

Legislation Review Committee



PARLIAMENT OF
NEW SOUTH WALES

Legislation Review Digest



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

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Membership

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Guide to the Digest

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

Part One: Functions Regarding Bills

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

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

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

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

Trespass unduly on personal rights and liberties:

- retrospectivity
- self-incrimination and the right to silence
- reversal of the onus of proof
- procedural fairness
- rule of law and separation of powers
- extraterritoriality
- strict liability and penalty notice offences
- search and seizure without warrant
- confidential communications and privilege
- wide regulatory powers
- access to vote
- ability to engage in public life and public elections
- equal application of laws
- freedom of expression and free speech
- freedom of religion and belief
- freedom of contract
- right to personal and real property
- privacy and protection of personal information
- right to personal physical integrity
- legislative interference in standing judicial matters

Insufficiently defined administrative powers:

- insufficiently defined or wide powers

Non-reviewable decisions:

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

Inappropriate delegation of legislative powers:

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

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny

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

In practice, the Committee highlights issues of concern and takes into consideration the potential reasons for introducing such a provision and any safeguards in place. The Committee determines if the provisions may be reasonable in the circumstances or should be referred to Parliament for further consideration.

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

Part Two: Functions Regarding Regulations with Comments

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. Anti-Discrimination Amendment \(Heterosexual Discrimination\) Bill 2024*](#)

Issue identified	Conclusion of Committee
Right to freedom of expression	No further comment
Right to freedom of contract – discrimination at work	Referred
Right to freedom of contract and freedom of association – discrimination in other areas	Referred

[2. Automated External Defibrillators \(Public Access\) Bill 2024*](#)

Issue identified	Conclusion of Committee
Absolute liability offences	No further comment
Significant custodial penalty	Referred
Statutory rule expressed to commence before publication on NSW legislation website	Referred
Penalty notice offences and wide powers of delegation	Referred
Matters deferred to regulations – creation of offences	Referred

[3. Health Legislation Amendment \(Miscellaneous\) Bill 2024](#)

Issue identified	Conclusion of Committee
Significant matters delegated to regulations – information sharing and extending offences across states	No further comment

[4. Health Practitioner Legislation Amendment Bill 2024](#)

Issue identified	Conclusion of Committee
Wide investigative powers – privacy and absolute liability offence	Referred

[5. ICAC and Other Independent Commissions Legislation Amendment \(Independent Funding\) Bill 2024*](#)

Issue identified	Conclusion of Committee
Conflict of functions of relevant statutory committees	Referred

[6. Property NSW Amendment Bill 2024](#)

Issue identified	Conclusion of Committee
Wide power to compulsorily acquire land	Referred

PART TWO – REGULATIONS WITH COMMENT

1. Electricity Infrastructure Investment Amendment (Network Infrastructure) Regulation 2024

Issue identified	Conclusion of Committee
Wide discretion of the regulator – the meaning of 'appropriate'	No further comment

2. Industrial Relations (General) Amendment (Electoral Rolls) Regulation 2024

Issue identified	Conclusion of Committee
Privacy rights and absolute/strict liability offences – access to roll	No further comment

3. Local Government (General) Amendment (Tendering) Regulation (No 2) 2023

Issue identified	Conclusion of Committee
Freedom of contract	Referred

4. Marine Pollution Regulation 2024

Issue identified	Conclusion of Committee
Absolute liability offences	No further comment
Additional punishment for same offending conduct	No further comment
Use of certain evidence during prosecution without consent	No further comment

5. Strata Schemes Management Amendment Regulation 2024

Issue identified	Conclusion of Committee
Meaning of 'appropriate in the circumstances of the case'	Referred

Summary of Conclusions

PART ONE – BILLS

1. **Anti-Discrimination Amendment (Heterosexual Discrimination) Bill 2024***

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

Right to freedom of expression

The Bill seeks to insert Part 4D into the *Anti-Discrimination Act 1977*. Division 4 of Part 4D would make it unlawful for a person to incite hatred towards, serious contempt for, or severe ridicule of a person or group through a public act, on the ground of their heterosexuality. By restricting what public communications are lawful, the Bill may therefore limit an individual's right to freedom of expression contained in Article 19 of the ICCPR. The right to freedom of expression guarantees individuals the freedom to seek, receive and share information and ideas.

However, the Committee recognises the right to freedom of expression is not absolute and may be limited by law to protect the public interest or guarantee respect of the rights of other people. The Committee acknowledges that the proposed provisions are intended as an extension of existing sexual discrimination protections available under the Act to heterosexual people and goes no further than that which already exists for groups and people of other sexual orientations. The Committee further notes that Bill also exempts certain communications from the prohibition, including good faith discussions or communications for a purpose in the public interest. In the circumstances, the Committee makes no further comment.

Right to freedom of contract – discrimination at work

The Bill seeks to insert Part 4D into the *Anti-Discrimination Act 1977*, including Division 2 which prevents employers and other relevant organisations from discriminating against people on the ground of heterosexuality when selecting somebody for employment, work, engagement as a commission agent or a position as partner in a firm. It would also prevent certain contracts of employment and other forms of work and work-related opportunities from containing terms that would discriminate against a party on the ground of heterosexuality. Therefore, the Bill may impact a person's right to freedom of contract, including the right to choose who to offer employment and other contractual memberships, and freedom to negotiate and set out the terms and conditions of employment.

The Committee acknowledges that the proposed amendments are intended to mirror existing anti-discrimination protections for other sexual orientations and apply these protections to heterosexual people. However, 'heterosexual discrimination' under the proposed amendments would include less favourable treatment or impose 'unreasonable' conditions that cannot or are not complied with. In an employment and work-related context, the Committee notes that there may be conflicting hiring targets or policies intended to increase diversity and inclusion of certain minority groups, which may not include heterosexual people, and certain workplaces may be motivated by the nature of their work to not offer positions to heterosexual people, such as LGBTQIA+ organisations. The Committee considers that these employment practices could amount to unlawful discrimination under the Bill.

Additionally, the Committee notes that favourable treatment to non-heterosexual people could be interpreted as being less favourable to heterosexual people (and vice versa). As the Bill mirrors

existing anti-discrimination protections on the basis of sexual orientation under the Act, the Committee considers that the Bill may undermine the operational efficacy of existing anti-discrimination protections on the basis of sexual orientation. For these reasons, the Committee refers the issue to Parliament for further consideration.

Right to freedom of contract and freedom of association – discrimination in other areas

The Bill seeks to insert Part 4D into the *Anti-Discrimination Act 1977*, including Division 3 which prohibits people not being offered education or being denied goods and services, accommodation or membership at a registered club on the ground of their, or their relative's perceived heterosexuality. The proposed amendments would also prohibit heterosexual discrimination in the terms on which these goods, services, housing, enrolment or membership is offered. Therefore, the Bill may limit an individual's rights to freedom of association and freedom of contract, including their right to freely choose who to enter into contracts with and negotiate the terms and conditions of that contract.

The Committee acknowledges that the proposed amendments are intended to mirror existing anti-discrimination protections for other sexual orientations and apply these protections to heterosexual people. However, the Committee notes that certain registered clubs may wish to limit membership to non-heterosexual people to create a safe and inclusive environment for LGBTQIA+ members. The Committee further notes that the targeted provision of specialist goods and services for LGBTQIA+ people could amount to unlawful discrimination under the Bill. For these reasons, the Committee refers the issue to Parliament for further consideration.

2. Automated External Defibrillators (Public Access) Bill 2024*

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

Absolute liability offences

Section 7 of the Bill proposes to establish absolute liability offences for failure to comply with the requirements for the installation, maintenance and signage of automated external defibrillators. These offences carry a maximum penalty ranging from \$2 420 (22 penalty units) to \$19 800 (180 penalty units). 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 acknowledges that absolute liability offences are not uncommon in regulatory frameworks to encourage compliance. In this case, compliance with the regulatory regime is intended to ensure defibrillator devices are adequately installed and well maintained in order to protect public health and safety during potential medical emergencies. The Committee also notes that the offences only carry a monetary penalty and do not carry a custodial penalty. In the circumstances, the Committee makes no further comment.

Significant custodial penalty

Proposed section 9 of the Bill prohibits a person from intentionally, and without a reasonable excuse, damaging, destroying or removing a defibrillator. Non-compliance would be an offence carrying a maximum penalty of \$9 900 and/or five years imprisonment.

The Committee notes that this maximum penalty range is broad and the Bill does not appear to specify what circumstances or aggravating factors may warrant a custodial penalty for the commission of the offence. The Committee also notes that a maximum custodial penalty of five years imprisonment is a serious punishment which would render the offence a 'serious indictable

offence' under the *Crimes Act 1900*. Therefore, the Bill may impose a wide range of penalties for an offence which may include a disproportionate imprisonment sentence.

The Committee acknowledges that the offence may be intended to prevent damaging or removing potentially life-saving medical equipment, to ensure it is ready and accessible during medical emergencies. However, the Committee notes that without specifying circumstances or differentiating tiers of the seriousness of the offence, it may be difficult for an accused to understand what circumstances may attract a custodial sentence. Additionally, imposing a maximum custodial penalty of five years imprisonment renders the offence a serious indictable offence under the *Crimes Act 1900*, which may significantly change how the criminal prosecution of the offence is conducted. Given the significant impacts of a custodial sentence on an individual's rights, the Committee refers this matter to Parliament for consideration.

Statutory rule expressed to commence before publication on NSW legislation website

Schedule 1 of the Bill would allow regulations to make savings or transitional provisions that are consequent to the commencement of the Bill or other Act amending the Bill once enacted. It also provides that the regulation may take effect on a date earlier than the date that provision commenced, including a date before the publication of those regulations on the NSW legislation website. 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 also notes that this would conflict with section 39(2A) of the *Interpretation Act 1987*, which requires statutory rules commence either on the day of publication or a later specified date. For these reasons, the Committee refers this matter to the Parliament for its consideration.

Penalty notice offences and wide powers of delegation

Proposed section 14 of the Bill would enable authorised officers to issue a penalty notice to a person who appears to the officer to have committed a penalty notice offence (as prescribed by regulations). Under proposed subsection 14(6), an authorised officer is a person designated by the Department Secretary as an authorised officer.

The Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a court to have their matter heard. This may impact on a person's right to a fair trial, specifically their right to have their matter heard by an impartial decision maker. The Committee also notes that, by permitting authorised officers to issue penalty notices if it 'appears' to them that a person has committed a penalty notice offences, it may result in people being penalised for offences before guilt has been proven to the criminal standard of proof. Therefore, the Bill may also impact on a person's right to the presumption of innocence.

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

However, the Committee notes that the Bill allows the Secretary to designate a departmental employee or 'person prescribed by the regulations' as an authorised officer. The Bill may therefore provide for a wide power of delegation of the function to issue penalty notices under proposed section 14, including to an unknown or unclear group or class of persons prescribed by the regulations. 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

Section 15 of the Bill seeks to provide a general regulation-making power to prescribe anything 'necessary or convenient' for carrying out or giving effect to the Bill. The Committee notes that there does not appear to be any provisions that define or narrow the meaning of 'convenient'. Section 15 would also allow regulations to broadly exempt specified persons or entities from specified provisions of the Bill, once enacted. The Bill may therefore provide for a wide regulation-making power. Unlike primary legislation, regulations are subordinate legislation that are not required to be passed by Parliament and which the Parliament has no control over when they commence.

The Bill would also permit regulations to create offences punishable by a maximum penalty of \$1 100 (10 penalty units). The Committee generally prefers that offences are established in primary legislation in order to facilitate an appropriate level of Parliamentary scrutiny.

The Committee recognises that these regulation-making powers may allow for more flexible regulatory responses and encourage compliance with the broader regulatory framework. It notes that regulations can only create offences that carry monetary penalties. The Committee 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 general regulation-making power may effectively allow regulations to prescribe matters with little limit. It may enable the Executive to create offences and also broadly exempt the application of the parent Act without reference to Parliament. For these reasons, the Committee refers this matter to Parliament for consideration.

3. Health Legislation Amendment (Miscellaneous) Bill 2024

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

Significant matters delegated to regulations – information sharing and extending offences across states

The Bill seeks to insert subsections (7)-(9) into section 27 of the *Assisted Reproductive Technology Act 2007*, which criminalises the use of a single donor's gametes in assisted reproductive technology (ART) treatment that could result in offspring from that donor to more than five women. The proposed subsections seek to grant the Health Secretary the power to give 'relevant information' to interstate government agencies and ART providers, and authorise an ART provider to similarly share relevant information interstate, in circumstances prescribed by the regulations. These amendments would allow the regulations to prescribe what amounts to or cannot be provided as 'relevant information', when information can be shared interstate, and what conditions may be imposed for providing that information.

The Committee notes that sharing 'relevant' information, which may include a donor's health information, without the individual's consent may impact their privacy rights. Additionally, this information-sharing regime may facilitate the prosecution of offences in NSW or other states. As significant matters relating to the proposed information-sharing scheme may be prescribed to regulations, the Committee generally prefers that such substantive matters which may impact an individual's rights be set out in primary legislation to ensure an appropriate level of parliamentary scrutiny.

However, the Committee acknowledges that allowing regulations to prescribe certain matters provides flexibility in the regulatory scheme, which is intended to prevent potential consequences from the overuse of a single donor's gametes. It further notes that the information proposed to be shared is intended to be 'de-identified' information and that any penalty under section 27 of the Act is monetary and not custodial. Finally, the Committee recognises that the regulations would still be required to be tabled in Parliament and are therefore subject to disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.

4. Health Practitioner Legislation Amendment Bill 2024

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

Wide investigative powers – privacy and absolute liability offence

The Bill proposes to amend the *Health Practitioner Regulation (Adoption of National Law) Act 2009* to enable an assessor to request information or records from a person, if they believe that it would assist the conducting of a performance assessment of a registered health practitioner. Under proposed subclause 2A, failure to provide the information or record requested without a reasonable excuse would be an offence carrying a maximum penalty of \$2 200 (20 penalty units).

The Bill therefore seeks to create an absolute liability offence relating to the power to request information. The Committee generally comments absolute liability offences as they depart from the common law principle that the mental element of 'fault' should be proven to establish criminal liability.

Proposed subclause 2A(2) states that the information or records can be provided 'despite any other law or Act', which would include privacy protection laws that might prohibit disclosure of the information subject to the proposed information gathering power. Therefore, the Bill may provide for a wide power of investigation to compel information or records at the pain of criminal penalty, the exercise of which may impact a person's privacy rights.

The Committee acknowledges that this power relates to the professional practice of a health practitioner that is the subject of a performance assessment. The exercise of this power may therefore facilitate the effective conduct of these assessments, which are intended to protect public health by ensuring that health practitioners are fit to practice. The Committee further recognises that the criminal penalty for non-compliance is only monetary and not custodial. However, the Committee notes that the wide power to compel information and records is subject to the discretion of an assessor. As the exercise of this discretionary investigation power may impact a person's privacy and expose them to an absolute liability offence, the Committee refers this matter to Parliament for consideration.

5. ICAC and Other Independent Commissions Legislation Amendment (Independent Funding) Bill 2024*

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

Conflict of functions of relevant statutory committees

The Bill seeks to amend a number of Acts which establish relevant statutory parliamentary committees that oversight the work of the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the Ombudsman's Office and the Audit Office. It also seeks

to establish in statute a Legislative Council Public Accountability Committee and a Joint Committee on Parliamentary Services.

These proposed amendments would require these parliamentary committees to review, determine and report on an amount which should be included for the appropriation for their relevant oversight body or parliamentary department in annual appropriation bills. It would also require the Treasurer to explain when introducing the annual appropriation bills any inconsistency between the committees' determined amounts and the amounts included in the bills for the appropriation for any of these bodies.

The Committee notes that the primary functions of the relevant committees under the existing Acts and establishing resolutions is to monitor and review the exercise by the agency of their functions under the relevant Acts, and to report to one or both Houses of Parliament on any matter relating to their functions that the attention of Parliament should be directed. Therefore, the Bill may inappropriately delegate legislative power to parliamentary committees to determine the appropriation of funds for statutory agencies or parliamentary departments that they also oversee.

The Committee acknowledges that the amendments may be intended to strengthen integrity in the funding of these agencies and departments, by separating the budget process for these agencies from the Executive-led departments. However, the Committee notes that requiring parliamentary committees to report on the funding of an agency that the committee oversees may conflict with its function to independently review the performance of the agency. For these reasons, the Committee refers the matter to Parliament for its consideration.

6. Property NSW Amendment Bill 2024

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

Wide power to compulsorily acquire land

The Bill proposes to insert section 14A into the *Property NSW Act 2006*, which would empower Property NSW to acquire land either by agreement or by compulsory acquisition through the *Land Acquisition (Just Terms Compensation) Act 1991*, which determines the rate at which original owner of the land is compensated. Proposed section 14A also clarifies that this land acquisition power of Property NSW does not authorise its private subsidiary corporations to do the same. Therefore, the Bill may provide a wide power to compulsorily acquire land to a government agency, Property NSW. The Committee notes that the compulsory acquisition of land may infringe on an individual's property rights, including their right to peaceful enjoyment of their property and their right to freedom of contract.

The Committee recognises that the proposed amendments are intended to facilitate Property NSW carrying out its functions more efficiently by removing the need for it to rely on other NSW government agencies to acquire land on its behalf. The Committee also notes that it is not uncommon for government agencies and public bodies to have powers to compulsorily acquire land in order for them to carry out their objectives and functions.

However, the Committee notes that existing land acquisition powers conferred by legislation to other agencies often define or confine how or when that power can be used by the agency. There does not appear to be any provisions in the Bill which might similarly define or confine when Property NSW can or should exercise its power to compulsorily acquire land. Given the broad remit of the power as worded by proposed section 14A, the Committee refers this matter to Parliament for its consideration.

PART TWO – REGULATIONS WITH COMMENT

1. Electricity Infrastructure Investment Amendment (Network Infrastructure) Regulation 2024

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

Wide discretion of the regulator – the meaning of 'appropriate'

The Regulation inserts clause 47E into the *Electricity Infrastructure Investment Regulation 2021*, which requires the regulator to make revenue determinations for contestable augmentation based on a number of discretionary factors. Among other factors, the regulator must determine whether subclause 47E(2) or (3) applies to the component and must therefore use that relevant method for determining the amount under that subclause. Under subclause 47E(3), the regulator must make this determination by relying on and adopting information provided by the network operator or infrastructure planner, if they are satisfied that the existing contractual arrangements contain an 'appropriate referenced costs process', and that the amount was determined using that process.

Under subclause 47E(7), an 'appropriate referenced costs process' is defined as a mechanism in an existing contract that the regulator is satisfied is 'appropriate' for wholly or partially determining the amount for a component. The Regulation may, therefore, may give broad discretion to the regulator to determine how the amount for the component is calculated, without defining or specifying what amounts to an 'appropriate' mechanism or process. This discretion may make it difficult for a person to determine how a revenue determination for a contestable augmentation was calculated.

However, the Committee acknowledges that the broadly worded discretion may be intended to facilitate flexibility and ensure that the complex regulatory scheme is efficiently administered. It further notes that there are other similar discretionary powers for making revenue determinations in the Regulation. In the circumstances, the Committee makes no further comment.

2. Industrial Relations (General) Amendment (Electoral Rolls) Regulation 2024

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

Privacy rights and absolute/strict liability offences – access to roll

The Regulation inserts clause 19A into Schedule 3 of the *Industrial Relations (General) Regulation 2020* which allows the Industrial Registrar to authorise a candidate to access the election roll for a state industrial organisation. Under new clause 19A, the returning officer is required to give a copy of the roll to an authorised candidate and/or allow the candidate to inspect a copy of the roll. The Regulation may therefore impact individual's privacy rights by authorising a candidate for an election of a state industrial organisation to access personal information contained in an electoral roll, which is otherwise protected from disclosure and use under the *Privacy and Personal Information Protection Act 1998*.

Subclauses 19A(5) and (6) also creates two new offences for non-compliance with the undertaking which a candidate may be required to give under subclause (3) before they can access the roll, and for using or disclosing electoral information for an a purpose not connected to the election. A candidate is guilty of committing these offences if they did so without a 'reasonable excuse', and these offences carry a maximum penalty of \$5 500 (50 penalty units).

The Committee notes that the term 'reasonable excuse' may not always include a defence of 'honest and reasonable mistake of fact'. Therefore, the Regulation provides for absolute and/or strict liability offences. The Committee generally comments on these 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 the amendments might be intended to facilitate a candidate's meaningful participation in an industrial election. The Committee also notes that new clause 19A includes some privacy protections like requiring the candidate give an undertaking and establishing offences for failure to comply with the undertaking or misusing the information obtained.

Regarding the new offences, the Committee recognises that absolute and strict liability offences are not uncommon in regulatory settings to encourage compliance. In this case, these offences may be intended to prevent electoral information from being misused or inappropriately disclosed.

Finally, the Committee acknowledges that the Principal Regulation previously had provisions which effectively allowed candidates to access the election roll without the additional protections proposed under new clause 19A. In the circumstances, the Committee makes no further comment.

3. Local Government (General) Amendment (Tendering) Regulation (No 2) 2023

May have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Freedom of contract

The Regulation amends the *Local Government (General) Regulation 2021* to require a tenderer for domestic or other waste management services to give an undertaking guaranteeing certain employment conditions for individual employees who provide domestic or other waste management services. It inserts subclauses 173(4) to (7) to require that a tenderer for waste management services regulated by local councils give an undertaking which ensures that an individual employee will be offered and entitled to employment conditions which are not less favourable than their current conditions. The undertaking is enforceable by the individual employee under new subclause 173(6).

The Regulation also amends clauses 177 and 178 which makes compliance with the undertaking a prerequisite for a council to consider and accept a tender submission. This places additional obligations upon an employer that intends to make a tender submission for the performance of domestic or other waste management services.

Therefore, the Regulation may impact an employer's rights to freedom of contract, including the freedom to choose who to employ, and the freedom to negotiate and set out the terms and conditions of employment with their employees. As a consequence, this may have an adverse impact on the sectors of the business community that provide domestic or other waste management services.

The Committee recognises that the Regulation may be intended to protect individual employees from being offered or treated with less favourable employment conditions than they are currently entitled to. It also acknowledges that the Regulation may provide for certainty and consistency for an individual employee who may be impacted by a tender process. However, the Committee considers that an employer's freedom to choose who it enters into an employment contract with, and its freedom to negotiate the terms and conditions of employment are fundamental common

law rights arising from the freedom of contract. Further, requiring a tenderer to give guarantees in undertaking in order for it to be successful in a tender bid may undermine the operational autonomy of businesses. For these reasons, the Committee refers this matter to Parliament for its consideration.

4. Marine Pollution Regulation 2024

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

Absolute liability offences

Sections 34 and 35 of the Regulation require ship masters and owners to notify Transport for NSW of any accident or defect which substantially impacts the sewage system of a ship. Sections 36 and 37 further prohibit a ship master or owner from modifying the sewage system without written approval from TfNSW, and from failing to comply with any subsequent directions by TfNSW to have the ship inspected or surveyed for compliance with sewage standards. Masters and owners that fail to comply with these provisions may incur an absolute liability offence with a maximum penalty of up to \$2 200 for an individual or \$11 000 otherwise.

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 notes that absolute liability offences are not uncommon in regulatory settings to encourage compliance. Further, the maximum penalties for these offences are monetary and not custodial. In the circumstances, the Committee makes no further comment.

Additional punishment for same offending conduct

Sections 37 and 38 of the Regulation empowers Transport for NSW to commence an investigation into whether a ship complies with relevant standards and give directions to ship owners to undertake an inspection or survey. Under these provisions, not following these directions resulting from a TfNSW investigation is an offence. The Regulation also empowers TfNSW to require ship owners to pay for investigations, and these payments are legally enforceable.

The Committee notes that this may result in a ship owner who has been charged and convicted with the offence of non-compliance with a direction to also pay the costs of investigation. Therefore, the Regulation may permit a person to receive additional punishment for the same offending conduct. The Committee further notes that an individual may be subjected to additional punishment for the costs incurred in the course of an investigation which may lead to a direction that must be followed at pain of criminal liability.

However, the Committee acknowledges that the power to recover costs may be intended to reduce the costs burden for administrators investigating potentially unsafe management of ship sewage systems. The Committee further recognises that this power may encourage compliance with the regulatory regime which may be intended to protect public health and safety. In the circumstances, the Committee makes no further comment.

Use of certain evidence during prosecution without consent

The Regulation substantially remakes Part 5 of the *Marine Pollution Regulation 2014*, which sets out requirements for reporting prescribed pollution incidents to the Minister for Transport and establishing absolute liability offences for non-compliance with these requirements or producing incomplete, false or misleading reports. However, the Regulation omits the previous prohibition against the use of the contents of these report as evidence in the prosecution of an offence under this Part without the consent of the accused.

Therefore, the Regulation may infringe on the accused's rights to a fair hearing and procedural fairness by requiring individuals to produce reports to the Minister at the pain of criminal penalty, and permitting the use of those reports in order to prove that person's guilt.

However, the Committee recognises that the Regulation may be intended to encourage compliance with marine pollution regulations and protect public health and safety. The Committee further notes that the relevant offences only carry monetary and not custodial penalties. In the circumstances, the Committee makes no further comment.

5. Strata Schemes Management Amendment Regulation 2024

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

Meaning of 'appropriate in the circumstances of the case'

The Regulation inserts clause 55AA into the *Strata Schemes Management Regulation 2016*, which provides circumstances in which the Commissioner for Fair Trading may enable the cancellation of a building bond. A building bond is paid by developers to NSW Fair Trading to secure money that can be put towards rectifying any building defects.

Subclause 55AA(b) allows the Secretary to enable the cancellation of a building bond where they consider it 'appropriate in the circumstances of the case'. The Committee notes that neither the *Strata Schemes Management Act 2015* or its regulations have provisions which limit or specify what may amount to 'appropriate in the circumstances' in respect to building bond cancellations. Therefore, the Regulation may grant the Secretary (that is, the Commissioner of Fair Trading) a broad discretionary power to cancel building bonds. This may make it difficult for affected parties such as residents, builders and owners corporations to understand how and when a bond may be cancelled.

The Committee acknowledges providing the Secretary with this discretion may be intended to build in administrative flexibility to address unforeseen circumstances where cancelling a building bond. However, the Committee notes that building bonds are meant to be security for the payment of rectifying defective building work. By holding building bonds until building work is cleared of defects, the Scheme may be intended to protect public safety by ensuring that rectification of defects occurs efficiently and that developers are accountable for defective building work. For these reasons, the Committee refers the issue to Parliament for further consideration.

Part One – Bills

1. Anti-Discrimination Amendment (Heterosexual Discrimination) Bill 2024*

Date introduced	20 March 2024
House introduced	Legislative Council
Member responsible	The Hon. Mark Banasiak MLC
	*Private Members Bill

Purpose and description

- 1.1 The object of this Bill is to amend the *Anti-Discrimination Act 1977* (the **Act**) to:
- (a) provide that discrimination against a person on the ground of the person's homosexuality is unlawful,
 - (b) prescribe certain work and other arrangements in which discrimination against a person on the ground of the person's homosexuality is unlawful,
 - (c) provide that heterosexual vilification, by certain public acts, is unlawful.

Background

- 1.2 In his second reading speech, the Hon. Mark Banasiak MLC explained that the amendments proposed by the Bill would extend legal discrimination protection for 'the homosexuals of New South Wales'. He further concluded that the intention of the Bill is 'ensuring that no individual is left vulnerable to discrimination based on their sexual orientation [which] is a basic human right'.
- 1.3 The Bill proposes to insert Part 4D into the Act, which makes provisions prohibiting discrimination against a person on the basis of homosexuality in certain circumstances. This prohibition would apply where the discrimination occurs based on a belief that a person is heterosexual, even if they do not identify as heterosexual.
- 1.4 Proposed Part 4D consists of four Divisions. Division 2 would make it unlawful for a person to be discriminated against on the ground of homosexuality in certain workplace or employment circumstances. Division 3 would similarly prohibit discrimination on the ground of homosexuality in other circumstances related to education, the provision of goods and services, accommodation and registered clubs. Finally, Division 4 would make it unlawful to publicly incite hate towards a person or group on the ground of homosexuality, with some exceptions.

Issues considered by the Committee

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

Right to freedom of expression

- 1.5 The Bill seeks to amend the Act to insert sections 49ZTO and 49ZTP, which would make heterosexual vilification unlawful. Proposed subsection 49ZTP(1) provides that it is unlawful for a person to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground of heterosexuality through a public act.
- 1.6 Under proposed subsection 49ZTP(2), the following are exemptions to the prohibition under subsection (1):
- (a) a fair report of a public act,
 - (b) a communication or the distribution or dissemination which would attract absolute privilege (whether under the *Defamation Act 2005* or otherwise) in defamation proceedings,
 - (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest.
- 1.7 Proposed section 49ZTO would define a 'public act' to include:
- 'any form of communication to the public',
 - 'any conduct observable by the public', including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
 - the distribution or dissemination of 'any matter to the public' with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the heterosexuality of the person or members of the group.

The Bill seeks to insert Part 4D into the *Anti-Discrimination Act 1977*. Division 4 of Part 4D would make it unlawful for a person to incite hatred towards, serious contempt for, or severe ridicule of a person or group through a public act, on the ground of their heterosexuality. By restricting what public communications are lawful, the Bill may therefore limit an individual's right to freedom of expression contained in Article 19 of the ICCPR.¹ The right to freedom of expression guarantees individuals the freedom to seek, receive and share information and ideas.

However, the Committee recognises the right to freedom of expression is not absolute and may be limited by law to protect the public interest or guarantee respect of the rights of other people. The Committee acknowledges that the proposed provisions are intended as an extension of existing sexual discrimination protections available under the Act to

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

heterosexual people and goes no further than that which already exists for groups and people of other sexual orientations. The Committee further notes that Bill also exempts certain communications from the prohibition, including good faith discussions or communications for a purpose in the public interest. In the circumstances, the Committee makes no further comment.

Right to freedom of contract – discrimination at work

1.8 The Bill proposes to insert Part 4D into the Act to enact anti-discrimination protections on the ground of heterosexuality. Proposed section 49ZTB of Part 4D mirrors existing sexual discrimination protections. It defines 'heterosexual discrimination' to mean either:

- treating a person on the ground that the person or their relative is heterosexual, in a way that is less favourable than they would otherwise treat them or their relative if they not heterosexual. This would include treatment or actions done on the ground of a characteristic of the person that is generalised to heterosexual people.
- requiring a person to comply with a requirement or condition that would be unreasonable in the circumstances and that they cannot or do not comply with, if that requirement or condition is one a 'substantially higher proportion' of people who are not heterosexual or who do not have a heterosexual relative can comply with.

1.9 Proposed Division 2 of Part 4D would prohibit discrimination against heterosexual people or people perceived to be heterosexual in decision-making about who should be offered employment, work, engagement as a commission agent or a position as a partner in a firm. It would also prohibit heterosexual discrimination by an employer, a principal, a firm consisting of more than five partners, an industrial organisation, an employment agency, or an authority or body empowered to deal with an authorisation or qualification through the terms on which it offers a person relevant work, position, participation, authorisation or provision of services.

The Bill seeks to insert Part 4D into the *Anti-Discrimination Act 1977*, including Division 2 which prevents employers and other relevant organisations from discriminating against people on the ground of heterosexuality when selecting somebody for employment, work, engagement as a commission agent or a position as partner in a firm. It would also prevent certain contracts of employment and other forms of work and work-related opportunities from containing terms that would discriminate against a party on the ground of heterosexuality. Therefore, the Bill may impact a person's right to freedom of contract, including the right to choose who to offer employment and other contractual memberships, and freedom to negotiate and set out the terms and conditions of employment.

The Committee acknowledges that the proposed amendments are intended to mirror existing anti-discrimination protections for other sexual orientations and apply these protections to heterosexual people. However, 'heterosexual discrimination' under the proposed amendments would include less favourable treatment or impose 'unreasonable' conditions that cannot or are not complied with. In an employment and work-related context, the Committee notes that there

may be conflicting hiring targets or policies intended to increase diversity and inclusion of certain minority groups, which may not include heterosexual people, and certain workplaces may be motivated by the nature of their work to not offer positions to heterosexual people, such as LGBTQIA+ organisations. The Committee considers that these employment practices could amount to unlawful discrimination under the Bill.

Additionally, the Committee notes that favourable treatment to non-heterosexual people could be interpreted as being less favourable to heterosexual people (and vice versa). As the Bill mirrors existing anti-discrimination protections on the basis of sexual orientation under the Act, the Committee considers that the Bill may undermine the operational efficacy of existing anti-discrimination protections on the basis of sexual orientation. For these reasons, the Committee refers the issue to Parliament for further consideration.

Right to freedom of contract and freedom of association – discrimination in other areas

1.10 The Bill proposes to insert Part 4D, including Division 3 which would protect heterosexual people or people perceived to be heterosexual from discrimination in decision-making about who should be offered education, or provided goods and services, accommodation and membership of a registered club. It would also make it unlawful for an education authority, a person who provides goods or services, a registered club, or a principal or agent to engage in heterosexual discrimination in the terms on which they are prepared to admit a person as a student or member, or provide the person with the service or accommodation.

1.11 As stated above, proposed subsection 49ZTB(1) provides that heterosexual discrimination includes:

- treating a person less favourably than they would otherwise, due to the belief that they, or a relative are heterosexual (including on the basis of generalised characteristics), and
- requiring a heterosexual person to comply with a requirement or condition that is unreasonable and that they cannot or does not comply with, if that requirement or condition is one which a substantially higher number of non-heterosexual people could comply with.

The Bill seeks to insert Part 4D into the *Anti-Discrimination Act 1977*, including Division 3 which prohibits people not being offered education or being denied goods and services, accommodation or membership at a registered club on the ground of their, or their relative's perceived heterosexuality. The proposed amendments would also prohibit heterosexual discrimination in the terms on which these goods, services, housing, enrolment or membership is offered. Therefore, the Bill may limit an individual's rights to freedom of association and freedom of contract, including their right to freely choose who to enter into contracts with and negotiate the terms and conditions of that contract.

The Committee acknowledges that the proposed amendments are intended to mirror existing anti-discrimination protections for other sexual orientations and apply these protections to heterosexual people. However, the Committee notes that certain registered clubs may wish to

limit membership to non-heterosexual people to create a safe and inclusive environment for LGBTQIA+ members. The Committee further notes that the targeted provision of specialist goods and services for LGBTQIA+ people could amount to unlawful discrimination under the Bill. For these reasons, the Committee refers the issue to Parliament for further consideration.

2. Automated External Defibrillators (Public Access) Bill 2024*

Date introduced	21 March 2024
House introduced	Legislative Assembly
Member responsible	Mr Gareth Ward MP
	*Private Members Bill

Purpose and description

- 2.1 The objects of this Bill are to:
- (a) require the installation of automated external defibrillators (**defibrillators**) in certain buildings and vehicles
 - (b) require the registration and maintenance of the defibrillators, and
 - (c) require the Minister responsible for the administration of the proposed Act to
 - (i) keep a publicly accessible register of the defibrillators, including the location of the defibrillators, and
 - (ii) develop a strategy to inform the public about defibrillators.

Background

- 2.2 In his second reading speech, Mr Gareth Ward MP said the Bill is intended to ensure that 'life-saving devices are where they need to be and that they are adequately maintained' by mandating defibrillators in 'public buildings such as schools, libraries and sporting facilities along with all modes of public transport.' He further emphasised that it would also 'require defibrillators to be tested every 12 months and require signage highlighting the presence of a defibrillator in a building or a vehicle.'
- 2.3 The Bill seeks to create a new Act that would mandate the installation, registration and maintenance of defibrillators in certain buildings and vehicles. If enacted, it would commence two years after the date of assent. Mr Ward explained that the proposed two year commencement period:

... allows time for the work that has been already started to be properly analysed and for the register to be reviewed, improved upon and consolidated with other versions of AED registers in the State. It also allows time for the departments of health and emergency services to prioritise locations, distribute the defibrillators and roll out education and awareness programs so that the public is aware of the devices and understands how to use them.

Issues considered by the Committee

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

Absolute liability offences

2.4 Section 7 of the Bill would require a responsible person of a relevant building or vehicle to ensure that:

- (a) defibrillators are installed, maintained and tested (subsection (1)), and
- (b) a sign indicating the location where a defibrillator is installed (subsection (2)).

2.5 The terms 'relevant building', 'relevant vehicle' and 'responsible person' are defined under sections 4 and 5 of the Bill. Proposed subsection 4(1) sets out a number of categories that are captured by the term 'relevant buildings', which would include large commercial buildings, government buildings, educational establishments and correctional centres. Under proposed subsection 4(2), 'relevant vehicles' would include an emergency services vehicle and a public passenger vehicle.

2.6 Under proposed section 5, 'responsible person' would mean:

- (a) for a relevant building, the owner of the building.
- (b) for an emergency services vehicle, the head of the emergency services organisation.
- (c) for a public passenger vehicle, the operator of the service provided using the vehicle.
- (d) for another vehicle prescribed as a relevant vehicle, the prescribed person.

2.7 The Bill also proposes to establish absolute liability offences regarding the requirements for the installation, maintenance and signage of defibrillators. Failure to comply with the requirements under section 7 would carry a maximum penalty ranging from \$2 420 (22 penalty unites) to \$19 800 (180 penalty unites).

2.8 In his second reading speech, Mr Ward emphasised that the Bill would ensure 'defibrillators are working, are accessible and are there when people need them.'

Section 7 of the Bill proposes to establish absolute liability offences for failure to comply with the requirements for the installation, maintenance and signage of automated external defibrillators. These offences carry a maximum penalty ranging from \$2 420 (22 penalty unites) to \$19 800 (180 penalty unites). 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 acknowledges that absolute liability offences are not uncommon in regulatory frameworks to encourage compliance. In this case, compliance with the regulatory regime is intended to ensure defibrillator devices are adequately installed and well maintained in order to protect public health and safety during potential medical

emergencies. The Committee also notes that the offences only carry a monetary penalty and do not carry a custodial penalty. In the circumstances, the Committee makes no further comment.

Significant custodial penalty

- 2.9 Proposed section 9 of the Bill prohibits a person from intentionally and without a reasonable excuse:
- (a) damaging or destroying a defibrillator, or
 - (b) removing a defibrillator from where it is installed, as required under the Bill.
- 2.10 Failure to comply with section 9 would carry a maximum penalty of \$9 900 (90 penalty units) and/or five years imprisonment.

Proposed section 9 of the Bill prohibits a person from intentionally, and without a reasonable excuse, damaging, destroying or removing a defibrillator. Non-compliance would be an offence carrying a maximum penalty of \$9 900 and/or five years imprisonment.

The Committee notes that this maximum penalty range is broad and the Bill does not appear to specify what circumstances or aggravating factors may warrant a custodial penalty for the commission of the offence. The Committee also notes that a maximum custodial penalty of five years imprisonment is a serious punishment which would render the offence a 'serious indictable offence' under the *Crimes Act 1900*. Therefore, the Bill may impose a wide range of penalties for an offence which may include a disproportionate imprisonment sentence.

The Committee acknowledges that the offence may be intended to prevent damaging or removing potentially life-saving medical equipment, to ensure it is ready and accessible during medical emergencies. However, the Committee notes that without specifying circumstances or differentiating tiers of the seriousness of the offence, it may be difficult for an accused to understand what circumstances may attract a custodial sentence. Additionally, imposing a maximum custodial penalty of five years imprisonment renders the offence a serious indictable offence under the *Crimes Act 1900*, which may significantly change how the criminal prosecution of the offence is conducted. Given the significant impacts of a custodial sentence on an individual's rights, the Committee refers this matter to Parliament for consideration.

Statutory rule expressed to commence before publication on NSW legislation website

- 2.11 Under section 39(1) of the *Interpretation Act 1987*, a statutory rule (including regulations) must be published on the NSW legislation website and commence on the date of publication or a later specified date. Subsection 39(2A) provides that a statutory rule is not invalid merely because it is expressed to commence (wholly or partly) before the date of publication, and is instead taken to commence on the date of publication rather than the earlier stated date.
- 2.12 Schedule 1 of the Bill seeks to establish a regulation-making power to make savings, transitional and other provisions. Subclauses 1(4) and 5 of Schedule 1 would allow a

savings or transitional provision which is made as a consequence of the commencement of a provision to take effect before that provision has commenced, including before publication of the regulation on the NSW legislation website.

Schedule 1 of the Bill would allow regulations to make savings or transitional provisions that are consequent to the commencement of the Bill or other Act amending the Bill once enacted. It also provides that the regulation may take effect on a date earlier than the date that provision commenced, including a date before the publication of those regulations on the NSW legislation website. 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 also notes that this would conflict with section 39(2A) of the *Interpretation Act 1987*, which requires statutory rules commence either on the day of publication or a later specified date. For these reasons, the Committee refers this matter to the Parliament for its consideration.

Penalty notice offences and wide powers of delegation

- 2.13 Proposed subsection 14(1) of the Bill would enable an authorised officer to issue a penalty notice to a person 'if it appears to the officer that the person has committed a penalty notice offence'. Under proposed subsection 14(2), the regulations may prescribe an offence as a penalty notice offence.
- 2.14 An authorised officer is defined under proposed subsection 14(6) as any of the following persons designated by the relevant Department Secretary:
- (a) a person employed in the Department, or
 - (b) another person prescribed by the regulations.

Proposed section 14 of the Bill would enable authorised officers to issue a penalty notice to a person who appears to the officer to have committed a penalty notice offence (as prescribed by regulations). Under proposed subsection 14(6), an authorised officer is a person designated by the Department Secretary as an authorised officer.

The Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a court to have their matter heard. This may impact on a person's right to a fair trial, specifically their right to have their matter heard by an impartial decision maker. The Committee also notes that, by permitting authorised officers to issue penalty notices if it 'appears' to them that a person has committed a penalty notice offences, it may result in people being penalised for offences before guilt has been proven to the criminal standard of proof. Therefore, the Bill may also impact on a person's right to the presumption of innocence.

The Committee recognises that individuals still retain the right to elect to have their matter heard and decided by a court. It also acknowledges that there are a range of practical benefits in allowing matters to be dealt with

by way of penalty notice, including reducing the costs and time associated with the administration of justice.

However, the Committee notes that the Bill allows the Secretary to designate a departmental employee or 'person prescribed by the regulations' as an authorised officer. The Bill may therefore provide for a wide power of delegation of the function to issue penalty notices under proposed section 14, including to an unknown or unclear group or class of persons prescribed by the regulations. 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

- 2.15 The Bill seeks to establish a number of regulation-making powers under proposed section 15, including a general regulation-making power that would allow regulations to be made about anything required or permitted to be prescribed, or 'necessary or convenient' to be prescribed for carrying out or giving effect to the Bill.
- 2.16 Proposed subsection 15(3) would further allow the regulations to create offences about the matters under proposed subsection (2). These offences may carry a maximum penalty of \$1 100 (10 penalty units).
- 2.17 Proposed subsection 15(5) would also permit regulations to 'exempt specified persons or entities from specified provisions' of the Bill.

Section 15 of the Bill seeks to provide a general regulation-making power to prescribe anything 'necessary or convenient' for carrying out or giving effect to the Bill. The Committee notes that there does not appear to be any provisions that define or narrow the meaning of 'convenient'. Section 15 would also allow regulations to broadly exempt specified persons or entities from specified provisions of the Bill, once enacted. The Bill may therefore provide for a wide regulation-making power. Unlike primary legislation, regulations are subordinate legislation that are not required to be passed by Parliament and which the Parliament has no control over when they commence.

The Bill would also permit regulations to create offences punishable by a maximum penalty of \$1 100 (10 penalty units). The Committee generally prefers that offences are established in primary legislation in order to facilitate an appropriate level of Parliamentary scrutiny.

The Committee recognises that these regulation-making powers may allow for more flexible regulatory responses and encourage compliance with the broader regulatory framework. It notes that regulations can only create offences that carry monetary penalties. The Committee 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 general regulation-making power may effectively allow regulations to prescribe matters with little limit. It may enable the Executive to create offences and also broadly exempt the application of the parent Act without reference to Parliament. For these

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

3. Health Legislation Amendment (Miscellaneous) Bill 2024

Date introduced	21 March 2024
House introduced	Legislative Council
Minister with carriage	The Hon. Rose Jackson MLC
Portfolio	Mental Health

Purpose and description

- 3.1 The object of this Bill is to make miscellaneous amendments to the following Acts:
- (a) the *Assisted Reproductive Technology Act 2007* (the **ART Act**)
 - (b) the *Crimes Act 1900*
 - (c) the *Drug and Alcohol Treatment Act 2007*
 - (d) the *Health Records and Information Privacy Act 2002*
 - (e) the *Medicines, Poisons and Therapeutic Goods Act 2022*
 - (f) the *Mental Health Act 2007*
 - (g) the *Private Health Facilities Act 2007*
 - (h) the *Public Health Act 2010*
 - (i) the *Public Health (Tobacco) Act 2008*.
- 3.2 The Bill also repeals the *Health Services Amendment (Ambulance Services) Act 2015*.

Background

- 3.3 The Bill proposes various amendments to a number of different Acts within the State's legislative framework regulating public health and services. The Hon. Rose Jackson MLC, Minister for Mental Health, noted in her second reading speech that the Bill is part of the Department of Health's 'miscellaneous law amendment program' which is intended to 'ensure legislation within the Health portfolio remains up to date and relevant and ensures that Acts are operating effectively'.
- 3.4 Among other amendments, the Bill seeks to repeal the *Health Services Amendment (Ambulance Services) Act 2015*. The Minister noted that the provisions of this Act have not been commenced and explained that repealing the Act is intended to address any 'confusion for people who are trying to understand their responsibilities under the law.'

- 3.5 The Bill proposes to make amendments to both the *Private Health Facilities Act 2007* and the *Public Health Act 2010* to extend and clarify the powers of the Health Secretary. It also seeks to amend the *Crimes Act 1900* to extend existing offences of assaulting or hindering frontline health workers to include medical practitioners and other persons working at a medical practice.
- 3.6 The proposed amendment to the *Drugs and Alcohol Treatment Act 2007* would clarify that an 'acting official visitor' can perform the necessary duties under the Act in certain circumstances, including acting as an advocate for patients about issues arising during an alcohol or drug dependency program. In her second reading speech, the Minister explained that this is intended to 'ensure that a temporary principal official visitor can properly undertake the statutory functions where there is an absence'.
- 3.7 The Bill would also amend the *Mental Health Act 2007* in line with the proposed changes to the *Drugs and Alcohol Treatment Act 2007* relating to principal official visitors. It proposes further amendments to the *Mental Health Act 2007* relating to community treatment orders, to allow notice of a breach of a community treatment order to be provided to each designated carer and the principal care provider of the person subject to the order.
- 3.8 Finally, the Bill proposes to amend the *Public Health (Tobacco) Act 2008* to allow inspectors to be appointed by the Secretary under that Act, rather than the *Public Health Act 2010*, and to clarify that the inspectors perform enforcement functions under the *Public Health (Tobacco) Act 2008*.

Issues considered by the Committee

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

Significant matters delegated to regulations – information sharing and extending offences across states

- 3.9 Section 27 of the ART Act prohibits gametes from a single donor from being provided to more than five women for assisted reproductive technology (**ART**) which is likely to result in offspring being born from that donor.
- 3.10 The Bill proposes to insert subsections 27(7)-(9) into the ART Act to facilitate information sharing between interstate government agencies or assisted reproductive technology providers. Proposed subsection (7) would allow the Health Secretary to share relevant information or authorise an ART provider to share information interstate, in circumstances prescribed by the regulations. Proposed subsection (8) sets out the matters relevant to the interstate information-sharing regime which may be prescribed by the regulations.
- 3.11 In her second reading speech, the Minister explained that these amendments are intended to facilitate compliance with the prohibition under section 27 to limit the number of potential half-siblings that people born using IVF could have, which would 'reduce the risk of a child unknowingly entering into a relationship with a blood relative'. She further explained that the relevant information intended to be shared under the amendments would 'be limited to numbers of offspring or numbers of women who are pregnant.'

The Bill seeks to insert subsections (7)-(9) into section 27 of the *Assisted Reproductive Technology Act 2007*, which criminalises the use of a single donor's gametes in assisted reproductive technology (ART) treatment that could result in offspring from that donor to more than five women. The proposed subsections seek to grant the Health Secretary the power to give 'relevant information' to interstate government agencies and ART providers, and authorise an ART provider to similarly share relevant information interstate, in circumstances prescribed by the regulations. These amendments would allow the regulations to prescribe what amounts to or cannot be provided as 'relevant information', when information can be shared interstate, and what conditions may be imposed for providing that information.

The Committee notes that sharing 'relevant' information, which may include a donor's health information, without the individual's consent may impact their privacy rights. Additionally, this information-sharing regime may facilitate the prosecution of offences in NSW or other states. As significant matters relating to the proposed information-sharing scheme may be prescribed to regulations, the Committee generally prefers that such substantive matters which may impact an individual's rights be set out in primary legislation to ensure an appropriate level of parliamentary scrutiny.

However, the Committee acknowledges that allowing regulations to prescribe certain matters provides flexibility in the regulatory scheme, which is intended to prevent potential consequences from the overuse of a single donor's gametes. It further notes that the information proposed to be shared is intended to be 'de-identified' information and that any penalty under section 27 of the Act is monetary and not custodial. Finally, the Committee recognises that the regulations would still be required to be tabled in Parliament and are therefore subject to disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.

4. Health Practitioner Legislation Amendment Bill 2024

Date introduced	19 March 2024
House introduced	Legislative Assembly
Minister with carriage	The Hon. Ryan Park MP
Member introducing	Dr Michael Holland MP
Portfolio	Health

Purpose and description

- 4.1 The object of this Bill is to make miscellaneous amendments to the *Health Care Complaints Act 1993* (the **HCCC Act**) and *Health Practitioner Regulation (Adoption of National Law) Act 2009* (the **National Law Act**).

Background

- 4.2 The HCCC Act establishes the Health Care Complaints Commission (the **Commission**) which investigates and prosecutes complaints against health care services providers. The National Law Act applies in NSW the model law regulating health practitioners set out in an Act of the Queensland Parliament (the **National Law**). The National Law includes provisions for complaints processes that are only applicable in NSW.
- 4.3 In his second reading speech, Dr Michael Holland MP, Parliamentary Secretary for Health, noted that the Government is currently reviewing the complaints process under the HCCC Act. The Parliamentary Secretary explained that, before the review is finalised, the Bill is proposing 'minor changes' which are intended to 'help streamline the complaints process and address some urgent issues'. He then said that these changes would:
- ... help ensure that the complaints process under the Health Practitioner Regulation National Law (NSW) and the Health Care Complaints Act continues to properly safeguard the New South Wales public, while ensuring procedural fairness and practitioner engagement.
- 4.4 The minor amendments to the HCCC Act proposed by the Bill include expanding the power of the Director of Proceedings to vary decisions and withdraw complaints, and requiring the Commission to record when complaints are withdrawn. The Bill also proposes to insert a new section (91A), which would enable the Commission to use expert reports to assist in its investigations and prescribes how these reports may be prepared and used.
- 4.5 The Bill also proposes minor amendments to the National Law Act to require 'Councils for health professions' to give written notice and reasons to a registered health practitioner regarding relevant decisions, and to take certain actions for the consideration of reports by an Impaired Registrants Panel.

- 4.6 The Bill also proposes to amend Schedule 1 of the National Law Act, which modifies the application of the National Law in NSW. This amendment would empower an assessor to obtain information and records about a registered health practitioner for the purpose of performance assessments. Proposed subclause 2A(3) makes it an offence to fail to provide that information without a reasonable excuse.

Issues considered by the Committee

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

Wide investigative powers – privacy and absolute liability offence

- 4.7 The Bill proposes to modify the application of the National Law in NSW, which is already modified by Schedule 1 of the National Law Act, by inserting clause 2A into Schedule 5B to Schedule 1[25]. Clause 2A would grant additional investigation powers to an assessor who must conduct a performance assessment of a registered health practitioner, as required by a Council or a Performance Review Panel.

- 4.8 Specifically, it would empower an assessor to request 'relevant information' or 'relevant records' from a person, if they believe that it would assist the conducting of the performance assessment. Proposed clause 2A(1) provides that an assessor may require by written notice that the person either or both:

- (a) provide written answers to questions in relation to the relevant information of which the person has knowledge, by the time and in the way specified in the notice.
- (b) produce relevant records owned by or under the control of the person, to the assessor.

- 4.9 Proposed subclause 2A(2) provides that the requested information or records can be provided 'despite any other Act or law'. Under subclause 2A(3), failure to comply with the request without reasonable excuse would be an offence which carries a maximum penalty of \$2 200 (20 penalty units).

- 4.10 Subclause 2A(4) would define:

- 'relevant information' to include information relating to the 'carrying out of the practitioner's professional practice', and
- 'relevant record' as 'a record relating to the carrying out of the practitioner's professional practice'.

- 4.11 In his second reading speech, the Parliamentary Secretary noted that this power would expand the existing power for assessors under the National Law:

Currently, the Health Practitioner Regulation National Law (NSW) only allows an assessor to obtain this information and those records by physically attending the premises where the practitioner practises or where records are held. This can hinder the completion of performance assessments that are conducted remotely or on the papers, where there is typically no need for the assessor to attend the premises to assess the performance of the practitioner.

The Bill proposes to amend the *Health Practitioner Regulation (Adoption of National Law) Act 2009* to enable an assessor to request information or records from a person, if they believe that it would assist the conducting of a performance assessment of a registered health practitioner. Under proposed subclause 2A, failure to provide the information or record requested without a reasonable excuse would be an offence carrying a maximum penalty of \$2 200 (20 penalty units).

The Bill therefore seeks to create an absolute liability offence relating to the power to request information. The Committee generally comments absolute liability offences as they depart from the common law principle that the mental element of 'fault' should be proven to establish criminal liability.

Proposed subclause 2A(2) states that the information or records can be provided 'despite any other law or Act', which would include privacy protection laws that might prohibit disclosure of the information subject to the proposed information gathering power. Therefore, the Bill may provide for a wide power of investigation to compel information or records at the pain of criminal penalty, the exercise of which may impact a person's privacy rights.

The Committee acknowledges that this power relates to the professional practice of a health practitioner that is the subject of a performance assessment. The exercise of this power may therefore facilitate the effective conduct of these assessments, which are intended to protect public health by ensuring that health practitioners are fit to practice. The Committee further recognises that the criminal penalty for non-compliance is only monetary and not custodial. However, the Committee notes that the wide power to compel information and records is subject to the discretion of an assessor. As the exercise of this discretionary investigation power may impact a person's privacy and expose them to an absolute liability offence, the Committee refers this matter to Parliament for consideration.

5. ICAC and Other Independent Commissions Legislation Amendment (Independent Funding) Bill 2024*

Date introduced	21 March 2024
House introduced	Legislative Assembly
Member responsible	Mrs Helen Dalton MP
	*Private Members Bill

Purpose and description

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

Background

- 5.2 In her second reading speech, Mrs Helen Dalton MP explained that the Bill's intended purpose is to 'ensure that the bodies entrusted to look over our Government are independently and properly funded'. She further stated that the Bill would provide:

... clear oversight of the adequacy of funding for ICAC, the Law Enforcement Conduct Commission, the NSW Electoral Commission and the NSW Ombudsman... by allowing the annual funding for those bodies to be allocated separately from other agencies and free from political interference

- 5.3 The Bill proposes amendments to several Acts establishing independent statutory oversight bodies, including the *Government Sector Audit Act 1983*, *Electoral Act 2017*, *Independent Commission Against Corruption Act 1988*, *Law Enforcement Conduct Commission Act 2016*, and *Ombudsman Act 1974*. The amendments proposed by the Bill would expand the statutory functions of the parliamentary committees established by these Acts to oversight the relevant statutory agency by introducing committee functions in relation to annual appropriations.
- 5.4 Mrs Dalton acknowledged that the Bill was previously introduced in the previous (57th) Parliament and was then titled the ICAC and Other Independent Commissions Legislation Amendment (Independent Funding) Bill 2022 (the **2022 Bill**). The Committee notes that the Bill's provisions are identical in substance to the provisions of the 2022 Bill, and an earlier iteration titled ICAC and Other Independent Commissions Legislation Amendment (Independent Funding) Bill 2021 (No. 2) (the **2021 Bill**). In accordance with Legislative Assembly Standing Order 105, the 2022 Bill lapsed on 8 December 2022 and the 2021 Bill lapsed on 19 May 2022.
- 5.5 The Committee reported on the 2021 Bill in its Digest No. 37/57,² 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 2021 Bill may lead to a conflict of the functions of statutory parliamentary committees.

Issues considered by the Committee

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

Conflict of functions of relevant statutory committees

- 5.6 The Bill proposes to amend the following Acts to expand the functions of the following parliamentary committees established under those Acts to review a relevant independent statutory agency:
- the *Government Sector Audit Act 1983*, regarding the Legislative Assembly Public Accounts Committee which reviews the work of the Audit Office,
 - the *Independent Commission Against Corruption Act 1988*, regarding the Committee on the Independent Commission Against Corruption which reviews the work of the ICAC; and
 - the *Law Enforcement Conduct Commission Act 2016*, and *Ombudsman Act 1974*, regarding the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission which reviews the work of a number of oversight bodies including the Law Enforcement Conduct Commission and the Ombudsman's Office.
- 5.7 These proposed amendments would insert provisions into the respective Acts that would require each parliamentary committee to:

² Parliament of New South Wales, Legislation Review Committee, [Legislation Review Digest No. 37/57](#), 16 November 2021.

- review the information for use in Budget preparations prepared by the relevant oversight body in accordance with section 4.5 of the *Government Sector Finance Act 2018* (the **GSF Act**),
- determine the amounts for inclusion in an annual appropriation bill for appropriations for the relevant oversight body, and
- report to the Parliament on that determination before the introduction of the relevant annual appropriation bill.

5.8 These proposed amendments, along with section 4.6A proposed by the Bill to be inserted into the GSF Act, would also require the Treasurer to make a statement of explanation when introducing an annual appropriation bill into the Parliament. The statement would address if the appropriation for one of the aforementioned oversight bodies contained in the bill is inconsistent with a determination by the responsible parliamentary committee.

5.9 Finally, the Bill seeks to insert Parts 9A and 9B into the GSF Act, which would respectively establish in statute a Legislative Council Public Accountability Committee and a Joint Committee on Parliamentary Services. Consistent with the proposed amendments to the other committees above, the Bill would require these committees to review and determine an amount for appropriation in relation to the Department of the Legislative Council and Department of Parliamentary Services, respectively.

The Bill seeks to amend a number of Acts which establish relevant statutory parliamentary committees that oversight the work of the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the Ombudsman's Office and the Audit Office. It also seeks to establish in statute a Legislative Council Public Accountability Committee and a Joint Committee on Parliamentary Services.

These proposed amendments would require these parliamentary committees to review, determine and report on an amount which should be included for the appropriation for their relevant oversight body or parliamentary department in annual appropriation bills. It would also require the Treasurer to explain when introducing the annual appropriation bills any inconsistency between the committees' determined amounts and the amounts included in the bills for the appropriation for any of these bodies.

The Committee notes that the primary functions of the relevant committees under the existing Acts and establishing resolutions is to monitor and review the exercise by the agency of their functions under the relevant Acts, and to report to one or both Houses of Parliament on any matter relating to their functions that the attention of Parliament should be directed. Therefore, the Bill may inappropriately delegate legislative power to parliamentary committees to determine the appropriation of funds for statutory agencies or parliamentary departments that they also oversight.

The Committee acknowledges that the amendments may be intended to strengthen integrity in the funding of these agencies and departments, by separating the budget process for these agencies from the Executive-

led departments. However, the Committee notes that requiring parliamentary committees to report on the funding of an agency that the committee oversights may conflict with its function to independently review the performance of the agency. For these reasons, the Committee refers the matter to Parliament for its consideration.

6. Property NSW Amendment Bill 2024

Date introduced	20 March 2024
House introduced	Legislative Assembly
Minister with carriage	The Hon. Stephen Kamper MP
Portfolio	Land and Property

Purpose and description

- 6.1 The object of this Bill is to make miscellaneous amendments to the *Property NSW Act 2006* (the **Act**).

Background

- 6.2 In his second reading speech, the Hon. Stephen Kamper MP, Minister for Land and Property, said that the Bill would allow Property NSW to better carry out its functions as the State's central property agency by proposing amendments intended to improve administrative efficiency, clarify the agency's scope, and enable it to 'better manage the Government's vast property portfolio'. The Bill proposes various amendments to the Act, including:

- (a) inserting section 14A to empower Property NSW to compulsorily acquire land under the *Land Acquisition (Just Terms Compensation) Act 1991* (the **Land Acquisition Act**).
- (b) amending section 9 and inserting section 15B to allow Property NSW to establish wholly-owned subsidiary corporations for the purpose of holding property.
- (c) amending the objectives and functions of the agency under sections 10 and 11 to include property development, management of particular IT assets, and entering into agreements with government and other persons relating to property.
- (d) amending the name of the Act and the agency to '*Property and Development NSW Act 2006*' and 'Property and Development NSW', respectively, and making further amendments to a number of other NSW Acts to reflect this change.

Issues considered by the Committee

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

Wide power to compulsorily acquire land

- 6.3 The Bill proposes to insert section 14A into the Act, which would empower Property NSW to acquire land by agreement or by compulsory process under the Land Acquisition Act. Proposed subsection 14A(2) clarifies that Property NSW's proposed acquisition power would not extend to the agency's private subsidiary corporations.

- 6.4 The Land Acquisition Act governs how NSW government agencies can acquire property by agreement or by compulsory process, although it does not broadly grant government agencies the statutory power to acquire real property. When land is acquired under the Land Acquisition Act, the original owner is compensated at a rate determined by the Act.
- 6.5 In his second reading speech, the Minister highlighted a recent example of operational difficulties involving an abandoned site which posed a risk to public health and the environment and which required compulsory acquisition by the government. He used this example to highlight the need for the land acquisition powers proposed by the Bill:

As the central property agency for the State, the burden to remediate the land fell upon Property and Development NSW in combination with several other government agencies. However, because Property and Development NSW did not have the power to compulsorily acquire land, it needed to rely upon other agencies to acquire the land before it could provide essential services for the remediation of that land. This resulted in unnecessary delays and additional costs, impacting the ability of the Government to remediate the land as quickly as possible.

The Bill proposes to insert section 14A into the *Property NSW Act 2006*, which would empower Property NSW to acquire land either by agreement or by compulsory acquisition through the *Land Acquisition (Just Terms Compensation) Act 1991*, which determines the rate at which original owner of the land is compensated. Proposed section 14A also clarifies that this land acquisition power of Property NSW does not authorise its private subsidiary corporations to do the same. Therefore, the Bill may provide a wide power to compulsorily acquire land to a government agency, Property NSW. The Committee notes that the compulsory acquisition of land may infringe on an individual's property rights, including their right to peaceful enjoyment of their property and their right to freedom of contract.

The Committee recognises that the proposed amendments are intended to facilitate Property NSW carrying out its functions more efficiently by removing the need for it to rely on other NSW government agencies to acquire land on its behalf. The Committee also notes that it is not uncommon for government agencies and public bodies to have powers to compulsorily acquire land in order for them to carry out their objectives and functions.

However, the Committee notes that existing land acquisition powers conferred by legislation to other agencies often define or confine how or when that power can be used by the agency.³ There does not appear to be any provisions in the Bill which might similarly define or confine when Property NSW can or should exercise its power to compulsorily acquire land. Given the broad remit of the power as worded by proposed section 14A, the Committee refers this matter to Parliament for its consideration.

³ For example, [Transport Administration Act 1988](#), Sch 1 cl 11(1).

Part Two – Regulations with comment

1. Electricity Infrastructure Investment Amendment (Network Infrastructure) Regulation 2024

Date tabled	LA: 6 February 2024 LC: 6 February 2024
Disallowance date	LA: 4 June 2024 LC: 4 June 2024
Minister responsible	The Hon. Penny Sharpe MLC
Portfolio	Energy

Purpose and description

- 1.1 The object of this Regulation is to amend the *Electricity Infrastructure Investment Regulation 2021* (the **Principal Regulation**) to establish a framework for the making of revenue determinations for projects that augment existing network infrastructure projects subject to a contestable revenue determination.

Issues considered by the Committee

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

Wide discretion of the regulator – the meaning of 'appropriate'

- 1.2 The Regulation is made under the *Electricity Infrastructure Investment Act 2020* (the **Act**). The regulator has various functions under Part 5 of the Act including, under section 38, to determine the amount payable to network operators for network infrastructure projects.
- 1.3 The Regulation inserts clause 47E into the Principal Regulation, which sets out how the regulator may make a revenue determination for contestable augmentation projects based on a number of discretionary factors. These discretionary factors include whether either subclause 47E(2) or (3) applies to the component and whether the regulator must determine the amount for the component by relying on and adopting information provided by the network operator or infrastructure planner. Under subclause (3), a regulator must rely on and adopt the information given if they are satisfied:
- (a) the existing contractual arrangements contain an 'appropriate referenced costs process', and
 - (b) the amount is determined using the 'appropriate referenced costs process'.

- 1.4 Subclause 47E(7) defines an 'appropriate referenced costs process' as being a mechanism in an existing contractual arrangement that the regulator is satisfied is 'appropriate' for determining the amount for a component.

The Regulation inserts clause 47E into the *Electricity Infrastructure Investment Regulation 2021*, which requires the regulator to make revenue determinations for contestable augmentation based on a number of discretionary factors. Among other factors, the regulator must determine whether subclause 47E(2) or (3) applies to the component and must therefore use that relevant method for determining the amount under that subclause. Under subclause 47E(3), the regulator must make this determination by relying on and adopting information provided by the network operator or infrastructure planner, if they are satisfied that the existing contractual arrangements contain an 'appropriate referenced costs process', and that the amount was determined using that process.

Under subclause 47E(7), an 'appropriate referenced costs process' is defined as a mechanism in an existing contract that the regulator is satisfied is 'appropriate' for wholly or partially determining the amount for a component. The Regulation may, therefore, may give broad discretion to the regulator to determine how the amount for the component is calculated, without defining or specifying what amounts to an 'appropriate' mechanism or process. This discretion may make it difficult for a person to determine how a revenue determination for a contestable augmentation was calculated.

However, the Committee acknowledges that the broadly worded discretion may be intended to facilitate flexibility and ensure that the complex regulatory scheme is efficiently administered. It further notes that there are other similar discretionary powers for making revenue determinations in the Regulation. In the circumstances, the Committee makes no further comment.

2. Industrial Relations (General) Amendment (Electoral Rolls) Regulation 2024

Date tabled	LA: 6 February 2024 LC: 6 February 2024
Disallowance date	LA: 4 June 2024 LC: 4 June 2024
Minister responsible	The Hon. Sophie Cotsis MP
Portfolio	Industrial Relations

Purpose and description

- 2.1 The objects of the Regulation are as follows:
- (a) to require a member's postal address, rather than residential address, to be used in relation to the list of members entitled to vote in an election
 - (b) to provide that the roll for an election may be kept in written or electronic form
 - (c) to enable the returning officer for an election to give a candidate access to the roll for an election if the candidate has been authorised by the Industrial Registrar to have access
 - (d) to specify how access will be given, and
 - (e) to clarify that expenses incurred in giving a candidate access to the roll for an election must be included in the notification to the Industrial Registrar of all expenses incurred by the returning officer in the conduct of the election.
- 2.2 The Regulation is made under the *Industrial Relations Act 1996* (the **Act**), sections 249 and 407.

Issues considered by the Committee

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

Privacy rights and absolute/strict liability offences – access to roll

- 2.3 The Regulation amends Schedule 3 of the *Industrial Relations (General) Regulation 2020* (the **Principal Regulation**) by inserting clause 19A, which allows the Industrial Registrar (the **Registrar**) to authorise a candidate for an election to state industrial organisations to have access to the roll for the election. If a candidate is authorised to access the roll, subclause 19A(2) requires the returning officer to:

- (a) give the candidate a copy of the roll in written or electronic form, and
- (b) allow the candidate to inspect a copy of the roll at the office of the returning officer, and during business hours at a time agreed with the candidate.

2.4 Before giving the candidate access to the roll, the returning office may require the candidate to give an undertaking under subclause 19A(3), that:

- (a) the candidate's systems and procedures are sufficient to preserve the security of electoral information, and
- (b) the candidate will return the electoral information to the returning officer or destroy the information within 20 business days after the election.

2.5 Subclauses 19A(5) and (6) creates new offences for non-compliance with the requirements under the new clause, which carry a maximum penalty of \$5 500 (50 penalty units). Specifically, the Regulation establishes an offence for a candidate who:

- fails to comply with an undertaking under subclause 19A(3) without reasonable excuse, (subclause (5)), and
- uses or discloses electoral information for a purpose not connected with an industrial election, (subclause (6)).

The Regulation inserts clause 19A into Schedule 3 of the *Industrial Relations (General) Regulation 2020* which allows the Industrial Registrar to authorise a candidate to access the election roll for a state industrial organisation. Under new clause 19A, the returning officer is required to give a copy of the roll to an authorised candidate and/or allow the candidate to inspect a copy of the roll. The Regulation may therefore impact individual's privacy rights by authorising a candidate for an election of a state industrial organisation to access personal information contained in an electoral roll, which is otherwise protected from disclosure and use under the *Privacy and Personal Information Protection Act 1998*.

Subclauses 19A(5) and (6) also creates two new offences for non-compliance with the undertaking which a candidate may be required to give under subclause (3) before they can access the roll, and for using or disclosing electoral information for an a purpose not connected to the election. A candidate is guilty of committing these offences if they did so without a 'reasonable excuse', and these offences carry a maximum penalty of \$5 500 (50 penalty units). The Committee notes that the term 'reasonable excuse' may not always include a defence of 'honest and reasonable mistake of fact'. Therefore, the Regulation provides for absolute and/or strict liability offences. The Committee generally comments on these 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 the amendments might be intended to facilitate a candidate's meaningful participation in an industrial election. The Committee also notes that new clause 19A includes some privacy protections like requiring the candidate give an

undertaking and establishing offences for failure to comply with the undertaking or misusing the information obtained.

Regarding the new offences, the Committee recognises that absolute and strict liability offences are not uncommon in regulatory settings to encourage compliance. In this case, these offences may be intended to prevent electoral information from being misused or inappropriately disclosed.

Finally, the Committee acknowledges that the Principal Regulation previously had provisions which effectively allowed candidates to access the election roll without the additional protections proposed under new clause 19A. In the circumstances, the Committee makes no further comment.

3. Local Government (General) Amendment (Tendering) Regulation (No 2) 2023

Date tabled	LA: 6 February 2024 LC: 6 February 2024
Disallowance date	LA: 4 June 2024 LC: 4 June 2024
Minister responsible	The Hon. Ron Hoenig MP
Portfolio	Local Government

Purpose and description

- 3.1 The object of this Regulation is to provide for the conditions of employment for employees who provide domestic or other waste management services which have been subject to a tender process.
- 3.2 This Regulation is made under the *Local Government Act 1993* (the **Act**), including section 748, the general regulation-making power, and Schedule 6, clauses 5 and 6.

Issues considered by the Committee

May have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Freedom of contract

- 3.3 Section 7 sets out the purposes of the Act, which includes setting out the responsibilities and powers of councils (subsection 7(b)), and providing for a system of local government that is accountable to the community and that is sustainable, flexible and effective (subsection 7(e)).
- 3.4 The Regulation amends the *Local Government (General) Regulation 2021* (the **Principal Regulation**) by inserting subclauses 173(4) to (7), which require a tenderer for the performance of domestic or other waste management services to give an undertaking and make provisions for enforcing that undertaking.
- 3.5 Subclause 173(4) provides that a tender for the performance of domestic or other waste management services must be accompanied by an undertaking from the tenderer. Under subclause 173(5), the undertaking must ensure that:
- (a) the individual employees who currently provide the service will be offered employment to continue to provide the service
 - (b) for an individual employee who accepts the offer of employment, the employment will be on at least the same terms as the individual's current

employment and will be taken to be a continuation of the individual's current employment with no loss of entitlements, and

- (c) the tenderer will pay the annual increase in the individual's base rate pay in accordance with the applicable industrial instrument or award.

- 3.6 Under subclause 173(6), the undertaking is deemed to be a contract between the tenderer, the employer and the individual employee. On that basis, the individual may take action to enforce it.
- 3.7 The Regulation also amends clauses 177 and 178 to set additional prerequisites for consideration and acceptance of tender submissions. New subclause 178(1A) provides that a council may only consider a tender submission if it complies with Part 7 of the Regulation, which includes the undertaking requirement set out above.
- 3.8 Under amended clause 178, a council must not accept a tender submission for a proposed contract unless the council consults with each relevant registered industrial organisation, and then each registered organisation is satisfied that appropriate industrial arrangements will be in place for compliance with the undertaking during the life of the contract.

The Regulation amends the *Local Government (General) Regulation 2021* to require a tenderer for domestic or other waste management services to give an undertaking guaranteeing certain employment conditions for individual employees who provide domestic or other waste management services. It inserts subclauses 173(4) to (7) to require that a tenderer for waste management services regulated by local councils give an undertaking which ensures that an individual employee will be offered and entitled to employment conditions which are not less favourable than their current conditions. The undertaking is enforceable by the individual employee under new subclause 173(6).

The Regulation also amends clauses 177 and 178 which makes compliance with the undertaking a prerequisite for a council to consider and accept a tender submission. This places additional obligations upon an employer that intends to make a tender submission for the performance of domestic or other waste management services.

Therefore, the Regulation may impact an employer's rights to freedom of contract, including the freedom to choose who to employ, and the freedom to negotiate and set out the terms and conditions of employment with their employees. As a consequence, this may have an adverse impact on the sectors of the business community that provide domestic or other waste management services.

The Committee recognises that the Regulation may be intended to protect individual employees from being offered or treated with less favourable employment conditions than they are currently entitled to. It also acknowledges that the Regulation may provide for certainty and consistency for an individual employee who may be impacted by a tender process. However, the Committee considers that an employer's freedom to choose who it enters into an employment contract with, and its freedom to negotiate the terms and conditions of employment are fundamental common law rights arising from the freedom of contract.

Further, requiring a tenderer to give guarantees in undertaking in order for it to be successful in a tender bid may undermine the operational autonomy of businesses. For these reasons, the Committee refers this matter to Parliament for its consideration.

4. Marine Pollution Regulation 2024

Date tabled	LA: 12 March 2024 LC: 12 March 2024
Disallowance date	LA: 18 June 2024 LC: 18 June 2024
Minister responsible	The Hon. Jo Haylen MP
Portfolio	Transport

Purpose and description

- 4.1 The object of this Regulation is to repeal and remake the *Marine Pollution Regulation 2014* (the **repealed Regulation**), which would otherwise be repealed on 1 September 2024 by the *Subordinate Legislation Act 1989*, section 10(2).
- 4.2 The Regulation prescribes matters under the *Marine Pollution Act 2012* (the **Act**) as follows—
- (a) the prevention of pollution by the following—
 - (i) oil,
 - (ii) noxious liquid substances,
 - (iii) packaged harmful substances,
 - (iv) sewage and greywater,
 - (v) garbage,
 - (b) the matters that must be included in the preparation of emergency and other plans,
 - (c) the reporting of pollution incidents,
 - (d) providing for matters relating to the certification of the construction of ships,
 - (e) setting the fees to be charged for certain services,
 - (f) providing for decisions that are administratively reviewable by the Civil and Administrative Tribunal.
- 4.3 This Regulation is made under the Act, including section 243, the general regulation-making power.

- 4.4 This Regulation comprises or relates to the following—
- (a) matters of a machinery nature,
 - (b) matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth,
 - (c) matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

Issues considered by the Committee

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

Absolute liability offences

- 4.5 Sections 34 and 35 of the Regulation require masters and owners of ships to notify Transport for NSW (**TfNSW**) of any accident or defect which substantially impacts the ship's sewage system. Failure to comply is an offence under the Regulation carrying a maximum penalty of \$1 100 for an individual, or \$5 500 otherwise.
- 4.6 Section 36 of the Regulation creates an offence for ship masters and owners to modify a ship sewage system without providing written notice to and obtaining written approval from TfNSW. This offence carries a maximum penalty of \$2 200 for an individual, or \$11 000 otherwise.
- 4.7 After notifying TfNSW, section 37 of the Regulation requires ship masters and owners to follow a subsequent direction by TfNSW to have the ship inspected or surveyed for compliance with sewage standards. Failure to comply with this direction is also an offence which carries a maximum penalty of \$2 200 for an individual, or \$11 000 otherwise.

Sections 34 and 35 of the Regulation require ship masters and owners to notify Transport for NSW of any accident or defect which substantially impacts the sewage system of a ship. Sections 36 and 37 further prohibit a ship master or owner from modifying the sewage system without written approval from TfNSW, and from failing to comply with any subsequent directions by TfNSW to have the ship inspected or surveyed for compliance with sewage standards. Masters and owners that fail to comply with these provisions may incur an absolute liability offence with a maximum penalty of up to \$2 200 for an individual or \$11 000 otherwise.

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 notes that absolute liability offences are not uncommon in regulatory settings to encourage compliance. Further, the maximum penalties for these offences are monetary and not custodial. In the circumstances, the Committee makes no further comment.

Additional punishment for same offending conduct

- 4.8 Sections 37 and 38 of the Regulation empower TfNSW to commence an investigation following a mandatory notification under sections 34 to 36 (as outlined above). The

investigation can be used to determine whether a ship's equipment, systems and fittings require an inspection or survey for the purpose of ensuring compliance with sewage standards.

- 4.9 Following an investigation, TfNSW can direct the owner of the ship to undertake an inspection or survey. Failure to comply with this direction is an offence under the Regulation carrying a maximum penalty of \$2 200 for an individual or \$11 000 otherwise. TfNSW may also require the owner of the ship to pay an investigation fee of \$165 per hour, which may be recovered through court proceedings.

Sections 37 and 38 of the Regulation empowers Transport for NSW to commence an investigation into whether a ship complies with relevant standards and give directions to ship owners to undertake an inspection or survey. Under these provisions, not following these directions resulting from a TfNSW investigation is an offence. The Regulation also empowers TfNSW to require ship owners to pay for investigations, and these payments are legally enforceable.

The Committee notes that this may result in a ship owner who has been charged and convicted with the offence of non-compliance with a direction to also pay the costs of investigation. Therefore, the Regulation may permit a person to receive additional punishment for the same offending conduct. The Committee further notes that an individual may be subjected to additional punishment for the costs incurred in the course of an investigation which may lead to a direction that must be followed at pain of criminal liability.

However, the Committee acknowledges that the power to recover costs may be intended to reduce the costs burden for administrators investigating potentially unsafe management of ship sewage systems. The Committee further recognises that this power may encourage compliance with the regulatory regime which may be intended to protect public health and safety. In the circumstances, the Committee makes no further comment.

Use of certain evidence during prosecution without consent

- 4.10 Part 5 of the repealed Regulation previously required certain people to make full and supplementary reports to the Minister for Transport when prescribed pollution incidents occur. Failure to comply with these reporting requirements or producing incomplete or false and misleading reports were offences under Part 5, carrying a maximum penalty of \$11 000 (100 penalty units). Section 52 of the repealed Regulation prohibited the use of 'the contents of a report or supplementary report given to the Minister' in a prosecution for an offence under Part 5, without the consent of the person charged.

- 4.11 Part 7 of the Regulation is substantially identical to Part 5 of the repealed Regulation. However, the prohibition under previous section 52 of the repealed Regulation has been omitted from the Regulation.

The Regulation substantially remakes Part 5 of the *Marine Pollution Regulation 2014*, which sets out requirements for reporting prescribed pollution incidents to the Minister for Transport and establishing absolute liability offences for non-compliance with these requirements

or producing incomplete, false or misleading reports. However, the Regulation omits the previous prohibition against the use of the contents of these report as evidence in the prosecution of an offence under this Part without the consent of the accused.

Therefore, the Regulation may infringe on the accused's rights to a fair hearing and procedural fairness by requiring individuals to produce reports to the Minister at the pain of criminal penalty, and permitting the use of those reports in order to prove that person's guilt.

However, the Committee recognises that the Regulation may be intended to encourage compliance with marine pollution regulations and protect public health and safety. The Committee further notes that the relevant offences only carry monetary and not custodial penalties. In the circumstances, the Committee makes no further comment.

5. Strata Schemes Management Amendment Regulation 2024

Date tabled	LA: 6 February 2024 LC: 6 February 2024
Disallowance date	LA: 4 June 2024 LC: 4 June 2024
Minister responsible	The Hon. Anoulack Chanthivong MP
Portfolio	Better Regulation and Fair Trading

Purpose and description

- 5.1 The objects of this Regulation are to:
- (a) prescribe building work relating to build-to-rent properties as building work to which the *Strata Schemes Management Act 2015* (the **Act**), Part 11 does not apply,
 - (b) delay an increase in the amount required to be secured for a building bond from 1 February 2024 to 1 July 2024,
 - (c) specify certain circumstances in which a building bond for building work provided by a developer may be cancelled.
- 5.2 Schedule 1[1] may be made under a Henry VIII provision because the exemption impliedly amends the Act by affecting the application of the Act.

Issues considered by the Committee

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

Meaning of 'appropriate in the circumstances of the case'

- 5.3 The Act and *Strata Scheme Management Regulation 2016* (the **Principal Regulation**) govern the Strata Building Bond and Inspections Scheme (the **Scheme**), which requires developers to pay a building bond to NSW Fair Trading for new apartment buildings higher than three storeys. If building defects are identified in inspections required by the Scheme, the building bond will be used to cover the rectification costs. If no defects are identified by the final report, the building bond will be returned to the developer.
- 5.4 Section 210A of the Act provides that the Secretary may provide any release necessary to cancel a building bond (and thus have it returned to the developer) in certain circumstances before a final report, or 'in any other circumstances specified in the regulations'. Under section 4 of the Act, the Secretary is the Commissioner for Fair Trading.

5.5 The Regulation inserts clause 55AA into the Principal Regulation, which allows the Secretary to provide any release necessary to cancel a building bond in the following circumstances:

- (a) if a final report on the building work does not identify defective building work (subclause (a)),
- (b) if the final report on the building work only identifies defective work which cannot be claimed by the Secretary for payment under the Act (subclause (a)), or
- (c) if 'the Secretary thinks it appropriate in the circumstances of the case to enable the building bond to be cancelled' (subclause (b)).

The Regulation inserts clause 55AA into the *Strata Schemes Management Regulation 2016*, which provides circumstances in which the Commissioner for Fair Trading may enable the cancellation of a building bond. A building bond is paid by developers to NSW Fair Trading to secure money that can be put towards rectifying any building defects.

Subclause 55AA(b) allows the Secretary to enable the cancellation of a building bond where they consider it 'appropriate in the circumstances of the case'. The Committee notes that neither the *Strata Schemes Management Act 2015* or its regulations have provisions which limit or specify what may amount to 'appropriate in the circumstances' in respect to building bond cancellations. Therefore, the Regulation may grant the Secretary (that is, the Commissioner of Fair Trading) a broad discretionary power to cancel building bonds. This may make it difficult for affected parties such as residents, builders and owners corporations to understand how and when a bond may be cancelled.

The Committee acknowledges providing the Secretary with this discretion may be intended to build in administrative flexibility to address unforeseen circumstances where cancelling a building bond. However, the Committee notes that building bonds are meant to be security for the payment of rectifying defective building work. By holding building bonds until building work is cleared of defects, the Scheme may be intended to protect public safety by ensuring that rectification of defects occurs efficiently and that developers are accountable for defective building work. For these reasons, the Committee refers the issue to Parliament for further consideration.

Part Three – Regulations without comment

Regulations without comment

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

1. [Civil Procedure Act 2005 Practice Note in Class 3 Valuation Objections Proceedings](#)

This Practice Note applies to Class 3 proceedings in the Land and Environment Court of New South Wales, which are objections to valuations under s 37 of the *Valuation of Land Act 1916*. The purpose is to set out the case management procedures for the just, quick and cheap resolution of Valuation Objections.

This Practice Note commenced on 2 April 2024. It replaces the former Practice Note – Class 3 Valuation Objections issued on 14 May 2007.

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

2. [Crown Land Management Amendment \(Reserve Trusts\) Regulation 2024](#)

The object of this Regulation is to amend the savings and transitional provisions in the *Crown Land Management Act 2016* (the Act), Schedule 7 to extend until 1 July 2024 the transitional period for reserve trusts managed by corporations that are category 1 non-council managers under the repealed *Crown Lands Act 1989*.

This Regulation is made under the Act, section 13.5, the general regulation-making power, and Schedule 7, clause 1(1), which is a Henry VIII provision that enables the making of regulations to amend the Act, Schedule 7.

Although the Regulation amends provisions in the Act by way of a Henry VIII clause, the Regulation only amends provisions of a savings and transitional nature and therefore does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

3. [Drug Court Amendment Regulation 2024](#)

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

This Regulation is made under the *Drug Court Act 1998*, including sections 5(1)(e), 31(1) and 32, the general regulation-making power.

The Regulation also empowers Northern Sydney Health District to provide information to the Drug Court if they are involved in a drug offender's program. Therefore, the Regulation does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

4. [Education Amendment \(Non-Government School Assets and Income\) Regulation 2024](#)

The object of this Regulation is to amend the *Education Regulation 2017* to clarify when a non-government school providing certain education and care services operates for profit. The Regulation makes provisions in respect to matters prescribed by the *Education Act 1990*, section 83C.

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

5. Environmental Planning and Assessment Amendment (Schools) Regulation 2024

The objects of this Regulation are as follows:

- (a) to require an application for a complying development certificate for certain development in schools under *State Environmental Planning Policy (Transport and Infrastructure) 2021*, Chapter 3 to be accompanied by a certificate relating to traffic impacts, and
- (b) to require a planning certificate issued by a council in relation to specified land in a local government area to include information about water or sewerage services provided to the land under the *Water Industry Competition Act 2006*.

This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including sections 4.28(1), 10.7 and 10.13, the general regulation-making power.

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

6. Fisheries Management (Eastern Blue Groper Possession Limit) Order 2024

The object of the Order is to impose possession limit for a recreational fisher in all circumstances for Eastern Blue Groper. This Order commences on 1 March 2024 and will remain in force for one calendar year.

The Order is made under the *Fisheries Management Act 1994*.

The Order effectively prohibits the recreational fishing of Eastern Blue Groper and therefore does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

7. Justice Legislation Amendment (Penalty Notices) Regulation 2024

The objects of this Regulation are to:

- (a) amend the *Criminal Procedure Regulation 2017* to prescribe certain offences under the *Drug Misuse and Trafficking Act 1985* as penalty notice offences
- (b) amend the *Fines Regulation 2020* to provide that certain penalty notices issued under the *Drug Misuse and Trafficking Act 1985* are taken to be paid if the person to whom the notice is issued completes the drug health intervention under the Early Drug Diversion Initiative provided by, or on behalf of, NSW Health.

The Regulation is made under the following provisions:

- (a) the *Criminal Procedure Act 1986*, sections 336 and 337, and
- (b) the *Fines Act 1996*, section 23B(1)(b).

Although the Regulation amends the *Fines Regulation 2020* to allow for completion of the Early Drug Diversion Initiative provided by or on behalf of NSW Health to be treated as payment to certain penalty notices, this alternative to payment is a voluntary option for individuals issues with relevant penalty notices.

8. [Liquor Amendment \(Licence Fees\) Regulation 2024](#)

The object of this Regulation is to increase certain fees payable for licences under the *Liquor Act 2007*.

This Regulation is made under the *Liquor Act 2007*, including sections 58A and 159, the general regulation making power.

The Regulation simply updates the amount for licencing fees and therefore does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

9. [Marine Safety Amendment \(Penalty Notice Offences\) Regulation 2024](#)

The object of this Regulation is to amend, consequent on the making of the *Marine Pollution Regulation 2024*, the *Marine Safety Regulation 2016* to update the list of offences under the *Marine Pollution Act 2012* that are penalty notice offences.

The Regulation is made under the *Marine Safety Act 1998*, sections 126 and 137, the general regulation making power.

The Regulation omits and replaces Schedule 10 which prescribes penalty notice offences under the *Marine Pollution Act 2012* and the *Marine Pollution Regulation 2024*, including some newly established absolute liability offences. However, penalty notice offences are not uncommon to encourage compliance with regulatory frameworks intended to protect public health and safety..

10. [Mental Health Amendment Regulation 2024](#)

The object of this Regulation is to amend the *Mental Health Regulation 2019* to update cross-references to Victorian legislation.

This Regulation is made under the *Mental Health Act 2007*, including sections 172(1) and (2), 179(4)(a), 182(2)(a), 187(e) and 196, the general Regulation-making power.

The Regulation updates cross-references to Acts of Victorian Parliament and therefore does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

11. [Mining Act 1992 and Petroleum \(Onshore\) Act 1991—Approved Arbitration Procedures Order 2024](#)

This Order is made pursuant to section 148A of the *Mining Act 1992* and section 69KA of the *Petroleum (Onshore) Act 1991*. Schedule 1 to the Order sets out the arbitration procedures for the conduct of mediations and arbitrations under Division 2 of Part 8 of the *Mining Act 1992* and Part 4A of the *Petroleum (Onshore) Act 1991*.

The Order takes effect on the date it is published in the NSW Government Gazette, which is 23 February 2024.

The Order sets out version 1.2 of the 'Land access arbitration procedure' under both Acts, and remakes the previous iteration (version 1 published in 2016) with updates to correct references to relevant departments and legislation. Therefore, the Order does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

12. [Notice of Reservation of a Regional Park \(n2024-0417\) GG No 79 of 8 March 2024](#)

This Notice reserves the land described as 'County of Cumberland, Parish of St George, 2.124 hectares, being Lot 3 DP123743, Lots 4-6 DP1226543, Lots 10, 13, 14, 16 and 18-23 DP1070237 and Lot C DP358037' as part of Wolli Creek Regional Park, under the provisions of Section 30A(1)(d) of the *National Parks and Wildlife Act 1974*.

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

13. [Notice of Reservation of a Regional Park \(n2024-0418\) GG No 79 of 8 March 2024](#)

This Notice reserves the land described as County of Cumberland, Parish of St George, 2.6 hectares, being Lot 1 DP1297200' as part of Wolli Creek Regional Park, under the provisions of Section 30A(1)(d) of the *National Parks and Wildlife Act 1974*.

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

14. [NSW Admission Board First Amendment Rule 2024](#)

The object of this Rule is to amend the NSW Admission Board Rules 2015 to provide for the Chief Justice to nominate the Chairperson and Deputy Chairpersons of the Legal Qualifications Committee and Examinations Committee, consistent with the current mode of appointment of the Presiding Member and Deputy Presiding Member of the Board and, from time to time in practice, Chairs of Committees.

The Rule is made under section 21A of the *Legal Profession Uniform Law Application Act 2014*.

The Rule replaces rules 19 and 27D of the NSW Admission Board Rules 2015, which sets out the procedure for nominating chairpersons and deputy chairpersons of committees of the Board and therefore does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

15. [NSW Admission Board Second Amendment Rule 2024](#)

The object of this Rule is to amend the NSW Admission Board Rules 2015 to provide for decisions on the relaxation of the rules applicable to the order in which students-at-law must progress through the Board's examinations, and decisions permitting students-at-law to sit at alternative examination venues, to be made by the Executive Officer in addition to the Examination Committee.

The Rule is made under section 21A of the *Legal Profession Uniform Law Application Act 2014*.

The Rule replaces rules 59 and 61, and would include the Executive Officer as a 'decision maker' (in addition to the Examinations Committee) under Rule 59 and 61. While this may expand the discretionary decision-making powers of the Executive Officer under the NSW Admission Board Rules 2015, affected applicants and students-at-law can still seek a review of decisions.

16. [Point to Point Transport \(Taxis and Hire Vehicles\) Amendment \(Penalty Notice Offences\) Regulation 2024](#)

The object of this Regulation is to amend the *Point to Point Transport (Taxis and Hire Vehicles) Regulation 2017* to:

- (a) increase the maximum penalty for an offence under clause 64(1), which prohibits the driver of a passenger vehicle from refusing to carry an assistance animal in the vehicle, and to increase the amount payable under a penalty notice issued for the offence, and
- (b) prescribe a breach of clause 15(1A), which requires certain information to be displayed in and on a taxi in a way that makes the information visible to passengers, as an offence for which a penalty notice may be issued.

This Regulation is made under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016*, including sections 20, 22, 135, 158, the general regulation-making power, and Schedule 1, clause 5.

While the Regulation prescribes a penalty notice offence, it relates to contraventions of safety standards for providers of passenger services including affiliates and vehicle owners.

17. [Privacy and Personal Information Protection Amendment \(Delegation\) Regulation 2023](#)

The object of this Regulation is to amend the *Privacy and Personal Information Protection Regulation 2019* to prescribe a class of persons to whom the head of a public sector agency may delegate the exercise of certain functions.

This Regulation is made under section 59ZJ of the *Privacy and Personal Information Protection Act 1998* and the general regulation-making power under section 71.

Although clause 7A of the Regulation prescribes the power of a public sector agency head to delegate the exercise of certain agency functions to other persons, those persons are 'employed in or by another public sector agency'. For that reason, the Regulation does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

18. [Protection of the Environment Operations \(Waste\) Amendment \(Waste Facility Contributions\) Regulation 2024](#)

The object of this Regulation is to amend the *Protection of the Environment Operations (Waste) Regulation 2014* to provide that the Kyogle local government area is no longer part of the regional levy area until 1 July 2027. This change affects the contributions payable by occupiers of scheduled waste facilities, including by exempting occupiers of facilities in Kyogle from the requirement to pay a particular amount for certain waste that is not general, or generated from waste generated, in the metropolitan levy area or regional levy area.

This Regulation is made under the *Protection of the Environment Operations Act 1997*, including sections 88(2) and (5)(a) and 323, the general regulation-making power.

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

19. [Road Transport \(Driver Licensing\) Amendment \(Visiting Drivers\) Regulation 2024](#)

The object of this Regulation is to amend the *Road Transport (Driver Licensing) Regulation 2017* to provide that after 28 February 2025, a visiting driver holding a temporary visa under the *Migration Act 1958* of the Commonwealth is permanently ineligible to be exempt from the requirement to hold a NSW driver licence under provisions applying to interstate and international visitors if the driver:

- (a) began to reside in New South Wales before 1 July 2023, and
- (b) Reside in New South Wales for a continuous period of 6 months after the driver is granted the temporary visa.

This Regulation is made under the *Road Transport Act 2013*, including sections 23, the general statutory rule-making power, and 53.

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

20. Road Transport (General) Amendment (University Traffic Offences) Regulation 2024

The object of this Regulation is to amend the *Road Transport (General) Regulation 2021* to include:

- (a) in the schedule of declared organisations, the Westmead campus as an area of operations of Western Sydney University, and
- (b) the University of Sydney as a university that has opted in to issuing lower-level penalty notices for certain parking offences.

This Regulation is made under the *Road Transport Act 2013*, including sections 23, the general statutory rule-making power, and 24(1).

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

21. Water Industry Competition (General) Regulation 2024

The object of this Regulation is to repeal and remake *Water Industry Competition (General) Regulation 2021*, at the same time as the *Water Industry Competition Amendment Act 2021* commences.

Together, the Regulation and the Act establishes a new framework for managing NSW's water industry. The Regulation comprehensively sets out matters relevant to the administration of the new water management framework under the Act – for example, section 21 prescribes a standard contract between retailers, operators and customers under regulated schemes. Therefore, 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. 13

TIME & DATE: 3.02PM, 6 MAY 2024

LOCATION: ROOM 1254 AND WEBEX

MEMBERS PRESENT

Lynda Voltz (**Chair**), Donna Davis (via Webex), Nathan Hagarty, Dave Layzell (via telephone) and Cameron Murphy.

APOLOGIES

Maryanne Stuart (**Deputy Chair**), Jacqui Munro and Sue Higginson

OFFICERS PRESENT

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

AGENDA ITEM

1. Confirmation of minutes

Resolved, on the motion of Mr Murphy: That the minutes of the meeting of 18 March 2024 be confirmed.

2. ****

3. Consideration of bills with comment for Legislation Review Digest 12/58

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

- a. Anti-Discrimination Amendment (Heterosexual Discrimination) Bill 2024
- b. Automated External Defibrillators (Public Access) Bill 2024
- c. Health Legislation Amendment (Miscellaneous) Bill 2024
- d. Health Practitioner Legislation Amendment Bill 2024
- e. ICAC and Other Independent Commissions Legislation Amendment (Independent Funding) Bill 2024
- f. Property NSW Amendment Bill 2024.

4. Consideration of regulations with comment for Legislation Review Digest 12/58

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

- a. Electricity Infrastructure Investment Amendment (Network Infrastructure) Regulation 2024
- b. Industrial Relations (General) Amendment (Electoral Rolls) Regulation 2024

- c. Local Government (General) Amendment (Tendering) Regulation (No 2) 2023
- d. Marine Pollution Regulation 2024
- e. Strata Schemes Management Amendment Regulation 2024.

5. Regulations without comment for Legislation Review Digest 12/58

Resolved, on the motion of Mr Hagarty: That the Committee adopts the regulations without comment as Part Three to Digest 12/58.

6. Legislation Review Digest 12/58

Resolved, on the motion of Mr Murphy:

- That appropriate minute extracts of this meeting be published as Appendix Two of the Digest.
- That the Committee adopts the Legislation Review Digest 12/58 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 13 May 2024 at 3.00pm.