of the Children’s Guardian Regulation 2022 and the establishment of the residential care workers register.

6. [Contract Cleaning Industry \(Portable Long Service Leave Scheme\) Regulation 2022](#)

The object of this Regulation is to remake, with changes, the Contract Cleaning Industry (Portable Long Service Leave Scheme) Regulation 2017, which is repealed on 1 September 2022 by the Subordinate Legislation Act 1989, section 10(2). The Regulation provides for the following matters—

- (a) the declaration of certain laws of other jurisdictions as corresponding laws for the purposes of the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* (the Act),
- (b) the non-service days that are to be treated as a day's service for the purposes of cancelling or suspending a worker's registration under the long service leave scheme,
- (c) the refund of long service leave levies paid in relation to a worker whose registration is cancelled,
- (d) appeals to the Contract Cleaning Industry Long Service Leave Committee against a decision of the Long Service Corporation,
- (e) the circumstances in which a break in a worker's engagement period must be counted as service,
- (f) the information required to be included in returns by employers and contractors,
- (g) the interest rate on an overdue long service leave levy,
- (h) a certificate purporting to be signed by a person holding, or acting in, the office or position of Director of the Long Service Corporation to be admissible as evidence of certain matters relating to long service leave levies,
 - (i) savings matters,
 - (j) the offences under the Act for which penalty notices may be issued, including the amounts payable.

This Regulation comprises or relates to matters set out in the *Subordinate Legislation Act 1989*, Schedule 3, namely—

- (a) matters of a machinery nature, and
- (b) matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or another State or Territory, and
- (c) matters that are not likely to impose an appreciable burden, cost or disadvantage on a sector of the public.

7. [Conveyancing \(General\) Amendment \(Transport Asset Holding Entity of New South Wales and Landcom\) Regulation 2022](#)

The objects of this Regulation are to—

- (a) prescribe the Transport Asset Holding Entity of New South Wales (TAHE) and Landcom as corporations that may impose restrictions on the use of land, or impose public positive covenants on land, whether or not the land is vested in the corporation, and
- (b) prescribe the Transport Asset Holding Entity of New South Wales as a corporation in favour of which an easement without a dominant tenement may be created.

The Regulation amends the Conveyancing (General) Regulation 2018 to prescribe TAHE and Landcom as corporations which may impose restrictions or public positive covenants on certain land not held by them, in accordance with section 88E of the Conveyancing Act 1919. However, section 88E requires the consent of the registered proprietor for lands held under the Torrens title system or the owners and all others with interest in the lands held under the Old title system in order for this to take effect.

Additionally, the Regulation prescribes TAHE and AusNET Transmission Group as corporations which may create easements in gross without a dominant tenement (and thus cannot be transferred to a new occupier), in accordance with section 88A of the Act. Section 88A limits that ability to create easements in gross only where it is for the purposes of (or incidental to) the supply of a utility service to the public.

8. [Employment Protection Regulation 2022](#)

The object of this Regulation is to remake, with minor changes, the Employment Protection Regulation 2017, which is repealed on 1 September 2022 by the Subordinate Legislation Act 1989, section 10(2).

The Regulation makes provision for the following matters—

- (a) the cases in which the *Employment Protection Act 1982*, section 7 or 8 does not apply,
- (b) the requirements for giving notice under the Act, section 7 or 8,
- (c) other formal and savings matters.

This Regulation comprises or relates to matters set out in the *Subordinate Legislation Act 1989*, Schedule 3, namely—

- (a) matters of a machinery nature, and
- (b) matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

The Regulation substantially remakes the previous iteration, save for the repeal of provisions enabling the Industrial Commission to direct a Registrar to issue written notice on an employer who has issued a notice of intention to/reasons for termination, to clarify particulars in that notice. However, the Committee notes that this does not impact the ability of the Commission to consider and inquire into a report on such a notice.

9. [Environmental Planning and Assessment Amendment \(Notice Requirements\) Regulation 2022](#)

The object of this Regulation is to require certain consent authorities to notify particular determinations of development applications and reviews in the form approved by the Secretary of the Department of Planning and Environment, unless the notice is in relation to State significant development or Crown development.

The Regulation amends the Environmental Planning and Assessment Regulation 2021 require specified consent authorities to give notice of particular determinations in the 'approved form'. Under the Dictionary to the Environmental Planning and Assessment Regulation 2021, an 'approved form' is the form approved by the Planning Secretary and published on the NSW planning portal.

The Committee notes that, unlike regulations, the forms published on the planning portal are not required to be tabled in Parliament and subject to disallowance under the Interpretation Act 1987 and usually prefers for these requirements to be included in the subordinate legislation. However, the amendments clarify how specified consent authorities must meet their obligations to give notice and are unlikely to impact on an applicant or interested party's right to receive notice of development determinations.

10. [Explosives Amendment \(Exemptions\) Regulation 2022](#)

The object of this Regulation is to exempt transport operators and persons working for transport operators who are transporting small arms ammunition, and percussion caps used in small arms ammunition, from the licensing and security clearance provisions of the Explosives Act 2003 and the Explosives Regulation 2013.

The Regulation creates exemptions for persons to transport small arms ammunitions and the percussion caps used in that ammunition, from the requirement to obtain a valid licence and security clearance under the Explosives Act 2003 and the Explosives Regulation 2013. This exemption is limited to possession, storage and movement of those materials in the course of their duties transporting it. It also does not extend to the weapons for which the ammunition is intended.

11. [Jury Regulation 2022](#)

The object of this Regulation is to repeal and remake, with amendments, the Jury Regulation 2015, which would otherwise be repealed on 1 September 2022 by the Subordinate Legislation Act 1989, section 10(2).

This Regulation provides for the following—

- (a) the determination of jury districts,
- (b) the kinds of trials for which a court may order the selection of up to 3 additional jurors,
- (c) the circumstances in which the identity of a principal witness must not be disclosed to jurors,
- (d) the amounts a juror is entitled to be paid for jury service,
- (e) savings matters.

This Regulation comprises matters set out in the *Subordinate Legislation Act 1989*, Schedule 3, namely—

- (f) matters of a machinery nature, and
- (g) matters that are not likely to impose an appreciable burden, cost or disadvantage on a sector of the public.

The Regulation substantially remakes and repeals its previous iteration, with some amendments to the quantities for attendance and travel allowances.

12. [Legal Profession Uniform General Amendment \(Conditional Costs Agreements\) Rule 2022](#)

This rule is made by the Legal Services Council under the Legal Profession Uniform Law and provides that the for the purposes of section 181(7)(c) of the Uniform Law, the Family Court Act 1997 of Western Australia is specified.

13. [Local Government \(General\) Amendment \(Elections\) Regulation 2022](#)

The objects of this Regulation are—

- (a) to provide that technology assisted voting, other than telephone voting for vision impaired or blind electors, is not to be used at by-elections held before the end of 1 September 2024, and
- (b) to make it clear that an original election, for the purposes of the *Local Government (General) Regulation 2021*, Schedule 9A, includes an election held on 30 July 2022 to fill vacancies in the offices of councillors of certain councils.

This Regulation is made under the Local Government Act 1993, including sections 291A(3) and 748, the general regulation-making power, and Schedule 6, clause 14.

14. [Notice of Reservation of a National Park—Mount Jerusalem National Park GG No 359 of 5.8.2022](#)

This instrument reserves the land described in the Schedule as part of Mount Jerusalem Nation Park, under the provisions of section 30A(1)(a) of the National Parks and Wildlife Act 1974.

15. [Protection of the Environment Operations \(General\) Amendment \(Licence Fees\) Regulation 2022](#)

The object of this Regulation is to amend the Protection of the Environment Operations (General) Regulation 2021 in relation to determining the administrative fee component of the annual licence fee for the scheduled activity of petroleum exploration, assessment and production.

This Regulation is made under the Protection of the Environment Operations Act 1997, including sections 57(1) and 323 (the general regulation-making power).

16. [Public Health \(Tobacco\) Regulation 2022](#)

The object of this Regulation is to remake, with minor changes, the *Public Health (Tobacco) Regulation 2016*, which is repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation provides for the following—

- (a) exclusions from the definitions of *e-cigarette* and *e-cigarette advertisement* in the *Public Health (Tobacco) Act 2008*,
- (b) requirements relating to the packing, display, advertisement and sale of tobacco and other smoking products,
- (c) health warnings and other notices and statements for display—
 - (i) at retail outlets from which tobacco and other smoking products are sold, and
 - (ii) on tobacco and e-cigarette vending machines,
- (d) giving notice of the commencement of tobacco or e-cigarette retailing,
- (e) offences under the *Public Health (Tobacco) Act 2008* and this Regulation for which penalty notices may be issued and the amounts payable under the penalty notices.

The Regulation substantially remakes the previous iteration, and makes additional provisions including in respect to e-cigarettes. Sections 13 and 14 the Regulation creates new offences, in accordance with subsection 58(3) of the *Public Health (Tobacco) Act 2008*. These offences are for contravening requirements for advertisement on e-cigarette products.

While the Regulations establish strict liability offences by way of a Henry VIII clause, the Committee acknowledges that the offences are intended to ensure compliance with public health measures intended to limit the potential harm from e-cigarette products.

17. [Road Transport \(General\) Amendment \(Penalty Notice Offences\) Regulation 2022](#)

The object of this Regulation is to correct 2 minor errors in Schedule 5 of the Road Transport (General) Regulation 2021 concerning penalty notice offences.

The Regulation amends the prescription of penalty notice offences under Schedule 5 of the Road Transport (General) Regulation 2021. These amendments do not increase or expand the number of offences prescribed as penalty notice offences.

18. [Security Industry Amendment \(Private Investigators\) Regulation 2022](#)

The *Security Industry Amendment (Private Investigators) Act 2016* repeals provisions that license private inquiry agents, to be known as private investigators, under the *Commercial Agents and Private Inquiry Agents Act 2004* and instead provides for the licensing of private investigators under the *Security Industry Act 1997*. The objects of this Regulation are as follows—

- (f) to prescribe offences that prevent a person being licensed to act as a private investigator,
- (g) to prescribe persons who may act as private investigators without the need for a licence,
- (h) to make savings and transitional arrangements for licences under the *Commercial Agents and Private Inquiry Agents Act 2004* that related to private inquiry agents.

This Regulation also makes amendments to correct incorrect cross references.

This Regulation is made under the *Security Industry Act 1997*, including section 48 (the general regulation-making power) and Schedule 2.

The Committee notes that, while the Regulation may prevent a person from obtaining a licence in respect to certain findings of guilt, the amendments are intended to protect public safety.

19. [Trustee Companies Regulation 2022](#)

The object of this Regulation is to repeal and remake, with amendments, the *Trustee Companies Regulation 2016*.

This Regulation—

- (a) provides that a trustee company may elect to administer the estate of a deceased person who died testate or intestate if, in addition to requirements set out in the *Trustee Companies Act 1964* (the Act), sections 15A(1) and 15AA(1), the estimated gross value of the estate is less than \$100,000, and
- (b) prescribes the way in which certain notices under the Act must be published and the content of the notices.

This Regulation comprises or relates to matters set out in the *Subordinate Legislation Act 1989*, Schedule 3, namely—

- (a) matters of a machinery nature, and
- (b) matters that are not likely to impose an appreciable burden, cost or disadvantage on a sector of the public.

20. [Water Industry Competition \(General\) Amendment Regulation 2022](#)

The object of this Regulation is to extend the operation of the *Water Industry Competition (General) Regulation 2021* until 1 September 2023. The Regulation is currently under review as significant changes will be made to the *Water Industry Competition Act 2006* following the commencement of the *Water Industry Competition Amendment Act 2021*.

This Regulation also makes a minor amendment to correct a reference to an Australian Standard.

This Regulation is made under the *Water Industry Competition Act 2006*, including sections 13(1)(a) and 101, the general regulation-making power.

21. [Water Management \(General\) Amendment Regulation 2022](#)

The object of this Regulation is to provide that a person who constructs or uses a water supply work smaller in capacity than the water supply work the person is approved to construct or use must notify the Minister of the smaller capacity.

22. [Work Health and Safety \(Mines and Petroleum Sites\) Amendment Regulation 2022](#)

This Regulation replaces existing penalty amounts, which are expressed as a monetary value, with the equivalent penalty expressed in penalty units to adopt an approach to expressing penalty amounts that is consistent with the Work Health and Safety Act 2011.

This Regulation is made under the Work Health and Safety (Mines and Petroleum Sites) Act 2013, including section 76, the general regulation-making power.

23. [Work Health and Safety Amendment Regulation 2022](#)

The objects of this Regulation are—

- (a) to give effect to the *Model Work Health and Safety Legislation Amendment 2022*, Part 3 by—
 - (i) requiring a person conducting a business or undertaking to manage psychosocial risks, and
 - (ii) specifying what details must be recorded in a log book for an amusement device, and
 - (iii) requiring a person with management or control of an amusement device to make the log book for the device available to a person to whom control of the device is relinquished, and
- (b) to make other minor amendments.

This Regulation is made under the Work Health and Safety Act 2011 (the Act), including sections 271(3)(c)(ii) and 276, the general regulation-making power, and Schedule 3, clauses 5 and 6.

The Committee notes that the Regulation prescribes the National Disability Insurance Scheme Act 2013 (Cth) (the NDIS Act) for the purposes of subsection 271(3)(c)(iii) of the Act. This would exempt disclosures of information or giving access to a document, which would otherwise be confidential and prohibited, if it was done or authorised by the regulator because it was necessary for the administration or enforcement of the NDIS Act and necessary to lessen or prevent a serious risk to public health or safety. The exemption would facilitate the operation of the National Disability Insurance Scheme.

24. [Workers' Compensation \(Dust Diseases\) Amendment \(Scheduled Diseases\) Regulation 2022](#)

The object of this Regulation is to amend the Workers' Compensation (Dust Diseases) Act 1942 (the Act), Schedule 1 to include additional specified diseases.

This Regulation is made under the Workers' Compensation (Dust Diseases) Act 1942, section 10(3)(a), a Henry VIII provision.

While the Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight, it notes that these amendments expand eligibility for the compensation scheme set up by the Act to include the additional specified diseases.