

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”.

Contents

Membership.....	4
Guide to the Digest.....	5
Digest Snapshot.....	12
Summary of Conclusions.....	14
PART ONE – BILLS	22
1. Casino Control Amendment Bill 2023	23
2. Crimes Amendment (Prosecution of Certain Offences) Bill 2023.....	27
3. Customer Service Legislation Amendment Bill 2023.....	29
4. Energy Legislation Amendment Bill 2023	31
5. Environmental Planning and Assessment Legislation Amendment (Agritourism) Bill 2023*	33
6. Greater Cities Commission Repeal Bill 2023.....	35
7. High Risk Offenders Legislation Amendment Bill 2023	37
8. Human Tissue Amendment (Ante-mortem Interventions) Bill 2023*	43
9. Industrial Relations Amendment Bill 2023	45
10. Local Government Amendment (De-amalgamation Plebiscites) Bill 2023*	50
11. Thoroughbred Racing Amendment Bill 2023.....	51
12. Transport Administration Amendment (TAHE) Bill 2023	52
13. Unlawful Gambling Amendment (Betting on Animals) Bill 2023*	53
APPENDICES.....	55
Appendix One – Functions of the Committee.....	56
Appendix Two – Regulations without comment	58
Appendix Three – Unconfirmed extracts of minutes	62

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. Casino Control Amendment Bill 2023

Issue identified	Conclusion of Committee
Treasurer's powers in relation to job guarantee agreements	Referred
Retrospective exclusion of right to compensation	Referred

2. Crimes Amendment (Prosecution of Certain Offences) Bill 2023

Issue identified	Conclusion of Committee
Expanding criminal prosecutions and retrospectivity	Referred

3. Customer Service Legislation Amendment Bill 2023

No issues identified

4. Energy Legislation Amendment Bill 2023

Issue identified	Conclusion of Committee
Wide delegation of powers to unspecified persons	No further comment

5. Environmental Planning and Assessment Legislation Amendment (Agritourism) Bill 2023*

No issues identified

6. Greater Cities Commission Repeal Bill 2023

Issue identified	Conclusion of Committee
Henry VIII clause	No further comment

7. High Risk Offenders Legislation Amendment Bill 2023

Issue identified	Conclusion of Committee
Broad extension of Act – freedom from arbitrary detention and right to liberty	Noted
Continuing detention orders – additional punishment, right to freedom from arbitrary detention and the presumption of innocence	Referred
Extended supervision orders – right to liberty, freedom of movement and privacy	Noted

8. Human Tissue Amendment (Ante-mortem Interventions) Bill 2023*

Issue identified	Conclusion of Committee
Right to bodily autonomy	No further comment

9. Industrial Relations Amendment Bill 2023

Issue identified	Conclusion of Committee
Contempt of court	Referred
Separation of powers doctrine - Independence of the judicial members	Noted

10. Local Government Amendment (De-amalgamation Plebiscites) Bill 2023*

No issues identified

11. Thoroughbred Racing Amendment Bill 2023

No issues identified

12. Transport Administration Amendment (TAHE) Bill 2023

No issues identified

13. Unlawful Gambling Amendment (Betting on Animals) Bill 2023*

Issue identified	Conclusion of Committee
Absolute liability offence	Referred

Summary of Conclusions

PART ONE – BILLS

1. Casino Control Amendment Bill 2023

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

Treasurer's powers in relation to job guarantee agreements

The Bill amends the *Casino Control Act 1992* to authorise the Treasurer to enter into a job guarantee agreement with a casino operator. A job guarantee agreement would mandate the minimum number of employees at the casino and may prescribe penalties for failure to comply with its terms. The terms of the agreement may be varied by the Treasurer with the parties' consent. Any penalty payable or interest on these penalties is taken to be casino duty payable under Part 8 of the Act, and may be recovered like other duties payable under this Part.

The Committee notes that it is unclear whether the Treasurer may unilaterally enter into or vary a job guarantee agreement. The Committee also notes that the terms of the job guarantee agreement override any other laws or commercial agreements. Given this broad enforceability, the Bill may therefore grant the Treasurer a broad discretionary power in relation to the making of these job guarantee agreements.

The Treasurer's powers also include the power to prescribe the amount of penalty payable in the job guarantee agreement, rather than in primary legislation or regulations. As with other terms, the amount of this duty or its method of calculation may be varied at the Treasurer's discretion 'at any time'. Although job guarantee agreements and any variations must be tabled in Parliament, it is unclear whether they are disallowable under section 41 of the *Interpretation Act 1987*. Therefore, the Bill may also grant the Treasurer a discretionary power which may not be subject to sufficient parliamentary scrutiny.

The Committee recognises that these amendments may be intended to give effect to a specific agreement entered into by the Treasurer. The Committee also recognises that the broadly worded powers may embed flexibility in regulating the casino industry. However, the Bill explicitly provides that these agreements are not limited by other laws and can impose penalties which are duties payable to the Crown. 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

Retrospective exclusion of right to compensation

The Bill amends section 156 of the *Casino Control Act 1992* to provide that no compensation is payable for certain regulatory actions. This includes where an Act affects or overrides a commercial agreement between the Crown and the casino operator, where an Act imposes a tax, duty or a levy, and when the Government makes an announcement or takes an action in preparation for another regulatory action. These amendments would take effect from 5 September 2022.

The Bill appears to expand what may amount to a 'regulatory action' for which no compensation is payable by the Government. This expanded criteria will apply retrospectively. The retrospective application of these provisions may limit or exclude a casino operator's prior-existing ability to seek compensation for damages arising from certain past regulatory actions.

The Committee recognises that the retrospective provisions are intended to have a limited application to specific circumstances mostly involving corporate entities. It also acknowledges that the amendments build on pre-existing provisions that already limit the right to seek compensation for certain regulatory action, which may be reasonably necessary to protect public interest in the proper regulation of the casino industry. However, the Committee notes that the retrospective exclusion of a right to seek compensation is a non-reviewable decision which may impact the rule of law principle that contracting parties understand the law that applies to them at any given time. For these reasons, the Committee refers the matter to Parliament for its consideration.

2. Crimes Amendment (Prosecution of Certain Offences) Bill 2023

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

Expanding criminal prosecutions and retrospectivity

The Bill removes subsection 93Z(4) from the *Crimes Act 1900*, which removes the requirement for the Director of Public Prosecutions (DPP) to approve a prosecution for an offence against section 93Z. It is an offence under section 93Z for a person to publicly threaten or incite violence towards another person or group on the grounds of their race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status. This offence carries a maximum penalty of 100 penalty units (\$11 000) and/or three years imprisonment for individuals.

The Committee acknowledges that the amendments are intended to allow the police to efficiently prosecute offences against section 93Z. However, the Committee notes that removing the requirement for DPP approval would allow a private person to bring a prosecution for an offence under section 93Z. Unlike the DPP which has its own prosecution guidelines setting out the relevant thresholds to charge and prosecute offences, a private person would not be required to follow any such guidelines. The Bill may therefore expand the number of criminal prosecutions for section 93Z, which would require individuals to engage with the criminal justice system and expose them to potential liability for an offence that carries a custodial penalty.

Although offences against section 93Z are tried summarily in the Local Court unless the prosecutor or accused person elects otherwise, the Local Court can impose maximum penalties of imprisonment for two years. It is also unclear how remand would apply in respect of a private person. Further, the Bill provides that the removal of section 93Z(4) would apply retrospectively, which impacts on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time. For these reasons, the Committee refers this matter to Parliament for its consideration.

3. Customer Service Legislation Amendment Bill 2023

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

4. Energy Legislation Amendment Bill 2023

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

Wide delegation of powers to unspecified persons

The Bill amends the *Energy and Utilities Administration Act 1987* for the Energy Corporation, the Minister and its Chief Executive Officer to delegate their function under the Act to a class of person prescribed by regulations. Functions that have been delegated by the Minister to the Corporation and the CEO can also be sub-delegated to a person of a class prescribed by regulations.

The Bill may therefore provide for the wide delegation of statutory functions to a class of unknown persons. This may enable private individuals to be delegated functions under the Act which may be expected to be performed by public officials or authorities. The Committee generally prefers that the classes of persons who may be delegated statutory functions are detailed in primary legislation to provide clarity as well as greater oversight of the exercise of those Executive and public functions.

However, the Committee acknowledges that allowing regulations to prescribe who may be delegated could allow for more flexibility in the administration of the statutory regime. The Committee also recognises that these regulations are still required to be tabled in Parliament and therefore would be subject to disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.

5. Environmental Planning and Assessment Legislation Amendment (Agritourism) Bill 2023*

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

6. Greater Cities Commission Repeal Bill 2023

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

Henry VIII clause

The Bill inserts a new regulation-making power into the *Environment Planning and Assessment Act 1979* to enable regulations to amend Schedule 9 of the Act. Schedule 9 identifies the cities that comprise the Six Cities Region, as well as the local government areas that make up these cities.

The Committee notes that the provision amounts to a Henry VIII clause, allowing the Executive to amend the provisions of an Act by adding or removing cities that constitute the Six Cities Region. The Committee generally considers Henry VIII clauses in bills to be inappropriate delegation of legislative powers, as regulations do not receive the same level of parliamentary scrutiny as primary legislation.

However, the Committee notes that a similar regulation-making power existed in the *Greater Cities Commission Act 2022*, which this Bill seeks to repeal. It also acknowledges that the provisions are intended to build flexibility to allow timely amendments as the planning needs of the State change. In the circumstances, the Committee makes no further comment.

7. High Risk Offenders Legislation Amendment Bill 2023

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

Broad extension of Act – freedom from arbitrary detention and right to liberty

The Bill extends the definition of a 'serious offence' under the *Crimes (High Risk Offenders) Act 2006* to include offences of intentional choking, suffocation and strangulation without consent. This would extend the application of the Act to these offences, to allow applications for supervision and continuing detention orders for a person convicted and imprisoned for strangulation offences.

The Bill may therefore impact on a person's right to liberty and freedom from arbitrary detention, if they are required to serve an extended period of detention or supervision. The right to liberty and freedom from arbitrary detention are fundamental human rights. The Committee considers that legislation which may impact these rights should only do so to the extent necessary to achieve public interest aims.

However, the Committee acknowledges that the inclusion of these offences is intended to protect public safety as well as the safety of victims of crime and domestic violence offences. It also recognises that the courts retain the discretion to make any supervision or continuing detention order.

In the circumstances, the Committee notes the matter for Parliament's consideration.

Continuing detention orders – additional punishment, right to freedom from arbitrary detention and the presumption of innocence

The Bill amends section 13B of the *Crimes (High Risk Offenders) Act 2006* and section 33 of the *Terrorism (High Risk Offenders) Act 2017* to clarify that aggregate and cumulative sentences, where at least one offence is an eligible or relevant offence, are valid terms of imprisonment for an application for a continuing detention order. Under these Acts, an application to the Supreme Court for a continuing detention order can only be made for an offender who is in custody to serve an imprisonment sentence for a number of offences that includes an eligible offence.

A continuing detention order applies when an offender's term of imprisonment under a sentence has expired. By allowing for applications of a continuing detention order in respect to aggregate and cumulative sentences, the Bill may therefore broaden the number of offenders who may be subject to continuing detention after they have finished serving their sentence of imprisonment.

Extending a punishment beyond an original sentence to include a period of continuing detention, may infringe on an individual's right to freedom from arbitrary detention contained in Article 9 of the ICCPR. As these continuing detention orders concern an offender who has been prosecuted and sentenced, the Bill also may permit a person to receive additional punishment for the same offence.

The Committee acknowledges that both Acts already allow applications for continuing detention orders in relation to an offender serving concurrent and consecutive sentences. It also recognises that courts retain the discretion to make any continuing detention order, and that these orders are intended to protect public safety.

However, as the Acts enable the courts to make further continuing detention orders, the Bill may expose more offenders to the potential for indefinite detention. The Committee also notes that these orders may be made on the grounds of 'unacceptable risk' of further offending. The Bill may

also undermine the offender's right to the presumption of innocence. This finding of 'unacceptable risk' may be made on the balance of probabilities, which is a lower standard of proof than that guaranteed in criminal proceedings. For these reasons, the Committee refers the matter to Parliament for its consideration.

Extended supervision orders – right to liberty, freedom of movement and privacy

The Bill amends the *Crimes (High Risk Offenders) Act 2006* and the *Terrorism (High Risk Offenders) Act 2017* to clarify that aggregate and cumulative sentences, where at least one offence is an eligible or relevant offence, are valid terms of imprisonment for an application for an extended supervision order. Under these Acts, an extended supervision order may be made if the Court is satisfied, to a high degree of probability, that the offender poses an unacceptable risk of committing another 'serious' or terrorism offence if not kept under the supervision.

The Bill also amends section 5I of the *Crimes (High Risk Offenders) Act 2006* to clarify that applications for extended supervision orders can be made in respect to federal offences and federal recognizance release orders which are to be considered as part of the imprisonment sentence.

The Committee previously commented on the *Crimes (Serious Sex Offenders) Bill 2006* which enacted the *Crimes (High Risk Offenders) Act 2006* in its Digest 5 of 2006. Consistent with those comments, the Committee notes that, by expanding which offenders may be subject to an extended supervision order on the basis of a risk assessment rather than as punishment for an offence committed, the Bill may impact personal rights and liberties. In this case, these rights include a person's right to the presumption of innocence as well as their rights to liberty, freedom of movement and privacy. The Committee also notes that the threshold test of whether a person poses an 'unacceptable risk' is based on a standard of high probability, which is lower than the standard of proof in criminal matters.

However, the Committee acknowledges that these extended supervision orders are intended to protect public safety and prevent further serious offences. It also recognises that the court retains the discretion to determine whether an extended supervision order should be made. Unlike continuing detention orders, the Committee notes that extended supervision orders do not involve a person entering custody.

In the circumstances, the Committee notes this matter for Parliament's consideration.

8. Human Tissue Amendment (Ante-mortem Interventions) Bill 2023*

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

Right to bodily autonomy

The Bill inserts Part 4A into the *Human Tissue Act 1983* to establish a process for authorising ante-mortem procedures on potential human tissue donors. Sub-section 27C(2) of the Bill allows a designated officer to authorise the carrying out of ante-mortem procedures where a potential donor lacks the capacity to provide consent. Under this subsection, a senior available next of kin of the donor can consent or, if they cannot be located, a designated officer can authorise the procedure if a person lacks capacity.

The Bill therefore can authorise the carrying out of medical procedures on a person without their personal consent. This may interfere with an individual's right to personal bodily autonomy, which includes their right to only receive medical treatments with their consent. Further, the Committee

notes that the Bill does not set out details for when a person should be deemed to 'lack the capacity to consent'.

However, the Committee notes that the ante-mortem procedures would only be undertaken in circumstances where a person has consented to tissue donation. The Committee also recognises that there are existing similar regimes for medical interventions where an individual lacks the capacity to consent to a medical procedure. In these circumstances, the Committee makes no further comment.

9. Industrial Relations Amendment Bill 2023

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

Contempt of court

The Bill amends section 164 of the *Industrial Relations Act 1996* to allow the Industrial Court of the Industrial Relations Commission to exercise certain functions of the Supreme Court. Subsection 164(2) provides that the Industrial Court can exercise the functions of the Supreme Court in relation to the apprehension, detention and punishment of a person guilty of contempt of the Commission or in disobedience of an order or process of the Commission.

A contempt of Commission is an offence under the Act which carries a maximum penalty of \$5 500 (500 penalty units) and/or 6 months imprisonment. The Industrial Court of the Commission may make relevant orders in respect to a purported contempt of the Commission, and is required to hear criminal proceedings of the offence of contempt of the Commission.

The Bill expands the judicial powers of the Commission which may enable it to arrest and enforce criminal sanctions against a person who disobeys an order or process of the Commission. The Bill may therefore impact an individual's personal rights and liberties, including the right to liberty and freedom from arbitrary detention.

The Committee acknowledges that powers of commissions to find and deal with contempt are not uncommon to maintain order and facilitate their functions. It also recognises that these functions can only be performed by judicial members of the Commission with appropriate legal qualifications. However, the Bill significantly expands the judicial powers of the Commission in respect to contempt, which could impact a person's personal rights and liberties. For these reasons, the Committee refers the matter to Parliament for its consideration.

Separation of powers doctrine - Independence of the judicial members

The Bill reinstates the offices of President, Vice President and Deputy President of the Commission, which the Bill refers to as 'Presidential Members' by amending section 147 of the *Industrial Relations Act 1996*. Under section 149, the Governor will appoint these Presidential Members as judicial members of the Industrial Court in the Commission. The Industrial Court has jurisdiction to hear civil and criminal industrial relations proceedings and make legally binding decisions, including proceedings for contempt.

As members of the Commission more generally, the judicial members of the Industrial Court may also exercise the general functions of the Commission and therefore also have non-judicial functions as members of the Commission. Therefore, the Bill may infringe the constitutional doctrine of the separation of powers, which strictly protects the independence and inherent legal powers of the judiciary from the legislature and executive branches of government in Australia. Under this doctrine, the actual and apparent independence of the judiciary and its members is

strictly upheld. Any apprehension of bias or inability to act independently by the judiciary may impact a person's rights to procedural fairness and a fair trial and could be grounds for appeal.

The Committee acknowledges that, under new section 151, judicial members are only permitted to exercise judicial functions relevant to the Industrial Court when they are acting in their capacity as a judicial member of the Industrial Court. It also acknowledges that having the Industrial Court as part of the Commission is intended to provide for flexibility.

However, the Committee is concerned that by having judicial members preside over proceedings in the Industrial Court who also exercise non-judicial functions of the Commission, including resolving industrial disputes, it may undermine the perception of independence of the Industrial Court to a lay person. While it recognises that there are already specialised courts and tribunals in NSW which exercise judicial functions, the Committee notes that the concerns relating to judicial independence may arise from the non-judicial official functions of the Industrial Court's members. For these reasons, the Committee refers this matter to Parliament for its consideration.

10. Local Government Amendment (De-amalgamation Plebiscites) Bill 2023*

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

11. Thoroughbred Racing Amendment Bill 2023

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

12. Transport Administration Amendment (TAHE) 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*.

13. Unlawful Gambling Amendment (Betting on Animals) Bill 2023*

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

Absolute liability offence

The Bill amends sections 8 and 9 of the *Unlawful Gambling Act 1998* to introduce offences for gambling on an activity involving live animals. Amended section 8 would make it an offence for a person to place a bet on an activity involving a live animal, carrying a penalty of \$5 500 and/or imprisonment for 1 year. Amended section 9 would make it unlawful for a bookmaker to offer bets on an activity involving a live animal. For a first offence of section 9, an individual may be required to pay a penalty of \$11 000 and/or face imprisonment for 2 years. For a second offence, the monetary penalty increases to \$55 000.

The Bill may therefore establish absolute liability offences. The Committee generally comments on absolute liability offences as they depart from the common law principle that the mental element of 'fault' should be proven to establish criminal liability. The Committee acknowledges that absolute liability offences are not uncommon in regulatory frameworks to encourage compliance. The Committee also acknowledges that the offences are intended to reduce harm to animals in racing industries and to address problem gambling.

However, the Committee notes that the maximum penalty for these offences include custodial penalties and that there are no defences available. For these reasons, the Committee refers this matter to Parliament for its consideration.

Part One – Bills

1. Casino Control Amendment Bill 2023

Date introduced	21 November 2023
House introduced	Legislative Assembly
Minister with carriage	The Hon. David Harris MP
Portfolio	Gaming and Racing

Purpose and description

- 1.1 The object of this Bill is to amend the *Casino Control Act 1992* (the **Act**) to:
- (a) authorise the Treasurer to enter into a jobs guarantee agreement with a casino operator, and
 - (b) clarify that the announcement of new casino duty rates and certain other actions do not give rise to any rights to compensation from the Crown.

Background

- 1.2 In his second reading speech, the Hon. David Harris MP, Minister for Gaming and Racing, said that the Bill seeks to introduce three changes to the Act to provide 'important measures for the regulation of casino taxation and operations'.
- 1.3 Firstly, the Bill proposes to amend section 35 of the Act to provide that an approval from the NSW Independent Casino Commission (the **NICC**) is not required for a major change involving a close associate where the close associate is already exempt under section 42A of the Act. The Minister described this proposed amendment as correcting 'an inadvertent omission' so that an exempt close associate will not be 'required to undergo onerous probity assessment under the major change provisions'.
- 1.4 Secondly, the Bill seeks to amend section 156 of the Act to clarify the types of regulatory actions that are not subject to compensation from the Crown.
- 1.5 Lastly, the Bill proposes to insert new section 157, to authorise the Treasurer to enter into an agreement with a casino operator that guarantees the minimum number of persons to be employed in a casino, as well as prescribe penalties payable for failing to do so.

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

Treasurer's powers in relation to job guarantee agreements

- 1.6 The Bill inserts section 157 into the Act to authorise the Treasurer to enter into a 'job guarantee agreement' with a casino operator. Subsection 157(3) states that this agreement may prescribe:

- (a) the minimum number of persons to be employed at the casino, as well as the proportions of persons employed in different categories of roles, and
 - (b) the penalties and other amounts payable by the casino operator or its close associate for failure to comply with the agreement, as well as how the penalties are to be calculated and when it is payable.
- 1.7 Under the subsections 157(7) and (8), the penalty payable is taken to be 'casino duty payable'. Both the penalty and any interest payable on it are enforceable in the same manner as other duty payable by the casino under Part 8 of the Act.
- 1.8 Subsection 157(4) provides that the job guarantee agreement has effect despite contrary provisions in the Act, any other laws, at general law or in another instrument, including a commercial agreement with the casino. Subsection 157(5) also provides that the Treasurer may vary its terms at any time, 'with the agreement of the casino operator and any other party' to the agreement.
- 1.9 Subsection 157(6) requires a job guarantee agreement and any variations to be tabled in Parliament.
- 1.10 In his second reading speech, the Minister described the application of section 157:

The bill authorises the Treasurer to enter into a job guarantee agreement with The Star, through which The Star will guarantee a minimum number of workers are employed in relation to the casino. The bill also authorises the Treasurer to impose financial penalties on The Star for failing to employ the minimum number of workers.

The Bill amends the *Casino Control Act 1992* to authorise the Treasurer to enter into a job guarantee agreement with a casino operator. A job guarantee agreement would mandate the minimum number of employees at the casino and may prescribe penalties for failure to comply with its terms. The terms of the agreement may be varied by the Treasurer with the parties' consent. Any penalty payable or interest on these penalties is taken to be casino duty payable under Part 8 of the Act, and may be recovered like other duties payable under this Part.

The Committee notes that it is unclear whether the Treasurer may unilaterally enter into or vary a job guarantee agreement. The Committee also notes that the terms of the job guarantee agreement override any other laws or commercial agreements. Given this broad enforceability, the Bill may therefore grant the Treasurer a broad discretionary power in relation to the making of these job guarantee agreements.

The Treasurer's powers also include the power to prescribe the amount of penalty payable in the job guarantee agreement, rather than in primary legislation or regulations. As with other terms, the amount of this duty or its method of calculation may be varied at the Treasurer's discretion 'at any time'. Although job guarantee agreements and any variations must be tabled in Parliament, it is unclear whether they are disallowable under section 41 of the *Interpretation Act 1987*. Therefore, the Bill may also grant the Treasurer a discretionary power which may not be subject to sufficient parliamentary scrutiny.

The Committee recognises that these amendments may be intended to give effect to a specific agreement entered into by the Treasurer. The Committee also recognises that the broadly worded powers may embed flexibility in regulating the casino industry. However, the Bill explicitly provides that these agreements are not limited by other laws and can impose penalties which are duties payable to the Crown. 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

Retrospective exclusion of right to compensation

- 1.11 Under section 156 of the Act, the Government is not required to pay compensation to a casino operator for consequences arising out of certain regulatory actions. Under the definition of 'regulatory action' in section 156(3), this includes the introduction of an Act that 'provides for or deals with the operation or regulation of casinos'.
- 1.12 The Bill amends section 156(3) to further provide that no compensation is payable where:
- an Act affects or overrides a commercial agreement between the Crown and a casino operator,
 - an Act imposes a tax, duty or levy.
- 1.13 The Bill also inserts subsection 156(3)(d). This subsection excludes compensation liability due to an announcement, statement, or takes other action by the Government which is taken in preparation for a regulatory action.
- 1.14 Section 2 of the Bill provides that when enacted as an Act, these amendments to section 156 will be taken to have commenced on 5 September 2022.
- 1.15 In his second reading speech, the Minister said that 'the Bill makes it clear that these actions are captured under section 156' so that the Government and the NICC 'are able to properly regulate casinos without fear that doing so will result in casinos being entitled to compensation under commercial agreements'.

The Bill amends section 156 of the *Casino Control Act 1992* to provide that no compensation is payable for certain regulatory actions. This includes where an Act affects or overrides a commercial agreement between the Crown and the casino operator, where an Act imposes a tax, duty or a levy, and when the Government makes an announcement or takes an action in preparation for another regulatory action. These amendments would take effect from 5 September 2022.

The Bill appears to expand what may amount to a 'regulatory action' for which no compensation is payable by the Government. This expanded criteria will apply retrospectively. The retrospective application of these provisions may limit or exclude a casino operator's prior-existing ability to seek compensation for damages arising from certain past regulatory actions.

The Committee recognises that the retrospective provisions are intended to have a limited application to specific circumstances mostly involving corporate entities. It also acknowledges that the amendments build on pre-existing provisions that already limit the right to seek compensation for certain regulatory action, which may be reasonably necessary to protect public interest in the proper regulation of the casino industry. However, the Committee notes that the retrospective exclusion of a right to seek compensation is a non-reviewable decision which may impact the rule of law principle that contracting parties understand the law that applies to them at any given time. For these reasons, the Committee refers the matter to Parliament for its consideration.

2. Crimes Amendment (Prosecution of Certain Offences) Bill 2023

Date introduced	21 November 2023
House introduced	Legislative Assembly
Minister with carriage	The Hon. Michael Daley MP
Portfolio	Attorney General

Purpose and description

- 2.1 The object of this Bill is to amend the requirements for commencing prosecution of certain offences committed on the grounds of a person or group's race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.

Background

- 2.2 The Bill proposes to amend the *Crimes Act 1900* (the **Act**) to remove the requirement for the Director of Public Prosecutions (**DPP**) to approve any prosecution for an offence against section 93Z.
- 2.3 Under section 93Z(1) of the Act, it is an offence for a person to intentionally or recklessly threaten or incite violence towards another person or group of persons on the grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status in public. This offence carries a maximum penalty of 100 penalty units (\$11 000) and/or 3 years imprisonment.
- 2.4 In his second reading speech, the Hon. Michael Daley MP, Attorney General, said that the proposed amendments would 'streamline the process for police to prosecute people who offend against section 93Z'.
- 2.5 Section 2 provides that the Bill, if passed, would commence as an Act by proclamation. The Attorney General explained that this would enable sufficient time for NSW Police to receive training on the circumstances in which it is appropriate to proceed with charges under section 93Z.

Issues considered by the Committee

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

Expanding criminal prosecutions and retrospectivity

- 2.6 The Bill removes a requirement that the DPP approve any prosecution for an offence against section 93Z by repealing subsection 93Z(4). This means that there are no longer any restrictions on who or how prosecutions for section 93Z offences can be started, as section 14 of the *Criminal Procedure Act 1986* (the **Criminal Procedure Act**) provides:

A prosecution or proceeding in respect of any offence under an Act may be instituted by any person unless the right to institute the prosecution or

proceeding is expressly conferred by that Act on a specified person or class of persons.

- 2.7 The Attorney General acknowledged in his second reading speech that the requirement for DPP approval was 'initially introduced as a safeguard to ensure appropriate prosecutions' but noted that:

The time taken to refer matters to the DPP and obtain approval to charge may act as a disincentive for laying charges under section 93Z that relate to conduct otherwise appropriate to be prosecuted under this provision.

- 2.8 Schedule 1 to the Criminal Procedure Act allows offences against section 93Z to be tried summarily in the Local Court, unless the prosecutor or accused person elects otherwise. The Attorney General stated that offences against section 93Z are 'typically prosecuted by the NSW Police Force in the Local Court'. He also noted that removing the requirement for DPP approval would make section 93Z consistent with other offences in NSW which do not carry the same requirement for prosecution.

- 2.9 The Bill also inserts new Part 42 into Schedule 11 which makes savings and transitional provisions. This Part provides that the proposed repeal of section 93Z(4) will apply to proceedings that are commenced on or after the Bill commences, regardless of when the offence was committed.

The Bill removes subsection 93Z(4) from the *Crimes Act 1900*, which removes the requirement for the Director of Public Prosecutions (DPP) to approve a prosecution for an offence against section 93Z. It is an offence under section 93Z for a person to publicly threaten or incite violence towards another person or group on the grounds of their race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status. This offence carries a maximum penalty of 100 penalty units (\$11 000) and/or three years imprisonment for individuals.

The Committee acknowledges that the amendments are intended to allow the police to efficiently prosecute offences against section 93Z. However, the Committee notes that removing the requirement for DPP approval would allow a private person to bring a prosecution for an offence under section 93Z. Unlike the DPP which has its own prosecution guidelines setting out the relevant thresholds to charge and prosecute offences, a private person would not be required to follow any such guidelines. The Bill may therefore expand the number of criminal prosecutions for section 93Z, which would require individuals to engage with the criminal justice system and expose them to potential liability for an offence that carries a custodial penalty.

Although offences against section 93Z are tried summarily in the Local Court unless the prosecutor or accused person elects otherwise, the Local Court can impose maximum penalties of imprisonment for two years. It is also unclear how remand would apply in respect of a private person. Further, the Bill provides that the removal of section 93Z(4) would apply retrospectively, which impacts on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time. For these reasons, the Committee refers this matter to Parliament for its consideration.

3. Customer Service Legislation Amendment Bill 2023

Date introduced	22 November 2023
House introduced	Legislative Assembly
Minister with carriage	The Hon. Anoulack Chanthivong MP
Portfolio	Better Regulation and Fair Trading

Purpose and description

- 3.1 The objects of this Bill are:
- (a) to provide for exemptions from certain requirements under the Associations Incorporation Act 2009 (the **Associations Incorporation Act**) and the Charitable Fundraising Act 1991 (the **Charitable Fundraising Act**) for an entity that is registered under the Australian Charities and Not-for-profits Commission Act 2012 of the Commonwealth (the **Commonwealth Act**),
 - (b) to permit a certificate of registration under the Property and Stock Agents Act 2002 (the **PSA Act**) to be issued, extended or restored in exceptional circumstances so that the certificate has a duration of more than 4 years,
 - (c) to prescribe an exceptional circumstance under the Property and Stock Agents Regulation 2022 (the **PSA Regulation**), and
 - (d) to extend a part of the Retail Leases Act 1994 (the **Retail Leases Act**), that currently applies to Sydney (Kingsford-Smith) Airport, to the new Sydney West Airport.

Background

- 3.2 The Bill seeks to make a number of amendments to various Acts within the Customer Services portfolio, which are grouped into five schedules.
- 3.3 Schedule 1 seeks to amend the Associations Incorporation Act, which provides that a registered entity under the Commonwealth Act is not required to lodge certain financial documents or a summary of the registered entity's financial affairs for a financial year under the Associations Incorporation Act if the registered entity has given statements and reports under the Commonwealth Act.
- 3.4 Schedule 2 seeks to amend the Charitable Fundraising Act, which provides that a registered entity under the Commonwealth Act is taken to hold an authority to conduct a fundraising appeal in New South Wales in certain circumstances.
- 3.5 In his second reading speech, the Hon. Anoulack Chanthivong MP, Minister for Better Regulation and Fair Trading said that these proposed amendments would 'significantly reduce administrative burdens for New South Wales charitable fundraisers that are also registered with the Australian Charities and Not-for-profits Commission.' The Minister also said that the amendments would align New South Wales fundraising laws with Commonwealth regulatory framework.

- 3.6 Schedule 3 seeks to amend the PSA Act to allow certificates of registration for assistant agents to be issued, extended and restored beyond the current four-year fixed term in 'exceptional circumstances'.
- 3.7 Schedule 4 would amend the PSA Regulation to prescribe a definition of 'exceptional circumstances', to include a real risk to the effective functioning of the property and stock agents industry. The Minister said that the amendments would 'help avoid a staffing and compliance crisis across New South Wales property agencies in March 2024'.
- 3.8 Schedule 5 seeks to amend the Retail Leases Act to extend a part that currently applies to Sydney (Kingsford-Smith) Airport to also apply to the new Sydney West Airport. The Minister said that the amendments would 'ensure the regulatory framework for lessors and lessees of a retail lease are consistent for Sydney's two international airports'.

Issues considered by the Committee

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

4. Energy Legislation Amendment Bill 2023

Date introduced	21 November 2023
House introduced	Legislative Assembly
Member introducing	Ms Trish Doyle MP
Minister with carriage	The Hon. Jihad Dib MP
Portfolio	Energy

Purpose and description

- 4.1 The objects of this Bill are as follows:
- (a) to amend the *Electricity Infrastructure Investment Act 2020* (the **EII Act**) in relation to the functions of the energy security target monitor and the consumer trustee and other matters, and
 - (b) to amend the *Energy and Utilities Administration Act 1987* (the **EUA Act**) in relation to the governance of the Energy Corporation and other matters.

Background

- 4.2 The Bill seeks to make amendments to the EII Act and the EUA Act to address the electricity system infrastructure transition set out under the Electricity Infrastructure Roadmap.¹ The EII Act establishes a regulatory framework to support the development and investment in electricity infrastructure. The EUA Act addresses energy and water security and supply in NSW.
- 4.3 In her second reading speech, Ms Trish Doyle MP, Parliamentary Secretary for Energy said that the Bill would implement 'some of the Government's response to the recommendations of the Electricity Supply and Reliability Check Up, the Check Up, to assist roadmap entities to successfully deliver on their functions.'
- 4.4 As explained by Ms Doyle, the Bill seeks to make 15 amendments to the EII Act that fall into three broad categories. These proposed changes are to the Energy Security Target Monitor, the Consumer Trustee and miscellaneous amendments. These amendments include:
- enabling the Secretary to delegate the functions of the Energy Security Target Monitor to an employee of the Department of Planning and Environment, and
 - enabling the Minister to make regulations about the exercise of the Consumer Trustee's functions.
- 4.5 The Bill proposes to make amendments to the EUA Act relating to the governance of the Energy Corporation of NSW (the **Corporation**). It includes establishing a Board appointed by the Minister, to manage the Corporation. It also seeks to establish delegation powers by inserting section 10A, to allow the delegation of functions of the

¹ NSW Department of Environment and Planning, [Electricity Infrastructure Roadmap](#).

Corporation and the Chief Executive Officer. These amendments to the EUA Act, are proposed to commence on a date appointed by proclamation.

Issues considered by the Committee

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

Wide delegation of powers to unspecified persons

- 4.6 The Bill inserts Part 3 into the EUA Act to establish the Corporation. Section 10A provides broad powers to delegate functions of the Corporation and its Chief Executive Officer to different entities, including persons prescribed by regulations.
- 4.7 Under subsection 10A(1), the Corporation can delegate its functions to 'a person of a class prescribed by the regulations'. Subsection 10A(2) allows the Corporation to sub-delegate functions delegated to it by the Minister, including to persons of a class prescribed by regulations.
- 4.8 Similarly, subsection 10A(3) and (4) allows the Chief Executive officer to delegate their functions and to sub-delegate functions delegated by the Minister to 'a person of a class prescribed by regulations'.
- 4.9 The Bill also expands an existing delegation power of the Minister under section 45 of the Act. New subsection 45(1)(d) allows the Minister to delegate the exercise of their functions under the Act to 'a person of a class prescribed by the regulations'.

The Bill amends the *Energy and Utilities Administration Act 1987* for the Energy Corporation, the Minister and its Chief Executive Officer to delegate their function under the Act to a class of person prescribed by regulations. Functions that have been delegated by the Minister to the Corporation and the CEO can also be sub-delegated to a person of a class prescribed by regulations.

The Bill may therefore provide for the wide delegation of statutory functions to a class of unknown persons. This may enable private individuals to be delegated functions under the Act which may be expected to be performed by public officials or authorities. The Committee generally prefers that the classes of persons who may be delegated statutory functions are detailed in primary legislation to provide clarity as well as greater oversight of the exercise of those Executive and public functions.

However, the Committee acknowledges that allowing regulations to prescribe who may be delegated could allow for more flexibility in the administration of the statutory regime. The Committee also recognises that these regulations are still required to be tabled in Parliament and therefore would be subject to disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.

5. Environmental Planning and Assessment Legislation Amendment (Agritourism) Bill 2023*

Date introduced	23 November 2023
House introduced	Legislative Assembly
Minister with carriage	Mr Gareth Ward MP
Portfolio	*Private Members Bill

Purpose and description

- 5.1 The objects of this Bill are:
- to reverse certain changes made by the *Standard Instrument (Local Environmental Plans) Amendment (Agritourism) Order 2022* (the **Agritourism Amendment Order**),
 - to introduce a new proposed land use, Agritourism premises, and set out the development standards that will apply to the proposed use,
 - to make consequential amendments to certain environmental planning instruments.

Background

- 5.2 The Bill seeks to make a number of amendments to various environmental planning instruments, which are grouped into five schedules. In particular, it proposes to reverse aspects of the Agritourism Amendment Order which provided for the land use of 'agritourism premises' as a subset of 'agriculture' land use in standard instrument local environment plans. As a result, various high-impact infrastructure and activities are allowed on any land where agriculture is permitted, and no development application would be required from a local council for those type of activities.
- 5.3 In his second reading speech, Mr Gareth Ward MP said that the Bill's proposed amendments would seek to achieve 'the right balance between supporting genuine agritourism and promoting the rights of property owners and our environment.' Mr Ward also said that the proposed amendments would allow local councils to properly regulate those high-impact activities.
- 5.4 Schedule 1 would amend certain environmental planning instruments prescribed by *Standard Instrument (Local Environmental Plans) Order 2006*, including:
- reversing changes in relation to agritourism made by the Agritourism Amendment Order
 - introducing a new proposed land use term for agritourism premises

- setting out the development standards that apply to agritourism premises, particularly referring to a standard of 'material adverse impact'.

5.5 Schedules 2 to 5 would make consequential amendments to the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, State Environmental Planning Policy (Housing) 2021, State Environmental Planning Policy (Primary Production) 2021 and State Environmental Planning Policy (Precincts-Regional) 2021.

Issues considered by the Committee

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

6. Greater Cities Commission Repeal Bill 2023

Date introduced	22 November 2023
House introduced	Legislative Assembly
Minister with carriage	The Hon. Paul Scully MP
Portfolio	Planning and Public Spaces

Purpose and description

- 6.1 The objects of this Bill are as follows:
- (a) to repeal the *Greater Cities Commission Act 2022* (the **repealed Act**) to abolish the Greater Cities Commission (the **Commission**) on 1 January 2024
 - (b) to amend the *Environment Planning and Assessment Act 1979* (the **EPA Act**) to transfer the Greater Cities Commission's strategic planning and functions under that Act to the Secretary of the Department in which that Act is administered
 - (c) to make minor consequential amendments to other legislation.

Background

- 6.2 In his second reading speech, the Hon. Paul Scully MP, Minister for Planning and Public Spaces, indicated that the Bill seeks to abolish the Commission. The Bill also proposes amendments that would transfer the assets, liabilities and functions of the Commission to the new Department of Planning, Housing and Infrastructure (the **new Department**), which will commence its operations on 1 January 2024.
- 6.3 The Minister explained that, while the Commission had an important role 'developing a strategic vision for the Greater Sydney region', the decision to dissolve the Commission will 'improve strategic planning and coordination across the State.'
- 6.4 Importantly, the Bill proposes to transfer the strategic planning functions in Part 3 of the EPA Act to the Secretary of the new Department. The Minister said that these amendments:
- ... only makes those changes that are necessary to transfer the strategic functions of the commission to the planning secretary. The bill does not—in any way—alter those functions in making them the responsibility of the planning secretary.
- 6.5 The Minister further said that the staff and resources of the Commission will be transferred to the new Department and that 'the Government has already redirected the bulk of the Commission's staff into the Department of Planning and Environment'.

Issues considered by the Committee

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

Henry VIII clause

- 6.6 The Bill inserts Schedule 9 into the EPA Act, which lists the cities, as well as the local government areas in these cities, that make up the Six Cities Region for the purposes of the Act (the **Six Cities Region**). Proposed Schedule 9 replicates Schedule 1 of the repealed Act, and includes the following constituent cities: the Eastern Harbour City, the Central River City, the Central Coast city, the Lower Hunter and Greater Newcastle City, the Western Parkland City, and the Illawarra-Shoalhaven City.
- 6.7 The Bill inserts new section 1.8 into the EPA Act to enable regulations to amend proposed Schedule 9 by extending or reducing the size of the Six Cities Region. Section 4 of the repealed Act previously authorised the Commission to make regulations that amend the Six Cities Region in Schedule 1.
- 6.8 In his second reading speech, the Minister stated that this new regulation-making power provides flexibility in directing the strategic planning sources:

...on those parts of the State that require them most. As strategic planning needs of the State will undoubtedly change over time, the need for flexibility is crucial and will ensure that the Government can respond to those needs as quickly as possible.

The Bill inserts a new regulation-making power into the *Environment Planning and Assessment Act 1979* to enable regulations to amend Schedule 9 of the Act. Schedule 9 identifies the cities that comprise the Six Cities Region, as well as the local government areas that make up these cities.

The Committee notes that the provision amounts to a Henry VIII clause, allowing the Executive to amend the provisions of an Act by adding or removing cities that constitute the Six Cities Region. The Committee generally considers Henry VIII clauses in bills to be inappropriate delegation of legislative powers, as regulations do not receive the same level of parliamentary scrutiny as primary legislation.

However, the Committee notes that a similar regulation-making power existed in the *Greater Cities Commission Act 2022*, which this Bill seeks to repeal. It also acknowledges that the provisions are intended to build flexibility to allow timely amendments as the planning needs of the State change. In the circumstances, the Committee makes no further comment.

7. High Risk Offenders Legislation Amendment Bill 2023

Date introduced	22 November 2023
House introduced	Legislative Assembly
Minister with carriage	The Hon. Michael Daley MP
Portfolio	Attorney General

Purpose and description

7.1 The explanatory note states that the objects of this Bill are to:

- (a) amend the *Crimes (High Risk Offenders) Act 2006* (the **CHRO Act**) to:
 - (i) prescribe a strangulation offence under the *Crimes Act 1900* (the **Crimes Act**), section 37(2) that has been committed with intent to commit an offence under the Crimes Act, Part 3, Division 10 (Sexual offences against adults and children) (the **intended offence**) as a serious sex offence for the purposes of the CHRO Act if the intended offence is punishable by imprisonment for 7 years or more,
 - (ii) prescribe a strangulation offence under the Crimes Act, section 37(2) that has been committed with intent to commit an offence under the Crimes Act, Part 3, Division 10 (Sexual offences against adults and children) as an offence of a sexual nature for the purposes of the CHRO Act,
 - (iii) prescribe a strangulation offence under the Crimes Act, section 37(1) and (2) as a serious violence offence for the purposes of the CHRO Act,
 - (iv) provide that if a federal recognizance release order is imposed on an offender under the *Crimes Act 1914* of the Commonwealth (the **Commonwealth Crimes Act**), sections 19AC and 20(1)(b) in combination with a federal prison sentence, the order is taken to be part of the offender's sentence of imprisonment for the purposes of the CHRO Act, section 51(2), definition of supervised offender,
 - (v) provide that an application for orders under the CHRO Act may be made in relation to an offender in the last 9 months of the offender's overall term of imprisonment if the overall term contains at least 1 prison sentence for:
 - (A) a serious offence, or
 - (B) an offence of a sexual nature, or
 - (C) an offence under the CHRO Act, section 12,
- (b) amend the *Terrorism (High Risk Offenders) Act 2017* (the **THRO Act**) to provide that applications for orders under the THRO Act may be made in

relation to an offender in the last 12 months of the offender's overall term of imprisonment if the overall term of imprisonment contains at least 1 prison sentence for a NSW indictable offence.

Background

- 7.2 The Bill proposes amendments across two Acts related to defining, detaining and supervising high risk offenders, including those who commit serious strangulation offences. In his second reading speech, the Hon. Michael Daley MP, Attorney General, explained these amendments as follows:

The Bill amends the CHRO Act to enable high-risk offenders who commit serious strangulation offences to be considered for post-sentence detention and supervision under the Act. The Bill also makes amendments to the THRO Act to improve the operation of these Acts.

Issues considered by the Committee

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

Broad extension of Act – freedom from arbitrary detention and right to liberty

- 7.3 Section 3 of the CHRO Act states that the Act's primary object is to provide for the extended supervision and continuing detention of 'high risk sex offenders' and 'high risk violent offenders' in order to 'ensure the safety and protection of the community'. The Supreme Court may make an extended supervision order or a continuing detention order under sections 5B and 5C, if the court is satisfied that, amongst other things, the offender is serving or has served a sentence of imprisonment for a 'serious offence'.
- 7.4 Under section 4, a 'serious offence' is a:
- 'serious sex offence', defined by section 5(1), or
 - 'serious violence offence', defined by section 5A.
- 7.5 The Bill extends the definition of 'serious sex offence', 'offence of a sexual nature' and 'serious violence offence' in sections 5 and 5A. This would include offences under section 37 of the Crimes Act of intentional choking, suffocation and strangulation without consent as 'serious offences' under the CHRO Act. This would allow an application for an extended supervision order or continuing detention order for offences under section 37 of the Crimes Act.
- 7.6 In his second reading speech, the Attorney General referred to a report by the NSW Domestic Violence Death Review Team which noted research findings of 'a link between strangulation and domestic homicide'.² He then stated that:

Offenders who commit serious strangulation offences should be captured by the Crimes (High Risk Offenders) Act 2006 so that action can be taken to address any unacceptable risk of serious reoffending. Although serious strangulation offences in New South Wales protect all members of the community, not only victims of domestic violence, it is particularly

² NSW Domestic Violence Death Review Team, [Report 2015-2017](#), 2017.

important to make these changes because we know that strangulation can be a precursor to domestic homicide.

The Bill extends the definition of a 'serious offence' under the *Crimes (High Risk Offenders) Act 2006* to include offences of intentional choking, suffocation and strangulation without consent. This would extend the application of the Act to these offences, to allow applications for supervision and continuing detention orders for a person convicted and imprisoned for strangulation offences.

The Bill may therefore impact on a person's right to liberty and freedom from arbitrary detention, if they are required to serve an extended period of detention or supervision. The right to liberty and freedom from arbitrary detention are fundamental human rights. The Committee considers that legislation which may impact these rights should only do so to the extent necessary to achieve public interest aims.

However, the Committee acknowledges that the inclusion of these offences is intended to protect public safety as well as the safety of victims of crime and domestic violence offences. It also recognises that the courts retain the discretion to make any supervision or continuing detention order.

In the circumstances, the Committee notes the matter for Parliament's consideration.

Continuing detention orders – additional punishment, right to freedom from arbitrary detention and the presumption of innocence

- 7.7 Under section 5C of the CHRO Act, the Supreme Court may make a continuing detention order if it is satisfied that, amongst other things, the offender:
- is serving (or has served) a sentence of imprisonment for a 'serious offence', and
 - poses an 'unacceptable risk' of committing another serious offence if not kept in detention.
- 7.8 Similarly, section 34 of the THRO Act allows for the making of a continuing detention order for an offender if the Supreme Court is satisfied, amongst other things, that the offender poses an 'unacceptable risk' of committing a serious terrorism offence if not kept in detention.
- 7.9 The Bill amends section 13B of the CHRO Act to clarify when an application for a continuing detention order may be made for an offender in the last 9 months of their sentence of imprisonment. Amended section 13B clarifies that a continuing detention order may also be made if the offender is serving an 'aggregate' or 'cumulative' sentence of imprisonment for multiple offences, as long as at least one of the offences is a 'serious offence', an 'offence of a sexual nature', or an offence of breaching a supervision order.
- 7.10 Similarly, the Bill amends section 7 of the THRO Act to provide that an 'eligible offender' under that Act includes someone serving a 'cumulative' or 'aggregate' imprisonment sentence where at least one of the offences is a NSW indictable offence. The Bill also similarly amends the definition of a 'detained offender' who may

be subject of a continuing detention order under section 33 to also include 'cumulative' or 'aggregate' imprisonment sentences.

- 7.11 In his second reading speech, the Attorney General made specific reference to the decision in *State of New South Wales v Avakian (Preliminary)* [2021] NSWSC 245, to highlight the need for these amendments. He explained that this case found that:

...in order for the existing provisions relating to consecutive or concurrent sentences to apply to a sentence that does not enliven eligibility for an order under the Act, it must be immediately consecutive to, or concurrent with, a sentence for an offence that does. It is not sufficient for the sentence to simply be one in a chain of sentences that includes a sentence for an eligible offence.

- 7.12 The Attorney General explained that these amendments would apply where an offender is serving a single term of imprisonment for multiple offences or covering multiple sentences and allow:

... an application for an extended supervision order or a continuing detention order will be able to be made as long as one of those sentences is either a sentence for an eligible offence or is an aggregate sentence for multiple offences which includes an eligible offence.

- 7.13 He also said that these amendments would ensure that these sections 'operate as they had always been intended in relation to offenders who are serving multiple sentences.'

The Bill amends section 13B of the *Crimes (High Risk Offenders) Act 2006* and section 33 of the *Terrorism (High Risk Offenders) Act 2017* to clarify that aggregate and cumulative sentences, where at least one offence is an eligible or relevant offence, are valid terms of imprisonment for an application for a continuing detention order. Under these Acts, an application to the Supreme Court for a continuing detention order can only be made for an offender who is in custody to serve an imprisonment sentence for a number of offences that includes an eligible offence.

A continuing detention order applies when an offender's term of imprisonment under a sentence has expired. By allowing for applications of a continuing detention order in respect to aggregate and cumulative sentences, the Bill may therefore broaden the number of offenders who may be subject to continuing detention after they have finished serving their sentence of imprisonment.

Extending a punishment beyond an original sentence to include a period of continuing detention, may infringe on an individual's right to freedom from arbitrary detention contained in Article 9 of the ICCPR.³ As these continuing detention orders concern an offender who has been prosecuted and sentenced, the Bill also may permit a person to receive additional punishment for the same offence.

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

The Committee acknowledges that both Acts already allow applications for continuing detention orders in relation to an offender serving concurrent and consecutive sentences. It also recognises that courts retain the discretion to make any continuing detention order, and that these orders are intended to protect public safety.

However, as the Acts enable the courts to make further continuing detention orders, the Bill may expose more offenders to the potential for indefinite detention. The Committee also notes that these orders may be made on the grounds of 'unacceptable risk' of further offending. The Bill may also undermine the offender's right to the presumption of innocence. This finding of 'unacceptable risk' may be made on the balance of probabilities, which is a lower standard of proof than that guaranteed in criminal proceedings. For these reasons, the Committee refers the matter to Parliament for its consideration.

Extended supervision orders – right to liberty, freedom of movement and privacy

- 7.14 Like section 5C of the CHRO Act, the Supreme Court may make an order of extended supervision in the community under section 5B if satisfied that the offender poses an unacceptable risk of committing another serious offence if not kept under supervision. Section 20 of the THRO Act also allows the making of an extended supervision order if satisfied that an offender poses an unacceptable risk of committing a serious terrorism offence.
- 7.15 Similar to the amendments discussed above, the Bill amends both Acts to clarify that these extended supervision orders may be made for an offender serving an aggregate or cumulative sentence of imprisonment, as long as the sentence includes an offence that is eligible for an extended supervision order under either Act.
- 7.16 The Bill amends section 5I of the CHRO Act to clarify that, where an offender is subject to a federal recognizance release order under the *Crimes Act 1914* (Cth) in respect of a federal prison sentence, the federal order is taken to be part of the offender's sentence of imprisonment.
- 7.17 The Attorney General explained that these amendments make it clear that applications for extended supervision orders under the CHRO Act 'can be made against certain Federal offenders subject to Federal recognizance release order imposed under the Commonwealth Crimes Act 1914.' He noted that 'Supreme Court judgments have differed on whether a recognizance release order imposed with a prison sentence is part of the prison sentence'.

The Bill amends the *Crimes (High Risk Offenders) Act 2006* and the *Terrorism (High Risk Offenders) Act 2017* to clarify that aggregate and cumulative sentences, where at least one offence is an eligible or relevant offence, are valid terms of imprisonment for an application for an extended supervision order. Under these Acts, an extended supervision order may be made if the Court is satisfied, to a high degree of probability, that the offender poses an unacceptable risk of committing another 'serious' or terrorism offence if not kept under the supervision.

The Bill also amends section 5I of the *Crimes (High Risk Offenders) Act 2006* to clarify that applications for extended supervision orders can be

made in respect to federal offences and federal recognizance release orders which are to be considered as part of the imprisonment sentence.

The Committee previously commented on the *Crimes (Serious Sex Offenders) Bill 2006* which enacted the *Crimes (High Risk Offenders) Act 2006* in its Digest 5 of 2006.⁴ Consistent with those comments, the Committee notes that, by expanding which offenders may be subject to an extended supervision order on the basis of a risk assessment rather than as punishment for an offence committed, the Bill may impact personal rights and liberties. In this case, these rights include a person's right to the presumption of innocence as well as their rights to liberty, freedom of movement and privacy. The Committee also notes that the threshold test of whether a person poses an 'unacceptable risk' is based on a standard of high probability, which is lower than the standard of proof in criminal matters.

However, the Committee acknowledges that these extended supervision orders are intended to protect public safety and prevent further serious offences. It also recognises that the court retains the discretion to determine whether an extended supervision order should be made. Unlike continuing detention orders, the Committee notes that extended supervision orders do not involve a person entering custody.

In the circumstances, the Committee notes this matter for Parliament's consideration.

⁴ Parliament of New South Wales, [Legislation Review Digest No 5 of 2006](#), 28 April 2006.

8. Human Tissue Amendment (Ante-mortem Interventions) Bill 2023*

Date introduced	23 November 2023
House introduced	Legislative Assembly
Member with carriage	The Hon. Greg Piper MP
	*Private Members Bill

Purpose and description

- 8.1 The object of this Bill is to amend the *Human Tissue Act 1983* (the **Act**) to provide for ante-mortem procedures to be carried out on persons to facilitate post-mortem tissue donation.

Background

- 8.2 The Act provides a legal framework for the donation of tissue by living persons, removal of tissue from deceased persons and post-mortem examinations and related matters.
- 8.3 The Bill proposes to amend the Act by inserting Part 4A. Proposed Part 4A creates a process for authorisations to be given for ante-mortem procedures, which is defined to mean 'a medical procedure carried out to determine, maintain or improve the viability of tissue for a relevant purpose'.
- 8.4 In his second reading speech, the Hon. Greg Piper MP, Speaker stated that the amendments establish:
- ... a process for authority to be given for the carrying out of an ante-mortem procedure for the purpose of transplantation of tissue from a donors body after the donor's death to the body of another living person.
- 8.5 The Bill proposes to insert section 27C into the Act which enables a designated officer to carry out ante-mortem procedures provided that certain consent requirements are met.

Issues considered by the Committee

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

Right to bodily autonomy

- 8.6 By inserting new section 27C into the Act, the Bill establishes a process to authorise the carrying out of ante-mortem procedures on a potential tissue donor that 'lacks the capacity to provide consent'.
- 8.7 Sub-section 27C(2) allows a designated officer to authorise the carrying out of an ante-mortem procedure where the donor lacks capacity to consent, if:
- (a) a senior available next of kin provides consent, or

- (b) a senior available next of kin cannot be located, and they are satisfied that:
- (i) the donor has consented to tissue donation,
 - (ii) consent has not been revoked, and
 - (iii) the potential donor has not expressed an objection to an ante-mortem procedure.

8.8 Under section 27B of Part 4A, the 'senior available next of kin' for a potential tissue donor is defined as:

- the parent, or otherwise adult sibling or guardian, where the donor is a child, or
- the donor's spouse, or otherwise adult child, parent or adult sibling, where the donor is an adult.

The Bill inserts Part 4A into the *Human Tissue Act 1983* to establish a process for authorising ante-mortem procedures on potential human tissue donors. Sub-section 27C(2) of the Bill allows a designated officer to authorise the carrying out of ante-mortem procedures where a potential donor lacks the capacity to provide consent. Under this subsection, a senior available next of kin of the donor can consent or, if they cannot be located, a designated officer can authorise the procedure if a person lacks capacity.

The Bill therefore can authorise the carrying out of medical procedures on a person without their personal consent. This may interfere with an individual's right to personal bodily autonomy, which includes their right to only receive medical treatments with their consent. Further, the Committee notes that the Bill does not set out details for when a person should be deemed to 'lack the capacity to consent'.

However, the Committee notes that the ante-mortem procedures would only be undertaken in circumstances where a person has consented to tissue donation. The Committee also recognises that there are existing similar regimes for medical interventions where an individual lacks the capacity to consent to a medical procedure. In these circumstances, the Committee makes no further comment.

9. Industrial Relations Amendment Bill 2023

Date introduced	23 November 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Sophie Cotsis MP
Portfolio	Industrial Relations

Purpose and description

9.1 The objects of this Bill are as follows:

- (a) to amend the *Industrial Relations Act 1996* to:
 - (i) re-establish the Industrial Relations Commission in Court Session
 - (ii) provide for mutual gains bargaining
 - (iii) require the Industrial Relations Commission (the **Commission**) to take into account the New South Wales Government's fiscal position and outlook in the exercise of the Commission's functions about public sector employees
 - (iv) repeal section 146C concerning the duty of the Commission to give effect to government policies on conditions of employment of public sector employees prescribed by the regulations
- (b) to amend certain other legislation consequence on the re-establishment of the Industrial Relations Commission in Court Session.

Background

9.2 The *Industrial Relations Act 1996* (the **Act**) provides a framework for the regulation of industrial relations and employment conditions in NSW, including the resolution of employment disputes and to promote economic productivity.

9.3 The Bill proposes to make multiple amendments to the Act, including by:

- introducing a mutual gains bargaining process
- re-establishing the Commission in Court Session (**Industrial Court**)
- requiring the Commission to take the fiscal position of NSW into account when exercising its functions.

9.4 One of the key amendments proposed by the Bill is to re-establish and restore the jurisdiction of the Industrial Court. In doing so it restores the judicial functions to the Industrial Court that had been transferred to the Supreme Court. The Bill also

proposes to amend the Act to define new judicial powers of the Industrial Court, its constitution and other procedural matters.

- 9.5 In her second reading speech, the Hon. Sophie Cotsis MP, Minister for Industrial Relations said that these proposed amendments mean the Commission can 'once again deal with the judicial functions transferred by the former Government in 2016 that are currently exercised by the Supreme Court'. These functions would include small claims, contravention of dispute orders, proceedings for declarations of right and the cancellation of the registration of industrial organisations.'
- 9.6 Schedule 2 of the Bill proposes to make consequential amendments to a number of different Acts. Those amendments relate to the restoration of the Industrial Court and related procedural issues. The Minister explained that Schedule 2 proposes to 'update references to the reinstated Industrial Court' and will enable the transfer of proceedings from the Supreme Court to the Industrial Court.

Issues considered by the Committee

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

Contempt of court

- 9.7 Section 164 of the Act deals with the Commission's powers relating to the production of evidence and perjury. The Bill inserts subsections 164(2) and (3) to provide the Industrial Court with the power to exercise certain functions of the Supreme Court.
- 9.8 Subsection 164(2) provides that the Industrial Court may exercise the functions of the Supreme Court which relate to:
- ... the apprehension, detention and punishment of persons guilty of contempt of the Commission, including disobedience of an order made by or process issuing out of the Commission.
- 9.9 Subsection 164(3) provides that a judicial member of the Commission may exercise functions of the Supreme Court for commencing contempt of Commission proceedings.
- 9.10 Under section 180 of the Act, contempt of the Commission is an offence carrying a maximum penalty of \$5 500 (500 penalty units) and/or 6 months imprisonment for an individual. The Bill also inserts subsection 180(3) of the Act which provides that proceedings for this offence can only be tried by the Industrial Court.

The Bill amends section 164 of the *Industrial Relations Act 1996* to allow the Industrial Court of the Industrial Relations Commission to exercise certain functions of the Supreme Court. Subsection 164(2) provides that the Industrial Court can exercise the functions of the Supreme Court in relation to the apprehension, detention and punishment of a person guilty of contempt of the Commission or in disobedience of an order or process of the Commission.

A contempt of Commission is an offence under the Act which carries a maximum penalty of \$5 500 (500 penalty units) and/or 6 months imprisonment. The Industrial Court of the Commission may make

relevant orders in respect to a purported contempt of the Commission, and is required to hear criminal proceedings of the offence of contempt of the Commission.

The Bill expands the judicial powers of the Commission which may enable it to arrest and enforce criminal sanctions against a person who disobeys an order or process of the Commission. The Bill may therefore impact an individual's personal rights and liberties, including the right to liberty and freedom from arbitrary detention.

The Committee acknowledges that powers of commissions to find and deal with contempt are not uncommon to maintain order and facilitate their functions. It also recognises that these functions can only be performed by judicial members of the Commission with appropriate legal qualifications. However, the Bill significantly expands the judicial powers of the Commission in respect to contempt, which could impact a person's personal rights and liberties. For these reasons, the Committee refers the matter to Parliament for its consideration.

Separation of powers doctrine - Independence of the judicial members

- 9.11 As noted, the Bill re-establishes the Industrial Court, which is part of the Commission. It is constituted by a judicial member or judicial members for the purposes of exercising functions of the Industrial Court.
- 9.12 In her second reading speech, the Minister explained that:
- The fact that the Industrial Court and the Commission will be part of the newly constituted Industrial Relations Commission will permit a judicial member of the Industrial Court to switch roles immediately and act in either a conciliation or arbitration role as a Presidential Member of the Commission. That will provide enormous flexibility and cost savings to the State's industrial stakeholders.
- 9.13 Under amended section 149, the Governor appoints a 'Presidential Member' of the Commission as a member of the Industrial Court. Section 147 amended by the Bill refers to the President, Vice-President and Deputy Presidents as 'Presidential Members' as well as being a member of the Commission.
- 9.14 The Bill inserts Part 3 into Chapter 4 of the Act, which sets out the functions and jurisdiction of the Industrial Court:
- (a) Under section 151, judicial members may only exercise functions imposed on the Industrial Court when acting in their capacity as a judicial member of the Industrial Court. Judicial members may still exercise their general functions of the Commission outside of the Industrial Court
 - (b) Section 152 establishes the Industrial Court as a superior court of record, which is of an equivalent status to the Supreme Court and the Land and Environment Court

- (c) Section 153 sets out the jurisdiction of the Industrial Court, which includes hearing proceedings for an offence taken before the Commission, including proceedings for contempt
- (d) Under section 154, the Industrial Court may make binding declarations of right in relation to a matter in which the Commission has jurisdiction.

9.15 Under section 146 of the Act, the Commission has the following general functions:

- (a) setting remuneration and other conditions of employment
- (b) resolving industrial disputes
- (c) hearing and determining other industrial matters
- (d) inquiring into and reporting on any industrial or other matter referred to it by the Minister.

9.16 Under sections 146B and 146C of the Act, the Commission may also exercise certain dispute resolution functions under federal enterprise agreements and may give effect to certain aspects of government policy on public sector employment.

The Bill reinstates the offices of President, Vice President and Deputy President of the Commission, which the Bill refers to as 'Presidential Members' by amending section 147 of the *Industrial Relations Act 1996*. Under section 149, the Governor will appoint these Presidential Members as judicial members of the Industrial Court in the Commission. The Industrial Court has jurisdiction to hear civil and criminal industrial relations proceedings and make legally binding decisions, including proceedings for contempt.

As members of the Commission more generally, the judicial members of the Industrial Court may also exercise the general functions of the Commission and therefore also have non-judicial functions as members of the Commission. Therefore, the Bill may infringe the constitutional doctrine of the separation of powers, which strictly protects the independence and inherent legal powers of the judiciary from the legislature and executive branches of government in Australia.⁵ Under this doctrine, the actual and apparent independence of the judiciary and its members is strictly upheld. Any apprehension of bias or inability to act independently by the judiciary may impact a person's rights to procedural fairness and a fair trial and could be grounds for appeal.

The Committee acknowledges that, under new section 151, judicial members are only permitted to exercise judicial functions relevant to the Industrial Court when they are acting in their capacity as a judicial member of the Industrial Court. It also acknowledges that having the

⁵ Australian Law Reform Commission, [Traditional Rights and Freedoms – Encroachments by Commonwealth Laws](#), Interim Report 127, July 2015, ch 16.

Industrial Court as part of the Commission is intended to provide for flexibility.

However, the Committee is concerned that by having judicial members preside over proceedings in the Industrial Court who also exercise non-judicial functions of the Commission, including resolving industrial disputes, it may undermine the perception of independence of the Industrial Court to a lay person. While it recognises that there are already specialised courts and tribunals in NSW which exercise judicial functions, the Committee notes that the concerns relating to judicial independence may arise from the non-judicial official functions of the Industrial Court's members. For these reasons, the Committee refers this matter to Parliament for its consideration.

10. Local Government Amendment (De-amalgamation Plebiscites) Bill 2023*

Date introduced	22 November 2023
House introduced	Legislative Council
Member with carriage	Dr Amanda Cohn MLC
	*Private Members Bill

Purpose and description

- 10.1 The object of this Bill is to amend the *Local Government Act 1993* (the **Act**) to provide for a process for plebiscites to be held to vote on the de-amalgamation of amalgamated local government areas.

Background

- 10.2 The Bill seeks to make multiple amendments to the Act to facilitate the de-amalgamation of local government areas, through plebiscites decided by local electors. This includes proposed Schedule 10 which outlines how the plebiscites are initiated and conducted.
- 10.3 The Act provides the legal framework for the administration and operation of the system of local government in NSW. In her second reading speech, Dr Amanda Cohn MLC said that the Bill's proposed amendments 'will ensure the restoration of former local government areas where that is what communities want.'
- 10.4 Proposed Schedule 11 outlines how the Minister must give effect to a de-amalgamation after the plebiscite. It would require the Minister to make a recommendation that the Governor make a proclamation to give effect to a de-amalgamation, if a majority of electors have supported de-amalgamation.
- 10.5 The Bill also proposes to insert provisions regarding elections for de-amalgamated councils, costs of de-amalgamation and regulations necessary to give effect to de-amalgamation.

Issues considered by the Committee

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

11. Thoroughbred Racing Amendment Bill 2023

Date introduced	21 November 2023
House introduced	Legislative Assembly
Minister with carriage	The Hon. David Harris MP
Portfolio	Minister for Gaming and Racing

Purpose and description

- 11.1 The object of this Bill is to extend, by 24 months, the period of appointment of the current Chairperson of Racing NSW as—
- (a) an appointed member of Racing NSW
 - (b) the Chairperson of Racing NSW.

Background

- 11.2 The Bill seeks to amend the *Thoroughbred Racing Act 1996* (the **Act**) in relation to the term of office of the Chairperson of Racing NSW.
- 11.3 Under sections 6(4) and 16(4) of the Act, a person is not eligible to hold office as an appointed member of Racing NSW for more than 12 years total and the Chairperson may hold office for a period of up to 4 years. The current Chairperson will reach the maximum appointment term of 12 years once his current term ends in December.
- 11.4 The Bill proposes to insert Part 12, Clause 47 into Schedule 1 of the Act. This would extend the terms of appointment of the Chairperson of Racing NSW by 2 years.
- 11.5 In his second reading speech, the Hon. David Harris MP, Minister for Gaming and Racing said that the Bill's proposed amendment would:
- ... extend the term of appointment of Mr Balding as the chair and a member of Racing NSW for a further two years, from 19 December 2023 to 18 December 2025.
- 11.6 The Minister said that there is a need for continuity of corporate knowledge of the Racing NSW board which would be important for 'navigating changing regulatory and economic reforms confronting the racing industry over the next two years'.

Issues considered by the Committee

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

12. Transport Administration Amendment (TAHE) Bill 2023

Date introduced	21 November 2023
House introduced	Legislative Assembly
Minister with carriage	The Hon. Jo Haylen MP
Portfolio	Minister for Transport

Purpose and description

- 12.1 The object of this Bill is to amend the *Transport Administration Act 1988* (the **Act**) to reorder the priorities of the objectives of the Transport Asset Holding Entity of New South Wales (**TAHE**).

Background

- 12.2 In her second reading speech, the Hon. Jo Haylen MP, Minister for Transport explained that the purpose of the Bill was to:

...make it clear that the principal objective of the Transport Asset Holding Entity of New South Wales, also known as TAHE, is to undertake its activities in a safe and reliable manner. The other objectives, which include being a successful business, will be secondary to that overriding objective.

- 12.3 The Bill proposes to re-order section 10 of the Act to provide for one principle objective of TAHE, along with delegating other objectives.

- 12.4 Consequentially, the Bill also seeks to insert section 10(2A) into the Act. This provision provides that "the other objectives of TAHE are of equal importance, but are not as important as the principal objective of the corporation".

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*.

13. Unlawful Gambling Amendment (Betting on Animals) Bill 2023*

Date introduced	22 November 2023
House introduced	Legislative Council
Member responsible	The Hon. Emma Hurst MLC
	*Private Members Bill

Purpose and description

- 13.1 The object of this Bill is to amend the *Unlawful Gambling Act 1998* (the **Act**) to outlaw gambling on activities involving live animals, including:
- (a) making it an offence for a person in the State to place a bet on an activity involving a live animal, and
 - (b) making it an offence for a licensed bookmaker to carry on bookmaking for an activity involving a live animal.

Background

- 13.2 The Bill proposes to remove subsections 7(a) and (a1) from the Act to make it unlawful to conduct a totalizator or any betting activity under the *Totalizator Act 1997*. A 'totalizator' is defined under section 6 of the *Totalizator Act 1997* to mean any system that enables a person to invest money in order to make bets on certain outcomes and enables that money to be divided and distributed to successful bettors.
- 13.3 The Bill also proposes amendments to sections 8 and 9 of the Act to ban gambling on activities involving live animals. In her second reading speech, the Hon. Emma Hurst MLC stated that:

The bill does not actually ban horse racing or greyhound racing... What the bill does is amend the Unlawful Gambling Act 1998 to make it an offence for a person to gamble on an activity involving a live animals, and it also make it an offence for a bookmaker to offer bets on such activities.

Issues considered by the Committee

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

Absolute liability offence

- 13.4 The Bill replaces section 8 in the Act by creating a new offence for gambling on an activity involving a live animal. This includes but is not limited to:
- (a) greyhound racing
 - (b) harness racing
 - (c) horse racing

(d) jumps racing.

13.5 This offence carries a maximum penalty for individuals of 50 penalty units (\$5 500) and/or imprisonment for 1 year.

13.6 The Bill amends section 9 to make it an offence for a licensed bookmaker to continue bookmaking for an activity involving a live animal. An individual faces a penalty of 100 penalty units (\$11 000) and/or 2 years imprisonment for a first offence. For a second offence, the monetary penalty increases to 500 penalty units (\$55 000).

The Bill amends sections 8 and 9 of the *Unlawful Gambling Act 1998* to introduce offences for gambling on an activity involving live animals. Amended section 8 would make it an offence for a person to place a bet on an activity involving a live animal, carrying a penalty of \$5 500 and/or imprisonment for 1 year. Amended section 9 would make it unlawful for a bookmaker to offer bets on an activity involving a live animal. For a first offence of section 9, an individual may be required to pay a penalty of \$11 000 and/or face imprisonment for 2 years. For a second offence, the monetary penalty increases to \$55 000.

The Bill may therefore establish absolute liability offences. The Committee generally comments on absolute liability offences as they depart from the common law principle that the mental element of 'fault' should be proven to establish criminal liability. The Committee acknowledges that absolute liability offences are not uncommon in regulatory frameworks to encourage compliance. The Committee also acknowledges that the offences are intended to reduce harm to animals in racing industries and to address problem gambling.

However, the Committee notes that the maximum penalty for these offences include custodial penalties and that there are no defences available. For these reasons, the Committee refers this matter to Parliament for its consideration.



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. Annual Determination (n2023-1728)

The object of this Annual Determination is to make a determination on the remuneration to be paid to the Governor. This Determination is consistent with the temporary wages policy which the Statutory and Other Officers Remuneration Tribunal (the *Tribunal*) is required to give effect to pursuant to the *Statutory and Other Offices Remuneration (Judicial and Other Office Holders) Regulation 2013*.

Pursuant to section 13 and to Part 3 of Schedule 6 of the *Statutory and Other Offices Remuneration Act 1975*, the Tribunal determines that there will be no increase to the remuneration to be paid to the holder of the office of Governor effective on and from 1 October 2023.

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

2. Border Fence Maintenance Amendment Regulation 2023

The object of the Regulation is to amend the *Border Fence Maintenance Regulation 2018* to prescribe the maximum amount that may be imposed and collected by the Border Fence Maintenance Board under the *Border Fence Maintenance Act 1921* as 7 cents per hectare.

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

3. Conveyancing (General) Amendment (Miscellaneous) Regulation 2023

The object of this Regulation is to amend the *Conveyancing (General) Regulation 2018* to:

- (a) clarify how the Registrar-General allocates distinctive references to instruments lodged for registration in the General Register of Deeds electronically
- (b) require the Registrar-General to give persons who lodge instruments electronically a copy of the registered instrument
- (c) omit obsolete provisions, including a provision requiring certain documents to be lodged by hand and a transitional provision that is spent, and
- (d) update the names of certain corporations.

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

4. Criminal Procedure Amendment (Penalty Notice) Regulation 2023

The objects of this Regulation are to:

- (a) amend the *Criminal Procedure Regulation 2017* to enable penalty notices to be issued for an offence under the *Crimes Act 1900*, section 93IB(1),
- (b) omit an obsolete provision of the *Summary Offences Regulation 2020*.

The Regulation amends the *Criminal Procedure Regulation 2017* to define certain knife related offences as penalty notice offences. While it establishes penalty notice offences, it does not create any new offences and the penalty notices only apply to offences that also include custodial sentences.

5. Environmental Planning and Assessment Amendment (Special Contributions Areas Infrastructure Fund) Regulation 2023

The object of this Regulation is to authorise, under certain conditions, money to be paid to the Commonwealth from the Special Contributions Areas Infrastructure Fund established under the *Environmental Planning and Assessment Act 1979*, section 7.28.

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

6. Environmental Planning and Assessment Amendment (Sustainable Buildings) Regulation 2023

The object of this Regulation is to amend the uncommenced *Environmental Planning and Assessment Amendment (Sustainable Buildings) Regulation 2022* to make changes required before the commencement of that regulation and *State Environmental Planning Policy (Sustainable Buildings) 2022* on 1 October 2023.

This Regulation also makes further provision for BASIX certificates that accompany development applications and applications for complying development certificates for BASIX development and BASIX optional development.

This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including sections 4.12(9), 4.17(11), 4.28, 4.64, 6.33(1) and 10.13, the general regulation-making power.

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

7. Environmental Planning and Assessment Legislation Amendment (Housing and Productivity Contributions) Regulation 2023

The object of this Regulation is to make amendments to the *Environmental Planning and Assessment Regulation 2021* and the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021* consequent on the enactment of the *Environmental Planning and Assessment Amendment (Housing and Productivity Contributions) Act 2013* (the **amending Act**).

The amending Act amends the *Environmental Planning and Assessment Act 1979* (the **principal Act**) to establish a new housing and productivity contributions scheme. The new scheme replaces the scheme for development contributions for the provision of infrastructure in relation to development on land in a special contributions area.

In particular, this regulation makes amends of a savings or transitional nature:

- (a) to deal with the application of certain provisions of the principal Act to development in former and continuing special contributions areas
- (b) to provide for the continuation of the Special Contributions areas Infrastructure Fund, and
- (c) to provide for the construction of references in planning agreements and other instruments.

This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including sections 10.13, the general regulation-making power, and 10.15 and Schedule 4, Part 1.

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

8. Fisheries Management (Mulloway Possession Limit) Order (No 2) 2023 (n2023-1876)

This Order makes provisions around possession limits for Mulloways. The limits differ according to the purpose of the possession. The Order refers to the following different purposes:

- (a) recreational possession
- (b) recreational boat
- (c) charter boat
- (d) commercial possession.

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

9. Liquor Amendment (Special Events Extended Trading) Regulation (No 3) 2023

The object of this Regulation is to enable certain hotels and clubs to trade during extended hours for certain special events held in October 2023, including the Rugby World Cup.

This Regulation is made under the *Liquor Act 2007*, sections 13 and 159, the general regulation-making power.

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

10. Motor Accident Injuries Amendment Regulation 2023

The object of this Regulation is to amend the *Motor Accident Injuries Regulation 2017* to provide that the *Motor Accident Injuries Act 2017* (the **Act**), Schedule 2, clause 2(c), as in force immediately before its repeal on 1 April 2023 (the **repealed provision**), continues to apply in relation to a motor accident occurring before 1 April 2023. The continued application of the repealed provision will enable medical assessors at the Personal Injury Commission to determine whether, for the Act, section 3.28, treatment or care provided to an injured person will improve the recovery of the injured person.

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

11. [NSW Admission Board Amendment Rule 2023](#)

The objective of this Rule is to amend the *NSW Admission Board Rules 2015* to remove the requirement for an application for relaxation to be made directly to the Examinations Committee but instead for these to be made to the Executive Officer to the Board.

This Rule is made under the *Legal Profession Uniform Law Application Act 2014*.

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

12. [Parliamentary Remuneration Amendment Regulation \(No 2\) 2023](#)

The object of this Regulation is to amend the additional salary and expense allowance of certain office holders.

This Regulation is made under the *Parliamentary Remuneration Act 1989 (the Act)*, 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, Schedule 1.

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

13. [Transport Legislation Amendment \(Penalties, Fees and Charges\) Regulation 2023](#)

This Regulation amends various instruments relating to transport to increase certain penalty levels, fees and charges imposed for offences dealt with by the issue of a penalty notice. The penalty, fee and charge increases are generally in line with movements in the Consumer Price Index.

This Regulation is made under the following Acts:

- (a) the *Driving Instructors Act 1992*, including sections 11(2), 30(2)(b) and 59, the general regulation-making power
- (b) the *Marine Safety Act 1998*, including sections 19K(1), 37 and 137, the general regulation-making power
- (c) the *Photo Card Act 2005*, including sections 5(3), 34(2) and 36, the general regulation-making power
- (d) the *Ports and Maritime Administration Act 1995*, including sections 85G and 110, the general regulation-making power
- (e) the *Road Transport Act 2013*, including sections 23, the general statutory rule-making power, 24, 32(1) and 195 and Schedule 1
- (f) the *Roads Act 1993*, including sections 243(2) and 264, the general regulation-making power.

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

Appendix Three – Unconfirmed extracts of minutes

Meeting no. 8

TIME & DATE: 3:02PM, 20 NOVEMBER 2023

LOCATION: ROOM 1136 AND WEBEX

MEMBERS PRESENT

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

APOLOGIES

Nil.

OFFICERS PRESENT

Sam Griffith, Anna Tran, Kate McCorquodale, Kayaneh Mouradian, Alex Read, Mengyuan Chen.

AGENDA ITEM

1. Confirmation of minutes

Resolved, on the motion of Mr Hagarty: That the minutes of the meeting of 20 November 2023 be confirmed.

2. Correspondence

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3. Consideration of Bills with comment for Legislation Review Digest 8/58

Resolved on the motion of Mr Murphy: That the Committee adopts the following draft bill reports *in globa*:

- a. Casino Control Amendment Bill 2023
- b. Crimes Amendment (Prosecution of Certain Offences) Bill 2023
- c. Energy Legislation Amendment Bill 2023
- d. Greater Cities Commission Repeal Bill 2023
- e. High Risk Offenders Legislation Amendment Bill 2023
- f. Human Tissue Amendment (Ante-mortem Interventions) Bill 2023
- g. Industrial Relations Amendment Bill 2023
- h. Unlawful Gambling Amendment (Betting on Animals) Bill 2023.

4. Consideration of Bills without comment for Legislation Review Digest 8/58

Resolved on the motion of Mr Murphy: That the Committee adopts the following draft bill reports *in globa*:

- a. Customer Service Legislation Amendment Bill 2023

- b. Environmental Planning and Assessment Legislation Amendment (Agritourism) Bill 2023
- c. Local Government Amendment (De-amalgamation Plebiscites) Bill 2023
- d. Thoroughbred Racing Amendment Bill 2023
- e. Transport Administration Amendment (TAHE) Bill 2023.

5. Regulations without comment for Legislation Review Digest No 8/58 (Appendix Two)

Resolved, on the motion of Mr Layzell: That the Committee adopts the regulations without comment as Appendix Two to Digest 8/58.

6. Legislation Review Digest 8/58

Resolved, on the motion of Ms Stuart:

- That appropriate minute extracts of this meeting be published as Appendix Three to the Digest.
- That the Committee adopts the Legislation Review Digest 8/58 and that it be signed by the Chair and presented to the House.

7. Regulations to be reviewed

The Committee noted the table listing the status of regulations and statutory instruments to be reviewed.

8. General business

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9. Next Meeting

The meeting adjourned at 3:07 pm until 3.00pm on Monday, 4 December 2023.