

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

<b>Chair</b>	Ms Lynda Voltz MP, Member for Auburn
<b>Deputy Chair</b>	Ms Maryanne Stuart MP, Member for Heathcote
<b>Members</b>	Ms Donna Davis MP, Member for Parramatta Mr Nathan Hagarty MP, Member for Leppington Ms Sue Higginson MLC Mr Dave Layzell MP, Member for Upper Hunter The Hon. Jacqui Munro MLC The Hon. Cameron Murphy MLC
<b>Contact details</b>	Legislation Review Committee Parliament of New South Wales 6 Macquarie Street Sydney NSW 2000
<b>Telephone</b>	(02) 9230 2151
<b>E-mail</b>	<a href="mailto:Legislation.Review@parliament.nsw.gov.au">Legislation.Review@parliament.nsw.gov.au</a>
<b>Website</b>	<a href="http://www.parliament.nsw.gov.au/lrc">www.parliament.nsw.gov.au/lrc</a>

# 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. Bail Amendment \(Serious Personal Violence and Electronic Monitoring\) Bill 2024\\*](#)

Issue identified	Conclusion of Committee
Right to the presumption of innocence – rebuttable presumption to impose bail conditions	Referred
Judicial discretion – granting bail and imposing bail conditions	Referred
Right to liberty and freedom from arbitrary detention – automatic stay of release	Referred

### [2. Better Regulation, Fair Trading and Other Legislation Amendment Bill 2024](#)

Issue identified	Conclusion of Committee
Retrospective enactment of legislation	No further comment
Publication of information by 'appropriate electronic means'	Referred
Process for giving notice	Referred
Regulation-making power to incorporate extrinsic materials	No further comment

### [3. Electricity Infrastructure Investment Amendment \(Renewable Energy Sector Plan\) Bill 2024\\*](#)

No issues identified

### [4. Emergency Services Levy Amendment \(Land Classification\) Bill 2024](#)

Issue identified	Conclusion of Committee
Incorporation of extrinsic guidelines	No further comment

### [5. Emergency Services Levy Insurance Monitor Bill 2024](#)

Issue identified	Conclusion of Committee
Wide official powers of the Monitor and appointed inspectors	Referred
Wide incidental powers of the Monitor	Referred
Wide general regulation-making power	Referred
Wide power of delegation	Referred
Matters deferred to the regulations	Referred
Incorporation of extrinsic guidelines issued by the Monitor	Referred

### [6. Environmental Planning and Assessment Amendment \(Vibrancy Reforms\) Bill 2024](#)

Issue identified	Conclusion of Committee
Incorporation of extrinsic guidelines into legislation	Referred

**7. Local Government Amendment (Employment Arrangements) Bill 2024**

No issues identified

**8. Ombudsman and Other Legislation Amendment Bill 2024**

No issues identified

**9. Residential Tenancies Amendment (Animals in Residential Premises) Bill 2024\***

<b>Issue identified</b>	<b>Conclusion of Committee</b>
Property rights and retrospectivity	Referred
Broad judicial discretion	No further comment

**PART TWO – REGULATIONS WITH COMMENT****1. Civil Procedure Act 2005—Practice Note – Class 3 Compensation Claims**

<b>Issue identified</b>	<b>Conclusion of Committee</b>
Procedural fairness rights – leave to cross-examine oral evidence	No further comment

**2. Liquor Amendment (Savings and Transitional Arrangements) Regulation 2023**

<b>Issue identified</b>	<b>Conclusion of Committee</b>
Savings and transitional provision for repealed Part of Act	No further comment

**3. Motor Accident Guidelines: CTP Care (version 1.1)**

<b>Issue identified</b>	<b>Conclusion of Committee</b>
Incorporation of extrinsic document in Guidelines	Referred

**4. Practice Note Supreme Court Common Law Division No.11 Bail**

<b>Issue identified</b>	<b>Conclusion of Committee</b>
Liberty and freedom from arbitrary detention – discretion of the Registrar	Referred

# Summary of Conclusions

## PART ONE – BILLS

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### 1. Bail Amendment (Serious Personal Violence and Electronic Monitoring) Bill 2024\*

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

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##### *Right to the presumption of innocence – rebuttable presumption to impose bail conditions*

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The Bill seeks to insert section 22D into the *Bail Act 2013*, which sets a rebuttable presumption to imposed electronic monitoring bail conditions for an accused charged with serious personal violence offences who is granted bail. A bail authority must impose this condition if the Crown or their representative request that bail be refused or that electronic monitoring bail conditions be imposed, unless they are 'satisfied that sufficient reasons exist to justify' not imposing those conditions.

As the presumption would apply where the Crown is seeking that bail be refused or the condition be imposed, the proposed section implicitly puts the onus of proof on the accused person to rebut the presumption that electronic monitoring bail conditions be imposed. As bail decisions relate to individuals charged but not yet convicted of an offence, the Bill may therefore reverse the onus of proof in criminal actions. In regard to criminal actions, a reverse onus may undermine a person's right to the presumption of innocence as contained in Article 14 of the ICCPR. The right to the presumption of innocence protects an accused person's privilege to be presumed innocent until proved guilty according to law. The Committee further notes that, in imposing electronic monitoring conditions, the Bill may also adversely impact on the accused's privacy rights and right to freedom of liberty and movement.

The Committee acknowledges that the proposed amendments are intended to protect people, particularly women, from retributive personal violence from current or former partners who are released on bail for offences relating to alleged violence against them. However, the Committee notes that, under the existing bail system, an accused person charged with a 'serious personal violence offence' must show cause why their detention is not justified and satisfy the bail authority that they would not present an unacceptable risk before being granted bail. These two existing safeguards are also intended to protect the community, by placing the onus on the accused to establish that they would not pose a danger to others if on bail. This inherently infringes on the accused person's right to the presumption of innocence in prioritising community safety. The Committee further notes that the Bill would require the accused to rebut a presumption on the basis that the Crown has opposed bail or unconditional granting of bail. For these reasons, the Committee refers the matter to Parliament.

##### *Judicial discretion – granting bail and imposing bail conditions*

---

The Bill inserts section 22D into the *Bail Act 2013*, which creates a statutory rebuttable presumption that bail authorities must impose electronic monitoring conditions on persons accused of serious personal violence offences, unless satisfied sufficient reasons exist to justify otherwise. By establishing a statutory presumption against unconditional bail, the Bill may, in effect, limit the judicial discretion of the bail authority through an Act of Parliament. However, the Committee acknowledges that the court retains the discretion to determine whether sufficient reasons exist to rebut the presumption. In these circumstances, the Committee makes no further comment in respect to the limitations on judicial discretion under proposed section 22D.

The Bill would also insert subsection 40(1A) into the Act, to provide circumstances in which a bail authority's decision to release an accused person charged with a serious personal violence offence on unconditional bail would be automatically stayed. This stay automatically applies where a bail authority grants bail without electronic monitoring conditions, if the Crown informs the court of an intention to make a detention application in the Supreme Court. Therefore, the Bill may limit the discretion and powers of the judicial officer, by effectively rendering their decision ineffective upon the Crown providing notice of a detention application, pending determination of that application.

The Committee recognises that the intention of subsection 40(1A) may be to protect individuals from further personal violence by preventing the release of persons accused of serious personal violence offences before a higher appellate court can determine whether bail conditions are appropriate. The Committee also acknowledges that a similar automatic stay provision exists in section 40(1), regarding the granting of bail for serious offences. However, the Committee notes that the insertion of 40(1A) would have the effect of further limiting the powers of the judiciary through an Act of Parliament. It might also effectively divest judicial decision-making power from the court and grant the Crown the power to override bail decisions. For these reasons, the Committee refers the matter to Parliament for consideration.

#### *Right to liberty and freedom from arbitrary detention – automatic stay of release*

---

The Bill seeks to insert subsection 40(1A) into the *Bail Act 2013*, which would automatically stay a bail authority's decision to grant bail for an accused person charged with a serious personal violence offence in prescribed circumstances. Where a bail authority grants bail without certain bail conditions, the Crown may inform the court of an intention to make a detention application in the Supreme Court which automatically stays the release decision.

The effect of an automatic stay under proposed subsection 40(1A) would be the accused remaining in custody until either the Supreme Court affirms the decision to release, the Crown revokes their detention application or three business days have passed. Therefore, the Bill may impact on the accused's right to liberty and freedom from arbitrary detention contained in Article 9 of the ICCPR, which provides that holding accused persons in remand should not be the general rule.

The Committee recognises that the intention of subsection 40(1A) is to prevent the pre-emptive release of persons accused of serious personal violence offences before an appellate court can consider the appropriateness of unconditional bail. This is intended to protect members of the community who may be at risk of violence by current or former intimate partners. However, the Committee notes that the accused does not appear to have a right of reply on the stay of a release decision, which is dependent only on notice being given from the Crown. For these reasons, the Committee refers the matter to Parliament for consideration.

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## **2. Better Regulation, Fair Trading and Other Legislation Amendment Bill 2024**

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

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#### *Retrospective enactment of legislation*

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The Bill seeks to insert Part 12 into the *Liquor Act 2007* which would allow consent authorities to allow outdoor spaces to be used for dining and performance. It would also insert savings and transitional provisions that would retrospectively validate anything done or omitted to be done from 11 December 2023 onwards, which would otherwise have been permitted under proposed Part 12. The Committee generally comments on provisions that are drafted to have retrospective

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

However, the Committee acknowledges that the retrospective application may be intended to address any confusion or uncertainty in relation to the use of outdoor spaces resulting from the repeal of Part 12 of the Act on 11 December 2023 and the commencement of purported amendments to those provisions by the *24-Hour Economy Legislation Amendment (Vibrancy Reforms) Act 2023* after this date. In the circumstances, the Committee makes no further comment.

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

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#### *Publication of information by 'appropriate electronic means'*

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The Bill seeks to amend provisions in various Acts requiring publication of particular information by the Secretary of a Department, which currently require the Secretary to publish this information on a NSW Government or Departmental website. The proposed amendments would require to the Secretary to publish the relevant information on a Government website or 'by other appropriate electronic means.'

The Bill does set out provisions that would clarify or define what may amount to 'appropriate electronic means' in these circumstances, and therefore may subject the publication requirements under various Acts to a broad subjective power of the Secretary. The Committee notes that these publication requirements may relate to information that assists individuals to understand their rights or obligations, including particularly vulnerable groups. For example, the Bill's proposed amendments to section 49I(2) of the *Funeral Funds Act 1979* relates to the publication of the annual returns of pre-paid funeral funds and are intended to ensure consumer protections and proper management of pre-payments for funeral services.

The Committee acknowledges that these amendments are intended to build flexibility into the regulatory framework by enabling regulators to use alternative technologies that may emerge in the future. However, the Committee considers that the term 'other appropriate electronic means' may make it difficult for a lay person to understand where they can access relevant information. For these reasons, the Committee refers the matter to Parliament for consideration.

#### *Process for giving notice*

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The Bill proposes amending various Acts to include a standard definition of 'service of documents'. In particular, the Bill seeks to amend the *Associations Incorporations Act 2009* and the *Funeral Funds Act 1979* by replacing specific requirements for giving notice by personal service, post, email or other authorised method provisions for the 'service' of 'documents required to be served on a person'.

The Committee notes that, in a legal context, the word 'service' has a particular, discrete meaning, generally referring to the act of delivering a document to a person. 'Giving notice' of a matter does not necessarily mean it concerns a 'document which must be served on a person'. Therefore, the Bill may remove provisions which specify how the Secretary or Minister may give notice to a person as required under the relevant Act and insert provisions with respect to service that may not apply to these notice requirements. This may make it hard for an individual to understand how they can be informed of matters which may affect their rights and obligations under law. For these reasons, the Committee refers this matter to Parliament for consideration.



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

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*Regulation-making power to incorporate extrinsic materials*

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The Bill proposes to insert a new regulation-making power under the *Biofuels Act 2007*, which would allow a regulation to apply, adopt or incorporate a publication into the existing powers of that Act. By allowing regulations to incorporate extrinsic publications and give those publications legal force, the Bill may provide for a broad regulation-making power .

The Committee generally comments on any legislative provisions that permits the incorporation of external materials like guidelines and gives those materials legal force. It also prefers substantive matters to be set out in legislation or to be published in the Gazette and tabled in Parliament as regulations, where they can be subject to disallowance and therefore to appropriate parliamentary scrutiny.

However, the Committee acknowledges that the Act sets out a complex legislative framework regulating potentially hazardous chemicals which relies on evolving scientific standards and research. The Committee notes that these amendments are intended to facilitate administrative efficiency and flexibility in the regulatory framework by removing the need for legislative amendments each time a new standard is published. In the circumstances, the Committee makes no further comment.

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**3. Electricity Infrastructure Investment Amendment (Renewable Energy Sector Plan) Bill 2024\***

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

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**4. Emergency Services Levy Amendment (Land Classification) Bill 2024**

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

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*Incorporation of extrinsic guidelines*

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The Bill proposes to insert section 47E into the *Emergency Services Levy Act 2017* to empower the Treasurer to issue guidelines that must be published on a Revenue NSW website and could be amended, replaced or repealed by the Treasurer. The guidelines may prescribe the land classification categories and classification process for local councils to follow, which may affect rights of property owners in NSW. Further, the Chief Commissioner may impose an administrative penalty of up to \$2 200 on a local council for non-compliance with the requirements of Part 9 to provide classification information to the Chief Commissioner.

The Bill may therefore incorporate extrinsic guidelines into legislation. The Committee generally comments on any legislative provisions that permit the incorporation of external materials like guidelines and give those materials legal force. It also prefers substantive matters to be set out in legislation or to be published in the Gazette and tabled in Parliament as regulations, where they can be subject to disallowance and therefore to appropriate parliamentary scrutiny.

However, the Committee notes that prescribing such information in guidelines may enable greater flexibility and responsiveness to the changing practices. The Committee also acknowledges that

the proposed amendments are intended to facilitate policy reform of the emergency services funding framework. In the circumstances, the Committee makes no further comment.

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## 5. Emergency Services Levy Insurance Monitor Bill 2024

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

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#### *Wide official powers of the Monitor and appointed inspectors*

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The Bill would establish a new legislative framework for the operation of the Emergency Services Levy Insurance Monitor, to oversee insurance matters during a transition period under emergency services levy reforms. This framework would provide the Monitor and inspectors appointed by the Monitor with a number of investigation and enforcement powers. These include powers to: enter and search premises for a purpose under section 62, apply for search warrants on reasonable suspicion, examine and inspect premises and things, take things, require the provision of information or records from a person, and require a person to answer questions or give evidence to an inquiry and comply with requirements under various notices relating to prohibited conduct.

The Bill would also establish a number of absolute liability offences for non-compliance with the exercise of these powers, without reasonable excuse. These offences carry a maximum penalty ranging from \$5 500 (50 penalty units) to \$22 000 (200 penalty units). Section 76 clarifies that self-incrimination or liability to pay a penalty is not a reasonable excuse for non-compliance with a requirement to give documents, information or answers. It also enables the use of any records required to be provided as evidence in criminal proceedings against the person who provided the records.

Therefore, the Bill may grant the Monitor and appointed inspectors wide powers of investigation and enforcement. The exercise of these powers may impact an individual's rights including, for example, their property rights in respect to the power to enter premises and seize property, and their privilege from self-incrimination in respect to the power to give directions for assistance.

The Committee recognises that these provisions may be intended to strengthen compliance with the regulatory framework, ensure consumer protections and enable the Monitor to carry out its statutory function. The Bill also provides avenues for complaints against the use of the power of entry by inspectors and requires the Monitor to maintain a register of information about the use of the entry powers. The Committee further acknowledges that the investigation and enforcement powers under the Bill may be modelled on past powers of the previous Emergency Services Levy Insurance Monitor.

However, the Committee considers that it is unclear from sections 68 to 71 in what circumstances the power of entry may be exercised without a warrant. The Committee also notes that the investigation and enforcement powers under the Bill may be exercised on broadly defined grounds like determining contravention, obtaining documents and information in connection with that administration, general administration or in connection with statutory functions. The Committee further notes that the power of entry provided under the Bill would permit an inspector to use 'reasonable force' if necessary. Unlike police officers and other responders, it is unclear whether appointed inspectors are suitably qualified to exercise 'reasonable' force. For these reasons, the Committee refers the matter to Parliament for consideration.

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

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*Wide incidental powers of the Monitor*

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Section 12 of the Bill would give the Monitor various functions, including doing anything that is 'necessary', or 'in connection with', or 'reasonably incidental to' the exercise of the Monitor's functions. The Bill may therefore provide the Monitor with a wide power to take action in relation to their statutory functions.

The Committee acknowledges that the incidental powers may be intended to facilitate policy reform of the emergency services funding framework to enable the Monitor to operate flexibly and responsively during the transition of insurance pricing. The Committee also recognises that the Monitor's functions are intended to ensure consumer protections for insurance holders. However, the Committee notes that terms like 'necessary', 'in connection with' and 'incidental' may be, without legislative definitions or limitations, broadly defined to include any and all matters, actions or steps. This may amount to an unrestricted administrative power. For these reasons, the Committee refers the matter to Parliament for consideration.

*Wide general regulation-making power*

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The Bill provides a general regulation-making power under section 88(1). This would allow regulations to make provisions on any matter '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'.

The Bill may, therefore, provide for a wide regulation-making power. Unlike primary legislation, regulations are subordinate legislations that are not required to be passed by Parliament and which the Parliament has no control over once they commence.

The Committee recognises that these regulation-making powers may allow for more flexible regulatory responses. The Committee also acknowledges that any regulations would still have to be tabled in Parliament and are 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. For these reasons, the Committee refers the matter to Parliament for consideration.

*Wide power of delegation*

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Section 84 of the Bill would provide the Chief Commissioner of State Revenue with the power to delegate the exercise of one or more of their functions under the Bill to 'a person'. The Bill does not include any provisions specifying or limiting who may be delegated functions, or set any qualification requirements for a person to be delegated functions.

Therefore, the Bill may provide for a wide power of delegation of statutory functions. The Committee notes that the provision may effectively delegate statutory powers and functions without any oversight by the Parliament. Under proposed section 84 private individuals could be delegated statutory functions that the public may expect to be performed by public officials. The Committee prefers that the delegation of statutory functions be detailed in primary legislation to ensure appropriate parliamentary scrutiny over the exercise of these functions. For these reasons, the Committee refers the matter to Parliament for consideration.

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

### *Matters deferred to the regulations*

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The Bill would defer a significant number of matters to regulations. In particular, it would allow regulations to create offences, prescribe offences as penalty notice offences and incorporate extrinsic material into the regulations. The Bill would also provide regulation-making powers to specify who the Emergency Services Levy Insurance Monitor can delegate their functions to, and with whom the Monitor can enter into information sharing arrangements with. The regulations would also prescribe the end date of the 'monitoring period', upon which the Bill (if enacted) would be repealed.

Schedule 1 would also allow the making of regulations for the purpose of savings or transitional provisions that can take effect before being published on the NSW legislation website. The Committee notes this would conflict with subsection 39 of the *Interpretation Act 1987* which requires regulations to commence on the date they are published on the website and provides that, where one or more provisions of a regulation are expressed to commence before publication, they are taken to commence on the date they are published on the website (rather than the earlier day).

The Committee generally prefers substantive matters to be dealt with in the principal legislation, rather than the regulations, to facilitate an appropriate level of parliamentary oversight. The Committee acknowledges that these amendments may be intended to build more flexibility into the regulatory framework and allow regulators to better respond to changing needs and circumstances. The Committee also recognises that any regulations are required to be tabled in Parliament and therefore subject to disallowance under section 41 of the *Interpretation Act 1987*.

However, the Committee notes that the regulation-making powers are significant, including creating offences and setting the date of repeal of the legislative provisions, without reference to Parliament. By deferring these matters to regulations the Bill may be inappropriately delegating legislative power from the Parliament to the Executive. For these reasons, the Committee refers the matter to Parliament for consideration.

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

### *Incorporation of extrinsic guidelines issued by the Monitor*

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Section 20 of the Bill would allow the Monitor to create guidelines that would have legal force under the regulatory regime established by the Bill. Under this regime, certain decision makers must, or may consider the guidelines before taking specific actions which may attract absolute liability offences or monetary liability, or result in public statements naming insurance companies as engaging in prohibited conduct.

The Monitor's power to issue and vary these guidelines under section 20 is not subject to limitations regarding the contents of the guidelines, other than the requirement in section 7 that the guidelines relate to the operation and enforcement of this Act. Although subsection 20(3) requires the guidelines be published in the Gazette, the Committee notes it is also not clear whether these guidelines must be tabled in Parliament. Therefore, the Bill may incorporate extrinsic documents into law.

The Committee generally comments on any legislative provisions that permit the incorporation of external materials like guidelines and gives these materials legal force. It also prefers substantive

matters to be set out in legislation or otherwise tabled in Parliament, where they can be subject to disallowance, and therefore subject to appropriate parliamentary scrutiny.

The Committee acknowledges that these provisions may be intended to allow the Monitor to respond to emerging regulatory issues with flexibility and independence. The Committee further acknowledges that the guidelines are intended to better inform the insurance industry, which would be subject to the enforcement functions of the Monitor under the Bill.

However, the Committee notes that the Monitor would be required to consider the guidelines when making decisions about enforcement actions which attract absolute liability offences under the Bill for non-compliance. The Committee further notes that the Bill also enables the Supreme Court to consider the guidelines when deciding whether to order insurance companies to pay financial penalties. Given the significant consequences which may flow from the prohibited conduct set out in the guidelines, the Committee refers the matter to Parliament for consideration.

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## 6. Environmental Planning and Assessment Amendment (Vibrancy Reforms) Bill 2024

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

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#### *Incorporation of extrinsic guidelines into legislation*

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The Bill seeks to insert Part 5 into Schedule 8 of the *Environmental Planning and Assessment Act 1979*, which would empower the Planning Secretary to create 'vibrancy guidelines' that a consent authority must consider when determining applications for extended hours of operation. Subclause 2(1) provides that the vibrancy guidelines are to "enable venues to operate in a way that achieves their full social, business and cultural potential, particularly as part of the night-time economy". These proposed amendments do not include a requirement that the guidelines be tabled in Parliament.

Therefore, the Bill may provide for the incorporation of extrinsic materials into law. The Committee generally comments on any legislative provisions that permits the incorporation of external materials like guidelines and gives those materials legal force. It also prefers substantive matters to be set out in legislation or to be published in the Gazette and tabled in Parliament as regulations, where they can be subject to disallowance and therefore to appropriate parliamentary scrutiny.

The Committee acknowledges that the vibrancy guidelines may be intended to be published on a New South Wales Government website and made transparent in that way. However, the Committee notes that the Bill does not include any provisions which prescribe or clarify where the guidelines are to be published or how interested persons may access them.

The Committee also acknowledges that the proposed amendments include provisions which limit the application and contents of the guidelines, by clarifying that the guidelines cannot 'require applications to be automatically approved or refused' and that they must operate in addition to any other relevant legal requirements. However, the Committee considers that these limitations do not sufficiently narrow the broad range of matters which the guidelines may relate to. As it stands the Bill would enable the Secretary to issue vibrancy guidelines to 'enable venues to operate in a way that achieves their full social, business and cultural potential, particularly as part of the night-time economy'. The Committee notes that these terms may be interpreted widely with the consequence being that the Secretary is empowered to issue guidelines on a broad range of matters. As the guidelines are not required to be tabled in Parliament and are therefore not subject to parliamentary scrutiny, the Committee refers the matter to Parliament for further consideration.

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## 7. Local Government Amendment (Employment Arrangements) Bill 2024

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

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## 8. Ombudsman and Other Legislation Amendment Bill 2024

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

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## 9. Residential Tenancies Amendment (Animals in Residential Premises) Bill 2024\*

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

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#### *Property rights and retrospectivity*

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The Bill seeks to insert Division 3A into the *Residential Tenancies Act 2010* to prevent a landlord from refusing a tenant's request to keep an animal in a leased residential premises unless they receive an order from the Civil and Administrative Tribunal that it is reasonable to refuse that request. The landlord must apply to the Tribunal within 14 days of receiving a tenant's request to keep an animal in the premises in the approved form, and failure to do so would be taken to be 'consent' to keeping an animal under the proposed amendments. Therefore, the Bill may infringe on property rights of landlords, including the freedom of contract to set terms of a lease agreement and to determine who or, in this case, what animals are excluded from the premises.

The Bill also seeks to insert savings and transitional provisions into the Act to apply proposed Division 3A to residential tenancy agreements entered into before the amendments would commence. 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 further notes that the retrospective application of these amendments could override existing and agreed terms excluding or limiting animals in premises, which might further impact a person's right to freedom of contract.

The Committee recognises that the Bill may be intended to address concerns that pet owners have limited access or greater difficulty securing residential tenancies as a result of owning an animal. These reforms may prevent greater abandonment and death of animals, as well as individuals being left without secure accommodation. However, the Committee notes that the freedom of contract and the excludability of property rights are fundamental common law rights. By placing the onus on property owners to seek court orders to reasonably exclude animals from premises, the amendments may effectively extinguish these property rights. For these reasons, the Committee refers the matter to Parliament for consideration.

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

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#### *Broad judicial discretion*

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The Bill seeks to insert subsection 54G(2) into the *Residential Tenancies Act 2010*, which sets out the matters that the Civil and Administrative Tribunal may consider when determining an application by a landlord for an order to refuse a request to keep an animal on leased premises. These matters would also include 'another matter the Tribunal considers relevant'. There does not

appear to be any provisions which clarify what is a 'relevant matter' to the Tribunal in determining these applications, given the ordinary meaning of the words 'matter' and 'relevant'.

The Bill may therefore provide for a broad subjective discretion to the Tribunal to determine whether it is reasonable for a landlord to refuse consent to keep an animal on leased residential premises. However, the Committee acknowledges that the broadly worded discretion may be intended to facilitate appropriate judicial discretion for the Tribunal Members in their decision-making role. In the circumstances, the Committee makes no further comment.

## **PART TWO – REGULATIONS WITH COMMENT**

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### **1. Civil Procedure Act 2005—Practice Note – Class 3 Compensation Claims**

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

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##### *Procedural fairness rights – leave to cross-examine oral evidence*

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The Practice Note sets out how proceedings for objections to the amount of compensation for a compulsory acquisition of land are to be conducted in the Land and Environment Court, which fall within the Court's Class 3 jurisdiction. Paragraph 37 requires a party's legal representative to provide agreed or competing lists of the topics that they are proposing to cross-examine a witness on. These lists must be provided to the judge or commissioner of the final hearing at the start of that witness's oral evidence. Importantly, the Practice Note also adds a requirement that leave must be sought for these topics on which they are proposing to cross-examine a witness.

By requiring parties to seek leave to cross-examine the oral evidence of witnesses, the Practice Note may impact an individual's procedural fairness rights. Such rights ensure that parties have the opportunity to test a witness's evidence in a common law adversarial court system. Under common law, parties cannot seek the court make an adversarial inference about a witness if they have not first raised an issue of inconsistency with the witness in cross-examination. In this case, this may further impact applicant's ability to seek fair and just compensation for the compulsory acquisition of land.

However, the Committee notes that, under section 38 of the *Land and Environment Court Act 1979*, the Court is not required to follow the common law rules of evidence and can 'inform itself on any matter in such manner as it thinks appropriate' for Class 3 proceedings. The Committee further recognises that Class 3 proceedings are intended to be conducted quickly, efficiently and with as little formality and technicality as permissible, under both the Act and the Practice Note. In the circumstances, the Committee makes no further comment.

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### **2. Liquor Amendment (Savings and Transitional Arrangements) Regulation 2023**

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#### **May not accord with the spirit of the legislation under which it was made, even though it may have been legally made: s 9(1)(b)(iv) of the LRA**

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##### *Savings and transitional provision for repealed Part of Act*

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The Regulation inserts a savings and transitional provision into the *Liquor Regulation 2018* by inserting clause 132B in Schedule 1. Clause 132B provides that Part 12 of the *Liquor Act 2007* is taken not to have been repealed despite section 167 of the Act, which repeals Part 12 on 11

December 2023. Clause 132B also provides that Part 12 continues in force, as amended by Schedule 2, clauses [63]-[69] of the *24-Hour Economy Legislation Amendments (Vibrancy Reforms) Act 2023*, until the repeal of this clause. This amendment Act commenced on assent (being 12 December 2023) and would make Part 12 permanent. However, as Part 12 was repealed before this date of assent, the Committee notes that Schedule 2, clauses [63]-[69] had no operative effect. Therefore, the Regulation seeks to give effect to these amendments.

The Committee notes that the Regulation is purportedly made under Schedule 1, clause 1 of the *Liquor Act 2007*, which provides that regulations may contain provisions of a savings or transitional nature consequent on the enactment of any statute which amends that Act. However, the Committee notes that the Regulation attempts to amend the operation of legislative provisions in primary legislation by means of regulation. In doing so, the Regulation may make it hard for a person to understand what laws actually apply to them as it would require them to apply the amending Act to their interpretation of the parent Act and be aware of whether clause 132B remains in force. This may 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 considers that clause 132B appears to go beyond a 'savings' or 'transitional' nature, since it does not simply regulate the operation of provisions during a transition period or ensure consistency after amendments have been enacted. By attempting to give effect to inoperative amendments and preserve the operation of repealed statute provisions, the Regulation may go beyond the spirit of the power to make savings and transitional regulations under the *Liquor Act 2007*.

The Committee further considers that this is an inappropriate use of the legislative power delegated to the Executive. While the Committee appreciates that the intention may be to enable the amending Act to operate as intended, the Committee prefers that this is done through an amending Act to allow for appropriate parliamentary scrutiny. For these reasons, the Committee would normally be of the opinion that the Regulation ought to be disallowed and refer the matter to Parliament. However, as the Better Regulation, Fair Trading and Other Legislation Amendment Bill 2024 seeks to effectively repeal the Regulation, the Committee makes no further comment.

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### 3. Motor Accident Guidelines: CTP Care (version 1.1)

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#### **Object could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA**

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##### *Incorporation of extrinsic document in Guidelines*

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The Motor Accident Guidelines: CTP Care (version 1.1) amends clause 3.6 to remove and amend circumstances where the Lifetime Care and Support Authority (LCSA) is required to provide formal, written notification to the Statute Insurance Regulatory Authority (SIRA) within 5 business days. The updated Guidelines also include new clause 3.6A which provides for a further circumstance where LCSA is required to formally notify SIRA. These circumstances are prescribed as significant matters in accordance with the *Significant Matter Notification Requirements* document.

The Committee notes that the *Significant Matter Notification Requirements* document is not attached to or linked to from the Guidelines, and that it is a 9-page document published on the SIRA website that applies to three separate schemes SIRA regulates. The Committee generally comments on legislative provisions that permit the incorporation of external materials and gives those materials legal force. In this case, the Committee notes that while the external document is published on the SIRA website, it is not published in the Gazette or tabled in Parliament.



The Committee recognises that the proposed amendments to the Guidelines may be intended to alleviate administrative burden or simplify the current Guidelines. However, the external document is not a document that can be subject to disallowance and therefore subject to appropriate parliamentary scrutiny. For these reasons, the Committee refers the matter to Parliament for further consideration.

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#### **4. Practice Note Supreme Court Common Law Division No.11 Bail**

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

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###### *Liberty and freedom from arbitrary detention – discretion of the Registrar*

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The Practice Note at Clause 32 allows a bail hearing date to be vacated at the discretion of the Registrar, if there is any 'slippage' of the standard timetable for the filing and service submissions and materials by the applicant or the opposing party for a bail decision.

The Committee notes that the discretion of the Registrar to vacate the hearing date is broad and the Practice Note does not appear to specify what time period would amount to 'slippage' of a timetable and what circumstances would be taken into account by the Registrar before vacating a hearing date. The Committee also notes that vacating a hearing date would delay the proceedings of a bail application and could prolong the time in custody for a bail applicant. This may adversely impact the applicant's right to liberty and freedom from arbitrary detention contained in Article 9 of the ICCPR.

The Committee acknowledges that the discretion of the Registrar may be intended to build administrative flexibility into the Supreme Court's case management processes. However, the Committee notes that allowing a Registrar to have the broad discretionary power to vacate hearing dates on the basis of 'slippage', may make it difficult for parties to a bail application to understand what circumstances may result in the vacation of a date or the circumstances for a new hearing date to be fixed. For these reasons, the Committee refers the issue to Parliament for further consideration.

# Part One – Bills

# 1. Bail Amendment (Serious Personal Violence and Electronic Monitoring) Bill 2024\*

Date introduced	9 May 2024
House introduced	Legislative Assembly
Member responsible	Mr Alister Henskens SC MP
	*Private Members Bill

## Purpose and description

- 1.1 The object of this Bill is to amend the *Bail Act 2013* (the **Act**) to:
- (a) create a rebuttable presumption that bail conditions about electronic monitoring must be imposed if bail is granted for a serious personal violence alleged to have been committed:
    - (i) by an accused person who is at least 18 years of age, and
    - (ii) against a person with whom the accused person has, or has had, a domestic relationship, and
  - (b) provides that a grant of bail contrary to the rebuttable presumption will be stayed for up to 3 business days if a police officer or Crown lawyer immediately informs the court or authorised justice making the bail decision that an authorised officer or the Director of Public Prosecutions has approved the making of an application about the bail in the Supreme Court, and
  - (c) provide that a bail condition requiring the accused person be subject to electronic monitoring is a pre-release requirement for the purposes of the Act, and
  - (d) prohibit registrars of the Local Court from hearing bail applications for serious personal violence offences.

## Background

- 1.2 The Act sets out the legislative framework for people charged with criminal offences to apply for release on bail, pending a verdict on those charges. Under section 30A, bail conditions may currently be imposed which require the electronic monitoring of an accused person, and that monitoring must meet any minimum standards prescribed in the regulations.
- 1.3 The Bill seeks to amend the Act to:

- presume that electronic monitoring be set as a bail condition for people charged with certain serious personal violence offences to be released on bail.
- require a decision to release on bail to be stayed in certain circumstances.
- prevent Local Court registrars from hearing bail applications for serious personal violence offences.

1.4 In his second reading speech, Mr Alister Henskens SC MP stated that the Bill is intended to 'enhance protection of those women who are already victims of' domestic violence and 'improve women's safety'.

## Issues considered by the Committee

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

#### *Right to the presumption of innocence – rebuttable presumption to impose bail conditions*

1.5 The Bill proposes to insert section 22D into the Act, which requires an authority determining a bail application to impose conditions for the electronic monitoring of the accused person and a prohibition from them entering or remaining in certain places. This requirement that electronic monitoring and geographical restrictions be set as bail conditions applies where:

- the accused person is over 18 years old and is charged with a 'serious personal violence offence' allegedly committed against a person they have or had a domestic relationship with,
- the accused person is granted bail, and
- the representative for the Crown requests that the bail authority refuse bail or impose electronic monitoring bail conditions.

1.6 However, this is a rebuttal presumption as, under proposed subsection 22D(2), the bail authority does not have to impose this bail condition if they are satisfied that sufficient reasons exist that justify not imposing the condition.

1.7 The Bill also seeks to move the definition of 'serious personal violence offence' under section 16B into section 4. 'Serious personal violence offence' would still be defined as an offence against the person (that is, an offence under Part 3 of the *Crimes Act 1900*) which carries a maximum penalty of at least 14 years imprisonment.

1.8 Under Part 3 of the Act, an accused person charged with serious personal violence offences are required to undergo a three-step test before they can be granted release on bail:

- (a) First, the accused person must show cause why their detention is not justified to the bail authority (otherwise they must be refused bail) under Division 1A.
- (b) Then, under Division 2A, the accused person must be assessed by the bail authority for any 'bail concerns' (which includes concerns that, if released on bail, they will commit a serious offence or endanger the safety of victims or others) and must refuse bail if they are satisfied on that assessment that there is an unacceptable risk.

- (c) Finally, under Division 2A, the bail authority must either grant bail, release the person without bail or dispense with bail if there are no unacceptable risks. However, the authority may grant bail with conditions imposed, including requiring electronic monitoring under section 30A.

1.9 In his second reading speech, Mr Henskens acknowledged that the bail system 'balances the rights of the accused with the need to protect any alleged victims' and further stated that the Bill seeks to achieve a 'protective rebalancing' of these rights and protections 'in favour of protections'.

**The Bill seeks to insert section 22D into the *Bail Act 2013*, which sets a rebuttable presumption to imposed electronic monitoring bail conditions for an accused charged with serious personal violence offences who is granted bail. A bail authority must impose this condition if the Crown or their representative request that bail be refused or that electronic monitoring bail conditions be imposed, unless they are 'satisfied that sufficient reasons exist to justify' not imposing those conditions.**

As the presumption would apply where the Crown is seeking that bail be refused or the condition be imposed, the proposed section implicitly puts the onus of proof on the accused person to rebut the presumption that electronic monitoring bail conditions be imposed. As bail decisions relate to individuals charged but not yet convicted of an offence, the Bill may therefore reverse the onus of proof in criminal actions. In regard to criminal actions, a reverse onus may undermine a person's right to the presumption of innocence as contained in Article 14 of the ICCPR.<sup>1</sup> The right to the presumption of innocence protects an accused person's privilege to be presumed innocent until proved guilty according to law. The Committee further notes that, in imposing electronic monitoring conditions, the Bill may also adversely impact on the accused's privacy rights and right to freedom of liberty and movement.

The Committee acknowledges that the proposed amendments are intended to protect people, particularly women, from retributive personal violence from current or former partners who are released on bail for offences relating to alleged violence against them. However, the Committee notes that, under the existing bail system, an accused person charged with a 'serious personal violence offence' must show cause why their detention is not justified and satisfy the bail authority that they would not present an unacceptable risk before being granted bail. These two existing safeguards are also intended to protect the community, by placing the onus on the accused to establish that they would not pose a danger to others if on bail. This inherently infringes on the accused person's right to the presumption of innocence in prioritising community safety. The Committee further notes that the Bill would require the accused to rebut a presumption on the basis that the Crown has opposed bail or unconditional granting of bail. For these reasons, the Committee refers the matter to Parliament.

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<sup>1</sup> United Nations, Office of the High Commissioner for Human Rights, [International Covenant on Civil and Political Rights](#), 1966.

*Judicial discretion – granting bail and imposing bail conditions*

- 1.10 As set out above, section 22D imposes a rebuttable presumption that electronic monitoring bail conditions must be imposed by the bail authority.
- 1.11 The Bill would also insert a new subsection 40(1A) into the Act. This would automatically stay a decision of a court or authorised justice to grant bail for a person charged with a serious personal violence offence if:
- electronic monitoring and geographical restriction conditions under proposed section 22D were not imposed,
  - no previous bail decision has been made in the matter, after the accused's first appearance for the offence, and
  - the Crown informs the court that a detention application will be made in the Supreme Court, and provides authorisation from an authorised officer or the Director of Public Prosecutions.
- 1.12 Mr Henskens argued that proposed subsection 40(1A) would 'protect a victim, if electronic monitoring was sought but not ordered, until an appeal can be determined', because 'while an urgent appeal is being heard, the offender will continue to be detained for up to three business days until the appellate process, if engaged, is urgently concluded.'

**The Bill inserts section 22D into the *Bail Act 2013*, which creates a statutory rebuttable presumption that bail authorities must impose electronic monitoring conditions on persons accused of serious personal violence offences, unless satisfied sufficient reasons exist to justify otherwise. By establishing a statutory presumption against unconditional bail, the Bill may, in effect, limit the judicial discretion of the bail authority through an Act of Parliament. However, the Committee acknowledges that the court retains the discretion to determine whether sufficient reasons exist to rebut the presumption. In these circumstances, the Committee makes no further comment in respect to the limitations on judicial discretion under proposed section 22D.**

**The Bill would also insert subsection 40(1A) into the Act, to provide circumstances in which a bail authority's decision to release an accused person charged with a serious personal violence offence on unconditional bail would be automatically stayed. This stay automatically applies where a bail authority grants bail without electronic monitoring conditions, if the Crown informs the court of an intention to make a detention application in the Supreme Court. Therefore, the Bill may limit the discretion and powers of the judicial officer, by effectively rendering their decision ineffective upon the Crown providing notice of a detention application, pending determination of that application.**

**The Committee recognises that the intention of subsection 40(1A) may be to protect individuals from further personal violence by preventing the release of persons accused of serious personal violence offences before a higher appellate court can determine whether bail conditions are appropriate. The Committee also acknowledges that a similar automatic stay provision exists in section 40(1), regarding the granting of bail for serious offences. However, the Committee notes that the**

**insertion of 40(1A) would have the effect of further limiting the powers of the judiciary through an Act of Parliament. It might also effectively divest judicial decision-making power from the court and grant the Crown the power to override bail decisions. For these reasons, the Committee refers the matter to Parliament for consideration.**

*Right to liberty and freedom from arbitrary detention – automatic stay of release*

1.13 As set out above, subsection 40(1A) sets out the circumstances in which a bail authority's decision to grant bail for a serious personal violence offence will be stayed. Per subsection 40(2) of the Act, the stay will be effective until one of the following occurs first:

- the Supreme Court affirms, varies or substitutes the decision, or refuses to hear the bail application,
- the Crown files notice that they do not intend to proceed with the bail application, or
- it reaches 4.00pm three business days after the decision to grant bail is made.

**The Bill seeks to insert subsection 40(1A) into the *Bail Act 2013*, which would automatically stay a bail authority's decision to grant bail for an accused person charged with a serious personal violence offence in prescribed circumstances. Where a bail authority grants bail without certain bail conditions, the Crown may inform the court of an intention to make a detention application in the Supreme Court which automatically stays the release decision.**

**The effect of an automatic stay under proposed subsection 40(1A) would be the accused remaining in custody until either the Supreme Court affirms the decision to release, the Crown revokes their detention application or three business days have passed. Therefore, the Bill may impact on the accused's right to liberty and freedom from arbitrary detention contained in Article 9 of the ICCPR,<sup>2</sup> which provides that holding accused persons in remand should not be the general rule.**

**The Committee recognises that the intention of subsection 40(1A) is to prevent the pre-emptive release of persons accused of serious personal violence offences before an appellate court can consider the appropriateness of unconditional bail. This is intended to protect members of the community who may be at risk of violence by current or former intimate partners. However, the Committee notes that the accused does not appear to have a right of reply on the stay of a release decision, which is dependent only on notice being given from the Crown. For these reasons, the Committee refers the matter to Parliament for consideration.**

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<sup>2</sup> United Nations, Office of the High Commissioner for Human Rights, [International Covenant on Civil and Political Rights](#).

## 2. Better Regulation, Fair Trading and Other Legislation Amendment Bill 2024

Date introduced	8 May 2024
House introduced	Legislative Assembly
Minister with carriage	The Hon. Anoulack Chanthivong MP
Portfolio	Better Regulation and Fair Trading

### Purpose and description

- 2.1 The objects of this Bill are to—
- (a) amend various Acts and regulations administered by the Minister for Better Regulation and Fair Trading, and
  - (b) amend the *Liquor Act 2007* (the **Liquor Act**) to continue provisions allowing local councils to encourage the use of outdoor space for dining and performances and repeal a related regulation.

### Background

- 2.2 In his second reading speech, the Hon. Anoulack Chanthivong MP, Minister for Better Regulation and Fair Trading, stated that the Bill's proposed amendments to various Acts and regulations would 'ensure that the legislation in the portfolio remains relevant, fit for purpose and in line with twenty-first century practices.' These proposed amendments, set out at Schedules 1 to 7 of the Bill, are largely administrative and include updating language referring to technology, and standardising provisions relating to service of documents and notice requirements.
- 2.3 Schedule 8 of the Bill seeks to amend the Liquor Act and *Liquor Regulation 2018* (the **Liquor Regulation**), regarding the recently repealed Part 12 of the Liquor Act. In 2020, the Liquor Act was amended to include a power for local councils to allow the use of outdoor space for dining and performance under Part 12. These powers, would repeal on 11 December 2023 in accordance with section 167 of the Liquor Act.
- 2.4 On 12 December 2023 the *24-Hour Economy Legislation Amendment (Vibrancy Reforms) Act 2023* (the **2023 Vibrancy Reforms Act**) commenced. This Act sought to amend Part 12 of the Liquor Act to permanently allow councils to use outdoor spaces for dining and performance, and repeal the sunset provisions under section 167. On 27 December 2023 the *Liquor Amendment (Savings and Transitional Arrangements) Regulation 2023* (the **Liquor Savings Regulation**) was published and inserted clause 132B into the Liquor Regulation, which gave effect to the 2023 Vibrancy Reforms Act amendments to Part 12.
- 2.5 Schedule 8 of the Bill would reinstate Part 12, as amended by the 2023 Vibrancy Reforms Act, and repeal clause 132B of the Liquor Regulation, as inserted by the



Liquor Savings Regulation. This Committee has considered and reported on the Liquor Savings Regulation at page 62 of this Digest.

## Issues considered by the Committee

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

#### *Retrospective enactment of legislation*

- 2.6 Schedule 8 of the Bill seeks to insert a new Part 12 into the Liquor Act to allow councils to use outdoor space for dining and performance. These proposed provisions are substantively identical to the provisions of the previous Part 12 of the Liquor Act as it would have been amended by the 2023 Vibrancy Reforms Act, if Part 12 had not been repealed on 11 December 2023.
- 2.7 The Bill also seeks to insert further savings and transitional provisions into Schedule 1 of the Liquor Act. These proposed savings and transitional provisions provide that 'anything done or omitted to be done' in the period from 11 December 2023 to the date of assent to the Bill as an Act, which 'would have been validly done or omitted to be done had Part 12, as inserted by' the Bill is 'taken to have been, and always to have been, validly done or omitted to be done.'
- 2.8 In his second reading speech the Minister noted that these proposed amendments are intended to finalise the amendments under the 2023 Vibrancy Reforms Act and 'deliver the full intent of the vibrancy reforms'.

**The Bill seeks to insert Part 12 into the *Liquor Act 2007* which would allow consent authorities to allow outdoor spaces to be used for dining and performance. It would also insert savings and transitional provisions that would retrospectively validate anything done or omitted to be done from 11 December 2023 onwards, which would otherwise have been permitted under proposed Part 12. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.**

**However, the Committee acknowledges that the retrospective application may be intended to address any confusion or uncertainty in relation to the use of outdoor spaces resulting from the repeal of Part 12 of the Act on 11 December 2023 and the commencement of purported amendments to those provisions by the *24-Hour Economy Legislation Amendment (Vibrancy Reforms) Act 2023* after this date. In the circumstances, the Committee makes no further comment.**

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

#### *Publication of information by 'appropriate electronic means'*

- 2.9 The Bill proposes the following amendments to provisions in various Acts which require the Secretary of a Department to make the following information publicly available:

- a register of registered volume fuel retailers under section 10 of the *Biofuels Act 2007*,
- notice of the withdrawal or variation of an undertaking under section 25V of the *Charitable Fundraising Act 1991*,
- a register of undertakings under section 86B of the *Fair Trading Act 1987*,
- annual returns under section 49I of the *Funeral Funds Act 1979*, and
- details of exemptions granted under section 4A of the *Pawnbrokers and Second-hand Dealers Act 1996*.

2.10 Currently, the requirement is for this relevant information to be published on a publicly accessible website maintained by the Department or on a NSW Government website. The Bill would replace these publication requirements, to require that the information is published on a NSW Government website 'or by other appropriate electronic means'.

2.11 The Minister described the existing publication requirements as 'inflexible and outdated' and further stated that these proposed amendments:

...adopts technology-neutral language to give regulators more options to consider and use alternative technologies in the future—for example, the option to make information, documents, notices or forms accessible using other online technology such as portals or apps. These amendments will provide more flexibility for regulators and allow legislation to keep up with the rapid pace at which technology keeps evolving.

**The Bill seeks to amend provisions in various Acts requiring publication of particular information by the Secretary of a Department, which currently require the Secretary to publish this information on a NSW Government or Departmental website. The proposed amendments would require to the Secretary to publish the relevant information on a Government website or 'by other appropriate electronic means.'**

**The Bill does set out provisions that would clarify or define what may amount to 'appropriate electronic means' in these circumstances, and therefore may subject the publication requirements under various Acts to a broad subjective power of the Secretary. The Committee notes that these publication requirements may relate to information that assists individuals to understand their rights or obligations, including particularly vulnerable groups. For example, the Bill's proposed amendments to section 49I(2) of the *Funeral Funds Act 1979* relates to the publication of the annual returns of pre-paid funeral funds and are intended to ensure consumer protections and proper management of pre-payments for funeral services.**

**The Committee acknowledges that these amendments are intended to build flexibility into the regulatory framework by enabling regulators to use alternative technologies that may emerge in the future. However, the Committee considers that the term 'other appropriate electronic means' may make it difficult for a lay person to understand where they can access relevant information. For these reasons, the Committee refers the matter to Parliament for consideration.**

*Process for giving notice*

- 2.12 Schedule 6 of the Bill proposes implementing a standard definition of 'service of documents' in various Acts. These proposed amendments include:
- (a) Omitting sections 11(6), 61A(3), 74(4), 76(5) and 80(4) of the *Associations Incorporation Act 2009* which each relate to a requirement that the Secretary give notice to a person specifically by post or by email, and inserting section 101 providing for the 'service of documents.'
  - (b) Replacing section 87 of the *Funeral Funds Act 1979* which relates to the ways a Minister or Secretary may give notice, with provisions for the service of documents.
- 2.13 These amendments instead insert provisions setting out how the 'service' of 'a document that is authorised or required by this Act or the regulations to be served on a person' may be done.

**The Bill proposes amending various Acts to include a standard definition of 'service of documents'. In particular, the Bill seeks to amend the *Associations Incorporations Act 2009* and the *Funeral Funds Act 1979* by replacing specific requirements for giving notice by personal service, post, email or other authorised method provisions for the 'service' of 'documents required to be served on a person'.**

**The Committee notes that, in a legal context, the word 'service' has a particular, discrete meaning, generally referring to the act of delivering a document to a person. 'Giving notice' of a matter does not necessarily mean it concerns a 'document which must be served on a person'. Therefore, the Bill may remove provisions which specify how the Secretary or Minister may give notice to a person as required under the relevant Act and insert provisions with respect to service that may not apply to these notice requirements. This may make it hard for an individual to understand how they can be informed of matters which may affect their rights and obligations under law. For these reasons, the Committee refers this matter to Parliament for consideration.**

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

*Regulation-making power to incorporate extrinsic materials*

- 2.14 Currently, section 30(1) of the *Biofuels Act 2007* allows the making of regulations which are 'not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.'
- 2.15 The Bill seeks insert subsection 30(2) into the *Biofuels Act 2007* which would provide an additional regulation-making power to 'apply, adopt or incorporate a publication as in force at a particular time or as in force from time to time.'
- 2.16 In his second reading speech, the Minister noted that the *Biofuels Act 2007*:

... currently relies on the international industry standard for biofuel sustainability and is the only Act in the portfolio to rely on external publications. This means that the regulation needs to be amended every time a new version of the publication is released. This amendment will reduce administrative effort and resource allocation spent on amending the regulation...

**The Bill proposes to insert a new regulation-making power under the *Biofuels Act 2007*, which would allow a regulation to apply, adopt or incorporate a publication into the existing powers of that Act. By allowing regulations to incorporate extrinsic publications and give those publications legal force, the Bill may provide for a broad regulation-making power .**

**The Committee generally comments on any legislative provisions that permits the incorporation of external materials like guidelines and gives those materials legal force. It also prefers substantive matters to be set out in legislation or to be published in the Gazette and tabled in Parliament as regulations, where they can be subject to disallowance and therefore to appropriate parliamentary scrutiny.**

**However, the Committee acknowledges that the Act sets out a complex legislative framework regulating potentially hazardous chemicals which relies on evolving scientific standards and research. The Committee notes that these amendments are intended to facilitate administrative efficiency and flexibility in the regulatory framework by removing the need for legislative amendments each time a new standard is published. In the circumstances, the Committee makes no further comment.**

### 3. Electricity Infrastructure Investment Amendment (Renewable Energy Sector Plan) Bill 2024\*

Date introduced	9 May 2024
House introduced	Legislative Assembly
Member responsible	Mr Roy Butler MP
	*Private Members Bill

#### Purpose and description

- 3.1 The object of this Bill is to amend the *Electricity Infrastructure Investment Act 2020* (the **Act**) in relation to the plan for the NSW renewable energy sector prepared by the NSW Renewable Energy Sector Board (the **Board**) for manufacturing and construction in the sector, including by:
- (a) requiring a draft plan and proposed amendments to an approved plan to be published on the website of the Department of Climate Change, Energy, the Environment and Water
  - (b) providing for public consultation in relation to a draft plan or proposed amendments
  - (c) requiring the Board to consider certain requests for amendments to increase targets in the plan about the use of locally produced and supplied goods and services, and
  - (d) providing that a condition imposed in relation to the carrying out of a network infrastructure project is not required, in certain circumstances, to be consistent with a target in the plan about the use of locally produced and supplied goods and services.

#### Background

- 3.2 In his second reading speech, Mr Roy Butler MP said that the Bill is intended to ensure that 'New South Wales is as ready as possible for any transition to renewables and maximises economic benefits, accountability and fairness.' He further explained that it would encourage 'local manufacturers to invest in the six renewable energy zones' and would create 'a statutory process for accountability and transparency' in the Board's decision-making process.
- 3.3 The Bill seeks to amend section 8 of the Act which would require the Board to submit a draft plan for the NSW renewable energy sector to the Minister for approval and make any amendments to a draft plan requested by the Minister. Before giving a draft plan or proposed amendments to the Minister for approval, the Board would be required to publish the draft plan or proposed amendments, invite submissions on

the plan or amendments for a period of at least 28 days, and consider the submissions received during the period.

- 3.4 Subsection 8(4C), which the Bill proposes to insert, would require the regulator to take certain matters into account before making a recommendation to the Minister about a draft plan or proposed amendments to an approved plan. Mr Butler emphasised that this would ensure that both consumer protections and 'the social and economic benefit to all of New South Wales' are considered when the regulator makes any recommendations.
- 3.5 The Bill also proposes to insert section 8A into the Act, which would require the Board to consider any request to increase the proportion of goods and services that must be locally produced and supplied, and publish its decision and reasons.
- 3.6 Finally, the Bill proposes to insert subsection 9(5) into the Act to allow the Minister to assess local manufacturing capacity when imposing a condition upon a plan.

### Issues considered by the Committee

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

## 4. Emergency Services Levy Amendment (Land Classification) Bill 2024

Date introduced	9 May 2024
House introduced	Legislative Council
Minister with carriage	The Hon. Daniel Mookhey MLC
Portfolio	Treasurer

### Purpose and description

- 4.1 The object of this Bill is to amend the *Emergency Services Levy Act 2017* (the **Act**) to:
- (a) require local councils, for the purposes of evaluating and implementing reforms to the way in which emergency services are funded, to
    - (i) perform a preliminary classification of all parcels of land in the area of the local council,
    - (ii) identify if the parcel of land is owned by a person belonging to a class of persons specified in guidelines issued by the Treasurer, and
    - (iii) give the information to the Chief Commissioner of State Revenue (the **Chief Commissioner**)
  - (b) require the Chief Commissioner to keep a register of the information,
  - (c) enable the information to be given to certain persons and used for the purposes of evaluating and implementing reforms to the way in which emergency services are funded,
  - (d) enable the Chief Commissioner to monitor local councils' compliance with the new requirements,
  - (e) enable the Treasurer to issue guidelines for the purposes of the new requirements.

### Background

- 4.2 The Bill seeks to insert a new Part 9 into the Act regarding emergency services funding reform. New Part 9 would require local councils to classify all parcels of land and cooperate with the Chief Commissioner to enable the reform.
- 4.3 In his second reading speech, the Hon. Daniel Mookhey MLC, Treasurer, said that the amendments proposed by the Bill are intended to establish 'an initial one-off land

classification framework' to process the State's emergency services funding reform. The Statement of Public Interest tabled with the Bill noted that an 'initial land classification framework' is necessary to enable the Government to 'have the relevant current land classification data to model options for differential levy rates, fixed charges, discounts and caps.'

- 4.4 The Treasurer further explained that the Government would commit to reforming the funding system by 'removing the emergency services levy from insurance and replacing it with a contribution from all property owners across the State.'

### Issues considered by the Committee

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

##### *Incorporation of extrinsic guidelines*

- 4.5 The Bill proposes to insert a new Part 9 into the Act, to provide for 'emergency services funding reform'. These provisions would establish requirements for local councils to classify parcels of land and then provide this information to the Chief Commissioner. Under proposed section 47D, the Chief Commissioner may impose an administrative penalty of up to \$2 200 on a local council for non-compliance with Part 9.
- 4.6 Proposed Part 9 would include new section 47E, which allows the Treasurer to issue the guidelines for the 'purposes of this part', which includes requirements for how land is to be classified and how this information is to be provided to the Chief Commissioner. The Treasurer would have to publish the guidelines on a Revenue NSW website, including the classification categories and a classification process for local councils to follow. Proposed section 47E would also allow the Treasurer to amend, replace or repeal the guidelines.
- 4.7 In his second reading speech, the Treasurer said that the guidelines would 'enable the Government to design a replacement levy that is not constrained by existing available land classifications.'

**The Bill proposes to insert section 47E into the *Emergency Services Levy Act 2017* to empower the Treasurer to issue guidelines that must be published on a Revenue NSW website and could be amended, replaced or repealed by the Treasurer. The guidelines may prescribe the land classification categories and classification process for local councils to follow, which may affect rights of property owners in NSW. Further, the Chief Commissioner may impose an administrative penalty of up to \$2 200 on a local council for non-compliance with the requirements of Part 9 to provide classification information to the Chief Commissioner.**

**The Bill may therefore incorporate extrinsic guidelines into legislation. The Committee generally comments on any legislative provisions that permit the incorporation of external materials like guidelines and give those materials legal force. It also prefers substantive matters to be set out in legislation or to be published in the Gazette and tabled in Parliament as regulations, where they can be subject to disallowance and therefore to appropriate parliamentary scrutiny.**



**However, the Committee notes that prescribing such information in guidelines may enable greater flexibility and responsiveness to the changing practices. The Committee also acknowledges that the proposed amendments are intended to facilitate policy reform of the emergency services funding framework. In the circumstances, the Committee makes no further comment.**

## 5. Emergency Services Levy Insurance Monitor Bill 2024

Date introduced	9 May 2024
House introduced	Legislative Council
Minister with carriage	The Hon. Daniel Mookhey MLC
Portfolio	Treasurer

### Purpose and description

- 5.1 The object of this Bill is to provide for the establishment of an Emergency Services Levy Insurance Monitor (the **Monitor**) to oversee the transition of insurance prices and to appoint the Independent Pricing and Regulatory Tribunal (**IPART**) as the Monitor.

### Background

- 5.2 The Bill seeks to create a new Act that would appoint IPART to be the Monitor responsible for overseeing the transition of insurance prices due to recent reforms to the emergency services levy framework which removes the levy from insurance premiums. If enacted, IPART would have core functions and powers, including monitoring, investigation and enforcement.

- 5.3 In his second reading speech, the Hon. Daniel Mookhey MLC, Treasurer, said that the Bill is intended to establish an insurance monitor and appoint the independent tribunal IPART as the Monitor. He stated that establishing the Monitor would ensure that:

... insurers pass on savings from the removal of the emergency service levy from insurance policies to consumers... during a transition period between the current emergency service levy on insurers and a replacement levy that is to be spread across property owners.

- 5.4 The Treasurer further explained that the Bill would also establish 'a consumer protection framework' to facilitate ongoing reforms to the State's funding arrangements for emergency services.

### Issues considered by the Committee

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

##### *Wide official powers of the Monitor and appointed inspectors*

- 5.5 Part 6 of the Bill would set out investigation and enforcement powers that may be exercised by inspectors, including a class of persons, appointed by the Monitor under section 64. Under section 62, these powers may be exercised for one of the following purposes:

- (a) to determine whether there has been compliance with or a contravention of a provision of the Bill or regulations,
- (b) for obtaining information or records for purposes connected with the administration of the Bill,
- (c) 'in connection with exercising the functions of the Monitor',
- (d) 'generally for administering' the Bill.

5.6 There are a number of significant powers which an inspector would be able to exercise under Part 6, including:

- requiring a person to give the inspector information or records lawfully in their possession which are connected with 'a matter arising under or in connection with the functions of the Monitor', and making copies of those records (sections 66 and 67).
- entering premises (other than ones used only for residential purposes) at any time for one of the above listed purposes, including with the aid of other inspectors if considered necessary and 'with the use of reasonable force' (sections 68 and 69).
- once the inspector has lawfully entered a premises, inspecting and seizing things which relate to, are evidence of, or were used for the purpose of a contravention (section 70).
- with the approval of the Monitor, applying for a search warrant if the inspector believes on reasonable grounds that a contravention has occurred at a premises, or something connected with a contravention is on a premises, which an authorised officer must issue if satisfied there are 'reasonable grounds' for doing so (section 71).
- by written notice, require the owner or occupier of a premises to provide 'reasonable assistance and facilities' to enable the inspector to exercise their powers under Division 3 of Part 6 (section 72).
- with the approval of the Monitor, requiring a person who an inspector suspects on reasonable grounds to have knowledge of relevant matters/information to answer questions that are reasonably required for the purposes of the Bill (section 74).

5.7 Under section 76 a person would not be excused from complying with a requirement under Part 6 to answer a question or provide information/records because doing so might incriminate them or make them liable to a penalty. Subsection 76(4) would also clarify that a record given by a person in compliance with a requirement under Part 6 could be admissible evidence against them in criminal proceedings.

5.8 Sections 77 to 79 of Part 6 require the Monitor to receive a report on all exercises of a power of entry by an inspector, to keep a register of particulars for these reports, and to investigate complaints made by persons about the exercise of the power to enter premises.

5.9 Division 4 of Part 3 would enable the Monitor to conduct an inquiry into 'a matter relating to prohibited conduct in the insurance industry' which they consider 'to be of significance to the public'. Section 27 empowers the Monitor to require a person to attend and give evidence on oath to the inquiry and/or produce documents in their possession for the inquiry.

5.10 The Bill would also create a number of absolute liability offences for non-compliance, including:

- refusal or failure to comply with a requirement made in the exercise of an inspector's investigation and enforcement powers under Part 6, without reasonable excuse — failure to comply with a requirement made under Part 6 would be an offence carrying a maximum penalty of \$11 000 (100 penalty units).
- a prevention notice under section 16 — failure to comply with this notice would be an offence carrying a maximum penalty of \$11 000 (100 penalty units).
- a substantiation notice under section 21 — failure to comply with this notice would be an offence carrying a maximum penalty of \$4 400 (40 penalty units) for an individual, or \$22 000 (200 penalty units) otherwise.
- a notice to give evidence to an inquiry under section 27 — failure or refusal to comply with this notice would be an offence carrying a maximum penalty of \$11 000 (100 penalty units).
- an order requiring an insurance company or class of insurance companies to give information relevant to the emergency services funding reform — failure to comply with this requirement would be an offence carrying a maximum penalty of \$22 000 (200 penalty units).
- a debt recovery order to pay an over-collection amount to the Chief Commissioner — failure to pay within 30 days would be an offence carrying a maximum penalty of \$5 500 (50 penalty units).

5.11 In his second reading speech, the Treasurer noted that:

These monitoring and enforcement powers are based on the powers given to the previous monitor under the now repealed *Emergency Services Levy Insurance Monitor Act 2016*.

**The Bill would establish a new legislative framework for the operation of the Emergency Services Levy Insurance Monitor, to oversee insurance matters during a transition period under emergency services levy reforms. This framework would provide the Monitor and inspectors appointed by the Monitor with a number of investigation and enforcement powers. These include powers to: enter and search premises for a purpose under section 62, apply for search warrants on reasonable suspicion, examine and inspect premises and things, take things, require the provision of information or records from a person, and require a person to answer questions or give evidence to an inquiry and comply with requirements under various notices relating to prohibited conduct.**

The Bill would also establish a number of absolute liability offences for non-compliance with the exercise of these powers, without reasonable exercise. These offences carry a maximum penalty ranging from \$5 500 (50 penalty units) to \$22 000 (200 penalty units). Section 76 clarifies that self-incrimination or liability to pay a penalty is not a reasonable excuse for non-compliance with a requirement to give documents, information or answers. It also enables the use of any records required to be provided as evidence in criminal proceedings against the person who provided the records.

Therefore, the Bill may grant the Monitor and appointed inspectors wide powers of investigation and enforcement. The exercise of these powers may impact an individual's rights including, for example, their property rights in respect to the power to enter premises and seize property, and their privilege from self-incrimination in respect to the power to give directions for assistance.

The Committee recognises that these provisions may be intended to strengthen compliance with the regulatory framework, ensure consumer protections and enable the Monitor to carry out its statutory function. The Bill also provides avenues for complaints against the use of the power of entry by inspectors and requires the Monitor to maintain a register of information about the use of the entry powers. The Committee further acknowledges that the investigation and enforcement powers under the Bill may be modelled on past powers of the previous Emergency Services Levy Insurance Monitor.

However, the Committee considers that it is unclear from sections 68 to 71 in what circumstances the power of entry may be exercised without a warrant. The Committee also notes that the investigation and enforcement powers under the Bill may be exercised on broadly defined grounds like determining contravention, obtaining documents and information in connection with that administration, general administration or in connection with statutory functions. The Committee further notes that the power of entry provided under the Bill would permit an inspector to use 'reasonable force' if necessary. Unlike police officers and other responders, it is unclear whether appointed inspectors are suitably qualified to exercise 'reasonable' force. For these reasons, the Committee refers the matter to Parliament for consideration.

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

*Wide incidental powers of the Monitor*

- 5.12 Section 12 of the Bill would allow the Monitor to have powers to do anything 'necessary', or 'in connection with', or 'reasonably incidental to' the exercise of the Monitor's functions.

Section 12 of the Bill would give the Monitor various functions, including doing anything that is 'necessary', or 'in connection with', or 'reasonably incidental to' the exercise of the Monitor's functions. The Bill may therefore provide the Monitor with a wide power to take action in relation to their statutory functions.

**The Committee acknowledges that the incidental powers may be intended to facilitate policy reform of the emergency services funding framework to enable the Monitor to operate flexibly and responsively during the transition of insurance pricing. The Committee also recognises that the Monitor's functions are intended to ensure consumer protections for insurance holders. However, the Committee notes that terms like 'necessary', 'in connection with' and 'incidental' may be, without legislative definitions or limitations, broadly defined to include any and all matters, actions or steps. This may amount to an unrestricted administrative power. For these reasons, the Committee refers the matter to Parliament for consideration.**

*Wide general regulation-making power*

- 5.13 The Bill would provide for a general regulation-making power under proposed subsection 88(1). This would allow regulations to be made about anything required or permitted to be prescribed, or any matter 'necessary or convenient to be prescribed for carrying out or giving effect to' the Bill if enacted.

**The Bill provides a general regulation-making power under section 88(1). This would allow regulations to make provisions on any matter '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'.**

**The Bill may, therefore, provide for a wide regulation-making power. Unlike primary legislation, regulations are subordinate legislations that are not required to be passed by Parliament and which the Parliament has no control over once they commence.**

**The Committee recognises that these regulation-making powers may allow for more flexible regulatory responses. The Committee also acknowledges that any regulations would still have to be tabled in Parliament and are 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. For these reasons, the Committee refers the matter to Parliament for consideration.**

*Wide power of delegation*

- 5.14 Part 4 of the Bill would establish a framework for the investigation and regulatory response to 'over-collection amounts' of insurance premiums. The Chief Commissioner of State Revenue (the **Chief Commissioner**) would have a number of functions under this Part, including receiving payments of over-collection amounts and providing information to the Monitor as required under section 32.
- 5.15 Under section 84 of the Bill the Chief Commissioner would be able to delegate one or more their functions under the Bill to 'a person', other than the power of delegation.

**Section 84 of the Bill would provide the Chief Commissioner of State Revenue with the power to delegate the exercise of one or more of their functions under the Bill to 'a person'. The Bill does not include any provisions specifying or limiting who may be delegated functions, or set any qualification requirements for a person to be delegated functions.**

Therefore, the Bill may provide for a wide power of delegation of statutory functions. The Committee notes that the provision may effectively delegate statutory powers and functions without any oversight by the Parliament. Under proposed section 84 private individuals could be delegated statutory functions that the public may expect to be performed by public officials. The Committee prefers that the delegation of statutory functions be detailed in primary legislation to ensure appropriate parliamentary scrutiny over the exercise of these functions. For these reasons, the Committee refers the matter to Parliament for consideration.

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

#### *Matters deferred to the regulations*

5.16 The Bill includes several provisions that would defer broad powers to regulations. Matters that could be prescribed by the regulations include:

- who the Monitor can delegate their functions to under the Act (section 11),
- what persons or bodies are 'relevant agencies' with whom the Monitor can enter into an information sharing arrangement (section 81),
- which offences under the Bill or regulations are penalty notice offences and the amount payable under a penalty notice (section 87),
- incorporating an extrinsic document with or without modification in the regulations, including documents in force at a particular time or as in force from 'time to time' (subsection 88(2)),
- creation of offences punishable by a maximum penalty not exceeding \$11 000 (100 penalty units) (subsection 88(3)),
- the date on which the 'monitoring period' ends (Schedule 2), which under section 89 is the date on which the Bill (if enacted) would be repealed, and
- creating savings and transitional provisions that commence before the relevant regulation is published on the NSW legislation website (Schedule 1 clause 1(1) and (5)), contrary to section 39 of the *Interpretation Act 1987*.

**The Bill would defer a significant number of matters to regulations. In particular, it would allow regulations to create offences, prescribe offences as penalty notice offences and incorporate extrinsic material into the regulations. The Bill would also provide regulation-making powers to specify who the Emergency Services Levy Insurance Monitor can delegate their functions to, and with whom the Monitor can enter into information sharing arrangements with. The regulations would also prescribe the end date of the 'monitoring period', upon which the Bill (if enacted) would be repealed.**

Schedule 1 would also allow the making of regulations for the purpose of savings or transitional provisions that can take effect before being published on the NSW legislation website. The Committee notes this would conflict with subsection 39 of the *Interpretation Act 1987* which requires regulations to commence on the date they are published on the

**website and provides that, where one or more provisions of a regulation are expressed to commence before publication, they are taken to commence on the date they are published on the website (rather than the earlier day).**

**The Committee generally prefers substantive matters to be dealt with in the principal legislation, rather than the regulations, to facilitate an appropriate level of parliamentary oversight. The Committee acknowledges that these amendments may be intended to build more flexibility into the regulatory framework and allow regulators to better respond to changing needs and circumstances. The Committee also recognises that any regulations are required to be tabled in Parliament and therefore subject to disallowance under section 41 of the *Interpretation Act 1987*.**

**However, the Committee notes that the regulation-making powers are significant, including creating offences and setting the date of repeal of the legislative provisions, without reference to Parliament. By deferring these matters to regulations the Bill may be inappropriately delegating legislative power from the Parliament to the Executive. For these reasons, the Committee refers the matter to Parliament for consideration.**

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

*Incorporation of extrinsic guidelines issued by the Monitor*

- 5.17 Section 7(e) of the Bill states that one of the Monitor's functions would be to 'prepare and publish guidelines relating to the operation and enforcement of this Act and the regulations.'
- 5.18 Section 20 of the Bill would specifically empower the Monitor to issue and vary guidelines defining 'prohibited conduct'. The guidelines would be published in the Gazette and on a Government website used by the Monitor. The Monitor would also be able to specify when the guidelines will take effect, under subsection (3)(b).
- 5.19 Under various sections of the Bill, a decision maker is required to, or may consider the guidelines. For example:
- At section 16 the Monitor may give an insurance company a written notice about price exploitation but 'must have regard' to the guidelines when considering issuing the written notice.
  - At section 17 the NSW Supreme Court may order a respondent who has engaged in prohibited conduct to pay the State a maximum of \$500 000 for an individual, or \$10 million otherwise. The Court 'may have regard' to the guidelines when deciding whether to make an order, per subsection (4).
  - At section 21 the Monitor may require a person to substantiate a claim about the effect of the emergency services funding reform, but the Monitor 'must have regard' to the guidelines when considering whether to issue a substantiation notice.



- At section 80 the Monitor may issue a public statement about prohibited conduct and over-collection, and insurance companies engaging in that behaviour, but 'must have regard' to the guidelines when considering whether to issue a public statement.

5.20 As noted above, non-compliance with a written notice under sections 16 and 17 are absolute liability offences.

5.21 In his second reading speech, the Treasurer stated that:

In these guidelines, the Insurance Monitor will be able to inform the insurance industry on its intended approach to monitor its conduct and how it may undertake enforcement action where necessary.

**Section 20 of the Bill would allow the Monitor to create guidelines that would have legal force under the regulatory regime established by the Bill. Under this regime, certain decision makers must, or may consider the guidelines before taking specific actions which may attract absolute liability offences or monetary liability, or result in public statements naming insurance companies as engaging in prohibited conduct.**

The Monitor's power to issue and vary these guidelines under section 20 is not subject to limitations regarding the contents of the guidelines, other than the requirement in section 7 that the guidelines relate to the operation and enforcement of this Act. Although subsection 20(3) requires the guidelines be published in the Gazette, the Committee notes it is also not clear whether these guidelines must be tabled in Parliament. Therefore, the Bill may incorporate extrinsic documents into law.

The Committee generally comments on any legislative provisions that permit the incorporation of external materials like guidelines and gives these materials legal force. It also prefers substantive matters to be set out in legislation or otherwise tabled in Parliament, where they can be subject to disallowance, and therefore subject to appropriate parliamentary scrutiny.

The Committee acknowledges that these provisions may be intended to allow the Monitor to respond to emerging regulatory issues with flexibility and independence. The Committee further acknowledges that the guidelines are intended to better inform the insurance industry, which would be subject to the enforcement functions of the Monitor under the Bill.

However, the Committee notes that the Monitor would be required to consider the guidelines when making decisions about enforcement actions which attract absolute liability offences under the Bill for non-compliance. The Committee further notes that the Bill also enables the Supreme Court to consider the guidelines when deciding whether to order insurance companies to pay financial penalties. Given the significant consequences which may flow from the prohibited conduct set out in the guidelines, the Committee refers the matter to Parliament for consideration.

## 6. Environmental Planning and Assessment Amendment (Vibrancy Reforms) Bill 2024

Date introduced	7 May 2024
House introduced	Legislative Assembly
Minister with carriage	The Hon. Paul Scully MP
Portfolio	Planning and Public Spaces

### Purpose and description

- 6.1 The object of the Bill is to amend the *Environmental Planning and Assessment Act 1979* (the **Act**) to provide for certain decisions in relation to extended hours of operation for particular food and drink premises.

### Background

- 6.2 In his second reading speech, the Hon. Paul Scully MP, Minister for Planning and Public Spaces, said that the Bill is intended to ensure that 'councils and other consent authorities consider the Government's vibrancy agenda as an integral part of the merit assessment process for applications to extend trading hours.'
- 6.3 The Bill seeks to insert a new Part into Schedule 8 of the Act, which would allow the Secretary of the Department of Planning and Environment (the **Secretary**) to issue vibrancy guidelines after consulting with the 24-Hour Economy Commissioner (the **Commissioner**). The Minister noted that the guidelines are intended to 'address various factors such as the consideration of the potential impacts of later trading, such as sound, light spill, safety and amenity'.

### Issues considered by the Committee

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

##### *Incorporation of extrinsic guidelines into legislation*

- 6.4 The Bill seeks to insert Part 5 into Schedule 8 of the Act. Clause 1 of proposed Part 5 would allow the Secretary to, after consulting with the Commissioner, issue 'vibrancy guidelines to enable venues to operate in a way that achieves their full social, business and cultural potential, particularly as part of the night-time economy.' Under proposed clause 2, the vibrancy guidelines must be considered by a consent authority when determining an extended hours of operation application.
- 6.5 An extended hours of operation application is defined under proposed Part 5 to include:

- (a) a development application that includes a proposal for extended hours of operation,
  - (b) an application to modify a development consent to allow extended hours of operation.
- 6.6 It would also define 'extended hours of operation' to mean operating hours 'beyond 7pm on any night of the week'.
- 6.7 Under section 4.5 of the Act and depending on the type of development being applied for, the consent authority may be either the Independent Planning Commission, the Sydney district or a regional planning panel, a public authority, or the council of the area in which the development is to be carried out.
- 6.8 Clause 3 of Part 5 as proposed by the Bill clarifies that the vibrancy guidelines may not require extended hours of operation applications to be automatically approved or refused. It would also clarify that the requirement to consider the vibrancy guidelines is in addition to any other requirements under any laws which apply to applications for extended hours of operation.
- 6.9 In his second reading speech, the Minister noted that the development of the vibrancy guidelines 'is intended to be subject to detailed public consultation' and further stated that 'once finalised, the vibrancy guidelines will be issued by the planning secretary and published on a New South Wales Government website.'

**The Bill seeks to insert Part 5 into Schedule 8 of the *Environmental Planning and Assessment Act 1979*, which would empower the Planning Secretary to create 'vibrancy guidelines' that a consent authority must consider when determining applications for extended hours of operation. Subclause 2(1) provides that the vibrancy guidelines are to "enable venues to operate in a way that achieves their full social, business and cultural potential, particularly as part of the night-time economy". These proposed amendments do not include a requirement that the guidelines be tabled in Parliament.**

**Therefore, the Bill may provide for the incorporation of extrinsic materials into law. The Committee generally comments on any legislative provisions that permits the incorporation of external materials like guidelines and gives those materials legal force. It also prefers substantive matters to be set out in legislation or to be published in the Gazette and tabled in Parliament as regulations, where they can be subject to disallowance and therefore to appropriate parliamentary scrutiny.**

**The Committee acknowledges that the vibrancy guidelines may be intended to be published on a New South Wales Government website and made transparent in that way. However, the Committee notes that the Bill does not include any provisions which prescribe or clarify where the guidelines are to be published or how interested persons may access them.**

**The Committee also acknowledges that the proposed amendments include provisions which limit the application and contents of the guidelines, by clarifying that the guidelines cannot 'require applications**

**to be automatically approved or refused' and that they must operate in addition to any other relevant legal requirements. However, the Committee considers that these limitations do not sufficiently narrow the broad range of matters which the guidelines may relate to. As it stands the Bill would enable the Secretary to issue vibrancy guidelines to 'enable venues to operate in a way that achieves their full social, business and cultural potential, particularly as part of the night-time economy'. The Committee notes that these terms may be interpreted widely with the consequence being that the Secretary is empowered to issue guidelines on a broad range of matters. As the guidelines are not required to be tabled in Parliament and are therefore not subject to parliamentary scrutiny, the Committee refers the matter to Parliament for further consideration.**

## 7. Local Government Amendment (Employment Arrangements) Bill 2024

Date introduced	8 May 2024
House introduced	Legislative Assembly
Minister with carriage	The Hon. Sophie Cotsis MP
Portfolio	Industrial Relations

### Purpose and description

- 7.1 The object of this Bill is to amend the *Local Government Act 1993* (the **Act**) to remove the special employment status of local government senior staff within the organisation structures of local government councils.

### Background

- 7.2 In her second reading speech, the Hon. Sophie Cotsis MP, Minister for Industrial Relations, said that the amendments proposed by the Bill are intended to 'reduce potential corruption risks arising from the insecurity of employment of senior staff previously identified by the [Independent Commission Against Corruption]' and would transition senior staff to coverage under the relevant award, without them being disadvantaged.
- 7.3 The Bill proposes various amendments to the Act, including:
- (a) amending sections 223 and 332 to remove the discretion for governing bodies of councils to determine senior staff positions within the organisational structure of a council,
  - (b) amending section 338 to provide that only the general manager is employed under a standard contract, and section 340 to provide that senior staff are employed under the award and to allow them to seek redress in the Industrial Relations Commission for industrial matters,
  - (c) amending Part 6 of Chapter 11 to extend the existing employment protections for staff affected by council amalgamations to senior staff, and
  - (d) inserting Schedule 8 of savings, transitional and other provisions to allow senior staff currently under a standard contract to remain on the contract until it expires while still being able to go to the Industrial Relations Commission for dispute resolution.

### Issues considered by the Committee

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

## 8. Ombudsman and Other Legislation Amendment Bill 2024

Date introduced	8 May 2024
House introduced	Legislative Council
Minister with carriage	The Hon. John Graham MLC
Portfolio	Special Minister of State

### Purpose and description

- 8.1 The object of this Bill is to –
- (a) amend the *Ombudsman Act 1974* (the **Act**) to make minor miscellaneous amendments, and
  - (b) amend the *Community Services (Complaints, Reviews and Monitoring) Act 1993* to make changes consequent on the enactment of the proposed Act and the *Disability Inclusion Amendment Act 2022*, and
  - (c) repeal the *Ombudsman Regulation 2016*.

### Background

- 8.2 The Bill seeks to make various amendments to the Act which establishes the NSW Ombudsman (the **Ombudsman**). In his second reading speech, the Hon. John Graham MLC, Special Minister of State, stated that the Bill is intended to 'ensure the effective functioning of strong and independent integrity agencies in New South Wales', and noted that the amendments were requested by the Ombudsman.
- 8.3 The proposed amendments are largely administrative, for example updating language to reduce cross-referencing between provisions, and removing limits on complaints to the Ombudsman about conduct before 1976. The Minister explained that these amendments would make the Act 'more readily understood by those who may wish to make a complaint.'
- 8.4 The Bill also seeks amendments that would clarify the functions of the Ombudsman. For example, proposed subsection 13AA(1) would allow the Ombudsman to make preliminary inquiries about whether it had jurisdiction over particular conduct. Proposed section 36A of the Ombudsman Act would also require public authorities to cooperate and assist with investigations.
- 8.5 Part 3B of the Act currently requires the Ombudsman to 'monitor and assess' all Aboriginal programs prescribed by regulation. The Ombudsman Regulation prescribes that the Ombudsman monitors and assesses the NSW Government's Opportunity, Choice, Healing, Responsibility, Empowerment (OCHRE) program. The Bill seeks to broaden Part 3B to include all Government Aboriginal programs, as well as to allow the Ombudsman to choose whether to monitor and assess an Aboriginal program.

### Issues considered by the Committee

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

## 9. Residential Tenancies Amendment (Animals in Residential Premises) Bill 2024\*

Date introduced	8 May 2024
House introduced	Legislative Council
Member responsible	The Hon. Emma Hurst MLC
	*Private Members Bill

### Purpose and description

- 9.1 The object of the Bill is to amend the *Residential Tenancies Act 2010* (the **Act**) to prevent landlords unreasonably refusing permission for tenants to keep animals on residential premises.

### Background

- 9.2 In her second reading speech the Hon. Emma Hurst MLC noted that, under existing laws, property owners have the 'complete power to refuse to allow tenants to have animals at their property'. She further stated that the Bill seeks to create a new regulatory framework that would 'allow animals in rentals as the default position in our State'.
- 9.3 The Bill seeks to insert new provisions into the Act which would broadly allow animals to be kept on residential rental premises by tenants. Ms Hurst stated that these amendments are 'modelled closely on the animal rental reforms introduced by the Victorian Labor Government, which came into effect in early 2020.'

### Issues considered by the Committee

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

##### *Property rights and retrospectivity*

- 9.4 The Bill would insert Division 3A into Part 3 of the Act, which sets out the circumstances in which landlords may consent or refuse consent to a tenant's request to keep an animal in leased residential premises.
- 9.5 Under proposed Division 3A, a tenant may keep an animal on residential premises if a landlord consents to a tenant's request to do so. A landlord is taken to have consented when they:
- give written consent,
  - fail to apply to the Civil and Administrative Tribunal (the **Tribunal**) for an order within 14 days from receiving the request, or



- apply to the Tribunal within 14 days of receiving the request but the Tribunal makes an order permitting the tenant to keep the animal on the premises.
- 9.6 A landlord can refuse a tenant's request to keep an animal on a residential premises if, on application, the Tribunal orders that 'it is reasonable to refuse consent to keep an animal on residential premises.'
- 9.7 In her second reading speech, Ms Hurst noted that these proposed changes would put the 'onus... on the landlord to either allow the animal or choose to apply to the Tribunal.'
- 9.8 The Bill also seeks to insert a new Part into Schedule 2 of the Act, to make further savings and transitional provisions which would apply the provisions under proposed Division 3A to all residential tenancy agreements entered into before the commencement of the proposed amendments.

**The Bill seeks to insert Division 3A into the *Residential Tenancies Act 2010* to prevent a landlord from refusing a tenant's request to keep an animal in a leased residential premises unless they receive an order from the Civil and Administrative Tribunal that it is reasonable to refuse that request. The landlord must apply to the Tribunal within 14 days of receiving a tenant's request to keep an animal in the premises in the approved form, and failure to do so would be taken to be 'consent' to keeping an animal under the proposed amendments. Therefore, the Bill may infringe on property rights of landlords, including the freedom of contract to set terms of a lease agreement and to determine who or, in this case, what animals are excluded from the premises.**

**The Bill also seeks to insert savings and transitional provisions into the Act to apply proposed Division 3A to residential tenancy agreements entered into before the amendments would commence. 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 further notes that the retrospective application of these amendments could override existing and agreed terms excluding or limiting animals in premises, which might further impact a person's right to freedom of contract.**

**The Committee recognises that the Bill may be intended to address concerns that pet owners have limited access or greater difficulty securing residential tenancies as a result of owning an animal. These reforms may prevent greater abandonment and death of animals, as well as individuals being left without secure accommodation. However, the Committee notes that the freedom of contract and the excludability of property rights are fundamental common law rights. By placing the onus on property owners to seek court orders to reasonably exclude animals from premises, the amendments may effectively extinguish these property rights. For these reasons, the Committee refers the matter to Parliament for consideration.**

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

9.9 As noted earlier, the Bill seeks to insert Division 3A into Part 3 of the Act, which would require landlords to apply for an order from the Tribunal that refusal to allow an animal to be kept on leased residential premises is 'reasonable'. Without an order to this effect, a landlord would be prohibited from refusing a request to keep an animal on a premises.

9.10 The Bill also seeks to insert subsection 54G(2) into the Act. This provision would set out the matters that the Tribunal may consider when determining an application from a landlord to refuse consent to keep animals on residential premises. Under proposed subsection 54G(2)(d), the Tribunal may consider 'another matter the Tribunal considers relevant'.

**The Bill seeks to insert subsection 54G(2) into the *Residential Tenancies Act 2010*, which sets out the matters that the Civil and Administrative Tribunal may consider when determining an application by a landlord for an order to refuse a request to keep an animal on leased premises. These matters would also include 'another matter the Tribunal considers relevant'. There does not appear to be any provisions which clarify what is a 'relevant matter' to the Tribunal in determining these applications, given the ordinary meaning of the words 'matter' and 'relevant'.**

**The Bill may therefore provide for a broad subjective discretion to the Tribunal to determine whether it is reasonable for a landlord to refuse consent to keep an animal on leased residential premises. However, the Committee acknowledges that the broadly worded discretion may be intended to facilitate appropriate judicial discretion for the Tribunal Members in their decision-making role. In the circumstances, the Committee makes no further comment.**

# Part Two – Regulations with comment

# 1. Civil Procedure Act 2005—Practice Note – Class 3 Compensation Claims

Date tabled	LA: 12 March 2024 LC: 12 March 2024
Disallowance date	LA: 18 June 2024 LC: 18 June 2024
Minister responsible	The Hon. Michael Daley MP
Portfolio	Attorney General

## Purpose and description

- 1.1 This Practice Note applies to Class 3 claims for compensation by reason of the acquisition of land (**Class 3 Compensation Claims**), including claims under the *Land Acquisition (Just Terms Compensation) Act 1991* (**Just Terms Act**).
- 1.2 The purpose of this Practice Note is to set out the case management procedures for the just, quick and cheap resolution of Class 3 Compensation Claims.
- 1.3 The Practice Note is made under section 76 of the *Land and Environment Court Act 1979* (the **Act**). This Practice Note commenced on 2 April 2024. It replaces the Practice Note – Class 3 Compensation Claims dated 15 March 2019 (the **2019 Practice Note**).

## Issues considered by the Committee

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

#### *Procedural fairness rights – leave to cross-examine oral evidence*

- 1.4 The Just Terms Act sets out the process that certain statutory authorities must follow when exercising its power to compulsorily acquire land. Part 3 grants owners of land being compulsorily acquired a right to be paid compensation for that acquisition, and the procedures relating to the payment of compensation.
- 1.5 Under Division 5 of Part 3, land owners may lodge any objections to the amount determined for compensation to the Land and Environment Court (the **Court**). The Court considers these objections as Class 3 Compensation Claims proceedings.
- 1.6 Paragraphs 35 to 38 of the Practice Note provides for the conduct of the final hearing in these Class 3 Compensation Claims. These paragraphs are substantially identical to paragraphs 78 to 83 of the 2019 Practice Note which previously provided for the conduct of final hearings, with minor amendments.

1.7 Relevantly, paragraph 82 of the 2019 Practice Note states that:

At the commencement of oral evidence of any witness, counsel or the solicitor appearing for a party, having conferred beforehand, are to hand to the hearing judge or commissioner agreed or competing lists of the topics on which it is proposed to cross-examine.

1.8 The equivalent paragraph in the Practice Note, paragraph 37, duplicates this passage but further adds the following words after 'cross-examine':

... and for which leave is sought. Generally, the conduct of the hearing will not be determined by the convenience of a particular witness.

**The Practice Note sets out how proceedings for objections to the amount of compensation for a compulsory acquisition of land are to be conducted in the Land and Environment Court, which fall within the Court's Class 3 jurisdiction. Paragraph 37 requires a party's legal representative to provide agreed or competing lists of the topics that they are proposing to cross-examine a witness on. These lists must be provided to the judge or commissioner of the final hearing at the start of that witness's oral evidence. Importantly, the Practice Note also adds a requirement that leave must be sought for these topics on which they are proposing to cross-examine a witness.**

**By requiring parties to seek leave to cross-examine the oral evidence of witnesses, the Practice Note may impact an individual's procedural fairness rights. Such rights ensure that parties have the opportunity to test a witness's evidence in a common law adversarial court system. Under common law, parties cannot seek the court make an adversarial inference about a witness if they have not first raised an issue of inconsistency with the witness in cross-examination. In this case, this may further impact applicant's ability to seek fair and just compensation for the compulsory acquisition of land.**

**However, the Committee notes that, under section 38 of the *Land and Environment Court Act 1979*, the Court is not required to follow the common law rules of evidence and can 'inform itself on any matter in such manner as it thinks appropriate' for Class 3 proceedings. The Committee further recognises that Class 3 proceedings are intended to be conducted quickly, efficiently and with as little formality and technicality as permissible, under both the Act and the Practice Note. In the circumstances, the Committee makes no further comment.**

## 2. Liquor Amendment (Savings and Transitional Arrangements) Regulation 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. David Harris, MP
Portfolio	Gaming and Racing

### Purpose and description

- 2.1 The object of this Regulation is to provide for savings and transitional arrangements for provisions of the *Liquor Act 2007* (the **Act**) relating to outdoor dining and performances.

### Issues considered by the Committee

**May not accord with the spirit of the legislation under which it was made, even though it may have been legally made: s 9(1)(b)(iv) of the LRA**

#### *Savings and transitional provision for repealed Part of Act*

- 2.2 Schedule 1, clause 1(1) of the Act provides a regulation-making power to make provisions of a savings or transitional nature 'consequent on the enactment of this Act or any Act that amends this Act.'
- 2.3 The Regulation makes further savings and transitional provision by inserting clause 132B into Schedule 1 of the *Liquor Regulation 2018* (the **Principal Regulation**). Clause 132B provides that Part 12 of the Act is taken to:
- (a) not have been repealed, despite section 167 of the Act,
  - (b) have been amended, in line with the amendments under Schedule 2 clauses [63]-[69] of the *24-Hour Economy Legislation Amendments (Vibrancy Reforms) Act 2023* (the **Amending Act**), and
  - (c) continue in force as amended by the Amending Act, until clause 132B is repealed.
- 2.4 The effect of Schedule 2 clauses [63]-[69] of the Amending Act was to make permanent the permissions for outdoor dining and performance under Part 12, which was temporarily enacted during the COVID-19 pandemic.

- 2.5 Section 167 of the Act states that Part 12 is 'repealed at the beginning of 11 December 2023.' On 12 December 2023, the Amending Act was assented but the amendments to Part 12 under Schedule 2 clauses [63]-[69] had no operative effect because Part 12 was repealed the day before.

**The Regulation inserts a savings and transitional provision into the *Liquor Regulation 2018* by inserting clause 132B in Schedule 1. Clause 132B provides that Part 12 of the *Liquor Act 2007* is taken not to have been repealed despite section 167 of the Act, which repeals Part 12 on 11 December 2023. Clause 132B also provides that Part 12 continues in force, as amended by Schedule 2, clauses [63]-[69] of the *24-Hour Economy Legislation Amendments (Vibrancy Reforms) Act 2023*, until the repeal of this clause. This amendment Act commenced on assent (being 12 December 2023) and would make Part 12 permanent. However, as Part 12 was repealed before this date of assent, the Committee notes that Schedule 2, clauses [63]-[69] had no operative effect. Therefore, the Regulation seeks to give effect to these amendments.**

**The Committee notes that the Regulation is purportedly made under Schedule 1, clause 1 of the *Liquor Act 2007*, which provides that regulations may contain provisions of a savings or transitional nature consequent on the enactment of any statute which amends that Act. However, the Committee notes that the Regulation attempts to amend the operation of legislative provisions in primary legislation by means of regulation. In doing so, the Regulation may make it hard for a person to understand what laws actually apply to them as it would require them to apply the amending Act to their interpretation of the parent Act and be aware of whether clause 132B remains in force. This may 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 considers that clause 132B appears to go beyond a 'savings' or 'transitional' nature, since it does not simply regulate the operation of provisions during a transition period or ensure consistency after amendments have been enacted. By attempting to give effect to inoperative amendments and preserve the operation of repealed statute provisions, the Regulation may go beyond the spirit of the power to make savings and transitional regulations under the *Liquor Act 2007*.**

**The Committee further considers that this is an inappropriate use of the legislative power delegated to the Executive. While the Committee appreciates that the intention may be to enable the amending Act to operate as intended, the Committee prefers that this is done through an amending Act to allow for appropriate parliamentary scrutiny. For these reasons, the Committee would normally be of the opinion that the Regulation ought to be disallowed and refer the matter to Parliament.<sup>3</sup> However, as the Better Regulation, Fair Trading and Other Legislation Amendment Bill 2024 seeks to effectively repeal the Regulation, the Committee makes no further comment.**

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<sup>3</sup> Under section 9(1A) of the *Legislation Review Act 1987*, the Committee may make reports on regulations that set 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.'

### 3. Motor Accident Guidelines: CTP Care (version 1.1)

Date tabled	LA: 12 March 2024 LC: 12 March 2024
Disallowance date	LA: 18 June 2024 LC: 18 June 2024
Minister responsible	The Hon. Anoulack Chanthivong MP
Portfolio	Better Regulation and Fair Trading

#### Purpose and description

- 3.1 The Motor Accident Guidelines: CTP Care (version 1.1) (the **Guidelines**) were published by the State Insurance Regulatory Authority (**SIRA**), the regulator of compulsory insurance schemes in New South Wales. The Guidelines were issued under sections 6.1 and 10.2 of the *Motor Accident Injuries Act 2017* (the **Act**).
- 3.2 The Guidelines set out the required procedures for the transition of the payment of statutory benefits for treatment and care from a licensed insurer to the Lifetime Care and Support Authority (**LCSA**) in accordance with the Act.
- 3.3 Version 1.1 of the Guidelines incorporates changes in response to amendments made to SIRA's *Significant Matter Notification Requirements* policy document.

#### Issues considered by the Committee

##### Object could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

##### *Incorporation of extrinsic document in Guidelines*

- 3.4 Clause 3 of the Guidelines require written notification by LCSA to SIRA of certain matters within 5 business days, including:
- (a) disputes under section 3.45(5) of the Act that are likely to be referred to the Personal Injury Commission,
  - (b) any likely or actual dissolution of an agreement between a licensed insurer and LCSA under section 3.45(2) of the Act, and
  - (c) any funding issues identified relating to an early assumption of responsibilities by LCSA under section 3.45 of the Act.
- 3.5 Version 1.1 also adds a new clause to the Guidelines, 3.6A, which requires LCSA to:



... formally notify SIRA of a significant matter within the timeframes and in accordance with the requirements established and published by SIRA in the *Significant Matter Notification Requirements* document.

3.6 "Significant matter" is not defined within the Guidelines. Instead it is defined under Part 6 of the *Significant Matter Notification Requirements* document.

**The Motor Accident Guidelines: CTP Care (version 1.1) amends clause 3.6 to remove and amend circumstances where the Lifetime Care and Support Authority (LCSA) is required to provide formal, written notification to the Statute Insurance Regulatory Authority (SIRA) within 5 business days. The updated Guidelines also include new clause 3.6A which provides for a further circumstance where LCSA is required to formally notify SIRA. These circumstances are prescribed as significant matters in accordance with the *Significant Matter Notification Requirements* document.**

The Committee notes that the *Significant Matter Notification Requirements* document is not attached to or linked to from the Guidelines, and that it is a 9-page document published on the SIRA website that applies to three separate schemes SIRA regulates. The Committee generally comments on legislative provisions that permit the incorporation of external materials and gives those materials legal force. In this case, the Committee notes that while the external document is published on the SIRA website, it is not published in the Gazette or tabled in Parliament.

The Committee recognises that the proposed amendments to the Guidelines may be intended to alleviate administrative burden or simplify the current Guidelines. However, the external document is not a document that can be subject to disallowance and therefore subject to appropriate parliamentary scrutiny. For these reasons, the Committee refers the matter to Parliament for further consideration.

## 4. Practice Note Supreme Court Common Law Division No.11 Bail

Date tabled	LA: 12 March 2024 LC: 12 March 2024
Disallowance date	LA: 18 June 2024 LC: 18 June 2024
Minister responsible	The Hon. Michael Daley MP
Portfolio	Attorney General

### Purpose and description

- 4.1 Practice Note Supreme Court Common Law Division No.11 Bail (the **Practice Note**) applies to bail applications to be heard in the Common Law Division of the Supreme Court of New South Wales, which outlines the practice and procedure to be adopted for preparing and filing a bail application made under the *Bail Act 2013*.
- 4.2 It was issued on 23 February 2024 and commenced on 26 February 2024, and it replaces the previous version of Practice Note SC CL 11, which was issued on 18 December 2018.

### Issues considered by the Committee

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

##### *Liberty and freedom from arbitrary detention – discretion of the Registrar*

- 4.3 The Practice Note details that the Registrar of the Supreme Court (the **Registrar**) will fix a hearing date if satisfied that a bail application is ready to proceed to a hearing. After fixing a hearing date, the Registrar will fix a standard timetable for the filing and service of any further submissions and materials both for the applicant and for the opposing party.
- 4.4 The Practice Note amends the previous version by allowing the bail hearing date to be vacated at the discretion of the Registrar, if there is 'slippage' of the timetable. Secondly, the Registrar also has the discretion to make orders for the filing and service of documents prior to a new hearing date being fixed.

**The Practice Note at Clause 32 allows a bail hearing date to be vacated at the discretion of the Registrar, if there is any 'slippage' of the standard timetable for the filing and service submissions and materials by the applicant or the opposing party for a bail decision.**

**The Committee notes that the discretion of the Registrar to vacate the hearing date is broad and the Practice Note does not appear to specify what time period would amount to 'slippage' of a timetable and what circumstances would be taken into account by the Registrar before**

vacating a hearing date. The Committee also notes that vacating a hearing date would delay the proceedings of a bail application and could prolong the time in custody for a bail applicant. This may adversely impact the applicant's right to liberty and freedom from arbitrary detention contained in Article 9 of the ICCPR.<sup>4</sup>

The Committee acknowledges that the discretion of the Registrar may be intended to build administrative flexibility into the Supreme Court's case management processes. However, the Committee notes that allowing a Registrar to have the broad discretionary power to vacate hearing dates on the basis of 'slippage', may make it difficult for parties to a bail application to understand what circumstances may result in the vacation of a date or the circumstances for a new hearing date to be fixed. For these reasons, the Committee refers the issue to Parliament for further consideration.

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<sup>4</sup> United Nations, Office of the High Commissioner for Human Rights, [International Covenant on Civil and Political Rights](#).

# 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. Heavy Vehicle National Legislation Amendment Regulation 2024

The Regulation amends the Heavy Vehicle (Mass, Dimension and Loading) National Regulation and the heavy Vehicle (Vehicle Standards) National Regulation. The parent Act for each of these Regulations is the *Heavy Vehicle National Law Act 2012 (Qld)*, which is mirrored in this jurisdiction by the *Heavy Vehicle National Law 2013 (NSW)*.

The Regulation amends certain safety requirements and other standards for heavy vehicles operating on NSW Roads.

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

## 2. Inclosed Lands Protection Amendment Regulation 2024 (2024-118)

The object of the Regulation is to amend the *Inclosed Lands Protection Regulation 2023* to prescribe offences in relation to leaving gates open under the *Inclosed Lands Protection Act 1901* (the **Act**) as penalty notice offences, including the amounts payable by penalty notice.

The regulation is made under the Act, sections 10 and 11, the general regulation-making power.

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

## 3. Local Government (General) Amendment (City of Hawkesbury) Regulation 2024

The objects of this regulation are to:

- (a) apply provisions of the *Local Government Act 1993* relating to sewerage to certain land in the City of Hawkesbury local government area
- (b) to update a provision relating to the carrying out of certain activities under an approval or licence under the *Water Industry Competition Act 2006*, as a consequence of the commencement of the *Water Industry Competition Amendment Act 2021* on 1 March 2024.

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

## 4. Local Government (General) Amendment (Rates) Regulation 2024

The Regulation increases the limit on the minimum amount of ordinary council rates from \$590 to \$617. The Regulation amends the Local Government (General) Regulation 2021 and is made under the Local Government Act 1993.

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

#### 5. [The Bar Association of Queensland Professional Standards Scheme 2024](#)

The Scheme has been published in the NSW Government Gazette, number 92, on 15 March 2024 by authority of the Minister for Better Regulation and Fair Trading under section 13 of the *Professional Standards Act 1994* (the Act).

The Scheme applies to any Barrister who holds a Queensland practising certificate and commences in New South Wales on 1 July 2024.

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

#### 6. [The Law Society of Western Australia Professional Standards Scheme 2024](#)

Similar to The Bar Association of Queensland Professional Standards Scheme 2024, this Scheme has been published in the NSW Government Gazette, number 92, on 15 March 2024 under section 13 of the *Professional Standards Act 1994*.

The Scheme applies to any legal practitioner who holds a Western Australian practising certificate and commences in New South Wales on 1 July 2024.

The Scheme 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. 14

**TIME & DATE: 3.01PM, 13 MAY 2024**

**LOCATION: ROOM 1254 AND WEBEX**

### MEMBERS PRESENT

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

### APOLOGIES

Donna Davis.

### OFFICERS PRESENT

Rohan Tyler, Anna Tran, Kate McCorquodale, Mengyuan Chen, Alice Zwar, Charlie King, Oliver Sinclair and Nicolle Gill.

### AGENDA ITEM

#### 1. Confirmation of minutes

Resolved, on the motion of Mr Murphy: That the minutes of the meeting of 6 May 2024 be confirmed.

#### 2. \*\*\*

#### 3. Consideration of Bills with comment for Legislation Review Digest 13/58

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

- a. Bail Amendment (Serious Personal Violence and Electronic Monitoring) Bill 2024
- b. Better Regulation, Fair Trading and Other Legislation Amendment Bill 2024
- c. Emergency Services Levy Amendment (Land Classification) Bill 2024
- d. Emergency Services Levy Insurance Monitor Bill 2024
- e. Environmental Planning and Assessment Amendment (Vibrancy Reforms) Bill 2024
- f. Residential Tenancies Amendment (Animals in Residential Premises) Bill 2024.

#### 4. Consideration of Bills without comment for Legislation Review Digest 13/58

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

- a. Electricity Infrastructure Investment Amendment (Renewable Energy Sector Plan) Bill 2024
- b. Local Government Amendment (Employment Arrangements) Bill 2024
- c. Ombudsman and Other Legislation Amendment Bill 2024.

**5. Regulations with comment for Legislation Review Digest 13/58**

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

- a. Civil Procedure Act 2005 – Practice Note – Class 3 Compensation Claims
- b. Liquor Amendment (Savings and Transitional Arrangements) Regulation 2023
- c. Motor Accident Guidelines CTP Care (version 1.1)
- d. Practice Note Supreme Court Common Law Division No.11 Bail.

**6. Regulations without comment for Legislation Review Digest 13/58**

Resolved, on the motion of Ms Higginson: That the Committee adopts the regulations without comment as Part 3 to Digest 13/58.

**7. Legislation Review Digest 13/58**

Resolved, on the motion of Ms Stuart:

- That appropriate minute extracts of this meeting be published as Appendix Two of the Digest.
- That the Committee adopts the Legislation Review Digest 13/58 and that it be signed by the Chair and presented to the House.

**8. Regulations to be reviewed**

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

**9. \*\*\***

**10. Next Meeting**

The meeting adjourned at 3.06pm until 3 June 2024 at 3.00pm.