

Legislation Review Committee



PARLIAMENT OF
NEW SOUTH WALES

Legislation Review Digest



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

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Membership

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Guide to the Digest

The Legislation Review Committee has two broad functions set out in sections 8A and 9 of the *Legislation Review Act 1987* (**the Act**). Section 8A requires the Committee to scrutinise all Bills introduced into Parliament while section 9 requires the scrutiny of all regulations.

Part One: Functions Regarding Bills

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:

- (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) trespass unduly on personal rights and liberties
 - (ii) makes rights, liberties and obligations unduly dependent upon insufficiently defined administrative powers
 - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions
 - (iv) inappropriately delegates legislative powers, or
 - (v) 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
- procedural fairness
- rule of law and separation of powers
- extraterritoriality
- strict liability and penalty notice offences
- search and seizure without warrant
- confidential communications and privilege
- wide regulatory powers
- access to vote
- ability to engage in public life and public elections
- equal application of laws
- freedom of expression and free speech
- freedom of religion and belief
- freedom of contract
- right to personal and real property
- privacy and protection of personal information
- right to personal physical integrity
- legislative interference in standing judicial matters

Insufficiently defined administrative powers:

- insufficiently defined or wide powers

Non-reviewable decisions:

- excludes access to review
- limits type of evidence available to a decision-maker
- provides decision-maker is not required to provide reasons for a decision
- decisions made in private

Inappropriate delegation of legislative powers:

- provides the executive with unilateral authority to commence an Act (i.e. commencement by proclamation)
- wide power of delegation
- wide regulation-making powers (e.g. creation of offences or setting penalties)
- Henry VIII clauses (clauses that allow amendment of Acts by regulation)
- imposition of tax or levy by regulation

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny

- subordinate legislation not tabled in Parliament and not subject to disallowance
- insufficient disallowance period
- significant matters which should be set by Parliament (e.g. definitions)
- incorporating rules or standards of other bodies in force not subject to disallowance

In practice, the Committee highlights issues of concern and takes into consideration the potential reasons for introducing such a provision and any safeguards in place. The Committee 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 it. However, this does not prevent the Committee from reporting on any passed or enacted Bill.

Part Two: Functions Regarding Regulations

The Committee's functions regarding regulations are established under section 9 of the Act:

- (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament, and
- (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.

The Committee reviews all disallowable regulations which have been tabled in Parliament. However, unlike Bills, 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.

Conclusions on Bills and Regulations

Part One of the Digest contains the Committee's reports on Bills which were introduced into Parliament. Under the section titled 'Issues considered by the Committee', the report includes commentary about whether the Bill engages with one or more of the five criteria for scrutiny set out in section 8A(1)(b) of the Act. This will include either:

- Where no issues set out in section 8A(1)(b) are identified, that 'The Committee makes no comment in respect of the issues set out in section 8A of the LRA.'
- Where issues set out in section 8A(1)(b) are identified, a distinct comment on each issue identified.

Part Two of the Digest contains the Committee's reports on regulations and other statutory instruments which are tabled in Parliament and are still subject to disallowance. As noted, the Committee only reports on regulations and other statutory instruments with identified issues under section 9 of the Act, and those instruments which don't have identified issues are listed in Appendix Two of the Digest. Like Bill reports, the Committee's regulation reports includes a distinct comment on each issue identified under the section titled 'Issues considered by the Committee'.

For every issue identified in a report, the Committee's comment will conclude either that the Committee 'refers/notes the matter to Parliament' or 'makes no further comment'.

Where the Committee concludes to **refer/notes the matter to Parliament**, the Committee considers that it requires a response or further comment by the Member with carriage of the Bill (for Bill reports) or the responsible Minister (for regulation reports).

Where the Committee concludes to **make no further comment** on an identified issue in the report, the Committee considers that the issue may technically engage with the criteria under section 8A or 9 of the Act but, given counterbalancing considerations (e.g. legislated safeguards), it is unlikely in practice to raise the issues under the relevant section. The Committee invites but does not otherwise require the Member with carriage (for Bill reports) or the responsible Minister (for regulation reports) to comment on these identified issues.

Digest Snapshot

PART ONE – BILLS

[1. Crimes Amendment \(Corrupt Benefit for Trustees\) Bill 2023](#)

No issues identified

[2. Civil and Administrative Tribunal Amendment Bill 2023](#)

Issue identified	Conclusion of Committee
<i>Broad discretionary power may impact proceedings</i>	Referred

[3. Equality Legislation Amendment \(LGBTIQA+\) Bill 2023; Conversion Practices Prohibition Bill 2023*](#)

Issue identified	Conclusion of Committee
<i>Right to freedom of religion</i>	Referred
<i>Wide application of anti-discrimination laws – variations of sex characteristics</i>	No further comment
<i>Wide application of anti-discrimination laws – sex workers</i>	Noted
<i>Wide application of laws – participation in a sporting activity</i>	Referred
<i>Application of laws to minors – altering a record of sex</i>	Referred
<i>Application of laws to minors – consent to medical treatments</i>	Referred
<i>Incorporating rules or standards not subject to disallowance</i>	Referred
<i>Offence regime – conduct concerning ‘change or suppression practices’</i>	Referred
<i>Extension of criminal liability</i>	Referred
<i>Right to freedom of religion – definition of ‘change or suppression practice’</i>	No further comment
<i>Application of laws outside NSW</i>	Referred
<i>Functions and powers of the President and Board</i>	Referred
<i>Wide powers of the President</i>	Referred
<i>Wide regulation-making power</i>	Referred

[4. Explosives Amendment Bill 2023](#)

Issue identified	Conclusion of Committee
<i>Strict liability offence and right to personal physical integrity</i>	Referred
<i>Right to the presumption of innocence and wide powers of delegation</i>	Referred
<i>Non-reviewable decisions – cancellation of authorisation</i>	Referred
<i>Matters deferred to the regulations</i>	Referred

5. [Motor Dealers and Repairers Amendment Bill 2023](#)

Issue identified	Conclusion of Committee
<i>Absolute liability offences</i>	No further comment
<i>Absolute liability offence and access to cashless payment systems</i>	Referred
<i>Right to the presumption of innocence – extension of regulatory powers to prohibit</i>	Referred
<i>Lack of clarity of standards and thresholds for compliance</i>	Referred
<i>Discretionary power of the Secretary to impose fine</i>	No further comment
<i>Commencement by proclamation</i>	Referred

6. [Sydney Olympic Park Authority Amendment \(Hill Road Upgrade\) Bill 2023](#)

No issues identified

PART TWO – REGULATIONS**1. [Surveillance Devices Amendment \(ICAC\) Regulation 2023](#)**

Issue identified	Conclusion of Committee
<i>Right to privacy</i>	Referred
<i>Procedural fairness</i>	Referred
<i>Timing and retrospectivity</i>	Referred

Summary of Conclusions

PART ONE – BILLS

1. Crimes Amendment (Corrupt Benefit for Trustees) Bill 2023

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

2. Civil and Administrative Tribunal Amendment Bill 2023

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

Broad discretionary power may impact proceedings

The Bill amends the *Civil and Administrative Tribunal Act 2013* to provide the President of the NSW Civil and Administrative Tribunal with a broad power to reconstitute the Tribunal. The amendment inserts section 52(1)(d) allowing the President to direct that a member of the Tribunal not take part in proceedings after a matter has commenced.

Therefore, the exercise of this power may impact the continuity of Tribunal proceedings. Given the broad jurisdiction of the Tribunal, many proceedings involve matters impacting individual rights. It is therefore important for members engaging with the Tribunal to have continuity in membership throughout proceedings wherever possible.

A direction from the President under section 52(1)(d) is subject to certain criteria outlined in section 52(2A) added by the Bill. These include a requirement that the President has consulted the member and is satisfied that the direction is in the interests of justice and achieving the expeditious conduct of proceedings, and is otherwise appropriate given the objects of the Act.

The Committee acknowledges that the amendment was recommended by the 2021 Statutory Review into the Act and is intended to facilitate the efficient allocation of resources for the Tribunal. However, it notes that the power to give directions and qualifications such as 'interests of justice' under section 52(2A) are broadly worded, which may undermine certainty for individuals with matters before the Tribunal. Additionally, the Bill does not include provisions requiring the President to provide reasons for the direction replacing a member. For these reasons, the Committee refers the broad wording of the discretionary power to Parliament for its consideration.

3. Equality Legislation Amendment (LGBTIQA+) Bill 2023; Conversion Practices Prohibition Bill 2023*

Equality Legislation Amendment (LGBTIQA+) Bill 2023

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

Right to freedom of religion

The Bill amends the *Anti-Discrimination Act 1977* to narrow exemptions available to religious bodies. Specifically, it limits the rights of religious bodies to discriminate on grounds of religious

beliefs in the areas of employment, management of religious educational institutions, and provision of goods and services which includes adoption services.

Religious organisations will continue to have an exemption on the basis of religious beliefs in relation to services but the Bill restricts the circumstances for this exemption to where it is 'reasonable and proportionate'. However, the Bill generally prohibits reliance on these exemptions in the provision of education, employment, and goods and services. Under Part 9, contraventions of the Act may be reported as a complaint to the NSW Anti-Discrimination Board. Therefore, the Bill may infringe a person's right to freedom of thought, conscience and religion, which is contained in Article 18 of the ICCPR.

The Committee recognises that there are existing laws in NSW which allow for conscientious objections by some individuals. However, it notes that conscientious objections are specific to certain professional services. The amendments therefore may still infringe on the rights of individuals outside of these professions.

While the Committee acknowledges that the limitation of this right may be intended to expand protections for the rights to equality and to freedom from discrimination, it notes whether this is beyond the extent that is 'necessary to protect public safety, order, health, or morals'. The Committee also notes removing the exemption for religious educational authorities in all circumstances may interfere with the rights of parents or guardians to determine the religious or moral education of their children. For these reasons, the Committee refers the matter to Parliament for its consideration.

Wide application of anti-discrimination laws – variations of sex characteristics

The Bill amends the *Anti-Discrimination Act 1977* to prohibit discrimination on the ground of variations of sex characteristics. The Bill defines what is a variation of sex characteristics, and makes it unlawful to discriminate on this ground in the areas of employment, education, and the provision of goods and services. It also makes a public act of vilification on this ground unlawful.

As a result, the Bill restricts the behaviour and decision-making of a person or organisation, including employers, industrial organisations, educational authorities, providers of goods and services, and registered clubs. The Bill may therefore limit a person's right to freedom of association with others, and freedom of expression, as contained in Articles 22 and 19 of the ICCPR.

However, the Committee notes that these rights are not absolute and may be subject to restrictions where it is reasonably necessary, including to respect the rights or reputations of others. In the circumstances, the Committee acknowledges that such limitations may be necessary in order to reduce discrimination and vilification of members of the community who have variations in sex characteristics. As these new protections are consistent with existing protections for other grounds of discrimination and offers a similar level of protection to this identified group, the Committee makes no further comment.

Wide application of anti-discrimination laws – sex workers

The Bill amends the *Anti-Discrimination Act 1977* by making it unlawful to discriminate against a person on the ground of sex work in areas including education, employment, and provision of goods and services. The Bill prevents organisations and persons from discriminating against a person on the ground of current or former engagement in sex work, or that their relative or associates are or were sex workers.

The Bill effectively extends similar anti-discrimination protections under the Act on the grounds of age, sex and race to a group of persons identified by a certain employment history, being sex work. As they are modelled on existing anti-discrimination laws, these new anti-discrimination provisions cover all circumstances of employment and other areas of life where discrimination may be present.

The Committee notes that the Bill makes it unlawful to discriminate on a characteristic that generally pertains or is imputed to sex workers. Given the ambiguity of what may amount to such a characteristic, the Bill may have a broad application. Therefore, the Bill may limit the rights of individuals including employers, educational authorities, providers of goods and services, and registered clubs, including the freedom of association and contract.

The Committee acknowledges that the Bill recognises the particular vulnerability of sex workers to discrimination and vilification. The Committee also notes that the discrimination protections on the basis of sex work may be considered differential treatment, as there are no similar protections under the Act for other categories of employment.

Wide application of laws – participation in a sporting activity

The Bill amends the *Anti-Discrimination Act 1977* to narrow the circumstances when a transgender person may be lawfully excluded from participating in a sporting activity. Specifically, it requires the exclusion to be 'reasonable and proportionate in all the circumstances'.

The Committee notes that the Bill is unclear as to what constitutes 'reasonable and proportionate'. It also does not define which persons or bodies are covered. As a result, it may be difficult for individuals to determine whether these provisions apply to their circumstances, or when such an exclusion may be unlawful. The Committee further notes that a contravention of these provisions may result in a complaint to the NSW Anti-Discrimination Board.

The Committee acknowledges that the Bill promotes the right of transgender persons to participate in sporting activities without discrimination. However, it notes that the provisions may have a broad application and subject individuals to disciplinary actions. For these reasons, the Committee refers the matter to Parliament for its consideration.

Application of laws to minors – altering a record of sex

The Bill amends *Births, Deaths and Marriages Registration Act 1995* to allow individuals to apply for an alteration of their recorded sex under new Part 5A. This includes a scheme for children and young people aged under 16 years to make an application to the Civil and Administrative Tribunal. This application must be accompanied by a statement of evidence that the young person has obtained counselling in relation to the implications of the application. However, the Committee notes that there is no requirement in the application process to establish that the child or young person has capacity to understand these implications or make the application.

The Tribunal may approve the alteration of the recorded sex, if it is satisfied that doing so is in the applicant's best interest. In deciding the outcome of an application, the Tribunal may consider whether the child is sufficiently mature to understand the meaning and implication of the alteration. However, the Committee notes that the Tribunal is not required to consider this matter in deciding each application.

The Committee recognises that these provisions may recognise the self-determination of children and young people by allowing them to apply to have their sex in State records altered to align with their sex identity. However, as this alteration would legally designate them to be the sex stated in the record, these applications attract certain legal consequences. It may be considered that young

people under 16 years of age may lack the capacity to properly understand the consequences of these applications.

Additionally, under section 32CA, the Tribunal has to take reasonable steps to notify the parents and other people with parental responsibility for the applicant about the application. However, this requirement is not necessary in the circumstances that may result in the child or young person being 'adversely affected'. The Committee further notes that, even where notice is given, there is no provision for a parent or guardian of the applicant to make a submission in relation to this applicant, nor does the Tribunal have to consider their views or interests. Therefore, the Bill may also limit the ability of parents and other people with parental responsibilities to determine what may be in the best interests of their children.

For these reasons, the Committee refers this matter to Parliament for its consideration.

Application of laws to minors – consent to medical treatments

The Bill inserts section 174A into the *Children and Young Persons (Care and Protection) Act 1998* to allow children and young people under 18 years of age to make decisions about their medical and dental treatments. This section provides that all young people aged between 16 and 18 years can make decisions and consent to their own medical treatment with the same effect and validity as an adult. This would effectively remove any distinction in healthcare between young people over 16 years and an adult. It also allows children under 16 years to consent to medical or dental treatment in certain circumstances.

The Committee acknowledges that these provisions are intended to recognise the rights of young people under the age of 18 years to make decisions concerning their own healthcare. Regarding children under 16 years of age, it also notes that the treating medical practitioner or dentist is required to first ascertain that the child is capable of understanding the nature, consequences and risks. However, the Committee notes that the Bill does not set out details of what constitutes this informed consent. It may be considered that young people under the age of 18 years may lack the capacity to fully understand the consequences of medical and dental treatments.

The Committee also notes that, for children under 16 years who consent to receiving treatment, the medical practitioner or dentist does not have to consult with the parents or guardians if they believe the child can understand the nature, consequences and risks of the treatment and it is in the child's best interests. Therefore, the Bill may also limit the ability of parents and other people with parental responsibilities to determine what may be in the best interests of their children. The Committee acknowledges that parents and guardians can challenge the provision of such treatments in the Federal Circuit and Family Court of Australia. However, a court challenge still places the responsibility for making healthcare decisions for a child to a third party (the court) rather than their parent or guardian.

For these reasons, 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

Incorporating rules or standards not subject to disallowance

The Bill incorporates a 'diversity and inclusion standard' into the *Government Sector Employment Act 2013*. The Standard is issued by the Public Services Commissioner and is not explicitly required under the Bill to be tabled in Parliament.

The Committee generally prefers substantive matters be set out in legislation so they are subject to parliamentary scrutiny. In this case, the Standard may prescribe leave for gender affirming care and specific workforce diversity targets and quotas for government agencies. The Committee notes that this would create mandatory requirements for all public sector agencies, regardless of their size or structure, and it is unclear whether agencies can seek exemptions or flexible application of this Standard.

The Committee recognises that these provisions are intended to strengthen representation of minority groups such as LGBTIQ+ people in government workforces, which may promote equality rights for these groups. It also acknowledges that including such information in the Standard enables flexibility and allows for its timely revision. However, the Committee notes that the Standard creates obligations on all Government sector agencies, the non-compliance of which may attract penalties. For these reasons, the Committee refers the matter to Parliament for its consideration.

Conversion Practices Prohibition Bill 2023

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

Offence regime – conduct concerning ‘change or suppression practices’

Part 2, Division 2 of the Bill creates new criminal offences for intentionally directing one or more 'change or suppression practices' towards another person, or taking them outside of NSW to receive such a practice, where the practice(s) causes 'injury' or 'serious injury'. A person or entity is guilty of these offences if they are negligent to the potential harm of the conversion practices. These offences carry maximum penalties ranging from \$26 400 to \$132 000 and/or 2 to 10 years' imprisonment for individuals. There is no defence of consent.

The Bill defines 'injury' widely, to mean any temporary or permanent 'physical injury' or 'harm to mental health'. Similarly, 'serious injury' is widely defined to include any injury or injuries which 'endangers life' or 'is substantial and protracted'.

By prohibiting practices intended to change or suppress their gender identity or sexual orientation, the Committee acknowledges that these offences may be intended to protect the rights of equality and non-discrimination for LGBTIQ+ people. However, the Committee notes that element of harm in these offences (that is, the practice caused 'injury' or 'serious injury') is widely defined and may capture a broad if not unlimited range of potential physical and mental harms, both temporary and permanent. This wide definition may make it difficult for a person to understand the scope of these criminal offences. As these offences carry maximum penalties that include terms of imprisonment, the Committee refers the matter to Parliament for its consideration.

Extension of criminal liability

Section 16 extends criminal liability for offences under Part 2, Division 2 of the Bill to corporations. In prosecuting a corporation for these offences, the 'relevant conduct' and 'knowledge' of an 'associate' of the corporation can be attributed to it, as well as the 'intention' of an associate if that intention arose from the 'corporate culture'. The 'intention' of the corporation's board of directors or its officers may also be attributed to the corporation in a prosecution for a Division 2 offence. If an officer of a corporation engages in conduct which is an offence under Division 2, the corporation is also taken to have engaged in that conduct unless it can prove it exercised due diligence to prevent the conduct.

The Bill defines an 'associate' of the corporation to be either an employee, agent or 'officer' of the corporation, acting within the scope of their employment/authority. The term 'officer' is also defined to have the same meaning under section 9 of the *Corporations Act 2001* (Cth). The Commonwealth Act broadly defines 'officer' to mean a number of roles within a corporation. This includes any person who makes decisions, participates in decision-making, has the 'capacity' to significantly affect its financial standing, or whose instructions/wishes are typically followed.

The Committee acknowledges that extending criminal liability to corporations may be intended to strengthen compliance with its legislative prohibition on conversion practices. This would promote the rights of equality and non-discrimination for LGBTIQ+ people who may be targeted by such practices.

However, the Committee notes that an 'associate' or 'officer' of the corporation is widely defined, which may capture most people who are employed or contracted by the organisation but not in a management position. This may broaden the scope for extending corporate liability for the offences under Division 2. The Committee further notes that section 16 permits the prosecution of a corporation on the basis of offending conduct by its officer, even where that officer has not been prosecuted or convicted of the relevant offence. For these reasons, the Committee refers this matter to Parliament for its consideration.

Right to freedom of religion – definition of 'change or suppression practice'

The Bill establishes new criminal offences to prohibit engaging in or advertising 'change or suppression practices'. Section 9 defines a 'change or suppression practice' as a 'practice, sustained effect or treatment' which is directed towards somebody because of their sexual orientation or gender identity and intended to change or suppress that orientation or identity. Certain actions are expressly excluded from this definition, including the expression 'only of a belief or religious principle' if it is not done with the intention to change or suppress a person's sexual orientation or gender identity.

This may restrict a person's expression of their beliefs or religious principles as expressions with certain intentions would contravene the prohibitions under the Bill. Therefore, the Bill may infringe a person's right to freedom of thought, conscience and religion, which is contained in Article 18 of the ICCPR.

However, the Committee acknowledges that the expressions of belief or religious principles prohibited by the Bill is limited to those expressions intended to change or suppress a person's sexual orientation or gender identity. By providing a limited exception, this may be intended to protect the rights of equality and non-discrimination for LGBTIQ+ people. The Committee further notes that the Bill does not prevent expressions of belief or religious principle that are not directed towards somebody's sexual orientation or gender identity. In the circumstances, the Committee makes no further comment.

Application of laws outside NSW

Section 7 of the Bill extends its application, including its criminal offence provisions, to conduct occurring wholly or partially outside of NSW that has a 'real and substantial link' with NSW. The provision clarifies that there is a 'real and substantial link' if a significant part of the conduct occurs in NSW or, where it occurred wholly outside, the effects of the conduct 'occurred wholly or partly in NSW'. The Committee generally comments where legislation may have extraterritorial effect because it may create uncertainty for individuals about what laws apply to them at any one time.

The Committee acknowledges that the extraterritorial application of the criminal offence provisions may be intended to strengthen compliance with its legislative prohibition on conversion

practices. This would promote the rights of equality and non-discrimination for LGBTQIA+ people who may be targeted by such practices, by preventing somebody from taking a person outside of NSW to avoid the prohibition.

However, the Committee notes that section 13 establishes an offence for taking a person outside of NSW with the intention that they be subjected to a conversion practice. The Committee further notes that a person may engage in criminal conduct under the Bill if the effects of their conduct occurs 'wholly or partly' in NSW. As it is unclear what may amount to an 'effect' of conduct or how it could occur wholly or partly within NSW, this may broadly expand the scope of a 'real and substantial link with NSW'. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Functions and powers of the President and Board

Section 19 of the Bill empowers the Anti-Discrimination Board and its President with 'all the powers necessary' to enable them to carry out their functions. The President has a wide range of functions under section 17, which includes responding to reports about alleged conversion practices prohibited under the Bill, supporting possible victims of offences under the Bill to make police reports and prosecuting offences under the Bill.

The Committee notes that section 19 is worded broadly and may permit the Board or the President to exercise an unrestricted range of powers so long as it can be construed to facilitate their functions. 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 President

The Bill grants the President of the Anti-Discrimination Board a number of discretionary powers. This includes powers to require the production of documents or information, compel a person to answer questions and refer reports of alleged contraventions to the NSW Police Force and the Director of Public Prosecutions (DPP).

The Bill may therefore grant the President wide powers of investigation and enforcement that may impact an individual's rights when exercised. This includes the right to silence by compelling a person to provide evidence at pain of criminal liability, and their right to liberty, by permitting the President to refer matters for or commence criminal prosecution as well as authorise a person to bring proceedings for offences.

The Committee acknowledges that enabling the President to exercise these powers may be intended to strengthen compliance with the Bill's legislative prohibition on conversion practices. It also notes that the Bill includes certain safeguard provisions regarding the exercise of these powers. This includes permitting a person to refuse to answer a question from the President on grounds of self-incrimination.

However, the Committee notes that non-compliance or contravention of the President's notices or directions is a strict liability offence, which carry custodial penalties in some circumstances. The Committee further notes that, despite the limited offences which the President may prosecute, they may still facilitate the criminal prosecution by referring matters to the Police, the

DPP or a person they have authorised to commence offence proceedings. 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

Wide regulation-making power

Section 55 of the Bill provides a general regulation-making power. This includes allowing the regulations to be made about anything 'necessary or convenient to be prescribed for carrying out or giving effect to' the Bill.

The Committee notes that there does not appear to be any provisions which define or narrow 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 this regulation-making power may allow for more flexible regulatory responses. However, the provision may effectively allow regulations to prescribe matters with little limit. For these reasons, the Committee refers this matter to Parliament for its consideration.

4. Explosives Amendment Bill 2023

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

Strict liability offence and right to personal physical integrity

The Bill inserts section 27A into the *Explosives Act 2003* which creates a strict liability offence against a person who enters a premises used to manufacture or store an explosive without authority. Section 27A(2) permits an authorised person to use reasonable force to remove a person that fails, without reasonable excuse, to immediately leave that premises after being directed to leave. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. However, by also authorising the use of force, the Bill may impact a person's right to personal physical integrity.

The Committee notes that the definition of 'authorised person' is broad and may legally authorise a private person to use force against another person. It also notes that the Bill does not define 'reasonable force', nor establishes circumstances where a person does not have a 'reasonable excuse' for remaining on the premises. Therefore, this may permit the use of possibly great force against a person in broad circumstances.

The Committee recognises the dangers of people entering premises used to manufacture or store explosives, who are not authorised to do so. However, section 27A may allow a potentially broad number of 'authorised' persons to use force to remove a person, without adequately defining the circumstances where this power can be exercised or limiting what force can be used. For these reasons, the Committee refers the matter to Parliament for its consideration.

Right to the presumption of innocence and wide powers of delegation

The Bill inserts section 24K into the Act, which sets out that an analyst, as defined by the regulations, may give a certificate specifying certain details about a forfeited explosive. That certificate is admissible in legal proceedings as 'prima facie evidence'. Accepting the certificate as 'prima facie' evidence would remove the need to demonstrate the analyst's relevant expertise

to adduce the certificate and the onus shifts to the defendant to rebut that evidence. Therefore, the Bill may impact on a person's right to the presumption of innocence.

The Committee recognises that section 24M of the Bill allows a defendant to apply to the Local Court for a review order, which can be made if the Court is satisfied that there is a reasonable doubt about the accuracy of the certificate. However, this may still effectively shift the burden onto a defendant to rebut the certificate evidence and relieves the prosecution of initially meeting the requirements under the *Evidence Act 1995* for expert evidence. For these reasons, the Committee refers this matter to Parliament for its consideration.

Given this potential impact on defendants, allowing regulations to prescribe the definition of an analyst may amount to a wide power of delegation. This is particularly the case for those defendants charged with indictable offences under the Act, which carry custodial penalties. Further, defendants may also be subject to strict liability offences under the Act.

The Committee acknowledges that allowing regulations to prescribe who can be an analyst builds flexibility into the scheme. However, it would prefer these provisions to have been drafted with more specificity. In addition, they should be included in the primary legislation rather than the regulations, to ensure an appropriate level of parliamentary oversight. For these reasons, the Committee also 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

Non-reviewable decisions – cancellation of authorisation

Section 9E of the Bill sets out a number of grounds on which the regulatory authority may cancel the authorisation of an explosive. Section 9F requires the authority to make reasonable efforts to give an applicant notice of the proposed cancellation and an opportunity to make submissions.

The Committee acknowledges the importance of enabling the regulator to cancel the authorisation of certain explosives, particularly for safety and public interest concerns. However, the Bill denies an impacted person's right to compensation for cancellation of an authorisation. There does not appear to be avenues available for reviewing this decision. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Matters deferred to the regulations

The Bill defers a number of matters to the regulations, including around the cancellation of authorisations for explosives and refusal of licences. The regulations may also outline eligibility requirements for individuals applying for security clearances and licences, including any exemptions, and the details to be included on a public register of exemptions.

As it also provides for certain non-reviewable decisions, the Bill may thereby provide a wide delegation of legislative powers by deferring important matters to the regulations instead of clearly setting them out in the primary Act. The Committee notes that these matters may impact on an individual's rights and liberties, for example deferring what information is included in a public register may risk publishing personal information without being subject to parliamentary oversight.

Further, the Bill defers to the regulations what powers and functions of an inspector under the Act may be exercised by police. While the Committee acknowledges that this is intended to enable

police officers to support compliance and enforcement measures, it may be unclear to an individual when a police officer is acting in their capacity as a police officer or as an inspector under the Act.

The Committee acknowledges that allowing regulations to prescribe certain matters provides flexibility, particularly in relation to matters that are more administrative in nature. However, it notes the scope of matters that the Bill defers to the regulations is broad, and that certain matters should be included in the primary legislation rather than the regulations, to ensure an appropriate level of parliamentary oversight. For these reasons, the Committee refers the matter for Parliament for its consideration.

5. Motor Dealers and Repairers Amendment Bill 2023

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

Absolute liability offences

The Bill amends the *Motor Dealers and Repairers Act 2013* to create new absolute liability offences relating to general business dealings of motor vehicle dealers, repairers and recyclers which include requirements for disclosure, handling odometers and record keeping. Monetary penalties ranging from \$2 200 to \$55 000 apply for these offences. The Committee generally comments on strict and absolute liability offences as they depart from the common law principle that a mental element of 'fault' should be proven to establish criminal liability.

However, the Committee notes that strict and absolute liability offences are not uncommon in regulatory settings to encourage compliance. The Committee also acknowledges that these new offences are intended to facilitate the better regulation of the motor vehicle industry and strengthen consumer protections. In the circumstances, the Committee makes no further comment.

Absolute liability offence and access to cashless payment systems

The Bill inserts section 99A into the *Motor Dealers and Repairers Act 2013* to prohibit licenced motor vehicle recyclers from buying recycled parts and accessories using cash, cheques payable to cash or 'in kind with goods or services'. This constitutes an absolute liability offence which carries a maximum penalty of \$11 000. Therefore, the Bill would restrict motor vehicle recyclers to cashless payment systems.

The Committee generally comments on strict and absolute liability offences as they depart from the common law principle that a mental element of 'fault' should be proven to establish criminal liability. The Committee acknowledges that the provision is consistent with an existing prohibition on purchasing scrap metal with cash under the *Scrap Metal Industry Act 2016* and with a recommendation by NSW Police Force. It also notes that absolute liability offences are not uncommon in regulatory settings to encourage compliance.

However, the Committee notes that this could disadvantage individuals who do not have access to cashless payments systems, particularly those who may have limited or poor access to the internet. As the prohibition attracts criminal liability and may prevent an individual from carrying on a valid motor vehicle recycler business, the Committee refers the matter to the Parliament for its consideration.

Right to the presumption of innocence – extension of regulatory powers to prohibit

The Bill amends section 186 of the *Motor Dealers and Repairers Act 2013* which allows the regulation to prohibit or regulate the employment of a person required to hold a licence. This amendment extends this regulation-making power in relation to people charged with offences under the Act, offences involving dishonesty or fraud, or other prescribed offences, whether or not in New South Wales.

This may allow the prohibition, limitation or regulation of an individual's access to a motor dealer, recycler or repairer licence on the basis of charges for criminal offences for which they were not convicted. Therefore, the Bill may undermine an individual's right to the presumption of innocence.

The Committee acknowledges that the amendments are intended better protect consumers, by removing the need to wait for a conviction to apply a prohibition. The Committee also notes that the Secretary, in accordance with the regulation, can clarify when and to whom a prohibition does and does not apply, and further acknowledges that this power may be included to exempt people who are not found guilty of relevant criminal charges.

However, the Committee notes that a prohibition may impact the ability of affected individuals to carry out a lawful business. Exercising this power of exemption for a person found not guilty may still undermine their right to the presumption of innocence during the period in which they are charged. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Lack of clarity of standards and thresholds for compliance

The Bill amends section 113 of the *Motor Dealers and Repairers Act 2013* to replace the words 'work' with 'act, matter or thing or work'. This would permit the Secretary to make a rectification order requiring a motor dealer or repairer to ensure an 'act, matter or thing' required is completed, when they are deemed to have not complied with a dealer or consumer guarantee.

The Committee notes that there does not appear to be any provisions in the Bill or Act which define or narrow the ordinary meaning of 'act', 'matter' or 'thing' or 'work'. These words are also not defined in either relevant regulations or the Australian Consumer Law.

Given that these terms may be widely defined, the Committee notes that this may result in confusion as it is not clear whether and, if so, how the scope for making rectification orders and their requirements has changed. Without further clarification, the Bill may make it difficult for individuals and motor dealers to understand how they may comply with the thresholds and standards for complying with guarantees imposed by the Act. 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

Discretionary power of the Secretary to impose fine

The Bill amends section 45 of the *Motor Dealers and Repairers Act 2013* to allow the Secretary to take disciplinary action that requires payment of a substantial monetary fine. The maximum amount that can be sought is \$11 000 for an individual and \$50 000 for a corporation.

The Committee notes that this may provide the Secretary with a wide discretionary power to seek monetary penalties for breaches of the Act. There does not appear to be any provisions in the Bill or Act to allow a person to challenge or review the Secretary's decision to impose a fine. However, the Committee acknowledges that this provision may be intended to strengthen compliance with the regulatory framework for the motor vehicle industry and protect individuals from potentially harmful or dangerous practices. In the circumstances, the Committee makes no further comment.

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

Commencement by proclamation

The Bill commences (as an Act) on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons.

The Committee acknowledges that a flexible start date may be preferable for necessary administrative arrangements across the automotive industry to implement these reforms. However, the Committee considers that amendments which may affect an individual's ability to conduct a lawful business should have a clear start date to provide certainty to those affected. Part 6 inserted by the Bill may create uncertainty for existing online motor dealers. For these reasons, the Committee refers the matter to Parliament for its consideration.

6. Sydney Olympic Park Authority Amendment (Hill Road Upgrade) Bill 2023

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. Surveillance Devices Amendment (ICAC) Regulation 2023

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

Right to privacy

The Regulation inserts section 6A into the *Surveillance Devices Regulation 2022*, which exempts the Independent Commission Against Corruption (ICAC) and its officers from contravening provisions of Part 2 of the *Surveillance Devices Act 2007*. This would permit the ICAC to lawfully use certain material obtained illegally by a third party with the use of a surveillance device.

This exemption has the potential to impact individuals' right to privacy, as it permits the ICAC and its officers to use information obtained by listening, optical surveillance, tracking and data surveillance devices without consent or a warrant in certain circumstances. For example, the ICAC would be permitted to publish or communicate a recorded private conversation.

The Committee acknowledges that the Regulation is not intended to exempt the ICAC from the requirement to apply for a surveillance device warrant in its investigations. It also recognises that the exemption is associated with an ongoing investigation of the ICAC and that the exemption will expire on 31 December 2025. However, the provisions are not worded so as to limit its application to any particular investigation.

However, the Regulation would allow the ICAC to use information that a third party has obtained without a requisite warrant or consent. The use of surveillance devices without a warrant can impact on an individuals' right to privacy without the requirement for judicial oversight. The Committee notes that there does not appear to be safeguards accompanying the exemption under the Regulation, to limit or allow a challenge or review of its application. For these reasons, the Committee refers the matter to Parliament for its consideration.

Procedural fairness

The Regulation allows the ICAC to use evidence obtained from a third party by the use of a surveillance device that would otherwise be unlawful under Part 2 of the *Surveillance Devices Act 2007*. The Committee is concerned that in using such evidence, it may lead to the prosecution of individuals on the basis of unlawfully obtained evidence. Normally, evidence that has been unlawfully obtained would be inadmissible under the rules of evidence.

The Committee also notes that it is unclear whether the Director of Public Prosecutions can provide directions under the ICAC's wide powers of investigation. Therefore, the Committee is concerned about the potential impact of the Regulation on individuals' right to procedural fairness. For these reasons, the Committee refers the matter to Parliament for its consideration.

Form or intention calls for elucidation: s 9(1)(b)(vii) of the LRA

Timing and retrospectivity

In accordance with section 59(3) of the *Surveillance Devices Act 2007*, the Regulation takes effect from the date that the period for either House of Parliament to disallow the Regulation expires. However, in potential conflict with this, the Regulation provides that it commences on the day it was published.

In light of this, the Committee notes that it is not apparent whether exemptions in the Regulation can retrospectively apply prior to its commencement, to permit the ICAC to possess and use evidence that was unlawfully obtained prior to the Regulation coming into effect.

The Committee further notes that the Regulation is currently subject to a notice of motion that it be disallowed in the Legislative Council. Until this notice is dealt with in the House, the Regulation remains 'disallowable'. For these reasons, the Committee refers the matter to Parliament for further clarity on the timing and applicability of the Regulation.



Part One – Bills

1. Crimes Amendment (Corrupt Benefit for Trustees) Bill 2023

Date introduced	22 August 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Michael Daley MP
Portfolio	Attorney General

Purpose and description

- 1.1 The object of this Bill is to amend the *Crimes Act 1900* (the **Act**) to:
- (a) substitute the offence in the Crimes Act, section 249E in relation to corrupt benefits for trustees and others to:
 - (i) specify that the offering, giving, receiving or soliciting of the benefit must be corrupt
 - (ii) exclude the requirement to obtain the consent of each person beneficially entitled to the property or the Supreme Court in certain circumstances
 - (iii) exclude the requirement for the Attorney General's consent to commence proceedings for an offence under the section.
 - (b) provide that proposed section 249E and sections 249F and 316 apply and extend to conduct engaged in before the commencement of the proposed Act and that section 249E, as in force before its substitution, no longer applies to conduct that occurred before the commencement.

Background

- 1.2 The Bill seeks to amend the Act to ensure that only 'corrupt' conduct relating to trustees (and others) receiving a benefit from transfer of assets from one trustee to another, and/or the appointment of a new trustee is an offence. These amendments seek to safeguard good-faith transactions so that they are not caught under sections 249E and 249F of the Act.
- 1.3 In his second reading speech, the Hon. Michael Daley MP, Attorney General said expressly including 'corruptly' in section 249E of the Act is intended to narrow the scope of the offence. This would ensure the offence 'only targets dishonest and improper conduct, while allowing parties to engage in good faith transactions without exposure to potential criminal sanctions'.
- 1.4 The inclusion of the word 'corruptly' in new section 249E will mirror similar offences under Part 4A of the Act. The Attorney General noted that the intention of the offence is to prevent a trustee from 'being persuaded by the prospect of personal gain to exercise their power to appoint a substitute trustee'.

- 1.5 The Attorney General also made reference to the recent Supreme Court decision of *Application of MLC Investments Limited (ACN 002 641 661)* [2022] NSWSC 1541 ('the **MLC case**'). In that case, the Court ultimately found that proving 'intent' for this offence does not involve the element of 'dishonesty' or a corrupt purpose. He noted concerns that, as a result, 'routine, good faith transactions may potentially be captured by the current offence'.
- 1.6 He highlighted that section 316 of the Act still applies for offences of 'concealing an indictable offence'. This means that, regardless of the amendments proposed by the Bill, there is an ongoing obligation for advisors to report past transactions which meet the offence under section 249E.
- 1.7 The Bill would also remove the requirement for the consent of the Attorney General to be established before proceedings are commenced under section 249E. It also seeks to remove the requirement to obtain consent of each beneficiary or the Supreme Court, if a benefit is to be provided to a person entrusted with property.

Issues considered by the Committee

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

2. Civil and Administrative Tribunal Amendment Bill 2023

Date introduced	22 August 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Michael Daley MP
Portfolio	Attorney General

Purpose and description

- 2.1 The object of this Bill is to make amendments to the *Civil and Administrative Act 2013* (the **Act**) following a statutory review in relation to the following matters:
- (a) the disclosure of reports, including sound recordings and transcripts, of proceedings, and names of persons involved in proceedings, of the Civil and Administrative Tribunal of New South Wales (the **Tribunal**)
 - (b) the correction of obvious errors in the text of decisions of the Tribunal
 - (c) the provision of material relevant to proceedings in the Tribunal
 - (d) contempt of the Tribunal for failure to comply with a summons
 - (e) the reallocation of matters allocated by default to the Administrative and Equal Opportunity Division of the Tribunal
 - (f) the reconstruction of the Tribunal after consideration of a matter by the Tribunal has commenced
 - (g) the provision of written reasons for decisions of the Tribunal at the request of a party to proceedings
 - (h) the functions and constitution of the Occupational Division of the Tribunal in relation to the *Legal Profession Uniform Law Application Act 2014* and the *Legal Professional Uniform Law (NSW)*
 - (i) the functions and constitution of the Guardianship Division of the Tribunal.

Background

- 2.2 The Act establishes the independent Civil and Administrative Tribunal of New South Wales to be a single access point for tribunal services in the State and provides for other related matters such as the conduct of proceedings, review of decisions and making tribunal proceedings accessible.
- 2.3 The Bill makes amendments to the Act to implement recommendations arising from the Report of the Statutory Review of the Civil and Administrative Tribunal Act which

was tabled on 23 December 2021 (the **Review**).¹ The Review recommended technical and procedural amendments to the Act to improve the efficient operation of the Tribunal.

2.4 During his second reading speech on the Bill, the Attorney General explained that the Bill implements recommendations from the Review which:

... aim to clarify aspects of the operation of the Act and to facilitate the just, quick and inexpensive resolution of proceedings before the NSW Civil and Administrative Tribunal.

2.5 The Bill makes a number of amendments to the Act, with the most significant being:

- (a) broadening the powers of the President to reconstitute the Tribunal by inserting section 52(1)(c) of the Act
- (b) inserting section 62(2A) and removing the requirement of the Tribunal to give reasons for certain procedural decisions
- (c) inserting section 73(2)(2A) to clarify that a person is guilty of contempt of the Tribunal if they fail, without reasonable excuse, to comply with a summons.

2.6 The Bill also makes minor consequential amendments by correcting cross-references to other Acts.

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

Broad discretionary power may impact proceedings

2.7 Section 52(1) of the Act authorises the President to replace the member or one of the members constituting the Tribunal after the matter has commenced, on certain grounds. The Bill inserts section 52(1)(d), which allows the President to direct a member not to take part in the proceedings.

2.8 The Bill qualifies the use of this power by adding section 52(2A). This subsection provides that the President must not make a direction under section 52(1)(d), unless the President:

- (a) has consulted the member, if it is reasonably practicable to do so, and
- (b) is satisfied that making the direction is
 - (i) in the interests of justice
 - (ii) in the interests of achieving the expeditious and efficient conduct of the proceedings, and
 - (iii) otherwise appropriate having regard to the objects of this Act.

¹ Department of Communities and Justice, [Statutory Review: Report of the Statutory Review of the Civil and Administrative Tribunal Act 2013](#), Parliament of New South Wales, November 2021.

2.9 The Attorney General outlined the policy rationale for the amendment, saying that the amendment:

... will ensure that the president can more flexibly allocate resources to efficiently resolve matters and improve time to justice. This is consistent with similar powers in equivalent tribunals in other jurisdictions, such as the power provided by section 19D of the Commonwealth Administrative Appeals Tribunal Act 1975.

2.10 The Review recommended that the Act be amended to provide the President with broader power to reconstitute the Tribunal to ensure the "President can more flexibly allocate resources to ensure the efficient resolution of matters."²

The Bill amends the *Civil and Administrative Tribunal Act 2013* to provide the President of the NSW Civil and Administrative Tribunal with a broad power to reconstitute the Tribunal. The amendment inserts section 52(1)(d) allowing the President to direct that a member of the Tribunal not take part in proceedings after a matter has commenced.

Therefore, the exercise of this power may impact the continuity of Tribunal proceedings. Given the broad jurisdiction of the Tribunal, many proceedings involve matters impacting individual rights. It is therefore important for members engaging with the Tribunal to have continuity in membership throughout proceedings wherever possible.

A direction from the President under section 52(1)(d) is subject to certain criteria outlined in section 52(2A) added by the Bill. These include a requirement that the President has consulted the member and is satisfied that the direction is in the interests of justice and achieving the expeditious conduct of proceedings, and is otherwise appropriate given the objects of the Act.

The Committee acknowledges that the amendment was recommended by the 2021 Statutory Review into the Act and is intended to facilitate the efficient allocation of resources for the Tribunal. However, it notes that the power to give directions and qualifications such as 'interests of justice' under section 52(2A) are broadly worded, which may undermine certainty for individuals with matters before the Tribunal. Additionally, the Bill does not include provisions requiring the President to provide reasons for the direction replacing a member. For these reasons, the Committee refers the broad wording of the discretionary power to Parliament for its consideration.

² Department of Communities and Justice, [Statutory Review: Report of the Statutory Review of the *Civil and Administrative Tribunal Act 2013*](#), Parliament of New South Wales, November 2021, p 51.

3. Equality Legislation Amendment (LGBTIQA+) Bill 2023; Conversion Practices Prohibition Bill 2023*

Date introduced	24 August 2023
House introduced	Legislative Assembly
Member responsible	Mr Alex Greenwich MP
	*Private Members Bill

Purpose and description

Equality Legislation Amendment (LGBTIQA+) Bill 2023

3.1 The object of the Equality Legislation Amendment (LGBTIQA+) Bill 2023 (the **Equality Amendment Bill**) is to provide full equality for LGBTIQA+ communities in New South Wales by amending the following:

- (a) the *Anti-Discrimination Act 1977*
- (b) the *Births, Deaths and Marriages Registration Act 1995*
- (c) the *Children and Young Persons (Care and Protection) Act 1998*
- (d) the *Children's Guardian Act 2019*
- (e) the *Court Security Act 2005*
- (f) the *Crimes Act 1900*
- (g) the *Crimes (Administration of Sentences) Act 1999*
- (h) the *Crimes (Domestic and Personal Violence) Act 2007*
- (i) the *Crimes (Forensic Procedures) Act 2000*
- (j) the *Crimes (Sentencing Procedure) Act 1999*
- (k) the *Drug Misuse and Trafficking Act 1985*
- (l) the *Government Sector Employment Act 2013*
- (m) the *Government Sector Employment (General) Rules 2014*
- (n) the *Interpretation Act 1987*

- (o) the *Law Enforcement (Powers and Responsibilities) Act 2002*
- (p) the *Mental Health Act 2007*
- (q) the *Sheriff Act 2005*
- (r) the *Summary Offences Act 1988*
- (s) the *Surrogacy Act 2010*
- (t) the *Workers Compensation Act 1987*.

Conversion Practices Prohibition Bill 2023

3.2 The object of the Conversion Practices Prohibition Bill 2023 (the **Conversion Practices Prohibition Bill**) is to:

- (a) prohibit change or suppression practices
- (b) establish a civil response scheme
- (c) ensure that all people, regardless of sexual orientation, gender identity or gender expression feel welcome and valued in New South Wales and are able to live authentically and with pride.

Background

3.3 The Equality Amendment Bill and the Conversion Practices Prohibition Bill seek to update and strengthen existing discrimination protection for LGBTIQA+ people under the law. In his second reading speech to the Bills, Mr Alex Greenwich MP said:

The bills amend 22 existing Acts and create a new Act. Reforms follow best practice in other States and Territories. They provide New South Wales with an unprecedented opportunity to be inclusive, welcoming, safe, affirming and respectful.

3.4 The Equality Amendment Bill amends the *Anti-Discrimination Act 1977* (the **Anti-Discrimination Act**) and other laws in NSW to update anti-discrimination protection and rights for LGBTIQA+ individuals. It does this across a number of matters, including discrimination, health care access, birth registration, body searches, sex work regulation, government sector employment and parentage of children born through surrogacy. Mr Greenwich described these reforms as ‘interim legislative protections within the current framework of the [Anti-Discrimination] Act that we should introduce now to close loopholes that leave LGBTIQA+ people vulnerable’.

3.5 The Conversion Practices Prohibition Bill would create a new Act that bans practices which try to change or suppress a person’s sexual orientation or gender identity. The Bill defines what constitutes a ‘change or suppression practice’ and makes provisions for education, a civil response scheme, and new criminal offences around conversion practices. Mr Greenwich highlighted in his second reading speech that this Bill is modelled on the legislative framework in Victoria.

- 3.6 Although these Bills are separate Acts when operative, the Equality Amendment Bill and the Conversion Practice Prohibition Bill are cognate. As a result, they were introduced and will be considered together. Therefore, in accordance with the Committee's usual practice, both Bills have been considered in the one report.

Issues considered by the Committee

Equality Legislation Amendment (LGBTIQA+) Bill 2023

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

Right to freedom of religion

- 3.7 Currently, the Anti-Discrimination Act provides exceptions to the application of certain anti-discrimination laws for religious bodies and schools. The Equality Amendment Bill narrows the circumstances in which these institutions may discriminate a person. In his second reading speech, Mr Greenwich said these amendments 'would remove all exemptions for private education authorities' and 'limit sweeping exemptions that permit religious bodies to discriminate in employment ... that is relevant to religious practice' in the Anti-Discrimination Act.

- 3.8 Specifically, the Bill's provisions makes amendments which:

- (a) remove existing exemptions for private educational authorities regarding discrimination protections in matters of education and employment (e.g. section 38K), on the grounds of transgender, marital or domestic status, disability, homosexuality and age.
- (b) narrow exemptions from anti-discrimination provisions on the basis of religious belief in section 56, by requiring exempt discriminatory actions to be 'reasonable and proportionate in all circumstances'. This is in addition to the existing requirement that the actions of 'a body established to propagate religion' both 'conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion'.
- (c) specifically exclude educational institutions and religious bodies under proposed section 56(2) from relying on the Act's religious exemption in relation to employment, education, and provision of goods, services and accommodation to the general public.
- (d) remove the exemption for religious bodies under section 59A to discriminate when providing adoption services.

The Bill amends the *Anti-Discrimination Act 1977* to narrow exemptions available to religious bodies. Specifically, it limits the rights of religious bodies to discriminate on grounds of religious beliefs in the areas of employment, management of religious educational institutions, and provision of goods and services which includes adoption services.

Religious organisations will continue to have an exemption on the basis of religious beliefs in relation to services but the Bill restricts the circumstances for this exemption to where it is 'reasonable and proportionate'. However, the Bill generally prohibits reliance on these

exemptions in the provision of education, employment, and goods and services. Under Part 9, contraventions of the Act may be reported as a complaint to the NSW Anti-Discrimination Board. Therefore, the Bill may infringe a person's right to freedom of thought, conscience and religion, which is contained in Article 18 of the ICCPR.³

The Committee recognises that there are existing laws in NSW which allow for conscientious objections by some individuals. However, it notes that conscientious objections are specific to certain professional services. The amendments therefore may still infringe on the rights of individuals outside of these professions.

While the Committee acknowledges that the limitation of this right may be intended to expand protections for the rights to equality and to freedom from discrimination, it notes whether this is beyond the extent that is 'necessary to protect public safety, order, health, or morals'.⁴ The Committee also notes removing the exemption for religious educational authorities in all circumstances may interfere with the rights of parents or guardians to determine the religious or moral education of their children.⁵ For these reasons, the Committee refers the matter to Parliament for its consideration.

Wide application of anti-discrimination laws – variations of sex characteristics

- 3.9 Schedule 1 of the Equality Amendment Bill inserts Part 3B into the Anti-Discrimination Act, which makes it unlawful to discriminate against a person for having a variation of sex characteristics. New section 38T defines what it means for a person to have a variation of sex characteristics, which Mr Greenwich further elaborated upon in his second reading speech:

Having variations in sex characteristics, or being intersex, refers to people with innate variations of primary or secondary sex characteristics that differ from expectations.

- 3.10 Part 3B mirrors the existing discrimination protections in the Anti-Discrimination Act for other grounds of discrimination, including on the basis of sex. The circumstances where it is unlawful to discriminate on the ground of variations of sex characteristics under this Part includes:
- (a) in work, covering applicants and employees, commission agents, contract workers, partnerships, local government councillors, industrial organisations, qualifying bodies, and employment agencies (Division 2)
 - (b) in other areas of public life, education, the provision of goods and services, accommodation, and membership of registered clubs (Division 3)

³ United Nations, Office of the High Commissioner for Human Rights, [International Covenant on Civil and Political Rights](#), 1966.

⁴ Article 18(3), United Nations, Office of the High Commissioner for Human Rights, [International Covenant on Civil and Political Rights](#), 1966.

⁵ Article 18(4), United Nations, Office of the High Commissioner for Human Rights, [International Covenant on Civil and Political Rights](#), 1966.

- (c) in public spaces, by making it unlawful to incite hatred, contempt or ridicule toward these individuals through public acts (Division 4).

- 3.11 On these new discrimination protections, Mr Greenwich spoke about the specific experience of discrimination for individuals with variations of sex characteristics:

Their experience of discrimination adds to challenges caused by medical interventions in infancy that have changed their bodies to fit norms without their consent, causing lifelong impacts.

- 3.12 The Bill also includes specific exceptions to these new anti-discrimination laws. These exceptions are limited such as, when the number of persons being considered for employment is less than six persons, or where it is for a private household.

The Bill amends the *Anti-Discrimination Act 1977* to prohibit discrimination on the ground of variations of sex characteristics. The Bill defines what is a variation of sex characteristics, and makes it unlawful to discriminate on this ground in the areas of employment, education, and the provision of goods and services. It also makes a public act of vilification on this ground unlawful.

As a result, the Bill restricts the behaviour and decision-making of a person or organisation, including employers, industrial organisations, educational authorities, providers of goods and services, and registered clubs. The Bill may therefore limit a person's right to freedom of association with others, and freedom of expression, as contained in Articles 22 and 19 of the ICCPR.⁶

However, the Committee notes that these rights are not absolute and may be subject to restrictions where it is reasonably necessary, including to respect the rights or reputations of others. In the circumstances, the Committee acknowledges that such limitations may be necessary in order to reduce discrimination and vilification of members of the community who have variations in sex characteristics. As these new protections are consistent with existing protections for other grounds of discrimination and offers a similar level of protection to this identified group, the Committee makes no further comment.

Wide application of anti-discrimination laws – sex workers

- 3.13 Similarly, the Equality Amendment Bill inserts Part 4H into the Anti-Discrimination Act, which makes it unlawful to discriminate against a person for their current or past occupation as a sex worker. Division 2 makes it unlawful to discriminate against sex workers in work-related matters. Division 3 outlines other areas of life where it is unlawful to discriminate on the basis of sex work, including in education; the provision of goods and services, accommodation, and membership of registered clubs.

- 3.14 Section 50AA defines a sex worker as 'a person who provides sexual services on a commercial basis'. Under section 50AB, discrimination under Part 4H includes

⁶ United Nations, Office of the High Commissioner for Human Rights, [International Covenant on Civil and Political Rights](#), 1966.

discrimination based on a characteristic that generally pertains and/or is generally imputed to sex workers.

- 3.15 In his second reading speech, Mr Greenwich spoke about the vulnerability of sex workers and the special need to protect this group of persons from discrimination and vilification. He also noted that the Bill was developed in close association with the Scarlet Alliance, the Australian Sex Workers Association and the Sex Workers Outreach Project.

The Bill amends the *Anti-Discrimination Act 1977* by making it unlawful to discriminate against a person on the ground of sex work in areas including education, employment, and provision of goods and services. The Bill prevents organisations and persons from discriminating against a person on the ground of current or former engagement in sex work, or that their relative or associates are or were sex workers.

The Bill effectively extends similar anti-discrimination protections under the Act on the grounds of age, sex and race to a group of persons identified by a certain employment history, being sex work. As they are modelled on existing anti-discrimination laws, these new anti-discrimination provisions cover all circumstances of employment and other areas of life where discrimination may be present.

The Committee notes that the Bill makes it unlawful to discriminate on a characteristic that generally pertains or is imputed to sex workers. Given the ambiguity of what may amount to such a characteristic, the Bill may have a broad application. Therefore, the Bill may limit the rights of individuals including employers, educational authorities, providers of goods and services, and registered clubs, including the freedom of association and contract.

The Committee acknowledges that the Bill recognises the particular vulnerability of sex workers to discrimination and vilification. The Committee also notes that the discrimination protections on the basis of sex work may be considered differential treatment, as there are no similar protections under the Act for other categories of employment.

Wide application of laws – participation in a sporting activity

- 3.16 The Equality Amendment Bill replaces section 38P of the Anti-Discrimination Act, narrowing the exemption from unlawful exclusion of a transgender person in respect to participation in a sporting activity. This amendment limits when a transgender person may be excluded from participating in a sporting activity to when it is 'reasonable and necessary in all the circumstances'.
- 3.17 In his second reading speech, Mr Greenwich described this amendment as limiting 'discrimination in sport' to circumstances 'where it is reasonable and necessary, never against children under 12, umpires or referees, and only for activities that involve competition, strength, stamina or physique'.
- 3.18 Part 9 of the Anti-Discrimination Act provides an avenue for complaints to be made to the NSW Anti-Discrimination Board when it is alleged that a person has contravened a provision of the Act.

The Bill amends the *Anti-Discrimination Act 1977* to narrow the circumstances when a transgender person may be lawfully excluded from participating in a sporting activity. Specifically, it requires the exclusion to be 'reasonable and proportionate in all the circumstances'.

The Committee notes that the Bill is unclear as to what constitutes 'reasonable and proportionate'. It also does not define which persons or bodies are covered. As a result, it may be difficult for individuals to determine whether these provisions apply to their circumstances, or when such an exclusion may be unlawful. The Committee further notes that a contravention of these provisions may result in a complaint to the NSW Anti-Discrimination Board.

The Committee acknowledges that the Bill promotes the right of transgender persons to participate in sporting activities without discrimination. However, it notes that the provisions may have a broad application and subject individuals to disciplinary actions. For these reasons, the Committee refers the matter to Parliament for its consideration.

Application of laws to minors – altering a record of sex

- 3.19 The Equality Amendment Bill inserts Part 5A into the *Births, Deaths and Marriages Registration Act 1995* to establish an application scheme for the alteration of sex acknowledged in certain documents. Division 6 provides that a person who alters the record of their sex is taken to be a person of that recorded sex in NSW.
- 3.20 In his second reading speech, Mr Greenwich noted that these provisions align with Commonwealth laws, for administrative consistency:
- Because Commonwealth laws allow trans people to update their sex on their passport and with Medicare, inconsistencies in identification can prevent access to entitlements like superannuation and can impact health information like vaccination records.
- 3.21 Section 32B enables a person over 16 years old to alter the record of their sex through the Registrar of Births, Deaths and Marriages.
- 3.22 For a child or young person under 16 years old seeking to alter a record of their sex, they may apply to the Civil and Administrative Tribunal (the **Tribunal**) under section 32C to have their recorded sex altered. Subsection 32C(2) requires the application be accompanied by a statement from a person who has provided counselling to the applicant. This statement must outline that the applicant has received counselling about the implications of making this application to alter a record of their sex.
- 3.23 Under section 32CA, the Tribunal is then required to take reasonable steps to notify parents or other persons with parental responsibility about the application. However, the Tribunal is not required to give this notice to a person under subsection 32CA(1)(b) if it decides that notifying the person 'could reasonably be expected to adversely affect the young person'. Subsection 32CA(3) clarifies that 'adverse affect' in these circumstances does not include mere disagreement with the application from the person with parental responsibility that would cause discomfort to the applicant.

- 3.24 Section 32G(2) makes it clear that the Tribunal may approve the alteration of a record if it is satisfied that making the order is in the child's best interest. In making that determination about the child's best interests, the Tribunal may have regard to the matters under subsection 32G(3). This non-exhaustive list does not include the interests or views of the parents or other persons with parental responsibility for the child or young person.

The Bill amends *Births, Deaths and Marriages Registration Act 1995* to allow individuals to apply for an alteration of their recorded sex under new Part 5A. This includes a scheme for children and young people aged under 16 years to make an application to the Civil and Administrative Tribunal. This application must be accompanied by a statement of evidence that the young person has obtained counselling in relation to the implications of the application. However, the Committee notes that there is no requirement in the application process to establish that the child or young person has capacity to understand these implications or make the application.

The Tribunal may approve the alteration of the recorded sex, if it is satisfied that doing so is in the applicant's best interest. In deciding the outcome of an application, the Tribunal may consider whether the child is sufficiently mature to understand the meaning and implication of the alteration. However, the Committee notes that the Tribunal is not required to consider this matter in deciding each application.

The Committee recognises that these provisions may recognise the self-determination of children and young people by allowing them to apply to have their sex in State records altered to align with their sex identity. However, as this alteration would legally designate them to be the sex stated in the record, these applications attract certain legal consequences. It may be considered that young people under 16 years of age may lack the capacity to properly understand the consequences of these applications.

Additionally, under section 32CA, the Tribunal has to take reasonable steps to notify the parents and other people with parental responsibility for the applicant about the application. However, this requirement is not necessary in the circumstances that may result in the child or young person being 'adversely affected'. The Committee further notes that, even where notice is given, there is no provision for a parent or guardian of the applicant to make a submission in relation to this applicant, nor does the Tribunal have to consider their views or interests. Therefore, the Bill may also limit the ability of parents and other people with parental responsibilities to determine what may be in the best interests of their children.

For these reasons, the Committee refers this matter to Parliament for its consideration.

Application of laws to minors – consent to medical treatments

- 3.25 Schedule 3 of the Equality Amendment Bill amends the *Children and Young Persons (Care and Protection) Act 1998* (the **Care and Protection Act**) for children and young people receiving medical and dental treatment. Section 3 of the Care and Protection Act defines:

- (a) a 'child' as 'a person who is under the age of 16 years'
- (b) a 'young person' as 'a person who is aged 16 years or above but who is under the age of 18 years'.

3.26 It inserts section 174A to allow a young person, that is someone aged 16 or 17 years to make a decision about their own medical or dental treatment. Mr Greenwich said in his second reading speech that this would effectively legislate competency for certain minors to consent to medical and dental treatment:

The bill would legislate Gillick competence by clarifying in the Children and Young Persons (Care and Protection) Act 1998 that a young person who is 16 or over is able to make a decision about their own medical and dental treatment as validly and effectively as an adult. Medical practitioners would still be required to assess decision-making capacity and ensure there is informed consent, as is the case with adults.

3.27 Section 17A would also allow a medical practitioner or dentist to administer medical or dental treatment to a child, that is someone aged under 16 years. This is only where:

- (a) one parent of the child consents, or
- (b) the child 'consents' and the medical practitioner or dentist believes both that:
 - (i) the treatment is in the best interests of the child's 'health and well-being'
 - (ii) the child is capable of 'understanding the nature, consequences and risks of the treatment'.

3.28 Mr Greenwich emphasised that these amendments are not limited to 'gender-affirming care' but sets the law around healthcare and consent 'for all children and young people so that there is clarity for all treatment'. He further said:

NSW Health will still be able to issue guidelines for specific treatment or procedures, and a parent will still be able to challenge treatment in the Federal Family Court.

The Bill inserts section 174A into the *Children and Young Persons (Care and Protection) Act 1998* to allow children and young people under 18 years of age to make decisions about their medical and dental treatments. This section provides that all young people aged between 16 and 18 years can make decisions and consent to their own medical treatment with the same effect and validity as an adult. This would effectively remove any distinction in healthcare between young people over 16 years and an adult. It also allows children under 16 years to consent to medical or dental treatment in certain circumstances.

The Committee acknowledges that these provisions are intended to recognise the rights of young people under the age of 18 years to make decisions concerning their own healthcare. Regarding children under 16 years of age, it also notes that the treating medical practitioner or dentist is required to first ascertain that the child is capable of understanding

the nature, consequences and risks. However, the Committee notes that the Bill does not set out details of what constitutes this informed consent. It may be considered that young people under the age of 18 years may lack the capacity to fully understand the consequences of medical and dental treatments.

The Committee also notes that, for children under 16 years who consent to receiving treatment, the medical practitioner or dentist does not have to consult with the parents or guardians if they believe the child can understand the nature, consequences and risks of the treatment and it is in the child’s best interests. Therefore, the Bill may also limit the ability of parents and other people with parental responsibilities to determine what may be in the best interests of their children. The Committee acknowledges that parents and guardians can challenge the provision of such treatments in the Federal Circuit and Family Court of Australia. However, a court challenge still places the responsibility for making healthcare decisions for a child to a third party (the court) rather than their parent or guardian.

For these reasons, 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

Incorporating rules or standards not subject to disallowance

3.29 The Equality Amendment Bill amends section 63 of the *Government Sector Employment Act 2013* to permit the Public Service Commissioner to issue a ‘minimum diversity and inclusion standard’ (the **Standard**) for all government sector agencies.

3.30 Under section 63(3A), the Standard may include:

- (a) provision for leave for gender affirming care
- (b) specific targets and quotas for workplace diversity.

3.31 Subsection 63(3C) requires the head of each government sector agency to ensure agency compliance with the Standard, and any other obligations under the government sector employment rules.

3.32 In his second reading speech, Mr Greenwich noted that these amendments were raised and supported by LGBTIQIA+ representative stakeholder groups:

The standard could include targets and quotas or gender affirmation leave, something the Pride council of the Public Sector Association has raised with me, and something that was highlighted in the Pride in Protest submission to my bill.

The Bill incorporates a ‘diversity and inclusion standard’ into the *Government Sector Employment Act 2013*. The Standard is issued by the Public Services Commissioner and is not explicitly required under the Bill to be tabled in Parliament.

The Committee generally prefers substantive matters be set out in legislation so they are subject to parliamentary scrutiny. In this case, the Standard may prescribe leave for gender affirming care and specific workforce diversity targets and quotas for government agencies. The Committee notes that this would create mandatory requirements for all public sector agencies, regardless of their size or structure, and it is unclear whether agencies can seek exemptions or flexible application of this Standard.

The Committee recognises that these provisions are intended to strengthen representation of minority groups such as LGBTIQA+ people in government workforces, which may promote equality rights for these groups. It also acknowledges that including such information in the Standard enables flexibility and allows for its timely revision. However, the Committee notes that the Standard creates obligations on all Government sector agencies, the non-compliance of which may attract penalties. For these reasons, the Committee refers the matter to Parliament for its consideration.

Conversion Practices Prohibition Bill 2023

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

Offence regime – conduct concerning ‘change or suppression practices’

- 3.33 Part 2, Division 2 of the Conversion Practices Prohibition Bill creates new criminal offences for conduct which is intended to direct a 'change or suppression practice' (a '**conversion practice**') towards an individual. Speaking about these new offences, Mr Greenwich said in his second reading speech that 'there is a very high standard to reach for criminal offences: intent, injury and neglect.'
- 3.34 Specifically, it is a criminal offence for a person or entity to:
- (a) intentionally engage in a conversion practice which causes 'serious injury' (section 11) or 'injury' (section 12) to the individual targeted. This carries a maximum penalty for individuals of:
 - (i) 10 years' imprisonment and/or 1 200 penalty units (\$132 000), for an offence under section 11
 - (ii) 5 years' imprisonment and/or 600 penalty units (\$66 000), for an offence under section 12.
 - (b) take a person or arrange for them to be taken from NSW with the intention for a conversion practice to be directed towards them outside of NSW, and the practice directed to them causes 'injury' (section 13). This offence carries a maximum penalty of 2 years' imprisonment and/or 240 penalty units (\$26 400) for individuals.
- 3.35 These offences also apply where multiple conversion practices are directed towards an individual which, when 'considered as a group', causes 'injury' or 'serious injury'. To be guilty of these offences, the person or entity must have been negligent to whether the conversion practice would cause the injury.

3.36 As defined in the Dictionary under Schedule 1:

- 'injury' means either a physical injury or 'harm to mental health', whether temporary or permanent
- 'serious injury' means:
 - (a) an injury, including the cumulative effect of more than one injury, that:
 - (i) endangers life, or
 - (ii) is substantial and protracted, or
 - (b) the destruction, other than the termination of a pregnancy under the Abortion Law Reform Act 2019, of the foetus of a pregnant person, whether or not the person suffers another harm.

3.37 The offence provisions under Part 2, Division 2 also explicitly exclude any defence of consent from the individual targeted to either having such practices directed towards them, or being taken from NSW for section 13 specifically.

Part 2, Division 2 of the Bill creates new criminal offences for intentionally directing one or more 'change or suppression practices' towards another person, or taking them outside of NSW to receive such a practice, where the practice(s) causes 'injury' or 'serious injury'. A person or entity is guilty of these offences if they are negligent to the potential harm of the conversion practices. These offences carry maximum penalties ranging from \$26 400 to \$132 000 and/or 2 to 10 years' imprisonment for individuals. There is no defence of consent.

The Bill defines 'injury' widely, to mean any temporary or permanent 'physical injury' or 'harm to mental health'. Similarly, 'serious injury' is widely defined to include any injury or injuries which 'endangers life' or 'is substantial and protracted'.

By prohibiting practices intended to change or suppress their gender identity or sexual orientation, the Committee acknowledges that these offences may be intended to protect the rights of equality and non-discrimination for LGBTIQA+ people. However, the Committee notes that element of harm in these offences (that is, the practice caused 'injury' or 'serious injury') is widely defined and may capture a broad if not unlimited range of potential physical and mental harms, both temporary and permanent. This wide definition may make it difficult for a person to understand the scope of these criminal offences. As these offences carry maximum penalties that include terms of imprisonment, the Committee refers the matter to Parliament for its consideration.

Extension of criminal liability

3.38 Section 10 of the Conversion Practices Prohibition Bill provides that 'an entity' contravenes its provisions if it engages in a 'change or suppression practice'. 'Entity' is defined under the Dictionary in Schedule 1 as including 'a person' and 'an organisation'.

- 3.39 Section 16 extends criminal liability for offences under Division 2 of Part 2 to a ‘body corporate’. In prosecuting a corporation for such an offence, subsection 16(1) allows the following to be attributed to the corporation:
- (a) ‘relevant conduct’ engaged in by an associate of the corporation
 - (b) ‘knowledge’ of an associate of the corporation
 - (c) ‘intention’ of the corporation’s board of directors, or its officer or another associate ‘if a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the formation of the intention.’
- 3.40 As discussed, Division 2 establishes a number of criminal offences for conduct which is intended to direct or advertise a conversion practice towards an individual. The offences under this Division carry maximum penalties for organisations ranging from \$33 000 (300 penalty units) to \$660 000 (6 000 penalty units).
- 3.41 The Dictionary in Schedule 1 defines an ‘associate’ of the corporation to be either:
- (a) an employee acting within the ‘actual or apparent scope’ of their employment, or agent acting within their ‘actual or apparent authority’, or
 - (b) an ‘officer’ of the corporation.
- 3.42 Under Schedule 1, ‘officer’ under the Bill has the same meaning as it does under the Dictionary contained in section 9 of the *Corporations Act 2001* (Cth). Section 9 of the *Corporations Act 2001* (Cth) defines ‘officer’ to mean a number of roles within a corporation, including:
- (b) a person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) who has the capacity to affect significantly the corporation’s financial standing; or
 - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the corporation); ...
- 3.43 Where an officer of a corporation engages in conduct which is a criminal offence under Division 2, subsection 16(2) provides that the corporation:
- (a) must be taken to have also engaged in conduct constituting the offence, and

- (b) may be proceeded against and found guilty of the offence, whether or not the officer has been proceeded against or found guilty of the offence.

3.44 However, subsection 16(3) provides a defence for a corporation which requires it prove due diligence was exercised to prevent the conduct engaged in by the officer.

Section 16 extends criminal liability for offences under Part 2, Division 2 of the Bill to corporations. In prosecuting a corporation for these offences, the 'relevant conduct' and 'knowledge' of an 'associate' of the corporation can be attributed to it, as well as the 'intention' of an associate if that intention arose from the 'corporate culture'. The 'intention' of the corporation's board of directors or its officers may also be attributed to the corporation in a prosecution for a Division 2 offence. If an officer of a corporation engages in conduct which is an offence under Division 2, the corporation is also taken to have engaged in that conduct unless it can prove it exercised due diligence to prevent the conduct.

The Bill defines an 'associate' of the corporation to be either an employee, agent or 'officer' of the corporation, acting within the scope of their employment/authority. The term 'officer' is also defined to have the same meaning under section 9 of the *Corporations Act 2001* (Cth). The Commonwealth Act broadly defines 'officer' to mean a number of roles within a corporation. This includes any person who makes decisions, participates in decision-making, has the 'capacity' to significantly affect its financial standing, or whose instructions/wishes are typically followed.

The Committee acknowledges that extending criminal liability to corporations may be intended to strengthen compliance with its legislative prohibition on conversion practices. This would promote the rights of equality and non-discrimination for LGBTIQA+ people who may be targeted by such practices.

However, the Committee notes that an 'associate' or 'officer' of the corporation is widely defined, which may capture most people who are employed or contracted by the organisation but not in a management position. This may broaden the scope for extending corporate liability for the offences under Division 2. The Committee further notes that section 16 permits the prosecution of a corporation on the basis of offending conduct by its officer, even where that officer has not been prosecuted or convicted of the relevant offence. For these reasons, the Committee refers this matter to Parliament for its consideration.

Right to freedom of religion – definition of 'change or suppression practice'

3.45 As noted earlier, the Conversion Practices Prohibition Bill would establish a new parent Act setting the legislative framework for the prohibition of, general education on and a civil response scheme to 'change or suppression practices' in NSW.

3.46 Section 9 of the Bill defines a 'change or suppression practice' as 'a practice, sustained effect or treatment' which is:

- (a) directed towards an individual because of their sexual orientation or gender identity, and
- (b) intended to change or suppress that individuals' sexual orientation or gender identity.

3.47 However, subsection 9(2) clarifies certain actions which would not constitute a 'change or suppression practice'. This list includes subsection 9(2)(f), which provides the following exception on religious grounds:

... the expression only of a belief or a religious principle made to an individual that is not intended to change or suppress the individual's sexual orientation or gender identity.

The Bill establishes new criminal offences to prohibit engaging in or advertising 'change or suppression practices'. Section 9 defines a 'change or suppression practice' as a 'practice, sustained effect or treatment' which is directed towards somebody because of their sexual orientation or gender identity and intended to change or suppress that orientation or identity. Certain actions are expressly excluded from this definition, including the expression 'only of a belief or religious principle' if it is not done with the intention to change or suppress a person's sexual orientation or gender identity.

This may restrict a person's expression of their beliefs or religious principles as expressions with certain intentions would contravene the prohibitions under the Bill. Therefore, the Bill may infringe a person's right to freedom of thought, conscience and religion, which is contained in Article 18 of the ICCPR.⁷

However, the Committee acknowledges that the expressions of belief or religious principles prohibited by the Bill is limited to those expressions intended to change or suppress a person's sexual orientation or gender identity. By providing a limited exception, this may be intended to protect the rights of equality and non-discrimination for LGBTIQA+ people. The Committee further notes that the Bill does not prevent expressions of belief or religious principle that are not directed towards somebody's sexual orientation or gender identity. In the circumstances, the Committee makes no further comment.

Application of laws outside NSW

3.48 Section 7 of the Conversion Practices Prohibition Bill extends the application of the Bill outside of NSW. Specifically, subsections 7(1) and (2) applies the Act to conduct occurring wholly or partly outside of NSW if the conduct has a 'real and substantial link' with NSW. Subsection (2) clarifies that the Act would apply to this conduct 'as if it had been engaged in wholly within' the State.

3.49 Subsection 7(3) clarifies that there is a 'real and substantial link' with NSW if either:

⁷ United Nations, Office of the High Commissioner for Human Rights, [International Covenant on Civil and Political Rights](#), 1966.

- (a) a significant part of the conduct occurs in New South Wales, or
- (b) the conduct occurred wholly outside New South Wales but the effects of the conduct occurred wholly or partly in New South Wales.

Section 7 of the Bill extends its application, including its criminal offence provisions, to conduct occurring wholly or partially outside of NSW that has a 'real and substantial link' with NSW. The provision clarifies that there is a 'real and substantial link' if a significant part of the conduct occurs in NSW or, where it occurred wholly outside, the effects of the conduct 'occurred wholly or partly in NSW'. The Committee generally comments where legislation may have extraterritorial effect because it may create uncertainty for individuals about what laws apply to them at any one time.

The Committee acknowledges that the extraterritorial application of the criminal offence provisions may be intended to strengthen compliance with its legislative prohibition on conversion practices. This would promote the rights of equality and non-discrimination for LGBTQIA+ people who may be targeted by such practices, by preventing somebody from taking a person outside of NSW to avoid the prohibition.

However, the Committee notes that section 13 establishes an offence for taking a person outside of NSW with the intention that they be subjected to a conversion practice. The Committee further notes that a person may engage in criminal conduct under the Bill if the effects of their conduct occurs 'wholly or partly' in NSW. As it is unclear what may amount to an 'effect' of conduct or how it could occur wholly or partly within NSW, this may broadly expand the scope of a 'real and substantial link with NSW'. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Functions and powers of the President and Board

3.50 Part 3 of the Conversion Practices Prohibition Bill establishes a 'civil response scheme'. This scheme is to be administered by both the Anti-Discrimination Board established under the Anti-Discrimination Act (the **Board**) and the President of the Board (the **President**). Part 3, Division 1 sets out the functions and powers of the Board and President. Section 19 provides that the Board and the President 'have all the powers necessary' to enable either to 'carry out their functions'.

3.51 Under section 17, the Board has the functions of developing, providing and offering education about conversion practices (including to entities engaged in such practices). It also has any other functions given to it under the Bill.

3.52 Under section 18, the President's functions include the following non-exhaustive list:

- (a) receiving reports about conversion practices
- (b) determining appropriate responses to reports

- (c) supporting a person who is, or may be, a victim of criminal offences under the Bill to voluntarily report the offences to the NSW Police Force
- (d) prosecuting offences under the Bill.

Section 19 of the Bill empowers the Anti-Discrimination Board and its President with 'all the powers necessary' to enable them to carry out their functions. The President has a wide range of functions under section 17, which includes responding to reports about alleged conversion practices prohibited under the Bill, supporting possible victims of offences under the Bill to make police reports and prosecuting offences under the Bill.

The Committee notes that section 19 is worded broadly and may permit the Board or the President to exercise an unrestricted range of powers so long as it can be construed to facilitate their functions. 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 President

- 3.53 As noted earlier, Part 3 of the Conversion Practices Prohibition Bill establishes a 'civil response scheme' to be administered by both the Board and the President. Division 2 makes provisions regarding the President's role of receiving and responding to reports about an alleged conversion practice.
- 3.54 Divisions 3 deals with the investigation of reports made to the President. Section 34 permits the President to investigate 'a matter' relating to the Bill which meets all of the following criteria:
 - raises an issue that is serious in nature, or indicates conversion practices which are 'systemic' or 'persisting'
 - indicates a possible contravention of the Bill
 - relates to a class or group of persons
 - would advance the Bill's objects.
- 3.55 The President can exercise a number of powers in the course of an investigation under Division 3. This includes:
 - (a) requiring a person by written notice to produce a document or supply information which the President 'reasonably believes' they possess and is necessary for the investigation (section 36)
 - (b) compelling a person by written notice to attend before the President to answer questions, if the President 'reasonably believes' that they have information which is relevant to and necessary for the investigation (section 37)

- (c) giving a direction which prohibits the disclosure of the identity or identifying information of a person who has or intends to give evidence to the President in the course of an investigation, if it is necessary to protect the person's employment or privacy, from victimisation or 'another right' (section 38)
- (d) giving a direction which prohibits the publication of any evidence, information or document given to the President as part of an investigation (section 39).

3.56 Non-compliance with a written notice without 'reasonable excuse' or contravention of a direction under these sections is a strict liability offence. However, subsections 36(6) and 37(5) clarifies that refusal to answer a question on grounds of self-incrimination is deemed a 'reasonable excuse' for non-compliance. These strict liability offences carry a maximum penalty for individuals of 60 penalty units (\$6 600). For sections 38 and 39, the offences may also attract up to six months' imprisonment, possibly in addition to a monetary penalty.

3.57 Under section 29, the President may refer a report of an alleged conversion practice to the NSW Police Force and the Director of Public Prosecutions (the **DPP**), if the President considers that the Police or DPP would 'more adequately' deal with the conduct reported.

3.58 Section 52 also provides that the following people may bring proceedings for an offence against the Bill:

- (a) the President, but only for offences of advertising conversion practices under section 14
- (b) the DPP
- (c) a police officer, or
- (d) 'a person authorised by the President, either generally or in a particular case'.

The Bill grants the President of the Anti-Discrimination Board a number of discretionary powers. This includes powers to require the production of documents or information, compel a person to answer questions and refer reports of alleged contraventions to the NSW Police Force and the Director of Public Prosecutions (DPP).

The Bill may therefore grant the President wide powers of investigation and enforcement that may impact an individual's rights when exercised. This includes the right to silence by compelling a person to provide evidence at pain of criminal liability, and their right to liberty, by permitting the President to refer matters for or commence criminal prosecution as well as authorise a person to bring proceedings for offences.

The Committee acknowledges that enabling the President to exercise these powers may be intended to strengthen compliance with the Bill's legislative prohibition on conversion practices. It also notes that the Bill includes certain safeguard provisions regarding the exercise of these powers. This includes permitting a person to refuse to answer a question from the President on grounds of self-incrimination.

However, the Committee notes that non-compliance or contravention of the President's notices or directions is a strict liability offence, which carry custodial penalties in some circumstances. The Committee further notes that, despite the limited offences which the President may prosecute, they may still facilitate the criminal prosecution by referring matters to the Police, the DPP or a person they have authorised to commence offence proceedings. 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

Wide regulation-making power

3.59 Section 55 of the Conversion Practices Prohibition Bill allows regulations to be made about a matter that is either:

- (a) required or permitted by the Bill to be prescribed, or
- (b) 'necessary or convenient to be prescribed for carrying out or giving effect to' the Bill.

Section 55 of the Bill provides a general regulation-making power. This includes allowing the regulations to be made about anything 'necessary or convenient to be prescribed for carrying out or giving effect to' the Bill.

The Committee notes that there does not appear to be any provisions which define or narrow 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 this regulation-making power may allow for more flexible regulatory responses. However, the provision may effectively allow regulations to prescribe matters with little limit. For these reasons, the Committee refers this matter to Parliament for its consideration.

4. Explosives Amendment Bill 2023

Date introduced	23 August 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Sophie Cotsis MP
Portfolio	Work Health and Safety

Purpose and description

- 4.1 The object of this Bill is to amend the *Explosives Act 2003* (the **Act**) to address the recommendations of the 2019 statutory review of the Act, including to:
- (a) relocate certain provisions from the *Explosives Regulation 2013* (the **Regulation**) to the Act relating to the following:
 - (i) the authorisation and prohibition of explosives
 - (ii) the classes of licences that may be granted for the handling and use of explosives and explosive precursors
 - (iii) the granting of exemptions from provisions of the Act
 - (b) define 'supply' to include the sale of an explosive and any transfer of ownership of or access to an explosive
 - (c) enable a regulatory authority in possession of forfeited explosives to destroy the bulk of the explosives while preserving admissible samples for proceedings for offences
 - (d) ensure regulation-making powers enable provision to be made:
 - (i) relating to security clearances
 - (ii) for police officers to exercise certain functions and powers of inspectors under the Act.

Background

- 4.2 The Bill seeks to make amendments in line with recommendations from a 2019 statutory review of the Act (the '**2019 review**')⁸ and inserts a number of administrative measures to transfer powers from the Regulation. Specifically, it transfers established parts of the Regulation into the Act, including new Part 2A which relates to the authorisation of explosives, the explosives register and cancellation procedures. The Bill also uplifts requirements related to the application and granting of security clearances and transfers existing classes of licences.
- 4.3 In her second reading speech, the Hon. Sophie Cotsis MP, Minister for Work Health and Safety said these amendments would 'complement' the existing legislative framework. She further described these amendments as 'primarily administrative' and intended to strengthen the 'function, operation and oversight' of the existing framework.
- 4.4 The Bill would set out the application process for exemptions in section 24D while providing for a regulation-making power to prescribe exemptions. It also distinguishes

⁸ [Statutory Report of the Explosives Act 2003.pdf \(nsw.gov.au\)](#)

between licences and security clearances in relation to applications. The Minister explained that 'security clearances and licences are separate authorisations and achieve different purposes for the regulation of explosives'.

- 4.5 Additionally, the Bill would insert new provisions relating to procedures for the use of certificate evidence and samples as evidence in prosecutions, enabling the destruction of forfeited explosives by the regulatory authority before proceedings are finalised. Finally, it would amend a number of definitions, including a minor amendment to the definition of 'explosive' to clarify the intent of the existing definition in the Act.

Issues considered by the Committee

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

Strict liability offence and right to personal physical integrity

- 4.6 Section 27A(1) would create a strict liability offence against a person that enters a premises used to manufacture or store an explosive without authority. This offence carries a maximum penalty of \$27 500 (250 penalty units).
- 4.7 Section 27A(2) inserted by the Bill allows an 'authorised person' to direct somebody to leave premises that are used to manufacture or store an explosive. If they fail to immediately leave the premises without reasonable excuse, the authorised person may use reasonable force to remove them.
- 4.8 An 'authorised person' is defined to mean:
- a licence holder
 - an employee of the licence holder
 - a person 'acting with the authority of the licence holder'
 - an inspector, or
 - a police officer.
- 4.9 It does not appear that the Bill or the Act sets out the circumstances in which a person is said to be 'acting with the authority of the licence holder'. There also does not appear to be any definition of 'reasonable excuse' or 'reasonable force' in the context of section 27A.

The Bill inserts section 27A into the *Explosives Act 2003* which creates a strict liability offence against a person who enters a premises used to manufacture or store an explosive without authority. Section 27A(2) permits an authorised person to use reasonable force to remove a person that fails, without reasonable excuse, to immediately leave that premises after being directed to leave. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. However, by also authorising the use of force, the Bill may impact a person's right to personal physical integrity.

The Committee notes that the definition of 'authorised person' is broad and may legally authorise a private person to use force against another person. It also notes that the Bill does not define 'reasonable force', nor establishes circumstances where a person does not have a 'reasonable

excuse' for remaining on the premises. Therefore, this may permit the use of possibly great force against a person in broad circumstances.

The Committee recognises the dangers of people entering premises used to manufacture or store explosives, who are not authorised to do so. However, section 27A may allow a potentially broad number of 'authorised' persons to use force to remove a person, without adequately defining the circumstances where this power can be exercised or limiting what force can be used. For these reasons, the Committee refers the matter to Parliament for its consideration.

Right to the presumption of innocence and wide powers of delegation

- 4.10 The Bill makes a number of provisions about forfeited explosives by inserting Part 3A. Under section 24G of the Bill, a forfeited explosive means an explosive or explosive precursor forfeited to the State under the *Work Health and Safety Act 2011* (the **WHS Act**), section 179(1)(c). Under section 179(1)(c), something that has been seized will be forfeited to the State if the regulator reasonably believes that it is necessary to prevent it being used to commit an offence against the WHS Act.
- 4.11 Section 27 of the Act extends the application of Part 8, Division 2 and Part 9 of the WHS Act, so that they also apply to inspectors under the Act. This has the effect that certain strict liability offences under the WHS Act are taken to be offences under the Act.
- 4.12 Section 24K of the Bill would allow an analyst to give a certificate of evidence which may specify the result of their analysis of a forfeited explosive. This certificate would be admissible in legal proceedings as prima facie evidence of the matters certified.
- 4.13 In her second reading speech, the Minister explained that these provisions respond to recommendations from the 2019 review that the Act be amended to:
- ... allow for the regulator to use certificate evidence and samples as evidence in prosecutions where the regulator would prefer to destroy the bulk of forfeited explosives that are the subject of the prosecution.
- 4.14 Under section 24G, an analyst is a person who either:
- (a) is appointed by the regulatory authority as an analyst, or
 - (b) belongs to a class of persons prescribed by the regulations as an analyst for Part 3.
- 4.15 Section 24M of the Bill prohibits the destruction of forfeited explosives before 28 days have passed from the date that the certificate was provided to both the owner of the seized explosives and a defendant in proceedings relating to those explosives. In her second reading speech, the Minister also stated that it is of the 'utmost importance' to ensure that procedural fairness applies to the process.
- 4.16 Under section 24M, an affected person can apply to the Local Court for a review of the certificate evidence of a forfeited explosive. However, the Court may only make a review order if there was a substantial failure to comply with the Act or regulations, or whether there is a 'reasonable doubt' about the accuracy of the certificate.

The Bill inserts section 24K into the Act, which sets out that an analyst, as defined by the regulations, may give a certificate specifying certain details about a forfeited explosive. That certificate is admissible in legal proceedings as 'prima facie evidence'. Accepting the certificate as 'prima facie' evidence would remove the need to demonstrate the analyst's

relevant expertise to adduce the certificate and the onus shifts to the defendant to rebut that evidence. Therefore, the Bill may impact on a person's right to the presumption of innocence.

The Committee recognises that section 24M of the Bill allows a defendant to apply to the Local Court for a review order, which can be made if the Court is satisfied that there is a reasonable doubt about the accuracy of the certificate. However, this may still effectively shift the burden onto a defendant to rebut the certificate evidence and relieves the prosecution of initially meeting the requirements under the *Evidence Act 1995* for expert evidence. For these reasons, the Committee refers this matter to Parliament for its consideration.

Given this potential impact on defendants, allowing regulations to prescribe the definition of an analyst may amount to a wide power of delegation. This is particularly the case for those defendants charged with indictable offences under the Act, which carry custodial penalties. Further, defendants may also be subject to strict liability offences under the Act.

The Committee acknowledges that allowing regulations to prescribe who can be an analyst builds flexibility into the scheme. However, it would prefer these provisions to have been drafted with more specificity. In addition, they should be included in the primary legislation rather than the regulations, to ensure an appropriate level of parliamentary oversight. For these reasons, the Committee also 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

Non-reviewable decisions – cancellation of authorisation

- 4.17 The Bill inserts section 9E which allows the regulatory authority to cancel the authorisation of an explosive on a number of grounds, including safety grounds or public interest grounds. The cancellation of an authorisation does not entitle a person to compensation under subsection 9E(2).
- 4.18 Before cancelling an authorisation, section 9F requires the regulatory authority to make reasonable efforts to give the applicant a minimum of 30 days written notice and an opportunity to make submissions about the proposed cancellation.
- 4.19 It does not appear that there is an avenue in the Bill or the Act for an applicant to review the regulatory authority's decision to cancel the authorisation once determined.

Section 9E of the Bill sets out a number of grounds on which the regulatory authority may cancel the authorisation of an explosive. Section 9F requires the authority to make reasonable efforts to give an applicant notice of the proposed cancellation and an opportunity to make submissions.

The Committee acknowledges the importance of enabling the regulator to cancel the authorisation of certain explosives, particularly for safety and public interest concerns. However, the Bill denies an impacted person's right to compensation for cancellation of an authorisation. There does not appear to be avenues available for reviewing this

decision. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Matters deferred to the regulations

- 4.20 The Bill also defers a number of matters to the regulations. This includes regulation-making powers to:
- (a) Prescribe grounds for cancelling the authorisation of an explosive or refusing a licence (sections 9E and 16AE respectively).
 - (b) Make provisions around the eligibility of individuals applying for a licence and security clearances (sections 16AC and 19A respectively).
 - (c) Set out the details of exemptions, including when a person is exempt from holding a licence or security clearance (Division 6). Section 24F requires the regulatory authority to keep a public register of exemptions, but leaves the details of the information to be included to the regulations.
 - (d) Making provisions for a police officer to exercise specific functions and power of an inspector under the Act or the regulations (section 36).
- 4.21 Section 24L of the Bill also provides that a forfeited explosive may be destroyed, subject to the regulations.

The Bill defers a number of matters to the regulations, including around the cancellation of authorisations for explosives and refusal of licences. The regulations may also outline eligibility requirements for individuals applying for security clearances and licences, including any exemptions, and the details to be included on a public register of exemptions.

As it also provides for certain non-reviewable decisions, the Bill may thereby provide a wide delegation of legislative powers by deferring important matters to the regulations instead of clearly setting them out in the primary Act. The Committee notes that these matters may impact on an individual's rights and liberties, for example deferring what information is included in a public register may risk publishing personal information without being subject to parliamentary oversight.

Further, the Bill defers to the regulations what powers and functions of an inspector under the Act may be exercised by police. While the Committee acknowledges that this is intended to enable police officers to support compliance and enforcement measures, it may be unclear to an individual when a police officer is acting in their capacity as a police officer or as an inspector under the Act.

The Committee acknowledges that allowing regulations to prescribe certain matters provides flexibility, particularly in relation to matters that are more administrative in nature. However, it notes the scope of matters that the Bill defers to the regulations is broad, and that certain matters should be included in the primary legislation rather than the regulations, to ensure an appropriate level of parliamentary oversight. For these reasons, the Committee refers the matter for Parliament for its consideration.

5. Motor Dealers and Repairers Amendment Bill 2023

Date introduced	24 August 2023
House introduced	Legislative Council
Member introducing	The Hon. Anthony D'Adam MLC
Minister responsible	The Hon. Courtney Houssos MLC
Portfolio	Finance

Purpose and description

- 5.1 The object of this Bill is to amend the *Motor Dealers and Repairers Act 2013* (the **Act**) to address the recommendations of the statutory review of the Act, including to:
- (a) insert a new legislative framework to permit and regulate the online sale of motor vehicles by motor dealers
 - (b) replace the requirement for motor dealers, motor vehicle recyclers and motor vehicle repairers to maintain separate registers for specified matters with a more general requirement to keep certain records in relation to their business
 - (c) make changes relating to the consumer guarantee for motor vehicles under the *Australian Consumer Law (NSW)* (**ACL**)
 - (d) make it an offence to possess a device capable of rendering the odometer of a motor vehicle inoperative or inaccurate
 - (e) make it an offence for a motor vehicle recycler to buy a motor vehicle or motor vehicle part or accessory with cash or to buy or sell an unidentified vehicle
 - (f) make changes relating to the disciplinary process for licence holders and former licence holders
 - (g) make changes to the period within which a person may make a claim for compensation from the Motor Dealers and Repairers Compensation Fund
 - (h) increase the maximum monetary penalty for various offences
 - (i) make other minor and consequential amendments.

Background

- 5.2 The Bill proposes a number of amendments to the Act, in response to the report of a statutory review published in November 2020, which made 17 recommendations.⁹
- 5.3 In his second reading speech, the Hon. Anthony D'Adam MLC, Parliamentary Secretary, on behalf of the Hon. Courtney Houssos MLC, Minister for Finance, said that these amendments 'will result in significant but important reforms to the automotive industry in New South Wales.' These reforms largely make changes relating to consumer protections and to facilitate the sale of motor vehicles online, along with the consequential changes to better regulate the motor vehicle sale, repair and recycling industry.
- 5.4 The Bill proposes a number of amendments in relation to the online sale of motor vehicles. This includes inserting Division 3A, which introduces provisions requiring the disclosure of certain documents, opportunities to inspect vehicles for sale and a cap on the maximum deposit a dealer can require. Proposed section 186 provides a broad regulation making power to regulate online motor dealers, including their sale.
- 5.5 Other amendments also address matters relating to the sale of motor vehicles. The Bill would remove an exemption for attaching a current inspection report to a vehicle where the vehicle had a number-plate attached. Proposed section 99B would prohibit buying or disposing of unidentified vehicles.
- 5.6 Reforms are also proposed in respect to licensing and certification for motor dealers. The Bill would require that the Secretary must be satisfied a licence applicant has the required qualifications or experience for the licence, and allow qualification requirements for a licence or tradesperson certificate to be approved by the Secretary and published on the NSW Legislation website. Proposed amendments to section 37 requires the Secretary to cancel the licence of a person if the Secretary would refuse an application for a licence by that person.
- 5.7 Proposed section 39A extends disciplinary action to an individual responsible for misconduct by a body corporate. The Parliamentary Secretary identified individuals who are responsible for the misconduct of the body corporate could currently re-establish a new licenced body corporate and keep operating.
- 5.8 The Bill would also change the way that licenced motor dealers, recyclers and repairers carry out their business and keep records or registers by amending section 100 of the Act to require them to keep records. It also proposes that the Secretary, can specify the types of records by notice on the NSW Fair Trading Website, or a regulation may make provisions about the records required.
- 5.9 Proposed section 77 would prevent double punishment by preventing a person taking against a dealer who has already complied with enforced consumer guarantees under the Australian Consumer Law. Proposed section 113 gives the Secretary the power to serve rectification orders upon a motor dealer to require them to comply with a consumer guarantee under the Australian Consumer Law. Similarly, proposed amendments to sections 45 and 57 removes a double jeopardy risk to allow a person

⁹ NSW Department of Customer Service, [Statutory Review – Motor Dealers and Repairers Act 2013](#), November 2020.

subject to a payment imposition a right to review in the Civil and Administrative Tribunal.

- 5.10 The Bill seeks to update section 53 which the Parliamentary Secretary described as 'making it an offence to possess a device capable of rendering the odometer of a motor vehicle inoperative or inaccurate'. Proposed section 99A also creates a requirement for cashless transactions for motor vehicle recyclers.
- 5.11 Proposed amendments to sections 38 and 39 extends the limitation period for taking out disciplinary action summoned by the Secretary from 12 months to 5 years, as well as who can be subject to disciplinary action to a member of a partnership or an officer of a body corporate. The Bill also extends the limitation period for making a compensation claim from the Motor Dealers and Repairers Compensation Fund, from 12 months to 18 months after the loss is incurred or the claimant becomes aware of the loss.
- 5.12 Finally, amendments proposed to section 11 would allow the Secretary rather than the Minister to declare a 'trade show', which allows interstate motor dealers to display their vehicles at NSW motor shows without requiring them to hold a NSW motor dealer licence.

Issues considered by the Committee

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

Absolute liability offences

- 5.13 The Bill inserts a number of new absolute liability offences in the Act. These new offences include:
- (a) a motor dealer failing to display their licence number on their website and in all advertising material to keep dealers accountable and transparent (section 19A). This carries a maximum penalty of \$2 200 (20 penalty units).
 - (b) a person possessing a device which could render the odometer of a motor vehicle inoperative or inaccurate (section 53(1)). This carries a maximum penalty of \$55 000 (500 penalty units). However, there is a defence for a licensed motor vehicle repairer who lawfully repairs or replaces odometers in the course of carrying on their repair business.
 - (c) a motor vehicle recycler buying or selling a motor vehicle without a unique identifier, or with an identifier that has been removed, obliterated, defaced or altered, without written authorisation from a police officer (section 99B). This carries a maximum penalty of \$11 000 (100 penalty units).
 - (d) a licence holder failing to keep records as specified by the Secretary on the NSW Fair Trading website or by the regulations (section 100). This carries a maximum penalty of \$5 500 (50 penalty units).
- 5.14 The Parliamentary Secretary explained in his second reading speech that these amendments are intended to better protect customers.

The Bill amends the *Motor Dealers and Repairers Act 2013* to create new absolute liability offences relating to general business dealings of motor vehicle dealers, repairers and recyclers which include requirements for

disclosure, handling odometers and record keeping. Monetary penalties ranging from \$2 200 to \$55 000 apply for these offences. The Committee generally comments on strict and absolute liability offences as they depart from the common law principle that a mental element of 'fault' should be proven to establish criminal liability.

However, the Committee notes that strict and absolute liability offences are not uncommon in regulatory settings to encourage compliance. The Committee also acknowledges that these new offences are intended to facilitate the better regulation of the motor vehicle industry and strengthen consumer protections. In the circumstances, the Committee makes no further comment.

Absolute liability offence and access to cashless payment systems

5.15 The Bill inserts a requirement for cashless transactions under section 99A. This applies to motor vehicle recyclers and 'to parts or accessories of a kind prescribed by the regulations for the purpose of this section'. Section 47 of the *Motor Dealers and Repairers Regulation 2014* prescribes what parts are to be marked and registered.

5.16 The Parliamentary Secretary explained in his second reading speech that this prohibition on cash transactions was recommended for consistency with other laws:

As part of the consultation process for the bill, New South Wales Police recommended the introduction of cashless transactions for recyclers in line with the requirements of the *Scrap Metal Act*.

5.17 Section 99A mirrors section 12 of the *Scrap Metal Industry Act 2016*, which prohibits paying for scrap metal with cash. Subsections 99A(b) and (c) similarly prohibits paying 'by cheque payable to cash' or 'in kind with goods and services'.

5.18 The maximum penalty for an offence under section 99A is \$11 000 (100 penalty units), mirroring the penalty under section 12 of the *Scrap Metal Industry Act 2016*.

The Bill inserts section 99A into the *Motor Dealers and Repairers Act 2013* to prohibit licenced motor vehicle recyclers from buying recycled parts and accessories using cash, cheques payable to cash or 'in kind with goods or services'. This constitutes an absolute liability offence which carries a maximum penalty of \$11 000. Therefore, the Bill would restrict motor vehicle recyclers to cashless payment systems.

The Committee generally comments on strict and absolute liability offences as they depart from the common law principle that a mental element of 'fault' should be proven to establish criminal liability. The Committee acknowledges that the provision is consistent with an existing prohibition on purchasing scrap metal with cash under the *Scrap Metal Industry Act 2016* and with a recommendation by NSW Police Force. It also notes that absolute liability offences are not uncommon in regulatory settings to encourage compliance.

However, the Committee notes that this could disadvantage individuals who do not have access to cashless payments systems, particularly those who may have limited or poor access to the internet. As the prohibition attracts criminal liability and may prevent an individual from

carrying on a valid motor vehicle recycler business, the Committee refers the matter to the Parliament for its consideration.

Right to the presumption of innocence – extension of regulatory powers to prohibit

- 5.19 The Bill amends section 186(2)(f) to extend the scope of a regulation-making power to make provisions prohibiting or regulating the employment of a person who is required to be licenced under the Act. This amendment would permit the regulations to prohibit or regulate the employment of 'a person found guilty or convicted of, or charged with, offences under this Act, offences involving fraud or dishonesty or other prescribed offences, whether or not in New South Wales'. Therefore, a prohibition under the regulations could apply to a person charged with a prescribed offence, regardless of whether they have been convicted.
- 5.20 New subsection 182(2A) gives a discretionary power, in accordance with regulations, to the Secretary. This power would permit the Secretary to exempt a person who is required to hold a licence from a regulation made under section 186(2)(f) above.
- 5.21 In his second reading speech, the Parliamentary Secretary noted that the current subsection 186(2)(f) 'requires that a person must be convicted of an offence before they can be prohibited' and confirmed that the amendments would prohibit people 'charged or found guilty'. He further said that 'in situations where a person is found not guilty, or a conviction is overturned, this prohibition would be lifted.'

The Bill amends section 186 of the *Motor Dealers and Repairers Act 2013* which allows the regulation to prohibit or regulate the employment of a person required to hold a licence. This amendment extends this regulation-making power in relation to people charged with offences under the Act, offences involving dishonesty or fraud, or other prescribed offences, whether or not in New South Wales.

This may allow the prohibition, limitation or regulation of an individual's access to a motor dealer, recycler or repairer licence on the basis of charges for criminal offences for which they were not convicted. Therefore, the Bill may undermine an individual's right to the presumption of innocence.

The Committee acknowledges that the amendments are intended better protect consumers, by removing the need to wait for a conviction to apply a prohibition. The Committee also notes that the Secretary, in accordance with the regulation, can clarify when and to whom a prohibition does and does not apply, and further acknowledges that this power may be included to exempt people who are not found guilty of relevant criminal charges.

However, the Committee notes that a prohibition may impact the ability of affected individuals to carry out a lawful business. Exercising this power of exemption for a person found not guilty may still undermine their right to the presumption of innocence during the period in which they are charged. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Lack of clarity of standards and thresholds for compliance

- 5.22 Section 113(1) outlines when the Secretary may make a rectification order which requires a motor dealer or repairer to comply with the 'dealer guarantees' and/or rectify work that is incomplete or defective. The Bill amends this provision to replace the words 'work' with 'act, matter or thing or work'.
- 5.23 This amendment would enable the Secretary to serve a rectification order on a motor dealer, if the Secretary is satisfied that an 'act, matter or thing' done or required to be done is incomplete or defective. The motor dealer or repairer may be required under the rectification order to take steps to ensure the 'act, matter or thing' is completed or the defect is rectified.

The Bill amends section 113 of the *Motor Dealers and Repairers Act 2013* to replace the words 'work' with 'act, matter or thing or work'. This would permit the Secretary to make a rectification order requiring a motor dealer or repairer to ensure an 'act, matter or thing' required is completed, when they are deemed to have not complied with a dealer or consumer guarantee.

The Committee notes that there does not appear to be any provisions in the Bill or Act which define or narrow the ordinary meaning of 'act', 'matter' or 'thing' or 'work'. These words are also not defined in either relevant regulations or the Australian Consumer Law.

Given that these terms may be widely defined, the Committee notes that this may result in confusion as it is not clear whether and, if so, how the scope for making rectification orders and their requirements has changed. Without further clarification, the Bill may make it difficult for individuals and motor dealers to understand how they may comply with the thresholds and standards for complying with guarantees imposed by the Act. 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

Discretionary power of the Secretary to impose fine

- 5.24 The Bill amends section 45, which grants the Secretary the power to take disciplinary action for contraventions of the Act. These amendments would enable the Secretary to require the payment of an amount of up to \$11 000 from an individual, or \$50 000 from a body corporate.

The Bill amends section 45 of the *Motor Dealers and Repairers Act 2013* to allow the Secretary to take disciplinary action that requires payment of a substantial monetary fine. The maximum amount that can be sought is \$11 000 for an individual and \$50 000 for a corporation.

The Committee notes that this may provide the Secretary with a wide discretionary power to seek monetary penalties for breaches of the Act. There does not appear to be any provisions in the Bill or Act to allow a

person to challenge or review the Secretary's decision to impose a fine. However, the Committee acknowledges that this provision may be intended to strengthen compliance with the regulatory framework for the motor vehicle industry and protect individuals from potentially harmful or dangerous practices. In the circumstances, the Committee makes no further comment.

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

Commencement by proclamation

- 5.25 Section 2 of the Bill provides that the Act commences on a day or days appointed by proclamation.
- 5.26 The Bill also inserts Part 6 into the Act, which makes savings and transitional provisions consequential to the enactment of the Bill as an Act. Part 6, section 25 requires existing motor vehicle dealers to notify the Secretary of their intention to trade online at least 20 business days before carrying on their business. It clarifies that dealers are not authorised by their existing licence conduct an online business without giving that notice 20 days earlier.

The Bill commences (as an Act) on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons.

The Committee acknowledges that a flexible start date may be preferable for necessary administrative arrangements across the automotive industry to implement these reforms. However, the Committee considers that amendments which may affect an individual's ability to conduct a lawful business should have a clear start date to provide certainty to those affected. Part 6 inserted by the Bill may create uncertainty for existing online motor dealers. For these reasons, the Committee refers the matter to Parliament for its consideration.

6. Sydney Olympic Park Authority Amendment (Hill Road Upgrade) Bill 2023

Date introduced	24 August 2023
House introduced	Legislative Council
Minister with carriage ¹⁰	The Hon. John Graham MLC
Portfolio	Roads

Purpose and description

- 6.1 The objects of this Bill are to enable certain land in the Millennium Parklands to be acquired for the purposes of the Hill Road upgrade.

Background

- 6.2 The *Sydney Olympic Park Authority Act 2001* (the **Act**) provides the legal framework for managing Sydney Olympic Park as a centre within Sydney for cultural, sporting and entertainment events, and that any development is done in accordance with the Act and best practice standards of environmental sustainability and accessibility.
- 6.3 The Bill seeks to amend the Act by inserting section 37A, which makes special provisions for the compulsory acquisition of 'Hill Road upgrade land' as delineated by a map which would be inserted as Schedule 5 to the Act. This land is currently owned by the Sydney Olympic Park Authority within the Millennium Parklands.
- 6.4 During his second reading speech, the Minister explained that the Bill's purpose is to enable Transport for NSW to acquire a 'small parcel of land' that is currently part of the Millennium Parklands. He further stated that:
- The acquisition of this small parcel of land is justified in this case having regard to the crucial role the Hill Road upgrade will have in delivering the Carter Street precinct
- 6.5 Subsection 37A(2) enables the Hill Road upgrade land to be compulsorily acquired by exempting it from a prohibition on the compulsory acquisition of Millennium Parklands land under section 31 of the Act. Subsection 37A(3) provides that, if that land is compulsorily acquired, it ceases to be part of the Millennium Parklands. Subsection 37A(4) also provides that a plan of management under the Act does not prevent any works for the purposes of developing Hill Road upgrade land and ancillary activities from being carried out on that land.

¹⁰ The Bill was introduced in the Legislative Council on 24 August 2023 by the Hon. John Graham MLC, the Minister for Roads, as the Minister with carriage. However, the Bill amends the *Sydney Olympic Park Authority Act 2001* which, in accordance with the [Administrative Arrangements \(Minns Ministry—Administration of Acts\) Order 2023](#), is administered by the Minister for Planning and Public Spaces, the Hon. Paul Scully MP.

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. Surveillance Devices Amendment (ICAC) Regulation 2023

Date tabled	LA: 23 August 2023 LC: 23 August 2023
Disallowance date	LA: 22 November 2023 LC: 22 November 2023
Minister responsible	The Hon. Michael Daley MP
Portfolio	Attorney General

Purpose and description

- 1.1 The object of this Regulation is to exempt the Independent Commission Against Corruption (**ICAC**) from certain provisions of the *Surveillance Devices Act 2007* (the **Act**) in relation to the use of surveillance device recordings unlawfully obtained by a person other than the ICAC.
- 1.2 On 23 August 2023, the Hon. Michael Daley MP, Attorney General tabled the Regulation and made a short statement in the Legislative Assembly. He explained that the Chief Commissioner of the ICAC had written to the Premier, the Special Minister of State and the Attorney General to advise that the ICAC had obtained evidence that may have been made by a third party, which would contravene Part 2 of the Act.
- 1.3 The Attorney General further informed the House that the Chief Commissioner advised that the records are of interest to an ongoing investigation and that the ICAC may wish to lawfully use the records. He stated that the Governor made the Regulation on the recommendation of the Executive Council.
- 1.4 The Regulation is made under section 59(2) of the Act, which provides that the regulations may exempt persons from any or all provisions of the Act. Section 59(3) provides that any such regulation which seeks to exempt persons takes effect on and from the date that the period for either House of Parliament to disallow the motion expires. The Attorney General explained that:

The regulation provides that if the ICAC relies on the proposed exemption in the course of conducting an investigation, the ICAC will be required to include a statement to that effect in any report of the investigation made under the ICAC Act.

Issues considered by the Committee

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

Right to privacy

- 1.5 Section 6A of the Regulation provides that the ICAC and an officer of the ICAC are exempt from Part 2 of the Act in relation to the ICAC obtaining, possessing, publishing

or communicating a record of a private conversation or activity obtained by the use of a surveillance device in contravention of the Act. This would allow the ICAC and its officers to use evidence obtained from surveillance devices without being subject to the penalties set out in Part 2 of the Act.

1.6 Part 2 of the Act regulates the installation, use and maintenance of surveillance devices. Subject to specified conditions, Part 2 of the Act sets out a number of offences which prohibit:

- (a) the installation, use and maintenance of listening devices
- (b) the installation, use and maintenance of optical surveillance devices without consent
- (c) the installation, use and maintenance of tracking devices
- (d) the installation, use and maintenance of data surveillance devices
- (e) communicating or publishing private conversations or recordings of activities
- (f) possessing a record of a private conversation or activity
- (g) manufacturing, supplying and possessing listening and other devices for unlawful use
- (h) communicating and publishing information from the use of a data surveillance device.

1.7 In his statement to the House, the Attorney General said:

The Surveillance Devices Act will otherwise continue to apply to the ICAC and its officers, including the requirement to apply for a surveillance device warrant to use a surveillance device in the ICAC's investigations.

1.8 Under section 6A(4) of the Regulation, section 6A will be repealed at the end of 31 December 2025.

The Regulation inserts section 6A into the *Surveillance Devices Regulation 2022*, which exempts the Independent Commission Against Corruption (ICAC) and its officers from contravening provisions of Part 2 of the *Surveillance Devices Act 2007*. This would permit the ICAC to lawfully use certain material obtained illegally by a third party with the use of a surveillance device.

This exemption has the potential to impact individuals' right to privacy, as it permits the ICAC and its officers to use information obtained by listening, optical surveillance, tracking and data surveillance devices without consent or a warrant in certain circumstances. For example, the ICAC would be permitted to publish or communicate a recorded private conversation.

The Committee acknowledges that the Regulation is not intended to exempt the ICAC from the requirement to apply for a surveillance device warrant in its investigations. It also recognises that the exemption is associated with an ongoing investigation of the ICAC and that the

exemption will expire on 31 December 2025. However, the provisions are not worded so as to limit its application to any particular investigation.

However, the Regulation would allow the ICAC to use information that a third party has obtained without a requisite warrant or consent. The use of surveillance devices without a warrant can impact on an individuals' right to privacy without the requirement for judicial oversight. The Committee notes that there does not appear to be safeguards accompanying the exemption under the Regulation, to limit or allow a challenge or review of its application. For these reasons, the Committee refers the matter to Parliament for its consideration.

Procedural fairness

- 1.9 As discussed above, section 6A of the Regulation exempts the ICAC from being subject to Part 2 of the Act and permits the ICAC to lawfully use certain material obtained illegally by a third party with the use of a surveillance device.
- 1.10 Section 14 of the *Independent Commission Against Corruption Act 1988 (ICAC Act)* provides that one of the ICAC's functions includes gathering and assembling evidence that may be admissible in the prosecution of a criminal offence, and providing that evidence to the Director of Public Prosecutions (the **DPP**). Under section 52A of the ICAC Act, the DPP may request that the ICAC exercise its powers following an investigation, such as obtaining information and issuing a search warrant to furnish admissible evidence to the DPP.
- 1.11 Additionally, section 112 of the ICAC Act states that the ICAC is obligated to disclose information to the DPP, under section 15A of the *Director of Public Prosecutions Act 1986 (DPP Act)*. Section 15A of the DPP Act provides that, in certain circumstances, law enforcement or investigating officers have a duty to disclose to the DPP all relevant information that might be expected to assist the case for the prosecution of an accused person.

The Regulation allows the ICAC to use evidence obtained from a third party by the use of a surveillance device that would otherwise be unlawful under Part 2 of the *Surveillance Devices Act 2007*. The Committee is concerned that in using such evidence, it may lead to the prosecution of individuals on the basis of unlawfully obtained evidence. Normally, evidence that has been unlawfully obtained would be inadmissible under the rules of evidence.

The Committee also notes that it is unclear whether the Director of Public Prosecutions can provide directions under the ICAC's wide powers of investigation. Therefore, the Committee is concerned about the potential impact of the Regulation on individuals' right to procedural fairness. For these reasons, the Committee refers the matter to Parliament for its consideration.

Form or intention calls for elucidation: s 9(1)(b)(vii) of the LRA

Timing and retrospectivity

- 1.12 Section 2 of the Regulation states that it commences 'on the day on which it is published on the NSW legislation website'. The Committee notes that the Regulation was published on the NSW legislation website on 23 August 2023.

- 1.13 However, under section 59(3) of the Act, regulations made under section 59(2) (which includes the Regulation) only take effect on and from the expiry of the period that either House may disallow a regulation under the *Interpretation Act 1987*.
- 1.14 According to section 41(1) of the *Interpretation Act*, either House may disallow a regulation as follows.
- (1) Either House of Parliament may pass a resolution disallowing a statutory rule—
 - (a) at any time before the relevant written notice is laid before the House, or
 - (b) at any time after the relevant written notice is laid before the House, but only if notice of the resolution was given within 15 sitting days of the House after the relevant written notice was so laid.
- 1.15 Section 41(1)(b) would allow either House to disallow a regulation after the 15 sitting day period, as long as *notice* of a disallowance motion had been given in that period.
- 1.16 On 24 August 2023, the Hon. John Ruddick MLC gave a notice of motion in the Legislative Council to disallow the Regulation.¹¹ In accordance with Standing Order 42 of the Legislative Council, this disallowance motion is given precedence as Business of the House for six sitting days before it is set down as private members' business. The expiry of private members' business notices under Standing Order 195 does not apply to disallowance motions.

In accordance with section 59(3) of the *Surveillance Devices Act 2007*, the Regulation takes effect from the date that the period for either House of Parliament to disallow the Regulation expires. However, in potential conflict with this, the Regulation provides that it commences on the day it was published.

In light of this, the Committee notes that it is not apparent whether exemptions in the Regulation can retrospectively apply prior to its commencement, to permit the ICAC to possess and use evidence that was unlawfully obtained prior to the Regulation coming into effect.

The Committee further notes that the Regulation is currently subject to a notice of motion that it be disallowed in the Legislative Council. Until this notice is dealt with in the House, the Regulation remains 'disallowable'. For these reasons, the Committee refers the matter to Parliament for further clarity on the timing and applicability of the Regulation.

¹¹ [Legislative Council Notice Paper No. 21](#), 12 September 2023, item 1, p 4.



Appendices

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

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

9 Functions with respect to regulations

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

- (v) that the objective of the regulation could have been achieved by alternative and more effective means,
 - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - (vii) that the form or intention of the regulation calls for elucidation, or
 - (viii) that any of the requirements of sections 4, 5 and 6 of the [Subordinate Legislation Act 1989](#), or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (1A) The Committee is not precluded from exercising its functions under subsection (1) in relation to a regulation after it has ceased to be subject to disallowance if, while it is subject to disallowance, the Committee resolves to review and report to Parliament on the regulation.
- (2) Further functions of the Committee are:
- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
 - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee with respect to regulations do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

Appendix Two – Regulations without comment

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

1. Criminal Assets Recovery Regulation 2023

The object of this Regulation is to repeal and remake, without substantial changes, the Criminal Assets Recovery Regulation 2017, which would otherwise be repealed on 1 September 2023 by the Subordinate Legislation Act 1989, section 10(2).

This Regulation:

- (a) prescribes Acts of other jurisdictions as *corresponding laws* for the *Criminal Assets Recovery Act 1990* (the **Act**)
- (b) declares certain orders and instruments in force under the corresponding laws as *interstate assets forfeiture orders, interstate proceeds assessment or unexplained wealth orders* and *interstate restraining orders* for the Act
- (c) prescribes the threshold amount of legal expenses relating to proceedings for restraining orders above which the NSW Trustee and Guardian may be directed to pay for further expenses
- (d) prescribes the maximum allowable costs for legal services provided in connection with an application for a restraining order or confiscation order or the defending of a criminal charge
- (e) requires notice to be given to the NSW Trustee and Guardian, in addition to the New South Wales Crime Commission, of applications for orders seeking exclusion of property from forfeiture
- (f) sets fees the NSW Trustee and Guardian is authorised to deduct in respect of the exercise of functions in relation to property under the Act
- (g) makes provision for the way in which notice of certain applications to, and orders of, the Supreme Court are to be given as required by the Act.

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

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

The Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

2. Crown Land Management Amendment Regulation

The object of this Regulation is to update references to certain entities prescribed as category 1 non-council managers under the *Crown Land Management Act 2016*,

consequent on the amalgamation of the entities into Metropolitan Memorial Parks Land Manager.

The Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

3. Disability Inclusion Regulation 2023

The object of this Regulation is to remake, with amendments, the *Disability Inclusion Regulation 2014*, which will be repealed on 1 September by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation:

- (a) prescribes certain entities as public authorities for the *Disability Inclusion Act 2014*
- (b) prescribes the day from which certain public authorities must prepare and make a disability inclusion action plan
- (c) provides for the appointment of the chairperson and deputy chairperson of the Disability Council NSW.

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

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

The Committee considers that the Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

4. Drug Court Amendment Regulation 2023

The object of this Regulation is to amend the *Drug Court Regulation 2020* to expand eligibility for referral to the Drug Court to residents of certain local government areas.

The Regulation does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

5. Major Events Amendment (FIFA Womens World Cup) Regulation 2023

The object of this Regulation is to declare the Fédération Internationale de Football Association Women's World Cup 2023 (*FIFA Women's World Cup 2023*) to be held in Sydney 2023 as a major event for the purposes of the **Major Events Act 2009** (the **Act**).

The Regulation provides for the following in relation to the FIFA Women's World Cup 2023—

- (a) the major event period
- (b) the provisions of the Act, Part 4 that apply in relation to the major event
- (c) the promoter and responsible authority for the major event

- (d) the sales control area and period for the major event during which the sale or distribution of articles prescribed by the Regulation is restricted
- (e) the advertising controlled site for the major event
- (f) the exemption of certain advertising material from the Act, section 39
- (g) the advertising controlled airspace for the major event
- (h) the official title and official insignia for the major event
- (i) the parking control period for the major event, during which a person must not use land for the purposes of car parks within 5km of the major event area if use of the land for that purpose is not lawful under the *Environmental Planning and Assessment Act 1979*
- (j) the persons prescribed as authorised persons for the major event
- (k) the persons prescribed as authorised officers for the major event
- (l) the process of applying to the responsible authority for authorisations to sell or distribute articles in areas where restrictions are in place
- (m) the provisions that attract a penalty notice offence.

The Regulation does prescribe certain offences as penalty notice offences. However, penalty notice offences are not uncommon in regulatory regimes for major events and, in this case, the relevant event has come to pass.

6. [Parliamentary Remuneration Amendment Regulation 2023](#)

The object of this Regulation is to make arrangements for the additional office holder remuneration of chairs of new and renamed Legislative Council committees.

This Regulation is made under the *Parliamentary Remuneration Act 1989*, including sections 6(4) and 21, the general Regulation making power.

Schedule 1 is made under a Henry VIII provision that enables the making of regulations to amend the Act.

The Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

Appendix Three – Unconfirmed extracts of minutes

Meeting no. 3

TIME & DATE: 3.00PM, 11 SEPTEMBER 2023

LOCATION: ROOM 1136 AND WEBEX

MEMBERS PRESENT

Maryanne Stuart (**Deputy Chair**) (by Webex), Donna Davis, Nathan Hagarty (by Webex), Dave Layzell, Jacqui Munro and Cameron Murphy.

APOLOGIES

Lynda Voltz and Sue Higginson.

OFFICERS PRESENT

Sam Griffith, Anna Tran, Alex Read, Ashley Kim, Kate McCorquodale, Nicolle Gill and Isabella Ciampa.

AGENDA ITEM

1. Confirmation of minutes

Resolved, on the motion of Mr Murphy, seconded Mr Hagarty: That the minutes of the meeting of 21 August 2023 be confirmed.

2. Correspondence

...

3. Consideration of Bills with comment for Legislation Review Digest No. 3/58

Resolved, on the motion of Mr Murphy, seconded by Mr Layzell: That the Committee adopt the following draft bill reports *in globo*:

- a. *Civil and Administrative Tribunal Amendment Bill 2023*
- b. *Equality Legislation Amendment (LGBTIQA+) Bill 2023; Conversion Practices Prohibition Bill 2023*
- c. *Explosives Amendment Bill 2023*
- d. *Motor Dealers and Repairers Amendment Bill 2023.*

4. Consideration of Bills without comment for Legislation Review Digest No. 3/58

Resolved, on the motion of Mr Murphy, seconded by Ms Munro: That the Committee adopt the following draft bill reports *in globo*:

- a. *Crimes Amendment (Corrupt Benefit for Trustees) Bill 2023*
- b. *Sydney Olympic Park Authority Amendment (Hill Road Upgrade) Bill 2023.*

5. Consideration of Regulations for Legislation Review Digest No. 3/58

Resolved, on the motion of Ms Munro, seconded by Mr Layzell: That the Committee adopts the draft report regarding the *Surveillance Device Amendment (ICAC) Regulation 2023* as amended, by inserting the following words after '31 December 2025' in the conclusion on pages 25 and 68: *'However, the provisions are not worded so as to limit its application to any particular investigation.'*

6. Regulations without comment for Legislation Review Digest No. 3/58 (Appendix Two)

Resolved on the motion of Mr Murphy, seconded by Ms Munro: That the Committee adopts the regulations without comment as Appendix Two to Digest No. 3/58.

7. Legislation Review Digest No. 3/58

Resolved, on the motion of Mr Murphy, seconded by Ms Munro:

- That appropriate minute extracts of this meeting be published as Appendix Three to Digest No. 3/58.
- That the Committee adopts the Legislation Review Digest No. 3/58 as amended and that it be signed by the Chair and presented to the House.

8. Regulation to be reviewed

The Committee noted the table circulated to members listing the status of regulations to be reviewed.

9. General Business

...

10. Next Meeting

The meeting adjourned at 3.20pm until 18 September 2023 at 3.00pm.