

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	28
1. Bail and Crimes Amendment Bill 2024.....	29
2. Children and Young Persons (Care and Protection) Amendment Bill 2024.....	35
3. Conversion Practices Ban Bill 2024.....	39
4. Electoral Amendment (Voter ID and Electronic Mark Off) Bill 2024*	48
5. Emergency Services Levy Amendment Bill 2024.....	50
6. Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Bill 2024.....	52
7. Independent Commission Against Corruption Amendment (Ministerial Diary Disclosure) Bill 2024*	66
8. Rural Fires Amendment (Red Fleet) Bill 2024*	68
PART TWO – REGULATIONS WITHOUT COMMENT.....	69
APPENDICES.....	72
Appendix One – Functions of the Committee.....	73
Appendix Two – Unconfirmed extracts of minutes.....	75

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 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.

Part Three: Regulations without comment

The Committee reviews all disallowable regulations which have been tabled in Parliament. However, unlike Bills, the Committee is only required by statute to report on those regulations with identified issues under section 9, rather than reporting on every regulation made.

Part Three to the Digest contains a brief summary of the regulations that do not engage with any issues under section 9 or, in the Committee's view, do not warrant further comment.

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. Bail and Crimes Amendment Bill 2024

Issue identified	Conclusion of Committee
Right to the presumption of innocence, liberty and freedom from arbitrary detention – requirement for granting bail	Referred
Elements of an offence for a 'performance crime'	Referred
Retrospectivity	Referred

2. Children and Young Persons (Care and Protection) Amendment Bill 2024

Issue identified	Conclusion of Committee
Extraterritorial application of laws	Referred
Retrospective application of laws	Referred

3. Conversion Practices Ban Bill 2024

Issue identified	Conclusion of Committee
Widely defined harm element of offence	Referred
Application of laws outside NSW	Referred
Autonomy and decision-making – no ability to consent	Noted
Wide investigation powers of the President – strict liability offence, privacy rights, right to silence and privilege against self-incrimination	Referred
Broadly worded powers of the President	Referred
Excludes administrative review	Referred
Wide regulation-making power	Referred
Wide power of delegation under regulations	Referred

4. Electoral Amendment (Voter ID and Electronic Mark Off) Bill 2024*

Issue identified	Conclusion of Committee
Access to voting – right to participate in public elections	Referred

5. Emergency Services Levy Amendment Bill 2024

Issue identified	Conclusion of Committee
Privacy rights – authority to require disclosure of personal information	No further comment

6. Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Bill 2024

Issue identified	Conclusion of Committee
Absolute liability offences	No further comment
Right to the presumption of innocence - reversal of the onus of proof	Referred
Presumption of innocence – prohibition orders	Referred
Procedural fairness – prima facie evidence	Referred
Procedural fairness – service of documents on effected persons	Referred
Application of the EPA's powers outside NSW	Referred
Determination of additional monetary punishment by prosecutor	Referred
Executive and administrative immunity – exclusion of liability for public statements	Referred
Matters deferred to regulations – creation of offences	No further comment

7. Independent Commission Against Corruption Amendment (Ministerial Diary Disclosure) Bill 2024*

Issue identified	Conclusion of Committee
Privacy rights – providing personal information	No further comment

8. Rural Fires Amendment (Red Fleet) Bill 2024*

No issues identified

Summary of Conclusions

PART ONE – BILLS

1. Bail and Crimes Amendment Bill 2024

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

Right to the presumption of innocence, liberty and freedom from arbitrary detention – requirement for granting bail

The Bill proposes to insert section 22C into the *Bail Act 2013* that would temporarily place an additional threshold for granting bail for young persons aged between 14 and 18 years who are alleged to have committed a motor theft or serious break and enter offence, while on bail for separate charges of either of these 'relevant offences'. The amendments would require a bail authority to deny bail, unless they have a 'high degree of confidence' that the young person will not commit a serious indictable offence while on bail, subject to any proposed bail conditions.

Proposed section 22C therefore extends the circumstances where an accused young person can be denied bail, on the basis that the young person is alleged to have committed a 'relevant offence' while on bail for another 'relevant offence'. It also presumes against granting bail unless the decision maker is 'highly confident' that the accused person will not commit a serious indictable offence while on bail'. The Bill may therefore impact an individual's right to the presumption of innocence, which guarantees that a person is presumed innocent until proven guilty according to the standards of criminal law. It may also infringe on their right to liberty and freedom from arbitrary detention contained in Article 9 of the ICCPR, which provides that holding accused persons in remand should not be the general rule.

The Committee notes that the Bill seeks to address repeat offending in young people that may pose a risk to community safety. The Committee also acknowledges that the proposed amendments do not change the requirement for the bail authority to assess whether a accused young person poses an 'unacceptable risk'. It also requires consideration of whether conditions could be set for granting bail, that might address concerns that the accused will commit a serious indictable offence while released on bail. The Committee further acknowledges that the new threshold for granting bail is temporary, with a 12 month expiration period, to allow for a review of the impacts of the reforms.

However, the Committee notes that the threshold of 'a high degree of confidence' is a discretionary one that lies with the bail authority. These decisions may be made on a lower standard of proof than that required in criminal proceedings given the subjective nature of 'confidence'. In addition, the Committee notes that the potential extension of refusal to grant bail applies where the accused person is aged between 14 and 18 years. Young people under the age of 18 years may lack the capacity to understand the consequences of a refusal to be released on bail. For these reasons, the Committee refers this matter to Parliament for its consideration.

Elements of an offence for a 'performance crime'

The Bill seeks to establish a new 'performance crime offence' by inserting section 154K into the *Crimes Act 1900*. A person commits a performance offence where they have disseminated materials to advertise an act or omission constituting a base offence, being a motor vehicle theft or break and enter offence, or to advertise their involvement in the offence. A person who disseminates such materials would only commit a performance crime offence if their act or

omission constitutes a base offence. Under the Crimes Act, convictions for a base offence would require an element of 'fault', being either intent or fraud.

The Committee notes that it is unclear from section 154K proposed by the Bill whether an accused person can be convicted of the performance crime offence without the need to establish the fault element of the base offence, or whether a person must merely commit an act or omission of 'motor theft' or 'break and enter' regardless of whether there was intent or fraud. Therefore, the performance crime offence proposed by the Bill may be characterised as a strict liability offence. The Committee generally comments on strict 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 recognises that the new offence is intended to protect public safety by deterring criminal behaviour that may be regarded as encouraging or incentivising similar offending. It also acknowledges that the amendments clarify that a person cannot be convicted of both the performance crime offence and the base offence in respect of the same act(s) or omission(s).

However, the Committee notes that, despite this clarification, it may be difficult for a lay person to understand what must be established by the prosecution to convict somebody of a 'performance crime issue'. This is of particular concern where a conviction for a performance crime offence carries a floating maximum penalty, being a maximum imprisonment term of two years on top of the maximum imprisonment term for the base offence. In those circumstances, an accused person may be sentenced to a greater imprisonment term than the base offence, without the need to demonstrate the fault required to establish the base offence. For these reasons, the Committee refers this matter to Parliament for its consideration.

Retrospectivity

The Bill seeks to insert a transitional provision clause into Schedule 3 of the *Bail Act 2013* which would extend the application of the proposed amendments around bail decisions for certain accused young persons to 'offences committed or alleged to have been committed, or charged, before the commencement of the amendment'. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

The Committee acknowledges that the provision is intended to capture those young people who would be considered repeat offenders of the motor theft or break and enter offences at the time of the Bill's commencement. However, the Committee notes that the retrospective application of the amendments may impact a young person's right to liberty and freedom from arbitrary detention, as well as their right to the presumption of innocence, which are fundamental guarantees in criminal proceedings. Additionally, these amendments would affect young persons aged under 18 years. The Committee notes that young people may have less capacity to understand how laws apply to them. The retrospective application of the provisions may only make it harder for a young person to understand how criminal laws particularly impact them. For these reasons, the Committee refers this matter to Parliament for its consideration.

2. Children and Young Persons (Care and Protection) Amendment Bill 2024

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

Extraterritorial application of laws

The Bill proposes to amend section 4 of the *Children and Young Persons (Care and Protection) Act 1998* to explicitly state a legislative intention for the Act to apply to outside of NSW, and clarify

that the Act may exercise functions for children or young people who have a 'sufficient connection' to NSW. This extraterritorial application of the Act would include children and young persons who do not live in, or who are not present in NSW.

The Bill therefore seeks to extend the legislative jurisdiction of the Act beyond the State of NSW. Extraterritorial application of the Act could also create conflict between the Act and another jurisdiction's laws concerning the care of children and young people.

The Committee generally comments on provisions that have extraterritorial effect as they impact on the rule of law principle that a person is entitled to know the law that applies to them at any given time. However, the Committee notes that the Act only has extraterritorial application to the extent that it is permitted under NSW law. Further, the Committee acknowledges that the proposed extraterritorial application addresses interjurisdictional challenges arising from recent court decisions. The amendments are intended to ensure that the Act can continue to regulate the care and protection of children and young people who are subject to NSW care proceedings but may be in other jurisdictions. For this reason, the Committee makes no further comment in respect to the extraterritorial application.

However, the proposed amendments to section 4 of the Act would extend the exercise of functions under the Act to children and young people who have a 'sufficient connection to' NSW. Subsection 4(3) which would be inserted by the Bill sets out a number of broad, subjective factors that 'may be considered' to determine whether a sufficient connection exists. The Committee notes that the Bill could be broadly interpreted to apply to children and young people who have never resided in NSW. Because children and young people could be subject to care orders that involve their removal from their existing households and permanent placement with other carers, the Committee refers this matter to Parliament to consider defining what amounts to a 'sufficient connection' in more specific and limited terms.

Retrospective application of laws

The Bill proposes to insert additional transitional and savings provisions into Schedule 3 of the *Children and Young Persons (Care and Protection) Act 1998*, to validate functions exercised and orders made under the Act before the commencement of the Bill, if those functions or orders would have been valid under the Bill as commenced.

Therefore the Bill seeks to apply retrospectively, by validating the exercise of powers and orders made under the Act before it commenced. The Committee generally comments on provisions that are drafted to have retrospective effect, as they impact on the rule of law principle that a person is entitled to know the law that applies to them at any given time. In this case, the retrospective validation may also amount to legislative interference with the rights of affected parties to seek legal recourse over care decisions by extinguishing potential avenues for appeal.

The Committee acknowledges that the retrospective application of the proposed amendments is intended to address uncertainty about the jurisdiction of the Children's Court following a recent decision of the Court of Appeal. It further acknowledges that this retrospective validation may prevent disruptions for children and young people who are in care placements. However, the proposed retrospective operation of the Bill undermines the rule of law, by retrospectively validating decisions or orders which were made outside of the legal limits of the Act. As these decisions and orders concern the potential removal of children and young people and their placement into new households, the Committee refers the matter to Parliament for its consideration.

3. Conversion Practices Ban Bill 2024

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

Widely defined harm element of offence

Section 5 of the Bill would establish a new criminal offence for the provision or delivery of conversion practices with the intention to change or suppress an individual's sexual orientation or gender identity, if it causes mental or physical harm to the individual that endangers their life or is 'substantial'. This offence carries a maximum penalty of five years imprisonment and subsection (4) explicitly excludes any defence of consent.

The Committee notes that there does not appear to be any provisions in the Bill which would define or narrow what might constitute 'substantial' physical or mental harm. Therefore, the Bill may create an offence that includes a widely defined element of harm that could capture a broad range of potential physical and mental harms.

By prohibiting practices intended to change or suppress sexual orientation or gender identity, the Committee acknowledges that these offences may be intended to protect the rights of equality and non-discrimination of LGBTQIA+ people. The Committee acknowledges that 'substantial harm' has been held in recent court cases to mean harm that is 'more than trivial or inconsequential' and requires more than 'taking offence, hurt feelings or shame and humiliation'.

However, the Committee notes that this definition may not be accessible to lay persons as it is comes from caselaw and requires an understanding of binding precedents in law. Without any definition of 'substantial harm' in the Act, the widely defined element of harm may make it difficult for a person to understand the scope of these criminal offences. As the offence carries a maximum penalty of five years imprisonment, the Committee refers the matter to Parliament for consideration.

Application of laws outside NSW

Section 5 of the Bill seeks to establish a criminal offence for the provision or delivery of conversion practices. Subsection (3) extends the application of that criminal offence to conversion practices provided or delivered 'partly in NSW and partly outside NSW'. The Committee generally comments where legislation may have extraterritorial effect because it may create uncertainty for individuals about what laws apply to them at any one time.

The Committee acknowledges that it is intended that legal principles which presume against the extraterritorial application of criminal laws do not apply to the proposed amendments, as the criminal conduct must still partly occur within NSW. The Committee also recognises that the partial extraterritorial application of the offence may be intended to strengthen compliance with the legislative prohibition on conversion practices.

However, the Committee notes that a person providing or delivering a conversion practice to an individual outside of NSW may not be aware that the individual has previously or will in the future be partly subjected to a conversion practice in NSW. Further, a person outside of NSW may not be aware of the legislative ban on conversion practices or the extraterritorial application of criminal offences for providing conversion practices to them. As the offence carries a maximum penalty of five years imprisonment, the Committee refers the matter to Parliament for consideration.

Autonomy and decision-making – no ability to consent

Section 6 of the Bill seeks to create new criminal offences taking an individual outside NSW or arranging them to be taken outside NSW with the intent to subject them to a conversion practice. It would also criminalise engaging a person outside of NSW to provide or deliver a conversion practice to an individual in NSW. Under proposed subsection 6(2), both offences apply regardless of whether the individual has legal capacity and consents to being taken or being subjected to the conversion practice, or arranges to be taken outside NSW.

The Bill may therefore interfere with the right to autonomy and decision-making of an individual who has legal capacity to make decisions for themselves. The Committee notes that the combined effect of proposed subsections 6(1) and (2) appears to criminalise a person who willingly leaves or engages someone outside of NSW to receive a conversion practice. Unlike the offence under proposed section 5, this criminal offence does not require proof of an element of harm resulting from the offending conduct.

The Committee also acknowledges that these offences may be intended to prevent people from avoiding the prohibition against conversion practices under the Bill by arranging for or engaging in conversion practices outside NSW. The Committee further recognises that the offence is intended to strengthen protections for individuals by preventing them from being subjected to the potential harm caused by conversion practices outside NSW. In the circumstances, the Committee notes the matter for Parliament's consideration.

Wide investigation powers of the President – strict liability offence, privacy rights, right to silence and privilege against self-incrimination

The Bill seeks to provide the President of the Anti-Discrimination Board with a number of investigative powers under Part 4. This includes the power to require the complainant, the entity which a complaint is made against or a third-party entity to produce information or documents under proposed section 17. Under this section, the complainant or entity must provide any of the relevant information or documents to the President within the period specified in the notice. Section 17 would also empower the President to require a third-party entity to supply information or documents.

Non-compliance with any notice to provide information to the President without 'a reasonable excuse' is an offence carrying a maximum penalty of \$1 100 (10 penalty units) for an individual and \$5 500 (50 penalty units) for other entities. Therefore, the Bill may provide for a strict liability offence. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of 'fault' should be proven to establish criminal liability.

There does not appear to be any provisions which would define what amounts to 'a reasonable excuse'. Although proposed section 51 provides that the President must not exercise their functions in a way that would prejudice criminal proceedings or a criminal investigation, it is unclear whether self-incrimination would be 'a reasonable excuse' for not providing information or documents to the President under proposed section 17. Therefore, the Bill may also provide the President with wide powers of investigation, the exercise of which may impact an individual's right to silence and privilege against self-incrimination as well as their privacy rights if it requires disclosure of their personal or sensitive information.

The Committee recognises that these provisions may be intended to facilitate the investigation of a complaint about conversation practices, which may help strengthen compliance with the legislative prohibition under the Bill. However, the Committee also notes that the exercise of these powers may require individuals, potentially including complainants who were victims of

conversion practices, to comply at the pain of penalty. As compliance may impact on their individual rights, the Committee refers this matter to Parliament for consideration.

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

Broadly worded powers of the President

The Bill seeks to introduce a civil complaints scheme under Part 4, to provide an avenue and process for the victims of conversion practices to make a complaint. Under proposed section 12, the President of the Anti-Discrimination Board may 'assist' an individual to make a complaint. The Bill does not appear to have any provisions which would specify or narrow what assistance the President may provide to the complainant. Proposed subsection 22(1)(b) of the Bill would empower the President to decline a complaint if the President is satisfied for 'any other reason' that no further action should be taken. The Committee notes that this is broadly worded and may give the President an unlimited discretion to decline a complaint.

Therefore, the Bill may provide insufficiently defined powers to the President in respect to the making and declining of complaints under the proposed civil scheme. As 'assist' can be broadly interpreted and the President may have an almost unlimited discretion to decline to progress a complaint, these broadly worded powers may impact a complainant's right to redress under the scheme.

The Committee recognises that the broadly worded powers may provide flexibility in the exercise of the President's functions under the complaints scheme. It also acknowledges that proposed section 27 would allow a complainant whose complaint has been declined, to request the complaint be referred to the Civil and Administrative Tribunal. However, the complaint could only be the subject of Tribunal proceedings if the Tribunal grants leave under proposed section 34. Any refusal to grant leave would not be internally appealable under the Bill's proposed amendments to the *Civil and Administrative Tribunal Act 2013*. For these reasons, the Committee refers this matter to Parliament for consideration.

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

Excludes administrative review

The Bill proposes to empower the President of the Anti-Discrimination Board to decline a complaint under section 15. Proposed subsection 15(5) provides that a decision to decline a complaint in whole or in part is not reviewable by the Civil and Administrative Tribunal. Therefore, the Bill may provide the President with a non-reviewable decision to decline. This may infringe upon a complainant's right to procedural fairness and, as it concerns a complaint which may lead to remedies and enforceable actions, may make a complainant's rights or obligations dependent upon a non-reviewable decision.

The Committee acknowledges that proposed section 27 would allow the complainant whose complaint has been declined by the President to request the complaint be referred to the Tribunal. However, the Tribunal must first grant leave for the complaint to be the subject of Tribunal proceedings for it to proceed, under proposed section 34. The Committee further notes that the complainant would not be able to internally review the decision of the Tribunal to not grant leave. For these reasons, the Committee refers this matter to Parliament for consideration.

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

Wide regulation-making power

Section 55 of the Bill seeks to provide a power to make regulations about anything 'necessary or convenient to be prescribed for carrying out or giving effect' to the Bill.

The Committee notes that there does not appear to be any provisions that clarify or narrow the meaning of 'convenient'. The Bill may therefore include wide regulation-making power. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when it commences.

The Committee recognises that this regulation-making power may allow for more flexible regulatory responses. It also acknowledges that any regulations would still have to be tabled in Parliament and therefore subject to disallowance under section 41 of the *Interpretation Act 1987*. However, the proposed regulation-making power may effectively allow regulations to prescribe matters with little limit. For these reasons, the Committee refers this matter to Parliament for consideration.

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

Wide power of delegation under regulations

Proposed section 32 of the Bill provides the President of the Anti-Discrimination Board with the power to delegate the exercise of one of their functions under Part 4 of the Bill to a 'specified individual' or the holder of a 'specified office'. Significant functions of the President under Part 4 includes investigating a complaint, referring declined complaints to the Civil and Administrative Tribunal and enforcing an order of the Tribunal.

The Bill does not have any provisions for who may be a specified individual or office holder to whom functions may be delegated under proposed section 32, or any qualifications required by those persons. It does not set out how an individual or office may be so 'specified' or who is responsible for making that designation. Therefore, the Bill may provide for a wide power of delegation of statutory functions under Part 4 to unknown persons or an unknown class of persons.

The Committee notes that the proposed delegation power may effectively delegate statutory powers and functions without any oversight by the Parliament. Under proposed section 32, private individuals could be delegated functions under the Bill that the public may expect to be performed by public officials. The Committee prefers that the delegation of statutory functions be detailed in primary legislation to ensure appropriate parliamentary scrutiny over the exercise of these functions. For these reasons, the Committee refers this matter to Parliament for consideration.

4. Electoral Amendment (Voter ID and Electronic Mark Off) Bill 2024*

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

Access to voting – right to participate in public elections

The Bill proposes to amend the Electoral Act 2017 to introduce a requirement to show a current identification document to an election official when voting. It also proposes to insert subsection 127(3)(d) which requires an election official to refuse a person's claim to vote if they fail or refuse

to show a relevant identification document. By requiring a person to produce identification documents to vote, the Bill may infringe on a person's access to voting and thereby impact on their right to vote and participate in public elections.

The Committee acknowledges that the amendments are intended to protect the integrity of the election process. However, the Committee notes that every person entitled to vote is constitutionally obligated to vote in each election and the Act establishes an offence for failing to do so. By potentially limiting access to voting, a person may be at greater risk of committing an electoral offence. For these reasons, the Committee refers the matter to Parliament for its consideration.

5. Emergency Services Levy Amendment Bill 2024

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

Privacy rights – authority to require disclosure of personal information

The Bill proposes amendments to section 47 of the *Emergency Services Levy Act 2017* to allow the Treasury Secretary or a person employed in Treasury to collect personal information from insurers. Such information can be collected for the purposes of 'evaluating and implementing reforms to the way in which emergency services are funded'.

The Bill may therefore impact individual's privacy rights by requiring that insurers provide personal information for collection and use, as an individual's personal information is otherwise protected from disclosure and use under the *Privacy and Personal Information Protection Act 1998*. The Committee is particularly concerned that these provisions would empower the Executive to require disclosure of personal information by insurers without any requirement to notify a person that their information will be disclosed or given an opportunity to object.

However, the Committee acknowledges that the proposed amendments would allow the Treasurer to obtain necessary data to inform emergency services funding reform. The Committee further acknowledges that the Bill includes privacy protections, including restricting disclosure of information obtained to Treasury employees only, requiring the disposal of the information by 30 June 2028, and sunsetting the provisions that empower personal information collection by December 2026. In the circumstances, the Committee makes no further comment.

6. Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Bill 2024

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

Absolute liability offences

The Bill proposes to amend the *Protection of the Environment Operations Act 1997* and the *Dangerous Goods (Road and Rail Transport) Act 2008* to introduce a number of new offences for illegal waste dumping, non-compliance with a notice or direction of the EPA and its authorised officers, or removal of a document relating to a contravention before that contravention has been remedied. For some of these new offences, a person may not be guilty if they have a 'reasonable' or 'lawful' excuse. These offences carry a maximum penalty ranging from \$11 000 to \$1 million, and additional cumulative penalties may apply for each continuing day for certain offences.

The Committee notes that the terms 'reasonable excuse' or 'lawful excuse' do not amount to either a defence in respect to a criminal offence or a mental element to prove guilt. Therefore, the Bill may establish a number of absolute liability offences.

The Bill also proposes to omit clause 96 of the *Protection of the Environment Operations (Waste) Regulation 2014*, which provides a defence for a person who does not comply with a requirement for the supply of waste under a resource recovery order. This offence carries a maximum penalty of \$22 000 for an individual. A defendant may rely on the defence under clause 96 if they can prove that, at the time of supplying the waste, they believed the person receiving the waste did not have certain intentions and that belief was based on reasonable grounds. By removing the only available defence to the offence under clause 96, the Bill may therefore convert the existing offence into an absolute liability offence.

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. However, the Committee recognises that absolute liability offences are not uncommon in regulatory settings in order to encourage compliance. Further, these offences are intended to deter illegal dumping of waste, including potentially dangerous materials, in public or open private places and to ensure compliance with the EPA's functions to protect public safety and protect the wider community from environmental damage. The Committee also acknowledges that the maximum penalties carried by these proposed offences would only be monetary and not custodial. In the circumstances, the Committee makes no further comment.

Right to the presumption of innocence - reversal of the onus of proof

The Bill proposes to create an offence of illegal dumping by inserting section 144AE into the *Protection of the Environment Operations Act 1997*. Proposed section 144AF would set out certain exceptions to this absolute liability offence. The Bill also proposes to insert new subsection 256(2) into the Act. This would provide that the onus of proving an exception under proposed section 144AF would lie with the defendant.

By requiring the defendant to prove the exceptions, even on the balance of probabilities, the Bill may therefore provide for a reversal of the onus of proof. In regard to criminal actions, a reversed onus may undermine a defendant's right to the presumption of innocence. Ordinarily, the prosecution is required to prove all elements of an offence beyond reasonable doubt, before a defendant can be found guilty of the offence.

The Committee recognises that, without the provision of exceptions, the proposed offence of illegal dumping would effectively capture all forms of incidental or authorised deposit of litter and waste. The exceptions may be intended to appropriately balance the need to deter littering with the effective management of public land. The Committee also recognises that the relevant offence does not attract custodial sentences, and that reversing the onus of proof may sometimes be justified where it relates to an issue that is particularly within the knowledge of the accused.

However, the Committee notes that the exceptions provided under the Bill are separate to the matter of proof in criminal proceedings. The Committee notes that, by requiring the defendant to prove they met an exception, it may reduce the need for the EPA or other bodies investigating potential offences to establish whether an exception was met before proceeding with prosecution. For this reason, the Committee refers the matter to Parliament for consideration.

Presumption of innocence – prohibition orders

The Bill proposes to insert section 253A into the *Protection of the Environment Operations Act 1997* to authorise the EPA to apply to the Land and Environment Court for a prohibition order

against a person. An application or grant of a prohibition order would prevent a person from applying for, or holding an environment protection licence for either a specified or an indefinite period of time. The amendments would allow the EPA to apply for this order against a person who it considers is 'likely to engage again or continue to engage in unlawful conduct'.

Because the Bill authorises an order to be sought or granted against a person who has not been charged or convicted of an offence under the Act, but is considered likely to engage in unlawful conduct, the Bill may therefore infringe on the person's right to the presumption of innocence. The Committee generally comments on bills that impact a person's right to the presumption of innocence. This is because it is a fundamental common law principle that protects a person's right to be presumed innocent of an offence until proven guilty to the criminal standard of proof, and because this right is protected under article 14 of the ICCPR.

The Committee acknowledges that the prohibition order only prevents a person from applying for an environment protection licence under the Act and does not include a penalty or attract an offence. The Committee also recognises that the prohibition order is intended to deter repeated contraventions of environmental protections and therefore to preserve public safety.

However, the Committee notes that an indefinite prohibition from holding an environment protection licence may effectively prevent a person from undertaking work or business requiring them to perform scheduled activities. They would also be prohibited from applying for a licence and therefore undertaking the work during the period when the application is being determined by the Court, that is, before the Court finds that they are likely to engage again in unlawful conduct. For these reasons, the Committee refers the matter to Parliament for consideration.

Procedural fairness – prima facie evidence

The Bill proposes to amend the *Contaminated Land Management Act 1997* and the *Protection of the Environment Operations Act 1997* to designate photos and images as admissible evidence of certain matters in proceedings under those Acts. The Bill seeks to insert subsection 262A(2) into the POEO Act and subsection 72A(2) into the Contaminated Land Act, which would designate those approved images as evidence of certain matters, unless evidence is admitted which proves the contrary. Proposed subsections 72A(2)(d) of the Contaminated Land Act and subsection 262A(2)(d) of the POEO Act provides that images can be evidence of anything prescribed by regulations.

By providing for these images and photos to be admissible evidence that are assumed to prove certain matters unless rebutted by contrary evidence, the Bill would provide for photos or images approved by the EPA as *prima facie* evidence in proceedings. In common law, evidence that is deemed *prima facie* evidence means the evidence proves the matters set out in it without requiring the party who is admitting the evidence to establish its credibility or validity. It requires an opposing party to rebut the *prima facie* presumption, that is, to demonstrate that the evidence does not sufficiently prove the matters it seeks to establish.

As a consequence, the Bill may impact the procedural fairness of a defendant in proceedings under the relevant Act by requiring them to admit evidence to the contrary to challenge either the admissibility of images or their use as evidence of certain matters. The regulation making power in the Bill could allow the Executive to broaden what matters may be proven by simply admitting images that the EPA has certified. This broad regulation making power could further undermine the procedural rights of defendants in proceedings under both the Contaminated Land Act and the POEO Act.

The Committee notes that a person can still present evidence in proceedings to disprove the admissibility of an image or prove that it does not establish the matters it purports to. However,

the proposed changes would place the onus on a defendant to establish that an image is not admissible evidence. The proposed amendments would also allow regulations to prescribe additional matters to which images are taken to be evidence of, which may broaden the scope of what is accepted as *prima facie* evidence. The Committee notes that this may further undermine a defendant's right to procedural fairness under both Acts. Because the use of *prima facie* evidence may impact procedural fairness in the prosecution of serious offences carrying significant penalties, the Committee refers this matter to Parliament for consideration.

Procedural fairness – service of documents on effected persons

The Bill proposes to replace existing sections in the *Contaminated Land Management Act 1997*, *Dangerous Goods (Road and Rail Transport) Act 2008*, *Pesticides Act 1999*, *Plastic Reduction and Circular Economy Act 2021*, *Protection from Harmful Radiation Act 1990* and *Protection of the Environment Operations Act 1997*, which provides for the service of documents. The amendments seeks to replace these sections with substantially identical provisions that would allow documents to be served on a person by personal delivery (if the person is an individual) or by any of the other means set out. The proposed provisions would also enable documents to be served by electronic communication, if the person 'expressly or impliedly' consented to electronic service. Proposed notes to this provision suggests that a person gives implied consent by previously emailing or providing their email address to the EPA.

By providing the EPA with the discretion to effect service of documents and notices by means other than personal service, the Bill may impact a person's right to procedural fairness. This is of particular concern where the documents and notices served require compliance with the matters in that document at the risk of criminal liability and penalties. The Committee notes further that the amendments permit electronic service if a person has 'impliedly' consented to electronic service of documents. What may amount to 'implied consent' could be broadly interpreted by the EPA, as suggested by the examples provided (previous email communications and disclosing an email address to the EPA).

The Committee acknowledges that the personal delivery of documents is onerous and resource-intensive. The Committee further acknowledges that electronic communication is a common mode of sending and receiving documents, particularly where the intended recipient is an entity and not an individual. However, the Committee notes that a person who sends an unrelated email to the EPA may not reasonably expect to be served an official document or notice by email. This may increase the risk of the recipient not having awareness of their requirements under the notice or document and becoming criminally liable for non-compliance. Under some of the various Acts that the Bill seeks to amend, non-compliance with a relevant notice may carry a maximum penalty that involves a potential imprisonment term. For these reasons, the Committee refers the matter to Parliament for consideration.

Application of the EPA's powers outside NSW

The Bill seeks to insert section 108A into Chapter 4 of the *Protection of the Environment Operations Act 1997* which would allow the EPA to issue a single environment protection notice under that Chapter which would apply to multiple pollution incidents across a number locations. Proposed subsection 108A(3) would enable the EPA to issue a single notice, even if it is not the 'appropriate regulatory authority', for all of the areas or premises to which pollution incidents relate. Section 109 of the Act makes clear that the EPA may issue an environment protection notice under Chapter 4 to a person or for a matter or thing that occurs outside of NSW, as long as that matter or thing 'affects' the State's environment.

Therefore, the Bill may extend the application of the EPA's power to issue an environment protection notice for multiple pollution incidents to areas where it is not the 'appropriate regulatory

authority', including potentially outside of NSW. The Committee generally comments where legislation may have extraterritorial effect as it could create uncertainty about what laws individuals are subject to at any one time, especially if they live in another State or Territory. The application of these provisions may impact the rights and liberties of a person outside of NSW, as these notices may require them to take certain actions, prohibit them from certain activities, or expose them to penalties if they fail to comply with the notice.

The Committee acknowledges that section 109 of the Act already permits the broad extraterritorial application of environment protection notices issued under Chapter 4, so long as they relate to something that affects the State's environment. The Committee also acknowledges that the amendments are intended to streamline the EPA's response to large scale incidents occurring across multiple premises or areas.

However, a notice under this amendment would treat all of the relevant incidents as a single incident, even if the majority of the multiple incidents or matters to which they relate occurred within the EPA's jurisdiction. This could operate to require a person outside of NSW to take certain actions for multiple pollution incidents which mainly occurred in NSW (a different jurisdiction) and is being treated as a single incident. As a person outside NSW who fails to comply with a notice may be exposed to significant penalties, the Committee refers this matter to Parliament for consideration.

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

Determination of additional monetary punishment by prosecutor

The Bill seeks to replace provisions in the *Contaminated Land Management Act 1997*, *Pesticides Act 1999*, *Protection from Harmful Radiation Act 1990* and the *Protection of the Environment Operations Act 1997*, which concern how the amount of monetary benefit gained by an offender in committing certain offences may be calculated for a 'monetary benefit order'. The amendments would allow a prosecutor, usually the EPA, to use any method they consider 'appropriate' to calculate a reasonable estimate of the monetary benefit, as opposed to only using the protocol prescribed by regulations for calculating the amount. That reasonable estimate may be accepted by a court which can then make a monetary benefit order requiring the offender to pay that amount in addition to any monetary penalty set by the court for the offence.

Therefore, the Bill may provide the prosecutor with broadly-defined discretion to determine what amount represents a 'reasonable estimate' of the monetary benefit acquired by the offender. Because this estimate could be imposed as an additional punishment for a person convicted of an environment offence, it may make a person's obligations dependent upon an insufficiently defined administrative power. The Committee generally comments on any provisions that may permit a person to receive an additional punishment for a single offence.

The Committee acknowledges that giving this discretion to a prosecutor may allow for quicker determinations of monetary benefits, thereby expediting the resolution of offence proceedings. The Committee also recognises that the court retains the discretion to accept reasonable estimates, or not, and the prosecutor may have to make submissions as to why the method used was 'appropriate' in the circumstances.

However, the Committee notes that the proposed amendments could enable a prosecutor to set a monetary penalty using undefined methods. Without clearly setting out the methods for this calculation in legislation, there is the potential for orders setting additional punishments to be inconsistently calculated across cases. This would infringe on the common law principle of *stare decisis*, that court proceedings should be determined consistently in accordance with precedent,

and therefore limit an offender's capacity to understand and anticipate how the law applies to them. For these reasons, the Committee refers the matter to Parliament for consideration.

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

Executive and administrative immunity – exclusion of liability for public statements

The Bill seeks to insert section 319B into the *Protection of the Environment Operations Act 1997* which would allow the EPA to issue 'public warning statements' identifying and giving warning or information about contraventions of environment protection legislation, if the EPA is satisfied it is in the public interest to do so. These statements may identify an individual and other specific information like the location of premises. The Bill also proposes to insert section 35A into the *Protection of the Environment Administration Act 1991*, which would exclude liability in relation to the good faith making or publication of these statements. The exclusion of liability (including liability for defamation) would apply to the Executive and 'protected persons', which includes the EPA, its board, committees and staff, as well as people working under the direction of the Executive or the EPA. Therefore, the Bill may provide for a broad Executive and administrative immunity from liability, including for defamation, arising from public warning statements.

The Committee acknowledges that the issuing of public statements is intended to ensure that the public can be made aware of offending conduct or potential environmentally hazardous incidents. However, the broad exclusion of liability may prevent people who are negatively impacted as a result of a public warning statement from seeking recourse, particularly where those statements would otherwise give rise to an action for defamation. For these reasons, the Committee refers this matter to Parliament for consideration.

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

Matters deferred to regulations – creation of offences

The Bill proposes to amend section 119 of the *Pesticides Act 1999* to clarify that the regulations may make provisions relating to requirements for pesticide purchasers, including creating offences for non-compliance with those requirements.

The Committee generally prefers that offences be established in primary legislation in order to facilitate an appropriate level of parliamentary scrutiny. However, under section 119 of the Act, regulations can only create offences that carry monetary penalties and not custodial ones. The Committee also recognises that the regulations are still required to be tabled in both Houses of Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.

7. Independent Commission Against Corruption Amendment (Ministerial Diary Disclosure) Bill 2024*

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

Privacy rights – providing personal information

The Bill would insert subclause 22B into the *Independent Commission Against Corruption Regulation 2017*, which would require a summary of relevant meetings with external persons attended by a Minister to be published on the Cabinet Office website. The summary would have

to include information such as the names of each individual who attended the meeting, even if an individual is representing an organisation.

The Committee notes that the Bill may impact individuals' right to privacy by requiring personal information, such as their names, to be published on a public website without their consent. However, the Committee acknowledges that Ministers are already required to disclose certain details, including names, in relation to meetings with external persons. Given that the Bill legislates already existing requirements, the Committee makes no further comment.

8. Rural Fires Amendment (Red Fleet) Bill 2024*

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

Part One – Bills

1. Bail and Crimes Amendment Bill 2024

Date introduced	12 March 2024
House introduced	Legislative Assembly
Minister with carriage	The Hon. Michael Daley MP
Portfolio	Attorney General

Purpose and description

- 1.1 The objects of this Bill are to:
- (a) provide a temporary limitation, in certain circumstances, on when bail authorities may grant bail to young persons who are between 14 and 18 years of age
 - (b) create a new offence, defined as a performance crime offence, or disseminating material to advertise the involvement by persons in specified offences.
- 1.2 The Bill amends the *Bail Act 2013* (the **Bail Act**) and the *Crimes Act 1900* (the **Crimes Act**).

Background

- 1.3 In his second reading speech, the Hon. Michael Daley MP, Attorney General, explained that the amendments proposed by the Bill are the first set of legislative reforms intended to address 'persistently high crime rates in regional New South Wales'. He explained the amendments are intended to put two key changes into effect:
- (a) temporarily changing the test for granting bail for young people charged with certain offences for a 12 month period, by inserting section 22C into the Bail Act.
 - (b) establishing a new 'performance crime' offence, by inserting Division 5B into the Crimes Act.
- 1.4 The Bill also proposes to insert section 154L into the Crimes Act which would require the Minister to conduct a statutory review of the amendments to the Crimes Act proposed by the Bill. The statutory review would be conducted two years after commencement, and the report of the review would be tabled within 6 months from the start of the review.

Issues considered by the Committee

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

Right to the presumption of innocence, liberty and freedom from arbitrary detention – requirement for granting bail

- 1.5 Part 3, Division 2 of the Bail Act sets out the test that a bail authority must carry out before they can make a bail decision. A 'bail authority' is defined in Part 1 of the Act as a 'police officer, an authorised justice or a court'. Division 2 currently requires a bail authority to perform an 'unacceptable risk test', to assess whether there is an unacceptable risk of an accused person committing any of the following if released from custody:
- failing to appear at any proceedings for the offence,
 - committing a serious offence,
 - endangering the safety of victims, individuals or the community, or
 - interfering with witnesses or evidence.
- 1.6 The Bill proposes to insert section 22C to the *Bail Act* to place a temporary new requirement for granting bail to young people aged between 14 and 18 years of age, who are charged with 'relevant offences' that they allegedly committed while on bail for another 'relevant offence'. Proposed section 22C would expire 12 months after its commencement, under subsection (4).
- 1.7 Proposed subsection 22C(1) would require a bail authority to only grant bail to an accused young person if they have 'a high degree of confidence' that the accused 'will not commit a serious indictable offence while on bail subject to any proposed bail conditions'. However, subsection (2) clarifies that, before making a decision under subsection (1), the bail authority must first make an assessment under Division 2 of the Bail Act and consider any appropriate bail conditions that could remedy concerns or risks that the accused young person would commit a further serious indictable offence.
- 1.8 A 'relevant offence' is defined in subsection 22C(5) as either a 'motor theft offence' under sections 154A, 154C and 154F of the Crimes Act, or a 'serious breaking and entering offence' which is an offence under Part 4, Division 4 of the Crimes Act and is punishable by at least 14 years imprisonment. It also defines a 'serious indictable offence' as an indictable offence punishable by at least 5 years imprisonment.
- 1.9 In his second reading speech, the Attorney General described proposed section 22C as 'a time-limited, targeted amendment' that would 'create an additional threshold for a bail decision maker, directed at the consideration of the risk of certain young persons committing further serious indictable offences whilst on bail.' He further acknowledged that:

This proposed change has been approached cautiously in light of the potentially serious consequences for young people and, in particular, Aboriginal young people. That is why this change is time-limited and specifically targeted at young people who are already alleged to have committed at least one relevant offence whilst on bail for another relevant

offence. It has been carefully developed to address a particular cohort of young people who may pose a greater risk to community safety as a result of repeat alleged offending, while also avoiding, as much as possible, broad or unintended adverse consequences. The provision will sunset after 12 months, with an evaluation to take place at the end of that period.

The Bill proposes to insert section 22C into the *Bail Act 2013* that would temporarily place an additional threshold for granting bail for young persons aged between 14 and 18 years who are alleged to have committed a motor theft or serious break and enter offence, while on bail for separate charges of either of these 'relevant offences'. The amendments would require a bail authority to deny bail, unless they have a 'high degree of confidence' that the young person will not commit a serious indictable offence while on bail, subject to any proposed bail conditions.

Proposed section 22C therefore extends the circumstances where an accused young person can be denied bail, on the basis that the young person is alleged to have committed a 'relevant offence' while on bail for another 'relevant offence'. It also presumes against granting bail unless the decision maker is 'highly confident' that the accused person will not commit a serious indictable offence while on bail'. The Bill may therefore impact an individual's right to the presumption of innocence, which guarantees that a person is presumed innocent until proven guilty according to the standards of criminal law. It may also infringe on their right to liberty and freedom from arbitrary detention contained in Article 9 of the ICCPR, which provides that holding accused persons in remand should not be the general rule.¹

The Committee notes that the Bill seeks to address repeat offending in young people that may pose a risk to community safety. The Committee also acknowledges that the proposed amendments do not change the requirement for the bail authority to assess whether a accused young person poses an 'unacceptable risk'. It also requires consideration of whether conditions could be set for granting bail, that might address concerns that the accused will commit a serious indictable offence while released on bail. The Committee further acknowledges that the new threshold for granting bail is temporary, with a 12 month expiration period, to allow for a review of the impacts of the reforms.

However, the Committee notes that the threshold of 'a high degree of confidence' is a discretionary one that lies with the bail authority. These decisions may be made on a lower standard of proof than that required in criminal proceedings given the subjective nature of 'confidence'. In addition, the Committee notes that the potential extension of refusal to grant bail applies where the accused person is aged between 14 and 18 years. Young people under the age of 18 years may lack the capacity to understand the consequences of a refusal to be released on bail. For these reasons, the Committee refers this matter to Parliament for its consideration.

¹ United Nations, Office of the High Commissioner for Human Rights, [International Covenant on Civil and Political Rights](#).

Elements of an offence for a 'performance crime'

1.10 The Bill seeks to insert section 154K into the Crimes Act which would establish 'performance crime' offences of 'performance crime'. A person commits a performance crime offence if:

- (a) their act or omission would constitute a base offence, being either a 'a motor theft offence' or 'a breaking and entering offence', and
- (b) they 'disseminate' material to advertise their involvement in the offence, or the act or omission constituting the offence.

1.11 Proposed subsection (4) defines the base offences as follows:

- 'Breaking and entering offences' are offences under Part 4, Division 4 of the Crimes Act. These offences vary from entering a dwelling house with intent to commit a serious indictable offence (section 111) to being armed with intent to commit an indictable offence (section 114), and carry maximum penalties ranging from seven to 14 years imprisonment, with extensions for certain aggravating circumstances.
- 'Motor theft offences' are offences concerning the theft, taking or driving a vehicle without the owner's consent including with assault, under sections 154A, 154C and 154F of the Crimes Act. These offences carry a maximum penalty ranging from five to 10 years imprisonment.

1.12 The maximum penalty for a performance crime offence proposed by subsection 154K(2) is an imprisonment term that is two years added to the maximum penalty for the base offence.

1.13 Proposed section 154K(3) clarifies that a person who is convicted of a performance crime offence cannot also be separately convicted of a base offence for the same conduct which constituted the performance crime offence'.

1.14 Speaking to the new offences proposed by the Bill, the Attorney General described the public safety concerns which the amendments seek to address:

Disseminating recordings of offending behaviour online may encourage others to engage in similar dangerous criminal behaviour. ... Posting videos of crimes that involve breaking and entering into the homes of other people can also cause further harm or distress to, or re-traumatise, the victims of these offences, especially where it leads to public ridicule, humiliation or shaming of the victim. ... It [proposed section 154K] reflects the community's disregard for conduct that encourages the commission of offences that violate the sanctity of people's homes and that place the community at risk.

The Bill seeks to establish a new 'performance crime offence' by inserting section 154K into the *Crimes Act 1900*. A person commits a performance offence where they have disseminated materials to advertise an act or omission constituting a base offence, being a motor vehicle theft or break and enter offence, or to advertise their involvement in the offence. A person who disseminates such materials would only

commit a performance crime offence if their act or omission constitutes a base offence. Under the Crimes Act, convictions for a base offence would require an element of 'fault', being either intent or fraud.

The Committee notes that it is unclear from section 154K proposed by the Bill whether an accused person can be convicted of the performance crime offence without the need to establish the fault element of the base offence, or whether a person must merely commit an act or omission of 'motor theft' or 'break and enter' regardless of whether there was intent or fraud. Therefore, the performance crime offence proposed by the Bill may be characterised as a strict liability offence. The Committee generally comments on strict 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 recognises that the new offence is intended to protect public safety by deterring criminal behaviour that may be regarded as encouraging or incentivising similar offending. It also acknowledges that the amendments clarify that a person cannot be convicted of both the performance crime offence and the base offence in respect of the same act(s) or omission(s).

However, the Committee notes that, despite this clarification, it may be difficult for a lay person to understand what must be established by the prosecution to convict somebody of a 'performance crime issue'. This is of particular concern where a conviction for a performance crime offence carries a floating maximum penalty, being a maximum imprisonment term of two years on top of the maximum imprisonment term for the base offence. In those circumstances, an accused person may be sentenced to a greater imprisonment term than the base offence, without the need to demonstrate the fault required to establish the base offence. For these reasons, the Committee refers this matter to Parliament for its consideration.

Retrospectivity

1.15 As discussed above, the Bill proposes amendments to the Bail Act that would temporarily set an additional threshold for granting bail to certain accused young persons, which may make it harder for them to be granted bail. Schedule 1[2] of the Bill provides that the proposed amendments to the *Bail Act* extend to 'offences committed or alleged to have been committed, or charged, before the commencement of the amendment'.

1.16 The Attorney General explained that this retrospective application is necessary:

...to capture young people who are alleged to have already committed relevant offences prior to the commencement of the new provision and are subsequently alleged to have committed a further relevant offence whilst on bail after its commencement.

The Bill seeks to insert a transitional provision clause into Schedule 3 of the *Bail Act 2013* which would extend the application of the proposed amendments around bail decisions for certain accused young persons to 'offences committed or alleged to have been committed, or charged, before the commencement of the amendment'. The Committee generally

comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

The Committee acknowledges that the provision is intended to capture those young people who would be considered repeat offenders of the motor theft or break and enter offences at the time of the Bill's commencement. However, the Committee notes that the retrospective application of the amendments may impact a young person's right to liberty and freedom from arbitrary detention, as well as their right to the presumption of innocence, which are fundamental guarantees in criminal proceedings. Additionally, these amendments would affect young persons aged under 18 years. The Committee notes that young people may have less capacity to understand how laws apply to them. The retrospective application of the provisions may only make it harder for a young person to understand how criminal laws particularly impact them. For these reasons, the Committee refers this matter to Parliament for its consideration.

2. Children and Young Persons (Care and Protection) Amendment Bill 2024

Date introduced	13 March 2024
House introduced	Legislative Assembly
Minister with carriage	The Hon. Kate Washington MP
Portfolio	Families and Communities

Purpose and description

- 2.1 The object of this Bill is to amend the *Children and Young Persons (Care and Protection) Act 1998* (the **Act**) to provide that the Act is intended to have extraterritorial application, including in relation to children and young persons who do not ordinarily live in, or who are not present in, New South Wales, if there is sufficient connection to New South Wales.

Background

- 2.2 The Act provides a framework for the care and protection of children and young people to ensure their safety, welfare and well-being.
- 2.3 In her second reading speech, the Hon. Kate Washington MP, Minister for Families and Communities, said that the Bill is intended to signal 'a clear legislative intention that the functions under [the Act] are intended to apply extraterritorially'. She further explained that the amendments would address uncertainty about the jurisdiction of the Children's Court, following a recent decision by the Court of Appeal.²
- 2.4 In *DN v Secretary, Department of Communities and Justice*, the Court of Appeal found that the Children's Court did not have the jurisdiction to make a care order under the Act for children currently outside of NSW. The Court's judgment stated that:
- ...the Children's Court had no power to allocate parental responsibility for the children who were then resident in the UK, to the carers, who were also resident in the UK and had no existing right to reside in New South Wales.³
- 2.5 The Minister said that without the bill, there is considerable uncertainty about the Children's Court's capacity to finalise care proceedings concerning children and young people not present or ordinarily living in NSW.

² *DN v Secretary, Department of Communities and Justice* [2023] NSWCA 321.

³ *Ibid* at [78].

- 2.6 The Bill then proposes to expand the jurisdictional application of the Act by inserting a clear legislative intention for the Act to have extraterritorial application. It also proposes to insert a further Part in Schedule 3 to provide for the validity of decisions made under the Act before the Bill commences.

Issues considered by the Committee

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

Extraterritorial application of laws

- 2.7 The Bill proposes to extend the application of the Act to children who are outside of NSW. It seeks to replace subsection 4(b), which would provide that the functions of the Act may be exercised for children and young persons who are present in NSW, or 'have a sufficient connection' to the State.
- 2.8 It also proposes to insert subsections 4(2) and (3) into the Act. Subsection (2) would explicitly provide that the Act has extraterritorial application, meaning that it applies outside the jurisdiction of NSW, 'in so far as the legislative powers of the State permit, including in relation to children and young persons who do not ordinarily live in, or who are not present in, New South Wales'.
- 2.9 Proposed subsection (3) sets out a list of factors that may be considered to determine whether a child or young person 'has a sufficient connection to New South Wales' under subsection 4(b), including whether members of the child or young person's 'family, kin or community' lives in NSW.
- 2.10 In her second reading speech, the Minister noted that the establishment of a sufficient connection would 'depend on the individual facts and circumstances of the child or young person'. She further stated that the amendments seek to balance 'ongoing responsibility that New South Wales has to these children, while appreciating that their connection to New South Wales may diminish over time and that it may be more appropriate for the jurisdiction they are currently living in to consider the matter.'

The Bill proposes to amend section 4 of the *Children and Young Persons (Care and Protection) Act 1998* to explicitly state a legislative intention for the Act to apply to outside of NSW, and clarify that the Act may exercise functions for children or young people who have a 'sufficient connection' to NSW. This extraterritorial application of the Act would include children and young persons who do not live in, or who are not present in NSW.

The Bill therefore seeks to extend the legislative jurisdiction of the Act beyond the State of NSW. Extraterritorial application of the Act could also create conflict between the Act and another jurisdiction's laws concerning the care of children and young people.

The Committee generally comments on provisions that have extraterritorial effect as they impact on the rule of law principle that a person is entitled to know the law that applies to them at any given time. However, the Committee notes that the Act only has extraterritorial application to the extent that it is permitted under NSW law. Further, the Committee acknowledges that the proposed extraterritorial application addresses interjurisdictional challenges arising from recent court

decisions. The amendments are intended to ensure that the Act can continue to regulate the care and protection of children and young people who are subject to NSW care proceedings but may be in other jurisdictions. For this reason, the Committee makes no further comment in respect to the extraterritorial application.

However, the proposed amendments to section 4 of the Act would extend the exercise of functions under the Act to children and young people who have a 'sufficient connection to' NSW. Subsection 4(3) which would be inserted by the Bill sets out a number of broad, subjective factors that 'may be considered' to determine whether a sufficient connection exists. The Committee notes that the Bill could be broadly interpreted to apply to children and young people who have never resided in NSW. Because children and young people could be subject to care orders that involve their removal from their existing households and permanent placement with other carers, the Committee refers this matter to Parliament to consider defining what amounts to a 'sufficient connection' in more specific and limited terms.

Retrospective application of laws

- 2.11 The Bill proposes to insert savings, transitional and other provisions into Schedule 3 of the Act which would validate a function exercised and a court order under the Act before the Bill commences, as if the function had been exercised or the order had been made after the Bill commenced.
- 2.12 In her second reading speech, the Minister said that the provisions are 'intended to remove doubt about the validity of functions exercised or orders made prior to the commencement of these amendments and to avoid placement disruptions for children and young people'.

The Bill proposes to insert additional transitional and savings provisions into Schedule 3 of the *Children and Young Persons (Care and Protection) Act 1998*, to validate functions exercised and orders made under the Act before the commencement of the Bill, if those functions or orders would have been valid under the Bill as commenced.

Therefore the Bill seeks to apply retrospectively, by validating the exercise of powers and orders made under the Act before it commenced. The Committee generally comments on provisions that are drafted to have retrospective effect, as they impact on the rule of law principle that a person is entitled to know the law that applies to them at any given time. In this case, the retrospective validation may also amount to legislative interference with the rights of affected parties to seek legal recourse over care decisions by extinguishing potential avenues for appeal.

The Committee acknowledges that the retrospective application of the proposed amendments is intended to address uncertainty about the jurisdiction of the Children's Court following a recent decision of the Court of Appeal. It further acknowledges that this retrospective validation may prevent disruptions for children and young people who are in care placements. However, the proposed retrospective operation of the Bill undermines the rule of law, by retrospectively validating decisions or orders which were made outside of the legal limits of the Act. As these decisions and orders concern the potential removal of

children and young people and their placement into new households, the Committee refers the matter to Parliament for its consideration.

3. Conversion Practices Ban Bill 2024

Date introduced	13 March 2024
House introduced	Legislative Assembly
Minister with carriage	The Hon. Michael Daley MP
Portfolio	Attorney General

Purpose and description

- 3.1 The objects of this Bill are:
- (a) to make it an offence to engage in conversion practices with the intention of changing or suppressing an individual's sexual orientation or gender identity, and
 - (b) to establish a civil complaints scheme to provide avenues and processes for redress for individuals and representative bodies if they have a complaint under this Bill.

Background

- 3.2 The Bill would create a new Act that bans conversion practices which are intended to change or suppress a person's sexual orientation or gender identity. In his second reading speech, the Hon. Michael Daley MP, Attorney General, described the Bill as 'a graduated response to LGBTQ+ conversion practices'. He emphasised the harm that can be caused by conversion practices and further said:

The Government recognised from the outset that this is complex and delicate law reform. It is important to balance prohibiting these harmful and objectionable practices while also respecting civil liberties such as the freedom of expression and the freedom of religious belief.

- 3.3 The Attorney General explained that the Bill seeks to implement the following key legislative reforms:
- defining what amounts to 'conversion practices',
 - criminalising carrying out or facilitating conversion practices, even outside of NSW, and
 - establishing a civil complaints scheme in relation to conversion practices.
- 3.4 The Bill also proposes to make consequential amendments to the *Civil and Administrative Tribunal Act 2013*, the *Crimes (Domestic and Personal Violence) Act 2007* and the *Criminal Procedure Act 1986*.

Issues considered by the Committee

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

Widely defined harm element of offence

3.5 Part 3 of the Bill seeks to establish new offences relating to conversion practices. Section 5 would create a new criminal offence for providing or delivering a 'conversion practice' to an individual. The offence would carry a maximum penalty of five years imprisonment and, under subsection (4), a person is guilty of the offence regardless of whether the individual or their guardian (for those who lack legal capacity) consents to the conversion practice.

3.6 To be convicted of this offence, an intention to change or suppress the individual's sexual orientation or gender identity would have to be established. Under proposed subsection 5(1)(b), the offence only occurs where the conversion practice caused mental or physical harm to an individual that either:

- (a) endangered their life, or
- (b) was 'substantial'.

3.7 What amounts to 'substantial harm' is not defined by the Bill. In his second reading speech, the Hon. Michael Daley provided that:

Substantial harm has been held in case law to mean harm that is more than trivial or inconsequential. It must be more than taking offence, hurt feelings or shame and humiliation.

3.8 Subsection 5(2) would require that an assessment of the harm caused to an individual must consider all of the conversion practices undertaken on them.

Section 5 of the Bill would establish a new criminal offence for the provision or delivery of conversion practices with the intention to change or suppress an individual's sexual orientation or gender identity, if it causes mental or physical harm to the individual that endangers their life or is 'substantial'. This offence carries a maximum penalty of five years imprisonment and subsection (4) explicitly excludes any defence of consent.

The Committee notes that there does not appear to be any provisions in the Bill which would define or narrow what might constitute 'substantial' physical or mental harm. Therefore, the Bill may create an offence that includes a widely defined element of harm that could capture a broad range of potential physical and mental harms.

By prohibiting practices intended to change or suppress sexual orientation or gender identity, the Committee acknowledges that these offences may be intended to protect the rights of equality and non-discrimination of LGBTQIA+ people. The Committee acknowledges that 'substantial harm' has been held in recent court cases to mean harm that is 'more than trivial or inconsequential' and requires more than 'taking offence, hurt feelings or shame and humiliation'.

However, the Committee notes that this definition may not be accessible to lay persons as it comes from caselaw and requires an understanding of binding precedents in law. Without any definition of 'substantial harm' in the Act, the widely defined element of harm may make it difficult for a person to understand the scope of these criminal offences. As the offence carries a maximum penalty of five years imprisonment, the Committee refers the matter to Parliament for consideration.

Application of laws outside NSW

3.9 As noted above, section 5 of the Bill seeks to create a new offence for providing or delivering conversion practices to an individual which is intended to change or suppress their sexual orientation or gender identity. Proposed subsection (3) extends the application of this criminal offence to conversion practices provided or delivered partly in and partly outside NSW.

3.10 In his second reading speech, the Hon. Michael Daley commented that:

...this provision does not up-end the general principles about extraterritorial application of the criminal law. The criminal conduct must still partly occur within New South Wales for the offence to apply.

Section 5 of the Bill seeks to establish a criminal offence for the provision or delivery of conversation practices. Subsection (3) extends the application of that criminal offence to conversion practices provided or delivered 'partly in NSW and partly outside NSW'. The Committee generally comments where legislation may have extraterritorial effect because it may create uncertainty for individuals about what laws apply to them at any one time.

The Committee acknowledges that it is intended that legal principles which presume against the extraterritorial application of criminal laws do not apply to the proposed amendments, as the criminal conduct must still partly occur within NSW. The Committee also recognises that the partial extraterritorial application of the offence may be intended to strengthen compliance with the legislative prohibition on conversion practices.

However, the Committee notes that a person providing or delivering a conversion practice to an individual outside of NSW may not be aware that the individual has previously or will in the future be partly subjected to a conversion practice in NSW. Further, a person outside of NSW may not be aware of the legislative ban on conversion practices or the extraterritorial application of criminal offences for providing conversion practices to them. As the offence carries a maximum penalty of five years imprisonment, the Committee refers the matter to Parliament for consideration.

Autonomy and decision-making – no ability to consent

3.11 Section 6 of the Bill would create a criminal offence for a person who takes an individual or arranges for an individual to be taken outside of NSW, with the intention of subjecting them to a conversion practice. It would also criminalise engaging a person outside of NSW to provide or deliver a conversion practice to an individual in NSW. In his second reading speech, the Hon. Michael Daley explained that:

This offence reflects the evidence that victims are sometimes sent overseas for conversion practices to be performed.

- 3.12 Under proposed subsection 6(2), a person is guilty of these offences even if the individual or their legal guardian (where they lack legal capacity) consents to being taken from NSW, arranges them being taken from NSW or consents to the conversion practice being provided or delivered.

Section 6 of the Bill seeks to create new criminal offences taking an individual outside NSW or arranging them to be taken outside NSW with the intent to subject them to a conversion practice. It would also criminalise engaging a person outside of NSW to provide or deliver a conversion practice to an individual in NSW. Under proposed subsection 6(2), both offences apply regardless of whether the individual has legal capacity and consents to being taken or being subjected to the conversion practice, or arranges to be taken outside NSW.

The Bill may therefore interfere with the right to autonomy and decision-making of an individual who has legal capacity to make decisions for themselves. The Committee notes that the combined effect of proposed subsections 6(1) and (2) appears to criminalise a person who willingly leaves or engages someone outside of NSW to receive a conversion practice. Unlike the offence under proposed section 5, this criminal offence does not require proof of an element of harm resulting from the offending conduct.

The Committee also acknowledges that these offences may be intended to prevent people from avoiding the prohibition against conversion practices under the Bill by arranging for or engaging in conversion practices outside NSW. The Committee further recognises that the offence is intended to strengthen protections for individuals by preventing them from being subjected to the potential harm caused by conversion practices outside NSW. In the circumstances, the Committee notes the matter for Parliament's consideration.

Wide investigation powers of the President – strict liability offence, privacy rights, right to silence and privilege against self-incrimination

- 3.13 Part 4 of the Bill would establish a civil complaints scheme for complaints of conversion practices. In his second reading speech, the Attorney General noted that the structure of the proposed scheme under the Bill would be consistent with the existing framework for complaints to Anti-Discrimination NSW (the **Board**).
- 3.14 The President is to investigate complaints under Subdivision 3 of Part 4, Division 3. Under proposed subsections 17(1) and (3) of the Bill, the President of the Board (the **President**) would have the power to require a complainant or an entity which is the subject of a complaint under Part 4 to provide information and documents.
- 3.15 The complainant or entity would have to provide any relevant information or documents it has to the President within the period specified in the notice, unless the entity has a reasonable excuse for not doing so. If it cannot supply the information or documents, the entity would have to give notice to the President if they are unable to supply information and documents. Failure to comply with the requirement without a

reasonable excuse would be an offence carrying a maximum penalty of \$1 100 (10 penalty units) for an individual and \$5 500 (50 penalty units) otherwise.

- 3.16 Under proposed subsections 17(4) and (5), the President may require a third-party entity to supply the relevant material. Failure to comply with this requirement or provide a reasonable excuse would also be an offence carrying the same maximum penalties as the offence under subsection 17(3).
- 3.17 Proposed subsection 17(6) provides that if relevant material is not provided or supplied as required by the President, the President may refer the complaint to the Civil and Administrative Tribunal (the **Tribunal**).

The Bill seeks to provide the President of the Anti-Discrimination Board with a number of investigative powers under Part 4. This includes the power to require the complainant, the entity which a complaint is made against or a third-party entity to produce information or documents under proposed section 17. Under this section, the complainant or entity must provide any of the relevant information or documents to the President within the period specified in the notice. Section 17 would also empower the President to require a third-party entity to supply information or documents.

Non-compliance with any notice to provide information to the President without 'a reasonable excuse' is an offence carrying a maximum penalty of \$1 100 (10 penalty units) for an individual and \$5 500 (50 penalty units) for other entities. Therefore, the Bill may provide for a strict liability offence. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of 'fault' should be proven to establish criminal liability.

There does not appear to be any provisions which would define what amounts to 'a reasonable excuse'. Although proposed section 51 provides that the President must not exercise their functions in a way that would prejudice criminal proceedings or a criminal investigation, it is unclear whether self-incrimination would be 'a reasonable excuse' for not providing information or documents to the President under proposed section 17. Therefore, the Bill may also provide the President with wide powers of investigation, the exercise of which may impact an individual's right to silence and privilege against self-incrimination as well as their privacy rights if it requires disclosure of their personal or sensitive information.

The Committee recognises that these provisions may be intended to facilitate the investigation of a complaint about conversation practices, which may help strengthen compliance with the legislative prohibition under the Bill. However, the Committee also notes that the exercise of these powers may require individuals, potentially including complainants who were victims of conversion practices, to comply at the pain of penalty. As compliance may impact on their individual rights, the Committee refers this matter to Parliament for consideration.

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

Broadly worded powers of the President

- 3.18 As noted above, Part 4 of the Bill proposes to establish a civil complaints scheme which would allow victims of conversion practices to make complaints to the President. The President may 'assist' an individual to make a complaint under proposed section 12.
- 3.19 Under proposed Division 3 of Part 4, the President would have a wide range of functions to investigate and conciliate the complaints, including accepting, declining, terminating and resolving the complaints. The Bill also seeks to empower the President to refer complaints to a 'prescribed entity' or the Tribunal, as well as the power to enforce an order of the Tribunal.
- 3.20 Separately, proposed subsection 22(1)(b) would allow the President to decline a complaint if the President is satisfied for 'any other reason' outside of the list set out under subsection (1)(a) that no further action should be taken.
- 3.21 Proposed section 27 would allow the complainant of a complaint declined by the President under subsection 22(1) to request the President refer the complaint to the Tribunal. However, under proposed section 34, the Tribunal must grant leave for a referred complaint to be the subject of tribunal proceedings. Schedule 3 of the Bill seeks to insert a provision into Schedule 3, clause 15 of the *Civil and Administrative Tribunal Act 2013* which would prevent any decision not to grant leave from being appealed internally within the Tribunal.

The Bill seeks to introduce a civil complaints scheme under Part 4, to provide an avenue and process for the victims of conversion practices to make a complaint. Under proposed section 12, the President of the Anti-Discrimination Board may 'assist' an individual to make a complaint. The Bill does not appear to have any provisions which would specify or narrow what assistance the President may provide to the complainant. Proposed subsection 22(1)(b) of the Bill would empower the President to decline a complaint if the President is satisfied for 'any other reason' that no further action should be taken. The Committee notes that this is broadly worded and may give the President an unlimited discretion to decline a complaint.

Therefore, the Bill may provide insufficiently defined powers to the President in respect to the making and declining of complaints under the proposed civil scheme. As 'assist' can be broadly interpreted and the President may have an almost unlimited discretion to decline to progress a complaint, these broadly worded powers may impact a complainant's right to redress under the scheme.

The Committee recognises that the broadly worded powers may provide flexibility in the exercise of the President's functions under the complaints scheme. It also acknowledges that proposed section 27 would allow a complainant whose complaint has been declined, to request the complaint be referred to the Civil and Administrative Tribunal. However, the complaint could only be the subject of Tribunal proceedings if the Tribunal grants leave under proposed section 34. Any

refusal to grant leave would not be internally appealable under the Bill's proposed amendments to the *Civil and Administrative Tribunal Act 2013*. For these reasons, the Committee refers this matter to Parliament for consideration.

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

Excludes administrative review

- 3.22 The Bill proposes to empower the President to decline a complaint. Under proposed subsection 15(5), a decision to decline a complaint in whole or in part is not reviewable by the Tribunal.
- 3.23 As mentioned above, while proposed section 27 would allow the President to refer the declined complaint to the Tribunal, under proposed section 34 the referred complaint needs leave from the Tribunal before it could proceed. Further, the proposed insertion of clause 15(b1) in the *Civil and Administrative Tribunal Act 2013* would mean that the complainant could not internally review the Tribunal's decision to not give leave.

The Bill proposes to empower the President of the Anti-Discrimination Board to decline a complaint under section 15. Proposed subsection 15(5) provides that a decision to decline a complaint in whole or in part is not reviewable by the Civil and Administrative Tribunal. Therefore, the Bill may provide the President with a non-reviewable decision to decline. This may infringe upon a complainant's right to procedural fairness and, as it concerns a complaint which may lead to remedies and enforceable actions, may make a complainant's rights or obligations dependent upon a non-reviewable decision.

The Committee acknowledges that proposed section 27 would allow the complainant whose complaint has been declined by the President to request the complaint be referred to the Tribunal. However, the Tribunal must first grant leave for the complaint to be the subject of Tribunal proceedings for it to proceed, under proposed section 34. The Committee further notes that the complainant would not be able to internally review the decision of the Tribunal to not grant leave. For these reasons, the Committee refers this matter to Parliament for consideration.

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

Wide regulation-making power

- 3.24 Section 55 of the Bill proposes a regulation-making power that would allow regulations to be made about anything required or permitted by the Bill to be prescribed, and anything 'necessary or convenient' to be prescribed for carrying out or giving effect to the Bill.

Section 55 of the Bill seeks to provide a power to make regulations about anything 'necessary or convenient to be prescribed for carrying out or giving effect' to the Bill.

The Committee notes that there does not appear to be any provisions that clarify or narrow the meaning of 'convenient'. The Bill may therefore include wide regulation-making power. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when it commences.

The Committee recognises that this regulation-making power may allow for more flexible regulatory responses. It also acknowledges that any regulations would still have to be tabled in Parliament and therefore subject to disallowance under section 41 of the *Interpretation Act 1987*. However, the proposed regulation-making power may effectively allow regulations to prescribe matters with little limit. For these reasons, the Committee refers this matter to Parliament for consideration.

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

Wide power of delegation under regulations

3.25 Under proposed section 32 of the Bill, the President would be able to delegate the exercise of one or more of their functions under Part 4 of the Bill to:

- (a) a 'specified individual', or
- (b) the holder of a 'specified office'.

3.26 Proposed subsection 32(2) provides that an individual who is a delegate of the President is a member of staff of the President.

Proposed section 32 of the Bill provides the President of the Anti-Discrimination Board with the power to delegate the exercise of one of their functions under Part 4 of the Bill to a 'specified individual' or the holder of a 'specified office'. Significant functions of the President under Part 4 includes investigating a complaint, referring declined complaints to the Civil and Administrative Tribunal and enforcing an order of the Tribunal.

The Bill does not have any provisions for who may be a specified individual or office holder to whom functions may be delegated under proposed section 32, or any qualifications required by those persons. It does not set out how an individual or office may be so 'specified' or who is responsible for making that designation. Therefore, the Bill may provide for a wide power of delegation of statutory functions under Part 4 to unknown persons or an unknown class of persons.

The Committee notes that the proposed delegation power may effectively delegate statutory powers and functions without any oversight by the Parliament. Under proposed section 32, private individuals could be delegated functions under the Bill that the public may expect to be performed by public officials. The Committee prefers that the delegation of statutory functions be detailed in primary legislation to ensure appropriate parliamentary scrutiny over the

exercise of these functions. For these reasons, the Committee refers this matter to Parliament for consideration.

4. Electoral Amendment (Voter ID and Electronic Mark Off) Bill 2024*

Date introduced	14 March 2024
House introduced	Legislative Assembly
Member responsible	Mr Gareth Ward MP
	*Private Members Bill

Purpose and description

4.1 The object of this Bill is to amend the *Electoral Act 2017* (the **Act**) to provide that:

- (a) voters must show evidence of their identify to be eligible to vote
- (b) election officials must use an electronic authorised roll kept on a networked computer system to record the distribution of ballot papers

Background

4.2 The Bill proposes to amend the Act to introduce requirements that a person show an identification document in order to vote, and prescribes a list of identification documents that may be accepted.

4.3 During his second reading speech, Mr Gareth Ward MP said that the Bill 'seeks to enshrine in legislation a requirement that when someone goes to vote that they are required to show some form of identification' to prevent a person from being able to vote twice. He further noted previous reports of people voting twice in the 2019 State election and said that these reports:

... should concern any person who cares for our democracy and wants to see our system of government fairly represent the interests of the people of the State of New South Wales. The reason I say that is, by someone voting twice, they are effectively cancelling out the democratic right of somebody else.

4.4 Schedule 1.2 of the Bill also proposes to introduce a process for electronic mark off requirements by replacing provisions of the Act to require that the roll of electors be in both an electronic and printed form. It also requires an election official to record that the ballot has been received on an electronic authorised roll.

4.5 The Committee notes that the Bill's provisions are substantially identical to the provisions of the *Electoral Amendment (Voter ID and Electronic Mark Off) Bill 2023 (Voter ID Bill 2023)*. The Voter ID Bill 2023 was introduced by Mr Gareth Ward MP in the Legislative Assembly on 21 September 2023 and lapsed in accordance with the Legislative Assembly's Standing Order 105 on 4 February 2024.

- 4.6 The Committee reported on the Voter ID Bill 2023 in its Digest No. 5/58,⁴ and the comments in this report are consistent with the comments in that Digest. In that Digest, the Committee noted that the provisions of the Voter ID Bill 2023 may limit access to voting and referred it to Parliament for its consideration.

Issues considered by the Committee

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

Access to voting – right to participate in public elections

- 4.7 The Bill proposes to insert subsection 127(2A) into the Act which requires an election official to ask each person claiming to vote in an election to show a current identification document to establish their identity.
- 4.8 Subsection 127(3) of the Act sets out mandatory grounds for an election official to reject a person's claim to vote. The Bill would insert subsection 127(3)(d) to provide an additional ground for refusal or failure to show a current identification document to an official.
- 4.9 The Bill also proposes to apply a requirement to show identification documents to absent and for provisional voting, by inserting subsections 135(2A) and (2B) and 137(6) respectively.

The Bill proposes to amend the Electoral Act 2017 to introduce a requirement to show a current identification document to an election official when voting. It also proposes to insert subsection 127(3)(d) which requires an election official to refuse a person's claim to vote if they fail or refuse to show a relevant identification document. By requiring a person to produce identification documents to vote, the Bill may infringe on a person's access to voting and thereby impact on their right to vote and participate in public elections.

The Committee acknowledges that the amendments are intended to protect the integrity of the election process. However, the Committee notes that every person entitled to vote is constitutionally obligated to vote in each election and the Act establishes an offence for failing to do so. By potentially limiting access to voting, a person may be at greater risk of committing an electoral offence. For these reasons, the Committee refers the matter to Parliament for its consideration.

⁴ Parliament of New South Wales, Legislation Review Committee, [Legislation Review Digest No. 5/58](#), 10 October 2023.

5. Emergency Services Levy Amendment Bill 2024

Date introduced	14 March 2024
House introduced	Legislative Council
Minister with carriage	The Hon. Daniel Mookhey MLC
Portfolio	Treasury

Purpose and description

- 5.1 The objective of this Bill is to permit the Treasurer to require an insurer to provide information for the purposes of evaluating and implementing reforms to the way in which emergency services are funded.

Background

- 5.2 The Bill proposes to amend the *Emergency Services Levy Act 2017* (the **Act**), which creates a scheme requiring insurers to provide contributions for emergency services. Under subsection 47(2) of the Act, information may be obtained by the Treasurer for a specific purpose. The Bill proposes amendments to section 47(2) of the Act to provide that information may be obtained and used for 'evaluating and implementing reforms to the way in which emergency services are funded.'

- 5.3 During his second reading speech, the Hon. Daniel Mookhey MLC, Treasurer, explained that the:

Proposed amendments seek to grant the Treasurer the authority to require information including unit record data of insurance policy holders from insurers for the purposes of evaluating and implementing reforms to emergency services funding.

- 5.4 The Bill proposes to grant new powers to the Treasurer to be able to collect personal information from insurers for purposes under the Act. It also seeks to insert subsection 47(8) to authorise the Secretary or a person employed in the Treasury to collect personal information and use personal information, although this would not authorise the person who collected the information to disclose it to someone not employed by Treasury under proposed subsection (9).

Issues considered by the Committee

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

Privacy rights – authority to require disclosure of personal information

- 5.5 The Bill proposes to replace subsection 47(7) of the Act with subsections (7) to (11). These new provisions would allow the Treasurer to require, by written notice, that insurers provide information to Treasury.

- 5.6 Proposed subsection 47(8) authorises the Secretary or other employees of Treasury to collect personal information provided under section 47, and to use that information for the purposes of this section.
- 5.7 Proposed subsection 47(9) protects the use of that personal information by clarifying that these amendments would not authorise the Secretary or an employee of Treasury to disclose that information to someone not employed by Treasury. The personal information would be required to be securely disposed of by 30 June 2028 under proposed subsection (10). Finally, the amendments under the Bill are time limited as proposed subsection 47(7) would prevent the Treasurer from requiring information from an insurer under section 47 after 31 December 2026.

The Bill proposes amendments to section 47 of the *Emergency Services Levy Act 2017* to allow the Treasury Secretary or a person employed in Treasury to collect personal information from insurers. Such information can be collected for the purposes of 'evaluating and implementing reforms to the way in which emergency services are funded'.

The Bill may therefore impact individual's privacy rights by requiring that insurers provide personal information for collection and use, as an individual's personal information is otherwise protected from disclosure and use under the *Privacy and Personal Information Protection Act 1998*. The Committee is particularly concerned that these provisions would empower the Executive to require disclosure of personal information by insurers without any requirement to notify a person that their information will be disclosed or given an opportunity to object.

However, the Committee acknowledges that the proposed amendments would allow the Treasurer to obtain necessary data to inform emergency services funding reform. The Committee further acknowledges that the Bill includes privacy protections, including restricting disclosure of information obtained to Treasury employees only, requiring the disposal of the information by 30 June 2028, and sunsetting the provisions that empower personal information collection by December 2026. In the circumstances, the Committee makes no further comment.

6. Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Bill 2024

Date introduced	14 March 2024
House introduced	Legislative Assembly
Minister with carriage	The Hon. Jihad Dib MP
Member introducing	Ms Trish Doyle MP
Portfolio	Climate Change and the Environment

Purpose and description

- 6.1 The object of this Bill is to increase certain penalties and strengthen protections for the environment by amending the following—
- (a) the *Contaminated Land Management Act 1997* (the **Contaminated Land Act**),
 - (b) the *Dangerous Goods (Road and Rail Transport) Act 2008* (the **Dangerous Goods Act**),
 - (c) the *Land and Environment Court Act 1979*,
 - (d) the *Pesticides Act 1999* (the **Pesticides Act**),
 - (e) the *Plastic Reduction and Circular Economy Act 2021* (the **Plastic Act**),
 - (f) the *Protection from Harmful Radiation Act 1990* (the **Harmful Radiation Act**),
 - (g) the *Protection from Harmful Radiation Regulation 2013*,
 - (h) the *Protection of the Environment Administration Act 1991* (the **PEA Act**),
 - (i) the *Protection of the Environment Operations Act 1997* (the **POEO Act**),
 - (j) the *Protection of the Environment Operations (General) Regulation 2022*,
 - (k) the *Protection of the Environment Operations (Waste) Regulation 2014* (the **POEO Waste Regulation**).

Background

- 6.2 The Bill proposes a significant number of amendments to the State's environmental protection regulatory framework to strengthen the Environmental Protection Authority (**EPA**) and its enforcement and investigation role. These reforms would amend 11 different Acts and regulations which constitute this legislative framework.

6.3 In her second reading speech on behalf of the Minister, Ms Trish Doyle MP, Parliamentary Secretary for Climate Change and the Environment, described the Bill as the 'first step in strengthening environmental regulation'. She further outlined the thrust of the proposed reforms:

This bill amends several environment protection Acts to strengthen environment legislation and ensure the EPA has the right frameworks and powers to deter environmental crimes and respond to pollution incidents. This includes increased penalties, new investigation powers and recall powers, improved protections for the public including a "name and shame" provision, and new offences and penalties to tackle illegal dumping.

Issues considered by the Committee

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

Absolute liability offences

6.4 The Bill proposes to amend a number of Acts and regulations by inserting provisions which would establish new offences, including for:

- Failing to comply with a preliminary investigation notice which requires the recipient of the notice to facilitate the EPA carrying out its preliminary investigation (proposed section 90B of the POEO Act), which for an individual would carry a maximum penalty of \$500 000 and an additional \$120 000 for each day the offence continues.
- A supply chain participant who fails to comply with a recall notice without a reasonable excuse (proposed section 94L of the POEO Act), which for an individual would carry a maximum penalty of \$500 000 and an additional \$120 000 for each day the offence continues.
- Depositing, or otherwise causing or permitting the deposit of, more than 50L or 50kg of waste in a public place or an open private place (proposed section 144AE of the POEO Act), which for an individual would carry a maximum penalty of \$25 000, or \$50 000 if the offence was committed in or on a sensitive place.
- Failing to comply with a clean-up notice given in respect of an illegal dumping incident without a reasonable excuse (proposed section 144AE of the POEO Act), which for an individual would carry a maximum penalty of \$25 000 and an additional \$6 000 for each day the offence continues.
- Failing to comply with a verbal direction of an authorised officer to remove litter or waste from a public space (proposed section 144AH of the POEO Act), which for an individual would carry a maximum penalty of \$5 000 or \$10 000 if the litter or waste is more than 50kg or 50L.
- Depositing litter that is or includes dangerous materials in or on a public place or an open private place (proposed section 145A of the POEO Act), which for an individual would carry a maximum penalty of \$25 000.
- Failing to comply with the requirements under a resource recovery order (proposed section 286A of the POEO Act), which for an individual would carry

a maximum penalty of \$500 000 or \$1 million if the offence involves asbestos waste, and an additional \$120 000 for each day the offence continues.

- Failing to record information required by a resource recovery exemption or resource recovery order (proposed section 286B of the POEO Act), which for an individual would carry a maximum penalty of \$250 000 or \$500 000 if the offence involves asbestos waste.
- Failing to provide another person with information or records relating to waste as required under a resource recovery exemption or resource recovery order (proposed section 286C of the POEO Act), which for an individual would carry a maximum penalty of \$250 000 or \$500 000 if the offence involves asbestos waste.
- Removing a document placed on a relevant vehicle which relates to a contravention before the contravention has been remedied unless it is necessary to remove the document to remedy the matters (proposed new section 39(3) of the Dangerous Goods Act), which for an individual would carry a maximum penalty of \$11 000 (100 penalty units).

6.5 Under clauses 91 to 93 of the POEO Waste Regulation, the EPA may grant a person a 'resource recovery exemption' and 'resource recovery order', to exempt them from provisions under the POEO Act relating to the recovery of waste and then supply of resource recovery waste. There is a related offence under clause 93 for non-compliance with any requirements for supply of waste under a resource recovery order, carrying a maximum penalty of \$22 000 (200 penalty units) for individuals.

6.6 Clause 96 provides a defence to this offence if it relates to the alleged supply of waste. To rely on this defence, the defendant must establish that, at the time of supply, they had reasonable grounds to believe that the person who was supplied the waste did not intend to:

- (a) use the waste for an activity carried out in accordance with the exemption, and
- (b) resupply the waste to another person for an activity carried out (whether or not by the other person) in accordance with the exemption.

6.7 The Bill also proposes to omit clause 96 of the POEO Waste Regulation.

The Bill proposes to amend the *Protection of the Environment Operations Act 1997* and the *Dangerous Goods (Road and Rail Transport) Act 2008* to introduce a number of new offences for illegal waste dumping, non-compliance with a notice or direction of the EPA and its authorised officers, or removal of a document relating to a contravention before that contravention has been remedied. For some of these new offences, a person may not be guilty if they have a 'reasonable' or 'lawful' excuse. These offences carry a maximum penalty ranging from \$11 000 to \$1 million, and additional cumulative penalties may apply for each continuing day for certain offences.

The Committee notes that the terms 'reasonable excuse' or 'lawful excuse' do not amount to either a defence in respect to a criminal offence or a mental element to prove guilt. Therefore, the Bill may establish a number of absolute liability offences.

The Bill also proposes to omit clause 96 of the *Protection of the Environment Operations (Waste) Regulation 2014*, which provides a defence for a person who does not comply with a requirement for the supply of waste under a resource recovery order. This offence carries a maximum penalty of \$22 000 for an individual. A defendant may rely on the defence under clause 96 if they can prove that, at the time of supplying the waste, they believed the person receiving the waste did not have certain intentions and that belief was based on reasonable grounds. By removing the only available defence to the offence under clause 96, the Bill may therefore convert the existing offence into an absolute liability offence.

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. However, the Committee recognises that absolute liability offences are not uncommon in regulatory settings in order to encourage compliance. Further, these offences are intended to deter illegal dumping of waste, including potentially dangerous materials, in public or open private places and to ensure compliance with the EPA's functions to protect public safety and protect the wider community from environmental damage. The Committee also acknowledges that the maximum penalties carried by these proposed offences would only be monetary and not custodial. In the circumstances, the Committee makes no further comment.

Right to the presumption of innocence - reversal of the onus of proof

- 6.8 As noted above, the Bill proposes to create a new offence for illegal waste dumping by inserting section 144AE of the POEO Act. The Bill also proposes some exceptions to this offence under proposed section 144AF, which would apply to a person who deposits litter or waste in or on a public place.
- 6.9 The exceptions under proposed section 144AF would apply to a person, if any of the following circumstances apply:
- (a) the person deposited the litter or waste in a container provided by the custodian of the place or provided for depositing that waste,
 - (b) the person left a container containing the litter or waste for the purpose of it being removed by a service provided by the custodian,
 - (c) the person was the custodian of the place at the relevant time,
 - (d) the person was acting in accordance with the consent or instructions received from the custodian of the place, or
 - (e) the person deposited the litter or waste in accordance with any relevant laws or the relevant regulations.
- 6.10 The Bill also proposes to amend subsection 256(2) of the POEO Act. Under new subsection 256(2), the onus of proving an exception under the proposed section 144AF would lie with the defendant.

The Bill proposes to create an offence of illegal dumping by inserting section 144AE into the *Protection of the Environment Operations Act 1997*. Proposed section 144AF would set out certain exceptions to this absolute liability offence. The Bill also proposes to insert new subsection 256(2) into the Act. This would provide that the onus of proving an exception under proposed section 144AF would lie with the defendant.

By requiring the defendant to prove the exceptions, even on the balance of probabilities, the Bill may therefore provide for a reversal of the onus of proof. In regard to criminal actions, a reversed onus may undermine a defendant's right to the presumption of innocence. Ordinarily, the prosecution is required to prove all elements of an offence beyond reasonable doubt, before a defendant can be found guilty of the offence.

The Committee recognises that, without the provision of exceptions, the proposed offence of illegal dumping would effectively capture all forms of incidental or authorised deposit of litter and waste. The exceptions may be intended to appropriately balance the need to deter littering with the effective management of public land. The Committee also recognises that the relevant offence does not attract custodial sentences, and that reversing the onus of proof may sometimes be justified where it relates to an issue that is particularly within the knowledge of the accused.

However, the Committee notes that the exceptions provided under the Bill are separate to the matter of proof in criminal proceedings. The Committee notes that, by requiring the defendant to prove they met an exception, it may reduce the need for the EPA or other bodies investigating potential offences to establish whether an exception was met before proceeding with prosecution. For this reason, the Committee refers the matter to Parliament for consideration.

Presumption of innocence – prohibition orders

- 6.11 The Bill proposes to insert section 253B into the POEO Act, which would give the EPA the power to apply for a prohibition order against a person from the Land and Environment Court. Under proposed subsection 253B(4), this would be an order prohibiting a person from being 'involved in scheduled activities or applying for or holding an environment protection licence' for a specified or 'indefinite' period of time, as well as 'another order the Court considers appropriate'.
- 6.12 Proposed subsection 253B(1) would allow the EPA to apply for a prohibition order against a person, if it considers that the person is either:
- (a) likely to engage again, or continue to engage in, unlawful conduct, or
 - (b) not a fit and proper person to hold, or continue to hold, an environment protection licence.
- 6.13 Under proposed subsection 253B(3), a person that is the subject of an application for a prohibition order cannot apply for an environment protection licence during the time between applying for the prohibition order and when the Court makes a decision on the application.

The Bill proposes to insert section 253A into the *Protection of the Environment Operations Act 1997* to authorise the EPA to apply to the Land and Environment Court for a prohibition order against a person. An application or grant of a prohibition order would prevent a person from applying for, or holding an environment protection licence for either a specified or an indefinite period of time. The amendments would allow the EPA to apply for this order against a person who it considers is 'likely to engage again or continue to engage in unlawful conduct'.

Because the Bill authorises an order to be sought or granted against a person who has not been charged or convicted of an offence under the Act, but is considered likely to engage in unlawful conduct, the Bill may therefore infringe on the person's right to the presumption of innocence. The Committee generally comments on bills that impact a person's right to the presumption of innocence. This is because it is a fundamental common law principle that protects a person's right to be presumed innocent of an offence until proven guilty to the criminal standard of proof, and because this right is protected under article 14 of the ICCPR.⁵

The Committee acknowledges that the prohibition order only prevents a person from applying for an environment protection licence under the Act and does not include a penalty or attract an offence. The Committee also recognises that the prohibition order is intended to deter repeated contraventions of environmental protections and therefore to preserve public safety.

However, the Committee notes that an indefinite prohibition from holding an environment protection licence may effectively prevent a person from undertaking work or business requiring them to perform scheduled activities. They would also be prohibited from applying for a licence and therefore undertaking the work during the period when the application is being determined by the Court, that is, before the Court finds that they are likely to engage again in unlawful conduct. For these reasons, the Committee refers the matter to Parliament for consideration.

Procedural fairness – prima facie evidence

- 6.14 The Bill proposes to insert provisions into the Contaminated Land Act and the POEO Act to provide that photographs and images are admissible in proceedings under those Acts and are taken to be evidence of certain things in those proceedings.
- 6.15 The Bill proposes to insert section 72A into the Contaminated Land Act which would deem photographs or other images of land formed from data as an 'approved image' that is admissible as evidence in proceedings under the Act. Under proposed subsection 72A(1), a photo or image will be an approved image if it is certified by the CEO of the EPA, or an officer of the EPA designated by the CEO.
- 6.16 Proposed subsection 72A(2) provides that 'in the absence of evidence to the contrary' an approved image is taken to be evidence of:

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

- (a) the matter depicted on the image,
- (b) information recorded on the image relating to the location or boundaries of the land,
- (c) the time when, or period during which the image was taken, and
- (d) other matters prescribed by regulations.

6.17 Proposed subsection 72A(3) would also provide that, if an image is admitted into proceedings, no evidence is required to prove the accuracy of processes used to orthorectify the image (that is, to stretch the image to match the spatial accuracy of a given map) or determine the boundaries of land in the image.

6.18 The Bill proposes to make similar amendments by inserting section 272A into the POEO Act regarding the admissibility of approved images and their use as evidence in proceedings. Proposed subsection 272A(2) provides that an approved image is taken to be admissible in proceedings under the POEO Act and is also evidence of the following matters:

- (a) the matter depicted in the image,
- (b) the information recorded on the image relating to the location or boundaries of the land,
- (c) the time when or period during which the image was taken,
- (d) other matters prescribed by regulations.

6.19 Proposed subsection 272A(3) would provide that, if an image is admitted as evidence, no evidence is required to prove the accuracy of processes used to orthorectify the image or determine the boundaries of land in the image.

The Bill proposes to amend the *Contaminated Land Management Act 1997* and the *Protection of the Environment Operations Act 1997* to designate photos and images as admissible evidence of certain matters in proceedings under those Acts. The Bill seeks to insert subsection 262A(2) into the POEO Act and subsection 72A(2) into the Contaminated Land Act, which would designate those approved images as evidence of certain matters, unless evidence is admitted which proves the contrary. Proposed subsections 72A(2)(d) of the Contaminated Land Act and subsection 262A(2)(d) of the POEO Act provides that images can be evidence of anything prescribed by regulations.

By providing for these images and photos to be admissible evidence that are assumed to prove certain matters unless rebutted by contrary evidence, the Bill would provide for photos or images approved by the EPA as *prima facie* evidence in proceedings. In common law, evidence that is deemed *prima facie* evidence means the evidence proves the matters set out in it without requiring the party who is admitting the evidence to establish its credibility or validity. It requires an opposing

party to rebut the *prima facie* presumption, that is, to demonstrate that the evidence does not sufficiently prove the matters it seeks to establish.

As a consequence, the Bill may impact the procedural fairness of a defendant in proceedings under the relevant Act by requiring them to admit evidence to the contrary to challenge either the admissibility of images or their use as evidence of certain matters. The regulation making power in the Bill could allow the Executive to broaden what matters may be proven by simply admitting images that the EPA has certified. This broad regulation making power could further undermine the procedural rights of defendants in proceedings under both the Contaminated Land Act and the POEO Act.

The Committee notes that a person can still present evidence in proceedings to disprove the admissibility of an image or prove that it does not establish the matters it purports to. However, the proposed changes would place the onus on a defendant to establish that an image is not admissible evidence. The proposed amendments would also allow regulations to prescribe additional matters to which images are taken to be evidence of, which may broaden the scope of what is accepted as *prima facie* evidence. The Committee notes that this may further undermine a defendant's right to procedural fairness under both Acts. Because the use of *prima facie* evidence may impact procedural fairness in the prosecution of serious offences carrying significant penalties, the Committee refers this matter to Parliament for consideration.

Procedural fairness – service of documents on effected persons

- 6.20 The Bill seeks to replace the following sections in multiple Acts, which provide for the service of the documents in a substantially similar manner:
- the Contaminated Land Act, section 108,
 - the Dangerous Goods Act, section 39,
 - the Pesticides Act, section 118,
 - the Plastic Act, section 59,
 - the Harmful Radiation Act, section 35, and
 - the POEO Act, section 321.
- 6.21 The new provisions proposed by the Bill would also be similar in substance. The proposed amendments would allow documents that are authorised or required by the relevant Act or regulations to be served on a person, who is either an individual or 'another person'.
- 6.22 Currently, the above listed sections of the relevant Acts allow for electronic service of documents or notices if it is 'in accordance with arrangements indicated by the person as appropriate for transmitting documents to the person' or if it is 'to an email address specified by the person for the service of documents of that kind'.
- 6.23 The amendments would enable electronic service on a person where the individual or other person has 'explicitly or impliedly consented' to service of documents by

electronic communication. The proposed notes to that provision would set out the following example of implied consent:

... previously using email to correspond with the Environment Protection Authority or including the person's email address on applications made, or other documents given, to the Environment Protection Authority

The Bill proposes to replace existing sections in the *Contaminated Land Management Act 1997*, *Dangerous Goods (Road and Rail Transport) Act 2008*, *Pesticides Act 1999*, *Plastic Reduction and Circular Economy Act 2021*, *Protection from Harmful Radiation Act 1990* and *Protection of the Environment Operations Act 1997*, which provides for the service of documents. The amendments seeks to replace these sections with substantially identical provisions that would allow documents to be served on a person by personal delivery (if the person is an individual) or by any of the other means set out. The proposed provisions would also enable documents to be served by electronic communication, if the person 'expressly or impliedly' consented to electronic service. Proposed notes to this provision suggests that a person gives implied consent by previously emailing or providing their email address to the EPA.

By providing the EPA with the discretion to effect service of documents and notices by means other than personal service, the Bill may impact a person's right to procedural fairness. This is of particular concern where the documents and notices served require compliance with the matters in that document at the risk of criminal liability and penalties. The Committee notes further that the amendments permit electronic service if a person has 'impliedly' consented to electronic service of documents. What may amount to 'implied consent' could be broadly interpreted by the EPA, as suggested by the examples provided (previous email communications and disclosing an email address to the EPA).

The Committee acknowledges that the personal delivery of documents is onerous and resource-intensive. The Committee further acknowledges that electronic communication is a common mode of sending and receiving documents, particularly where the intended recipient is an entity and not an individual. However, the Committee notes that a person who sends an unrelated email to the EPA may not reasonably expect to be served an official document or notice by email. This may increase the risk of the recipient not having awareness of their requirements under the notice or document and becoming criminally liable for non-compliance. Under some of the various Acts that the Bill seeks to amend, non-compliance with a relevant notice may carry a maximum penalty that involves a potential imprisonment term. For these reasons, the Committee refers the matter to Parliament for consideration.

Application of the EPA's powers outside NSW

- 6.24 Chapter 4 of the POEO Act sets out the legislative framework for the issue of 'environment protection notices' by the EPA. These include notices to clean up a pollution incident, take action to prevent potential environmental concerns, and prohibit activities that are likely to cause harm to the environment or public health.

- 6.25 Failure to comply with these notices is an offence which carries a maximum penalty of \$250 000 for an individual and an additional \$60 000 for each day the offence continues. Under Part 4.5 of the POEO Act, the EPA may also issue a notice requiring a person to pay the costs it incurred in carrying out these compliance and monitoring functions.
- 6.26 The Bill proposes to insert section 108A into Chapter 4 of the POEO Act which would allow the EPA to issue a single notice for multiple pollution incidents. Proposed subsection (2) would clarify that the EPA can issue a single notice that would treat multiple 'pollution incidents' as one pollution incident.
- 6.27 In her second reading speech, the Parliamentary Secretary highlighted the complexity for the EPA in regulating incidents that involve multiple locations. She explained that these proposed amendments are intended to 'streamline the EPA's response to incidents occurring at multiple premises'.
- 6.28 Proposed subsection 108A(3) would also clarify that the EPA may issue a single notice for multiple pollution incidents, even if the EPA is not the 'appropriate regulatory authority' for all the areas, premises, activities or matters to which the pollution incidents relate.
- 6.29 Section 109 of the POEO Act provides that a notice under Chapter 4 may be given to a person outside of NSW, or in respect to a matter or thing that occurs or is located outside NSW, as long as the matter or thing 'affects the environment of' NSW.

The Bill seeks to insert section 108A into Chapter 4 of the *Protection of the Environment Operations Act 1997* which would allow the EPA to issue a single environment protection notice under that Chapter which would apply to multiple pollution incidents across a number locations. Proposed subsection 108A(3) would enable the EPA to issue a single notice, even if it is not the 'appropriate regulatory authority', for all of the areas or premises to which pollution incidents relate. Section 109 of the Act makes clear that the EPA may issue an environment protection notice under Chapter 4 to a person or for a matter or thing that occurs outside of NSW, as long as that matter or thing 'affects' the State's environment.

Therefore, the Bill may extend the application of the EPA's power to issue an environment protection notice for multiple pollution incidents to areas where it is not the 'appropriate regulatory authority', including potentially outside of NSW. The Committee generally comments where legislation may have extraterritorial effect as it could create uncertainty about what laws individuals are subject to at any one time, especially if they live in another State or Territory. The application of these provisions may impact the rights and liberties of a person outside of NSW, as these notices may require them to take certain actions, prohibit them from certain activities, or expose them to penalties if they fail to comply with the notice.

The Committee acknowledges that section 109 of the Act already permits the broad extraterritorial application of environment protection notices issued under Chapter 4, so long as they relate to something that affects the State's environment. The Committee also acknowledges that the amendments are intended to streamline the EPA's response to large scale incidents occurring across multiple premises or areas.

However, a notice under this amendment would treat all of the relevant incidents as a single incident, even if the majority of the multiple incidents or matters to which they relate occurred within the EPA's jurisdiction. This could operate to require a person outside of NSW to take certain actions for multiple pollution incidents which mainly occurred in NSW (a different jurisdiction) and is being treated as a single incident. As a person outside NSW who fails to comply with a notice may be exposed to significant penalties, the Committee refers this matter to Parliament for consideration.

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

Determination of additional monetary punishment by prosecutor

6.30 A number of Acts which the Bill seeks to amend make provisions for a court to make 'monetary benefit orders' in offence proceedings brought by the EPA under the relevant Act. These orders would require a person or entity convicted of an environment offence to pay an additional penalty. The additional penalty would be an amount that, on the balance of probabilities, the court is satisfied:

... represents the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence.

6.31 The Bill seeks to amend a number of these provisions with respect to how the amount of monetary benefit may be determined. It proposes to replace existing subsections and insert additional provisions in the:

- Contaminated Land Act, replacing subsection 95A(3) and 95C(5) and inserting subsections 95A(3A) and 95C(5A),
- Pesticides Act, replacing subsection 112C(5) and inserting subsections 98(2A) and (2B) and 112C(5A),
- Harmful Radiation Act, replacing subsections 23A(3) and 27A(5) and inserting subsections 23A(3A) and 27A(5A), and
- POEO Act, replacing subsections 249(2A) and 251A(4) and inserting subsections 249(2B) and 251A(4A)

6.32 These proposed amendments would allow the prosecutor (i.e. the EPA) to estimate the amount of monetary benefits gained by an offender. This estimate may be calculated in accordance with a protocol prescribed by regulation, or using another method the prosecutor considers 'appropriate'.

The Bill seeks to replace provisions in the *Contaminated Land Management Act 1997*, *Pesticides Act 1999*, *Protection from Harmful Radiation Act 1990* and the *Protection of the Environment Operations Act 1997*, which concern how the amount of monetary benefit gained by an offender in committing certain offences may be calculated for a 'monetary benefit order'. The amendments would allow a prosecutor, usually the EPA, to use any method they consider 'appropriate' to calculate a reasonable estimate of the monetary benefit, as opposed to

only using the protocol prescribed by regulations for calculating the amount. That reasonable estimate may be accepted by a court which can then make a monetary benefit order requiring the offender to pay that amount in addition to any monetary penalty set by the court for the offence.

Therefore, the Bill may provide the prosecutor with broadly-defined discretion to determine what amount represents a 'reasonable estimate' of the monetary benefit acquired by the offender. Because this estimate could be imposed as an additional punishment for a person convicted of an environment offence, it may make a person's obligations dependent upon an insufficiently defined administrative power. The Committee generally comments on any provisions that may permit a person to receive an additional punishment for a single offence.

The Committee acknowledges that giving this discretion to a prosecutor may allow for quicker determinations of monetary benefits, thereby expediting the resolution of offence proceedings. The Committee also recognises that the court retains the discretion to accept reasonable estimates, or not, and the prosecutor may have to make submissions as to why the method used was 'appropriate' in the circumstances.

However, the Committee notes that the proposed amendments could enable a prosecutor to set a monetary penalty using undefined methods. Without clearly setting out the methods for this calculation in legislation, there is the potential for orders setting additional punishments to be inconsistently calculated across cases. This would infringe on the common law principle of *stare decisis*, that court proceedings should be determined consistently in accordance with precedent, and therefore limit an offender's capacity to understand and anticipate how the law applies to them. For these reasons, the Committee refers the matter to Parliament for consideration.

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

Executive and administrative immunity – exclusion of liability for public statements

- 6.33 The Bill proposes to insert section 319B into the POEO Act, which would allow the EPA to issue a public statement that can identify and give warnings or information about various matters involving contraventions of the environment protection regulatory framework. Under proposed subsection (1), these matters could include:
- details about the providers of substances, if the EPA reasonably suspects the provider is contributing to a pollution incident, or
 - a person who in the EPA's opinion is of environmental concern, if it suspects there is a potential risk of harm to human health or the environment.
- 6.34 Proposed subsection (2) would allow these public statements to identify a particular individual or organisation, information about the substance or activity, and specific information about particular locations or premises.
- 6.35 The Parliamentary Secretary addressed the necessity of this power in her second reading speech:

Public warning powers are already available under fair trading and food safety legislation to protect the people of New South Wales, and it makes sense to extend this to environment protection legislation. ... A "name and shame" power will allow the public to be notified of activities or people that are subject to complaints or have been involved in pollution incidents. This also helps to level the playing field for the majority of operators that are doing the right thing.

- 6.36 Proposed subsection 319B(3) specifies that the EPA may make or issue public statements, if it is satisfied that doing so is in the public interest.
- 6.37 Under section 35 of the PEA Act, acts or omissions done or made in good faith of a 'protected person' are protected from action, liability, claim or demand. Section 35 defines a 'protected person' as any of the following:
- the Minister for Environment,
 - the EPA, its board including its Chairperson and members, an advisory committee and its members, the CEO or a member of staff of the EPA, and
 - a person acting under the direction of anyone listed above.
- 6.38 The Bill also proposes to insert section 35A to exclude liability for these public warning statements, as well as statements made relating to recall notices issued under the POEO Act. Proposed subsection (1) provides that no liability is incurred by the Crown or a protected person for these statements made or issued in good faith, and proposed subsection (2) extends this protection to a person who in 'good faith' publishes that statement or a fair report or summary of it.
- 6.39 Under proposed subsection 35A(3), 'liability' is defined to include liability for defamation and 'protected person' has the same meaning as under section 35.

The Bill seeks to insert section 319B into the *Protection of the Environment Operations Act 1997* which would allow the EPA to issue 'public warning statements' identifying and giving warning or information about contraventions of environment protection legislation, if the EPA is satisfied it is in the public interest to do so. These statements may identify an individual and other specific information like the location of premises. The Bill also proposes to insert section 35A into the *Protection of the Environment Administration Act 1991*, which would exclude liability in relation to the good faith making or publication of these statements. The exclusion of liability (including liability for defamation) would apply to the Executive and 'protected persons', which includes the EPA, its board, committees and staff, as well as people working under the direction of the Executive or the EPA. Therefore, the Bill may provide for a broad Executive and administrative immunity from liability, including for defamation, arising from public warning statements.

The Committee acknowledges that the issuing of public statements is intended to ensure that the public can be made aware of offending conduct or potential environmentally hazardous incidents. However, the broad exclusion of liability may prevent people who are negatively impacted as a result of a public warning statement from seeking

recourse, particularly where those statements would otherwise give rise to an action for defamation. For these reasons, the Committee refers this matter to Parliament for consideration.

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

Matters deferred to regulations – creation of offences

6.40 Section 119 of the Pesticides Act sets out the general regulation-making power under the Act. Under subsection (1), regulations may be made with respect to any matter that is 'required or permitted' to be prescribed under the Act, or 'necessary or convenient' to be prescribed for carrying out or giving effect to this Act. Subsection (2) lists matters which regulations may provide for, without limiting the generality of subsection (1).

6.41 The Bill proposes to insert subsection 119(2)(f1) into the Pesticides Act, to include that regulations can provide for matters relating to requirements for pesticide purchasers, 'including the creation of offences for failing to comply with the requirements'.

The Bill proposes to amend section 119 of the *Pesticides Act 1999* to clarify that the regulations may make provisions relating to requirements for pesticide purchasers, including creating offences for non-compliance with those requirements.

The Committee generally prefers that offences be established in primary legislation in order to facilitate an appropriate level of parliamentary scrutiny. However, under section 119 of the Act, regulations can only create offences that carry monetary penalties and not custodial ones. The Committee also recognises that the regulations are still required to be tabled in both Houses of Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.

7. Independent Commission Against Corruption Amendment (Ministerial Diary Disclosure) Bill 2024*

Date introduced	14 March 2024
House introduced	Legislative Assembly
Member responsible	Mr Gareth Ward MP
	*Private Members Bill

Purpose and description

- 7.1 The object of this Bill is to amend the *Independent Commission Against Corruption Regulation 2017* (the **Regulation**) to require, under the NSW Ministerial Code of Conduct, the publication of information relating to certain meetings involving Ministers, including Parliamentary Secretaries, and external persons.

Background

- 7.2 The Bill seeks to insert Part 4A into the Regulation, which would make provisions for a mandatory disclosure scheme of ministerial diaries on a quarterly basis. These disclosures would be published on the Cabinet Office website under proposed clause 22B(4).
- 7.3 In his second reading speech, Mr Gareth Ward MP stated that the Bill 'contained recommendations from ICAC' and that the object of the recommendations was 'to enhance transparency and accountability in government.'
- 7.4 Mr Ward also acknowledged that the Bill was previously introduced in 2023, then titled the Independent Commission Against Corruption Amendment (Ministerial Diary Disclosure) Bill 2023 (the **Ministerial Diary Disclosure Bill 2023**). The Committee notes that the Bill's provisions are identical in substance to the provisions of the Ministerial Diary Disclosure Bill 2023. The Ministerial Diary Disclosure Bill 2023 lapsed in accordance with the Legislative Assembly's Standing Order 105 on 29 December 2023.
- 7.5 The Committee reported on the Ministerial Diary Disclosure Bill 2023 in its Digest No. 7/58,⁶ and the comments in this report are consistent with the comments in that Digest. In that Digest, the Committee noted that the provisions of the Ministerial Diary Disclosure Bill 2023 may impact privacy rights of Ministers but made no further comment in respect of the issue.

⁶ Parliament of New South Wales, Legislation Review Committee, [Legislation Review Digest No. 7/58](#), 21 November 2023.

Issues considered by the Committee

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

Privacy rights – providing personal information

- 7.6 Currently, Ministers are required under a Premier's Memorandum to disclose certain details about their meetings with external stakeholders.⁷
- 7.7 The Bill seeks to insert clause 22B into the Regulation, to require a summary of every relevant meeting attended by a Minister with an external person be published on the Cabinet Office website. The summary would have to include the information set out in subclause 22B(2), which includes the names of each individual who attended the meeting.
- 7.8 Under proposed subclause 22B(2)(d), if a Minister meets with an individual representing a third-party lobbyist, the Minister would have to publish the name of each person at the meeting, the capacity in which each person attended and the details of the person(s) or organisation(s) represented.

The Bill would insert subclause 22B into the *Independent Commission Against Corruption Regulation 2017*, which would require a summary of relevant meetings with external persons attended by a Minister to be published on the Cabinet Office website. The summary would have to include information such as the names of each individual who attended the meeting, even if an individual is representing an organisation.

The Committee notes that the Bill may impact individuals' right to privacy by requiring personal information, such as their names, to be published on a public website without their consent. However, the Committee acknowledges that Ministers are already required to disclose certain details, including names, in relation to meetings with external persons. Given that the Bill legislates already existing requirements, the Committee makes no further comment.

⁷ Department of Premier and Cabinet, [Premier's Memorandum M2015-05](#), Publication of Ministerial Diaries and Release of Overseas Travel Information.

8. Rural Fires Amendment (Red Fleet) Bill 2024*

Date introduced	14 March 2024
House introduced	Legislative Assembly
Member responsible	The Hon. Adam Marshall MP
	*Private Members Bill

Purpose and description

- 8.1 The object of this Bill is to amend the *Rural Fires Act 1997* (the **Act**) to vest in the Commissioner of the NSW Rural Fire Service fire fighting equipment purchased or constructed wholly or partly from money to the credit of the New South Wales Rural Fire Fighting Fund (**Fund equipment**). Currently, Fund Equipment is vested in the council of the area for or on behalf of which the Fund equipment was purchased or constructed.

Background

- 8.2 The Act establishes a regulatory framework for the prevention of bush fires in local government areas, the coordination of fire fighting in the State and the protection of people, property and the environment from fire. Under the Act, 'the Commissioner' means the Commissioner of the NSW Rural Fire Service.

- 8.3 In his second reading speech, the Hon. Adam Marshall MP said that the amendments proposed by the Bill would:

... [transfer] ownership of all Rural Fire Service assets from local councils, which the Act's provisions from 1997 stipulate, to the State Government, where it should be, to make sure that RFS assets are treated consistently...

- 8.4 The Bill seeks to effect these reforms by replacing the words 'the council of the area for or on behalf of which the fire fighting equipment has been purchased or constructed' with the words 'the Commissioner' in subsection 119(2) of the Act. It also proposes to remove subsections 119(3), (5) and (6) which make references to 'a council' and actions that 'a council' may take relating to firefighting equipment.

Issues considered by the Committee

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



Part Two – Regulations without comment

Regulations without comment

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

1. [Health Practitioner Regulation National Law Amendment \(Professional Indemnity Insurance\) Regulation 2023 - Published by the Victorian Government Printer on 8.12.2023](#)

The Regulation was made by the Ministerial Council under section 245 of the *Health Practitioner Regulation National Law* as applied by the law of the States and Territories. It was published by the Victorian Government Printer on 8 December 2023, and commenced in NSW on the date of publication.

The Regulation extends the transition period for professional indemnity insurance arrangements for midwives practising private midwifery from 31 December 2023 to 1 July 2025. The Regulation does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

2. [Industrial Relations Act 1996 and Civil Procedure Act 2005 – Notification of Industrial Relations Commission of New South Wales Practice Notes \(n2024-0075\)](#)

The purposes of this Practice Note are: -

- (a) to advise the requirements of the Commission in relation to appropriate procedures for appeals; and
- (b) to facilitate the making of directions as to appeals.

The Practice Note is a re-issue of Practice Note No. 1A, first issued on 14 July 2000 and was re-issued on 15 February 2018. This Practice Note No. 1A was re-issued pursuant to section 185A of the *Industrial Relations Act 1996* and section 15 of the *Civil Procedure Act 2005*.

The Practice Note concerns case management orders for appeals to the Full Bench of the Industrial Relations Commission. Therefore, it does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

3. [Water Management \(General\) Amendment \(Joint Private Works\) Regulation 2024](#)

The object of this Regulation is, consequent on the commencement of certain provisions of the *Water Management Amendment Act 2010*, to:

- (a) provide for matters relating to private water corporations and private water trusts, including requirements for their governance
- (b) make saving and transitional provisions in connection with:
 - (i) the automatic conversion of private irrigation boards and private drainage boards to private water corporations on 1 March 2024
 - (ii) the optional conversion of private water trusts to private water corporations between 1 March 2024 and 1 March 2026.

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

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 – Unconfirmed extracts of minutes

Meeting no. 12

TIME & DATE: 3.01PM, 18 MARCH 2024

LOCATION: ROOM 1254 AND WEBEX

MEMBERS PRESENT

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

APOLOGIES

Nil.

OFFICERS PRESENT

Rohan Tyler, Anna Tran, Kate McCorquodale, Alex Read, Mengyuan Chen, Alice Zwar, Nicolle Gill and Caitlin Bailey.

AGENDA ITEM

1. Confirmation of minutes

Resolved, on the motion of Mr Hagarty: That the minutes of the meeting of 11 March 2024 be confirmed.

2. ****

3. Consideration of Bills with comment for Legislation Review Digest 11/58

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

- a) Bail and Crimes Amendment Bill 2024
- b) Children and Young Persons (Care and Protection) Amendment Bill 2024
- c) Conversion Practices Ban Bill 2024
- d) Electoral Amendment (Voter ID and Electronic Mark Off) Bill 2024
- e) Emergency Services Levy Amendment Bill 2024
- f) Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Bill 2024
- g) Independent Commission Against Corruption Amendment (Ministerial Diary Disclosure) Bill 2024

4. Consideration of Bills without comment for Legislation Review Digest 11/58

Resolved, on the motion of Mr Hagarty: That the Committee adopts the draft bill report regarding the Rural Fires Amendment (Red Fleet) Bill 2024.

5. Regulations without comment for Legislation Review Digest 11/58

Resolved, on the motion of Ms Davis: That the Committee adopts the regulations without comment as Part Two to Digest 11/58.

6. Legislation Review Digest 11/58

Resolved, on the motion of Ms Davis:

- That appropriate minute extracts of this meeting be published as Appendix Two of the Digest.
- That the Committee adopts the Legislation Review Digest 11/58 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. ***

9. Next Meeting

The meeting adjourned at 3.04pm until 6 May 2024 at 3.00pm.