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

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Membership

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Guide to the Digest

COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

COMMENT ON REGULATIONS

This section contains the Legislation Review Committee's reports on Regulations in accordance with section 9 of the *Legislation Review Act 1987*.

Conclusions

PART ONE – BILLS

1. ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS FREEDOMS) BILL 2018*

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

Discrimination

The Bill inserts sections 56B and 56C, which outline that nothing in the Act affects the rights of a person who holds the belief or conviction that marriage and family is based on the concept of a union of one man and one woman, and that nothing in the Act affects the right of any person who holds a belief or conviction that a person can only be one of two genders (that is, either male or female).

This may allow individuals to be afforded protection for beliefs that are manifested in practice and in public that conflicts with other aspects protected in the *Anti-Discrimination Act 1977* (ADA), including: potential discrimination on the grounds of transgender (ADA Part 3A); marital or domestic status (ADA Part 4); homosexuality (ADA Part 4C); and HIV/AIDS vilification (ADA Part 4F). In doing so, this may infringe on a person's right to equality and non-discrimination. The Committee refers to Parliament whether it is appropriate that the Bill affords protection to practices that may be otherwise unlawful under existing provisions of the *Anti-Discrimination Act 1977*.

Rights of parents and children

The Bill amends the principals on which the *Education Act 1990* is based, as outlined in section 4, to state that 'the education of a child is primarily the responsibility of the child's parents, whose liberty to ensure the religious and moral education of their children in conformity with their own convictions is to be respected by the State'. This may infringe on the rights of parents and children that choose not to instil a religion in their child's education. The Committee refers to Parliament whether it is appropriate for the principals of the *Education Act* to require religious and moral education.

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

Wide definitions

The Bill contains wide definitions of 'faith-based entity' and 'religious beliefs or religious activities'. Under the Bill, a faith-based entity may include any entity, under any law of any jurisdiction within or outside of Australia, that purports to be established to propagate religion, a religious ethos, or faith-based mission, objective or ethos. Similarly, the definition of 'religious beliefs or religious activities' is equally wide and may include any belief or activity that is based on a conviction, belief, opinion or affiliation that purports to have its founding in religion or the aforementioned faith-based entity.

Such definitions that contain a low threshold for what is to be considered a faith-based entity or religion may afford anti-discrimination protection to bodies, beliefs or activities that have a wide spectrum of views including those with extreme beliefs.

This is particularly concerning as these definitions are used within the Bill as the basis to determine whether discrimination has occurred on religious grounds in circumstances involving: employment; education; provision of goods and services; accommodation; registered clubs; special needs program and activities; provision of government funding and applications for grants; provision of goods, services, or benefits by government; and local government action.

The Committee refers to Parliament whether such a wide scope is appropriate for these definitions.

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

Delegation to the regulations

The Bill permits the regulations to determine further matters that the President may take into consideration in making a decision to decline a complaint involving a contravention of proposed Part 3B for discrimination on the ground of religious beliefs or religious activities. Generally, the Committee prefers that matters that directly impact a person subject to the legislation be contained in the principal legislation and subject to Parliamentary scrutiny. The Committee refers to Parliament whether it is appropriate for further matters to decline a complaint to be contained in the regulations.

2. COMPANION ANIMALS AND OTHER LEGISLATION AMENDMENT BILL 2018

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

Commencement by proclamation

The Act commences on a day or days to be appointed by proclamation. The Committee generally prefers Acts to commence on assent or a specified date. However, given that the Act implements changes to the duties and responsibilities of companion animal owners, the Committee considers flexibility with regard to commencement is reasonable.

3. GOVERNMENT SECTOR FINANCE BILL 2018; GOVERNMENT SECTOR FINANCE LEGISLATION (REPEAL AND AMENDMENT) BILL 2018

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

Ability of Treasurer to issue directions

Under the GSF Bill and the GSF Repeal Bill, the Treasurer has wide-ranging powers to issue directions to agencies in relation to a variety of matters, many of which appear to already exist under current legislation. However, a proposed change to section 8 of the *Electricity Retained Interest Corporations Act 2015* seems to contemplate that the Treasurer can issue directions to certain corporations in accordance with the GSF Act, in circumstances where this previously appeared not possible.

The Committee notes that the provision may otherwise represent an inappropriate delegation of legislative power, particularly in circumstances where under the existing Act the relevant corporation is free from the control or direction of the Government or Minister.

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

Commencement by proclamation

The bulk of the GSF Act and GSF Repeal Act will commence on a day or days to be appointed by proclamation. The Committee generally prefers Acts to commence on assent or a specified date. However, given that the Bills propose wide-ranging reforms to the financial, budgetary and reporting processes of government agencies, and is therefore likely to involve a degree of administrative complexity, the Committee makes no further comment.

4. JUSTICE LEGISLATION AMENDMENT BILL (NO 2) 2018

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

Right to a fair trial: issue one

The Bill introduces the concept of 'terrorism evidence' in the context of criminal proceedings. A prosecuting authority cannot be required to give an accused person a copy of a thing that the authority decides is 'terrorism evidence.' During the course of proceedings, a prosecuting authority can also seek the return of evidence it designates as terrorism evidence.

There are some safeguards in the Bill. For example, an unrepresented accused must be granted 'reasonable access' to view or listen to the terrorism evidence. However, such access may be supervised by the prosecuting authority, and 'reasonable access' is not defined. For those who are represented, their lawyer may retain a copy of the 'terrorism evidence', but the accused cannot view or listen to that evidence without the supervision of their lawyer.

The Court has no role under Part 2B in deciding that evidence is 'terrorism evidence' and what the appropriate level of access is to such evidence.

Notwithstanding some of the Part's safeguards, the Committee remains concerned that these provisions may unduly trespass on the right to a fair trial, including aspects of article 14 of the *International Covenant on Civil and Political Rights*. A fundamental principle of the rule of law is that all parties, including those to a proceeding, are equal before the Court. In addition, an accused person should be able to know, in detail, the case that is being made against them so as to be able to prepare a defence.

Under the ICCPR, rights such as the right to a fair trial may generally only be derogated from in times of public emergency (being emergencies that have been officially proclaimed) and only to the extent strictly required.

For these reasons, the Committee refers this matter to the attention of Parliament.

Right to a fair trial: issue two

In amending existing provisions relating to terrorism intelligence applications, the Bill raises a number of issues relating to the right to a fair trial.

Under the Bill, the Supreme Court must (rather than may) grant a terrorism intelligence application if satisfied that the relevant information is terrorism intelligence, among other things. If granted, special confidentiality provisions apply which may significantly restrict the accused's access.

If the Court is not satisfied that the information in question is terrorism intelligence, the applicant must be provided with an opportunity to withdraw the information from the proceedings. The accused then has no access to the information and the Court must disregard it.

These amendments may trespass on the accused's right to a fair trial, including by potentially impairing the ability of the accused to properly understand and respond to the case against them.

If an accused person is unrepresented, the Court must appoint an independent third party representative to make submissions on the accused's behalf. While this may be considered a safeguard, there is no requirement in the Act that such person be legally qualified.

The penalties attached to terrorism convictions are significant. In such circumstances it is especially important that the right to a fair trial is protected. For these reasons the Committee draws these amendments to the attention of Parliament.

Right to a fair trial: issue three

The Bill allows the State or a relevant authority to claim public interest immunity over a document or report in proceedings under the Act. However, if the Court is not satisfied that public interest immunity applies, the State or authority must be given the opportunity to withdraw that document or report.

The Court is not required to allow a document or report to be withdrawn from consideration if the Court considers its withdrawal would be 'manifestly unfair' to the accused. However, the Bill also provides that nothing in the Act abrogates public interest immunity.

The Committee notes that the ability of the State to withdraw evidence from the proceedings even where a claim of public interest immunity is not made out trespasses on the right to a fair trial. Although the Court is not required to allow such evidence to be withdrawn if it considers that it would be 'manifestly unfair' to the accused, 'manifestly unfair' is not defined and may be an inappropriately high threshold.

The Committee refers these matters to Parliament for its further consideration.

Access to government information

Under the Bill, there will be a conclusive presumption that there is an overriding public interest against disclosing information contained in any document prepared for the High Risk Offenders Assessment Committee.

A core function of that Committee is to review risk assessments of offenders and make recommendations to the Commissioner of Corrective Services for action which can be taken by the State in relation to those offenders. Such action may include applying to the Court for an extended supervision order or continuing detention order. The Committee is also responsible for overseeing the exercise of high risk offender functions of relevant agencies and identifying gaps. The Committee may also have other information, such as research into the effectiveness of the High Risk Offenders scheme, which will be captured by the conclusive presumption against disclosure.

This Committee notes that the provision may unduly trespass on the public interest in accessing government information, particularly in relation to decisions by the State concerning the ongoing supervision and detention of individuals in circumstances where a term of imprisonment has already been served. The Committee draws this matter to the attention of Parliament.

Search and seizure without warrant

The Bill introduces a standalone power to search persons for dangerous implements without warrant in public places and schools, rather than requiring the person to submit to a search: proposed section 23 of LEPR. This power also allows a police officer to seize and detain certain items found in the course of a search, rather than requiring the person to produce the knife or implement. However, the power consolidates and updates existing search and confiscation powers already found in Division 4 of LEPR.

The Committee notes that the amendments extend existing search and seizure powers and draws this to the attention of Parliament.

Right to liberty and freedom of movement

In the context of terrorism offenders, extended supervision orders and continuing detention orders are proposed to now be imposed on persons who are no longer in custody or subject to supervision. The new minimum requirement is that the offender was in custody or subject to supervision at the time the order was filed.

The Committee acknowledges there may be practical reasons for such a provision; for example, where unforeseeable delays mean that proceedings to extend an order remain undetermined on expiry of an existing order.

Nonetheless, the Committee is of the view that the ability for a Court to impose an extended supervision order or continuing detention order on persons who are no longer subject to supervision or detention and have otherwise served their custodial sentence may trespass on a person's right to liberty and freedom of movement. The Committee draws this to the attention of Parliament.

Right to personal physical integrity and freedom of movement

The Bill enables a juvenile justice officer or corrective services officer who is ordered by a court to take a defendant to hospital for a mental health assessment to exercise the same functions in respect of the defendant as they would have for a detainee. These include powers to restrain, search and use reasonable force.

This amendment may trespass on the right to personal physical integrity and the right to freedom of movement. However, the existing section already provides that a Court can nominate a juvenile justice or corrective services officer to take a defendant to the hospital. Accordingly, and given that such powers may be reasonably necessary for the officers to perform that role, the Committee makes no further comment.

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

Commencement by proclamation

Most of the Bill commences on assent. However, part of the Bill commences on a day or days to be appointed by proclamation. This includes provisions relating to terrorism evidence, guardianship, industrial relations and police powers to search without warrant.

The Committee generally prefers legislation to commence on assent or a fixed date. However, the provisions which are to commence on proclamation may involve some administrative complexity, and also noting that most of the Bill commences on assent, the Committee makes no further comment.

5. KOSCIUSZKO WILD HORSE HERITAGE BILL 2018

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

6. MISCELLANEOUS ACTS AMENDMENT (MARRIAGE) BILL 2018

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

7. PUBLIC ACCOUNTABILITY LEGISLATION AMENDMENT (SYDNEY MOTORWAY CORPORATION) BILL 2018*

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

8. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2018

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

The Committee generally prefers legislation to commence on assent or a fixed date. However, the Committee notes that the amendments to the *Children (Detention Centres) Act 1987* will apply after certain provisions in the *Crimes Sentencing Procedure Amendment (Sentencing Options) Act 2017* have commenced. The Committee makes no further comment.

PART TWO – REGULATIONS

1. CROWN LAND MANAGEMENT REGULATION 2018

Trespasses unduly on personal rights and liberties: s9(1)(b)(i) of the LRA*Freedom of assembly*

The Committee notes that the Regulation provides that taking part in any gathering, meeting or assembly on Crown land may be prohibited by direction or notice. There is no guidance on what basis a decision to prohibit activity on Crown land may be made. Prohibiting individuals from taking part in any gathering, meeting or assembly may unduly trespass upon the right of individuals to peacefully assemble for a common purpose and express their views. The Committee draws this issue to the special attention of Parliament.

Form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA*Ill-defined terms*

The Committee notes that the Regulation permits the destruction and taking of plants or animals that are pests or have assumed pest proportions. There is no guidance provided in the Regulation or the principal Act concerning what a pest animal or plant is. The Committee considers the lack of guidance may provide responsible managers of dedicated or reserved Crown land a wide discretion to determine what a pest animal or plant is. It may also lead to an inconsistent application of the provision. The Committee draws this clause to the special attention of Parliament.

Matters not addressed

The Committee notes the lack of clarification in the Regulation of terms used in the principal Act. The Committee also notes that the principal Act has specifically provided the Regulations with a power to clarify such terms. Given the importance these terms have in identifying Crown land in the Western Division that may be sold, the Committee draws this to the special attention of Parliament.

Part One – Bills

1. Anti-Discrimination Amendment (Religious Freedoms) Bill 2018*

Date introduced	24 May 2018
House introduced	Legislative Council
Minister responsible	Revd. the Hon Fred Nile MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Anti-Discrimination Act 1977* as follows:
 - a) to prohibit discrimination on the ground of a person's religious beliefs or religious activities,
 - b) to prohibit public authorities and officials from subjecting faith-based entities to detrimental treatment on the ground of faith,
 - c) to provide that the Act does not affect:
 - (i) the appointment of persons by faith-based entities, the discharge of duties by chaplains or certain other acts or practices of faith-based entities, or
 - (ii) certain conduct by persons who hold the belief or conviction that marriage and family are based on the concept of the union between one man and one woman or that a person can only be one of 2 genders (that is, either male or female),
 - d) to make it clear that the proposed provisions about religion and faith do not give rise to any ground of complaint or appeal in relation to certain land-use planning decisions by local councils.
2. This Bill also amends the *Education Act 1990* to require that the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions is to be respected by the State and that beliefs and convictions about marriage or gender taught or espoused by a non-government school should not prejudice Ministerial decisions about financial assistance to the school.

BACKGROUND

3. In his second reading speech, Revd. the Hon. Fred Nile MLC stated that this Bill 'intends to discrimination on the ground of religious beliefs or religious activities'.

4. The Bill makes amendments to both the *Anti-Discrimination Act 1977* and the *Education Act 1990*.

ISSUES CONSIDERED BY COMMITTEE

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

Discrimination

5. The Bill inserts proposed section 56B, which outlines that 'nothing in the Act affects the rights of a person who holds the belief or conviction that marriage and family is based on the concept of a union of one man and one woman to manifest, teach or comply with that belief or conviction in practice, worship or observance, whether in public or private'.
6. The Bill inserts proposed section 56C, which outlines that 'nothing in this Act affects the right of any person who holds a belief or conviction that a person can only be one of two genders (that is, either male or female) to manifest that belief, teach that belief, or comply with that belief in practice, worship or observance, whether in public or private'.

The Bill inserts sections 56B and 56C, which outline that nothing in the Act affects the rights of a person who holds the belief or conviction that marriage and family is based on the concept of a union of one man and one woman, and that nothing in the Act affects the right of any person who holds a belief or conviction that a person can only be one of two genders (that is, either male or female).

This may allow individuals to be afforded protection for beliefs that are manifested in practice and in public that conflicts with other aspects protected in the *Anti-Discrimination Act 1977* (ADA), including: potential discrimination on the grounds of transgender (ADA Part 3A); marital or domestic status (ADA Part 4); homosexuality (ADA Part 4C); and HIV/AIDS vilification (ADA Part 4F). In doing so, this may infringe on a person's right to equality and non-discrimination. The Committee refers to Parliament whether it is appropriate that the Bill affords protection to practices that may be otherwise unlawful under existing provisions of the *Anti-Discrimination Act 1977*.

Rights of parents and children

7. Schedule 2 of the Bill amends section 4 of the *Education Act 1990*, which outlines the principles on which this Act is based. The Bill proposes to omit subsection 4(b) that states the principle that 'the education of a child is primarily the responsibility of the child's parents' and insert instead 'the education of a child is primarily the responsibility of the child's parents, whose liberty to ensure the religious and moral education of their children in conformity with their own convictions is to be respected by the State'.

The Bill amends the principals on which the *Education Act 1990* is based, as outlined in section 4, to state that 'the education of a child is primarily the responsibility of the child's parents, whose liberty to ensure the religious and moral education of their children in conformity with their own convictions is to be respected by the State'. This may infringe on the rights of parents and children that choose not to instil a religion in their child's education. The Committee refers to Parliament whether it is appropriate for the principals of the *Education Act* to require religious and moral education.

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

Wide definitions

8. The Bill contains a wide definition of 'faith-based entities' to mean any of the following bodies, orders or association, whether or not incorporated under a law of any jurisdiction:
 - (a) a body established or run by a religious body,
 - (b) a religious order,
 - (c) a body, or association of persons, established to propagate religion,
 - (d) a body, or association of persons, established or operated by, or affiliated with, a religious order or body established to propagate religion,
 - (e) a body, or association of persons, established for, or operating in accordance with, a religious ethos or faith-based mission, objective or ethos,
 - (f) a body, or association of persons, established with objectives that include religious education or evangelisation, regardless of who established or operates the body or how it is affiliated.
9. Similarly, the definition of 'religious beliefs or religious activities' is defined as:
 - (a) having a religious conviction, belief, opinion or affiliation,
 - (b) engaging in religious activity, including activity motivated by, or closely or directly connected to, a religious conviction, belief, opinion or affiliation.

The Bill contains wide definitions of 'faith-based entity' and 'religious beliefs or religious activities'. Under the Bill, a faith-based entity may include any entity, under any law of any jurisdiction within or outside of Australia, that purports to be established to propagate religion, a religious ethos, or faith-based mission, objective or ethos. Similarly, the definition of 'religious beliefs or religious activities' is equally wide and may include any belief or activity that is based on a conviction, belief, opinion or affiliation that purports to have its founding in religion or the aforementioned faith-based entity.

Such definitions that contain a low threshold for what is to be considered a faith-based entity or religion may afford anti-discrimination protection to bodies, beliefs or activities that have a wide spectrum of views including those with extreme beliefs.

This is particularly concerning as these definitions are used within the Bill as the basis to determine whether discrimination has occurred on religious grounds in circumstances involving: employment; education; provision of goods and services; accommodation; registered clubs; special needs program and activities; provision of government funding and applications for grants; provision of goods, services, or benefits by government; and local government action.

The Committee refers to Parliament whether such a wide scope is appropriate for these definitions.

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

Delegation to the regulations

10. Proposed section 38ZM outlines an additional basis on which the President may decline a complaint involving a contravention of proposed Part 3B for discrimination on the ground of religious beliefs or religious activities. Subsection 38ZM(3) outlines that the regulations may make provision for or with respect to matters that may be taken into consideration by the President in making a decision under this section.

The Bill permits the regulations to determine further matters that the President may take into consideration in making a decision to decline a complaint involving a contravention of proposed Part 3B for discrimination on the ground of religious beliefs or religious activities. Generally, the Committee prefers that matters that directly impact a person subject to the legislation be contained in the principal legislation and subject to Parliamentary scrutiny. The Committee refers to Parliament whether it is appropriate for further matters to decline a complaint to be contained in the regulations.

2. Companion Animals and Other Legislation Amendment Bill 2018

Date introduced	23 May 2018
House introduced	Legislative Council
Minister responsible	The Hon Niall Blair MLC
Portfolio	Primary Industries

PURPOSE AND DESCRIPTION

1. The object of this Bill is to implement the Government's response to the Final Report of the Joint Select Committee Inquiry into Companion Animal Breeding Practices in New South Wales, and make other amendments about the welfare of animals and the duties and responsibilities of their owners, as follows:
 - a) by requiring permits to be obtained annually for dogs that have been declared to be restricted dogs or dangerous dogs and for cats that are not desexed by the time they are 4 months old,
 - b) by adding to the information about companion animals and their current and former registered owners that is required to be recorded on the Register of Companion Animals,
 - c) by extending the range of persons who can obtain access to that Register, including by providing for members of the public to find registration information and verify microchip numbers and other identifying details,
 - d) by increasing by 10 penalty units (currently \$1,100) the maximum penalty for a second or subsequent offence of failing to register a companion animal,
 - e) by increasing the maximum penalty for the offences of denying entry to an assistance animal, or unlawfully imposing a charge for entry of an assistance animal (from 8 penalty units to 15 penalty units, that is, from \$880 to \$1,650),
 - f) by regulating advertisements about dogs or cats (including an unborn dog or cat, and an animal that is to be given away) to ensure that they include identifying information about the animal,
 - g) by giving inspectors the power to require a person to produce documents, in limited circumstances,
 - h) by extending the power of courts hearing criminal proceedings for animal cruelty offences and certain other offences to make orders requiring the accused person to reimburse a person or organisation that incurred costs for the care of animals incurred as a result of the offence or those proceedings,
 - i) by authorising courts to disqualify persons convicted of animal cruelty offences from keeping, or participating in keeping, animals in the future.

BACKGROUND

2. The Bill makes changes to the *Companion Animals Act 1998* and the *Prevention of Cruelty to Animals Act 1979* aimed at improving the identification of companion animals, promoting responsible pet ownership and enabling more effective enforcement action with regard to animal welfare offences.
3. The Bill implements elements of the Government response to the inquiry of the Joint Select Committee on Companion Animal Breeding Practices in New South Wales. The inquiry into companion animal breeding practices was established in May 2015 against a background of ongoing media reports of puppy farming and community concern about commercial dog and cat breeding practices.

ISSUES CONSIDERED BY THE COMMITTEE

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

Commencement by proclamation

4. The Bill provides that the Act is to commence on a day or days appointed by proclamation.

The Act commences on a day or days to be appointed by proclamation. The Committee generally prefers Acts to commence on assent or a specified date. However, given that the Act implements changes to the duties and responsibilities of companion animal owners, the Committee considers flexibility with regard to commencement is reasonable.

3. Government Sector Finance Bill 2018; Government Sector Finance Legislation (Repeal and Amendment) Bill 2018

Date introduced	24 May 2018
House introduced	Legislative Assembly
Minister responsible	Mr Dominic Perrottet MP
Portfolio	Treasury

PURPOSE AND DESCRIPTION

1. The *Government Sector Finance Bill 2018* (the GSF Bill) and the *Government Sector Finance Legislation (Repeal and Amendment) Bill 2018* (the GSF Repeal Bill) were introduced as cognate Bills.
2. The object of the GSF Bill is to consolidate in one Act a new framework for government sector financial and resource management in New South Wales. It includes provisions relating to financial arrangements and annual reporting by certain agencies of the government sector (GSF agencies).
3. Some agencies will be classified as 'separate GSF agencies', and will be subject to different provisions in relation to directions and delegations by Ministers. These include the Audit Office, Independent Commission Against Corruption, the Judicial Commission of New South Wales, the New South Wales Electoral Commission and the Ombudsman's Office.
4. The object of the GSF Repeal Bill is to:
 - a) to repeal the following legislation:
 - (i) the *Annual Reports (Departments) Act 1985*,
 - (ii) the *Annual Reports (Statutory Bodies) Act 1984*,
 - (iii) the *Public Authorities (Financial Arrangements) Act 1987*,
 - (iv) the regulations under each of those Acts, and
 - b) to rename the *Public Finance and Audit Act 1983* (the Public Audit Act) as the *Government Sector Audit Act 1983* and amend that Act to omit provisions being relocated to the proposed *Government Sector Finance Act 2018*, and
 - c) to make other amendments to legislation that are consequential on the enactment of the proposed *Government Sector Finance Act 2018* and the renaming and amendment of the Public Audit Act.
5. The amendments made to the *Public Audit and Finance Act 1983* will not relocate provisions relating to the Auditor-General, the Audit Office of New South Wales and the

conduct of audits. Other amendments that are consequential on the enactment of the proposed Act (particularly in relation to terminology) will also be made.

BACKGROUND

6. The cognate Bills are the third pillar in a reform program dating back to 2013 known as the Financial Management Transformation (FMT) program. The program is understood to be informed by the NSW Commission of Audit 2012 (the Schott report).
7. The FMT program has introduced a new financial system called 'Prime', new policies for resource management, and consolidation and updating of existing legislation to establish a single framework for public sector financial management.
8. Financial management in NSW is currently governed by a number of Acts. For instance, the *Public Finance and Audit Act 1983* (the Public Audit Act) governs public finance administration, including in relation to accounting arrangements, public banking and appropriations. That Act also establishes the Audit Office of New South Wales and provides for the conduct of audits for different kinds of public authorities.
9. The *Public Authorities (Financial Arrangements) Act 1987* enables certain public authorities to enter into financial arrangements (including investments and joint financing arrangements) and provides for the approval of those arrangements.
10. The *Annual Reports (Departments) Act 1985* and the *Annual Reports (Statutory Bodies) Act 1984* then make provision for annual reports by Government Departments and certain statutory bodies respectively. The provisions of each Act are similar.
11. Section 39 of the *Constitution Act 1902* requires that all public moneys collected, received or held by any person for or on behalf of the State form one Fund (i.e. the Consolidated Fund), except as otherwise provided by or in accordance with any Act. Section 21 of the Public Audit Act then provides that money cannot be paid out of the Consolidated Fund except under the authority of an act of Parliament.
12. Authority can be given to use public money forming part of the Consolidated Fund if an Act (for example, the annual Appropriation Act passed at Budget time) appropriates an amount of money for use for a specified purpose.
13. Another way authority is given to use public money is for an Act to establish an account in the Special Deposit Account (SDA) and to require specified public money to be paid into the SDA account. The Act will usually also specify the purposes for which money can be paid out of the SDA Account. The Public Audit Act provides that money cannot be drawn out of an SDA account except for the purposes of the account and under the authority that may apply to the account.

ISSUES CONSIDERED BY THE COMMITTEE

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

Ability of Treasurer to issue directions

14. Under the GSF Bill and the GSF Repeal Bill, the Treasurer has wide-ranging powers to issue directions to agencies; for example, in relation to annual reporting requirements.

15. However, the Treasurer appears to have a new power to issue directions in respect of corporations constituted under the *Electricity Retained Interest Corporations Act 2015* because of a new section 8(1A) (clause 4.30(1) in the GSF Repeal Bill).
16. Under that Act, Corporations are not subject to the control or direction of the Government or a Minister in the exercise of its functions: section 8(1). However, the proposed new subsection then provides that subsection 8(1) does not operate to limit or prevent the application of the GSF Act 2018 to a Corporation (including the application of Treasurer's directions under that Act). There appears to be no ability for the Treasurer to issue directions to the Corporation under the current section 8.

Under the GSF Bill and the GSF Repeal Bill, the Treasurer has wide-ranging powers to issue directions to agencies in relation to a variety of matters, many of which appear to already exist under current legislation. However, a proposed change to section 8 of the *Electricity Retained Interest Corporations Act 2015* seems to contemplate that the Treasurer can issue directions to certain corporations in accordance with the GSF Act, in circumstances where this previously appeared not possible.

The Committee notes that the provision may otherwise represent an inappropriate delegation of legislative power, particularly in circumstances where under the existing Act the relevant corporation is free from the control or direction of the Government or Minister.

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

Commencement by proclamation

17. Proposed sections 1.2 of the GSF Bill and section 2 of the GSF Repeal Bill effectively provide that the majority of both Acts commence on a day or days to be appointed by proclamation.
18. In addition, proposed section 2(2) of the GSF Repeal Bill provides that certain amendments made by Schedule 1 to that Bill may be commenced on different days' so as to enable different provisions of that portion to be omitted separately.'

The bulk of the GSF Act and GSF Repeal Act will commence on a day or days to be appointed by proclamation. The Committee generally prefers Acts to commence on assent or a specified date. However, given that the Bills propose wide-ranging reforms to the financial, budgetary and reporting processes of government agencies, and is therefore likely to involve a degree of administrative complexity, the Committee makes no further comment.

4. Justice Legislation Amendment Bill (No 2) 2018

Date introduced	23 May 2018
House introduced	Legislative Council
Minister responsible	The Hon Mark Speakman SC MP
Portfolio	Attorney-General

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend legislation relating to courts and crimes and related matters, including as follows:
 - a) to amend the *Criminal Procedure Act 1986*, including:
 - i. to restrict an accused person's access to terrorism evidence in criminal proceedings, and
 - ii. to make a child or parent of an accused person compellable to give evidence in proceedings for a domestic violence or child assault offence (except where the accused person is under the age of 18 years), and
 - iii. to prevent a complainant in proceedings for a sexual assault offence being subpoenaed or otherwise compelled to disclose the identity of the complainant's counsellor, and
 - iv. to provide for the use of the NSW Police Force exhibits management system in relation to exhibits used as evidence in criminal proceedings,
 - b) to amend the *Law Enforcement (Powers and Responsibilities) Act 2002*, including:
 - i. to allow a police officer who reasonably suspects that a person in a public place or school has a knife or other dangerous implement unlawfully in the person's possession to stop, search and detain the person, rather than requiring the person to submit to a search, and
 - ii. to allow a police officer to seize any knife or other dangerous implement found during such a search, rather than requiring the person to produce the knife or implement, and
 - iii. to clarify that a police officer is not required to repeat a warning relating to a move on direction to each person in a group in a public place if the warning and direction are given to the whole group, and
 - iv. to provide that any time taken for a person arrested for the offence of assault causing death to undertake a breath test or breath analysis or to

provide a blood or urine sample is not to be included in the 6-hour investigation period during which the person can be detained by police,

- c) to amend the *Mental Health (Forensic Provisions) Act 1990*, including:
 - i. to provide that correctional officers and juvenile justice officers may exercise the same functions as they have in respect of inmates and detainees when transporting a defendant to a mental health facility for a mental health assessment, including by using reasonable force, and
 - ii. to enable a defendant who has been detained for a mental health assessment to be taken to a police station after the assessment for a police officer to decide whether or not to grant the defendant bail, instead of being taken before a Magistrate,
- d) to amend the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (an Act that, on its commencement, will abolish certain sentencing options and establish new ones), including:
 - i. to specify when an assessment report (being a report about an offender prepared by a community corrections officer or juvenile justice officer) is required or may be requested by a sentencing court, and
 - ii. to enable the regulations to prescribe the maximum number of hours of community service work that may be imposed as a condition of an intensive correction order or community correction order, and
 - iii. to enable the regulations to prescribe the minimum period that a community service work condition can be in force in relation to the number of hours of community service work specified in the condition, and
 - iv. to prevent an intensive correction order being made, or a supervision or community service work condition being imposed, in respect of an offender who resides outside New South Wales, unless the offender resides in an approved State or Territory, and
 - v. to provide that, subject to arrangements between Juvenile Justice NSW and Corrective Services NSW, the supervision of an offender in the community may be carried out by a community corrections officer or a juvenile justice officer without an application being made to the sentencing court to vary the order,
- e) to amend the *Terrorism (High Risk Offenders) Act 2017*, including:
 - i. to make further provision for dealing with information that is terrorism intelligence in Supreme Court proceedings under the Act, and
 - ii. to allow information or documents to be withdrawn from consideration by the Court if the Court is not satisfied that they are terrorism intelligence or subject to public interest immunity, and

- iii. to make it clear that terrorism intelligence includes information that may adversely affect the operations of intelligence agencies, and
 - iv. to make it clear that the Act does not abrogate public interest immunity,
- f) to amend the *Government Information (Public Access) Act 2009* to provide for a conclusive presumption under the Act that there is an overriding public interest against disclosure of information contained in any document prepared for the High Risk Offenders Assessment Committee established by the *Crimes (High Risk Offenders) Act 2006*,
- g) to amend the *Crimes Act 1900*, in relation to offences relating to child abuse material, voyeurism and recording or distributing intimate images, to clarify that the private parts of a female person, or a transgender or intersex person identifying as female, include the breasts whether or not the breasts are sexually developed,
- h) to amend the *Crimes (Sentencing Procedure) Act 1999* to include a person working at a hospital as an example of a victim who is vulnerable because of the victim's occupation. A vulnerable victim is an aggravating factor to be taken into account in sentencing,
- i) to amend the *Children (Criminal Proceedings) Act 1987* to provide that, subject to arrangements between Juvenile Justice NSW and Corrective Services NSW, the supervision of a child or young person who is on a good behaviour bond or probation may be carried out by a juvenile justice officer or a community corrections officer without an application being made to the Children's Court to vary the bond or probation,
- j) to amend the *Succession Act 2006* to enable the Supreme Court:
 - i. to grant interim administration of an estate, while an application for a family provision order or notional estate order is pending, to any person the Supreme Court considers appropriate, rather than only to the person applying for the order, and
 - ii. to decide the appropriate level of representation for interested parties in proceedings relating to an application to make, alter or revoke a will of a person who lacks testamentary capacity,
- k) to amend the *Supreme Court Act 1970* to clarify the powers of the Court of Appeal, when quashing a determination of a lower court, to make an order finally disposing of a matter rather than remitting the matter to the lower court,
- l) to amend the *Criminal Assets Recovery Act 1990* to enable the Supreme Court to make a restraining order in respect of property belonging to a defendant that the defendant should have disclosed during proceedings relating to an assets forfeiture order, proceeds assessment order or unexplained wealth order against the defendant's property,
- m) to amend the *Court Suppression and Non-publication Orders Act 2010* to provide that a court may make a suppression order or non-publication order to avoid

causing undue distress or embarrassment to a defendant in criminal proceedings involving an offence of a sexual nature only if there are exceptional circumstances,

- n) to amend the *Crimes (Domestic and Personal Violence) Act 2007* to provide that proceedings relating to an apprehended violence order against a child are to be held in closed court,
- o) to amend the *Guardianship Act 1987* to provide that the Public Guardian and the NSW Trustee and Guardian are parties to proceedings in the NSW Civil and Administrative Tribunal (NCAT) relating to a review of an appointment of an enduring guardian and that the Public Guardian is a party to NCAT proceedings relating to a review of a guardianship order,
- p) to amend the *Powers of Attorney Act 2003* to provide that the NSW Trustee and Guardian is a party to proceedings in the Supreme Court or NCAT relating to a review of an enduring power of attorney,
- q) to amend the *Young Offenders Act 1997* to allow statistical information about warnings, cautions and conferences given to children under the Act to be disclosed to the Attorney General and certain persons employed in the Department of Justice and to be included in reports to Parliament,
- r) to make other minor, consequential and law revision amendments.

BACKGROUND

- 2. This is the second Bill this year which makes amendments to a suite of justice legislation.
- 3. In particular, the Bill introduces amendments which apply in the context of those who have already served a sentence of imprisonment for a terrorism offence and also to proceedings involving terrorism evidence and intelligence.
- 4. According to the second reading speech, Schedule 1 contains the main amending provisions and Schedule 2 contains more minor provisions including consequential amendments to various Acts.

ISSUES CONSIDERED BY COMMITTEE

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

Right to a fair trial: issue one

- 5. The Bill introduces a new Part 2B in the *Criminal Procedure Act 1986* entitled 'Terrorism evidence.' This is modelled on 'Part 2A: Sensitive evidence' in the same Act.
- 6. Proposed section 281H provides that a prosecuting authority is not required and cannot be required to give an accused person a copy of a thing designated by that authority as 'terrorism evidence.'
- 7. 'Terrorism evidence' is defined to include anything that advocates support for engaging in, or planning or preparing for, any terrorist acts or violent extremism (among other things). The definition of terrorism evidence draws on the definitions of 'terrorist act' and 'terrorist organisation' found in Part 5.3 of the Commonwealth Criminal Code.

8. A prosecuting authority is also able to seek the return of evidence which it designates as terrorism evidence after it has been provided to the accused: proposed section 281J.
9. Proposed section 281I then provides that a prosecuting authority must serve a notice on an accused if they intend to designate certain evidence as terrorism evidence. That notice must notify the accused of a number of matters including:
 - a) If unrepresented, that the accused may view or listen to the evidence at a place nominated by the prosecuting authority and under its supervision,
 - b) If represented, that the prosecuting authority will give a copy of said evidence to the accused's lawyer. However, their lawyer cannot show them the evidence except under the lawyer's supervision.
10. The prosecuting authority must provide an unrepresented accused person with reasonable access to the designated terrorism evidence, and this may require access to be given on more than one occasion: proposed section 281K. However, 'reasonable access' is not defined.
11. Relevantly, the Court appears to have no express role under Part 2B in determining whether evidence is 'terrorism evidence', or whether 'reasonable access' is being granted to the accused. This appears to be consistent with Part 2A in Chapter 6 of the existing Act. However, this approach contrasts with other amendments proposed as part of this Bill which give the Court a role in determining what is terrorism intelligence and what level of access should be granted.
12. Part 2B creates several new offences, including for an accused person to be in possession of designated terrorism evidence, which has a maximum penalty of two years' imprisonment: proposed section 281M.
13. Savings and transitional provisions provide that Part 2B extends to criminal investigations or proceedings commenced but not finally determined before the commencement of the Part.

The Bill introduces the concept of 'terrorism evidence' in the context of criminal proceedings. A prosecuting authority cannot be required to give an accused person a copy of a thing that the authority decides is 'terrorism evidence.' During the course of proceedings, a prosecuting authority can also seek the return of evidence it designates as terrorism evidence.

There are some safeguards in the Bill. For example, an unrepresented accused must be granted 'reasonable access' to view or listen to the terrorism evidence. However, such access may be supervised by the prosecuting authority, and 'reasonable access' is not defined. For those who are represented, their lawyer may retain a copy of the 'terrorism evidence', but the accused cannot view or listen to that evidence without the supervision of their lawyer.

The Court has no role under Part 2B in deciding that evidence is 'terrorism evidence' and what the appropriate level of access is to such evidence.

Notwithstanding some of the Part's safeguards, the Committee remains concerned that these provisions may unduly trespass on the right to a fair trial,

including aspects of article 14 of the *International Covenant on Civil and Political Rights*. A fundamental principle of the rule of law is that all parties, including those to a proceeding, are equal before the Court. In addition, an accused person should be able to know, in detail, the case that is being made against them so as to be able to prepare a defence.

Under the ICCPR, rights such as the right to a fair trial may generally only be derogated from in times of public emergency (being emergencies that have been officially proclaimed) and only to the extent strictly required.

For these reasons, the Committee refers this matter to the attention of Parliament.

Right to a fair trial: issue two

14. The Bill amends section 60 of the *Terrorism (High Risk Offenders) Act 2017* and related provisions which apply to terrorism intelligence applications.
15. Terrorism intelligence, as amended, is information relating to actual or suspected terrorist activity which if disclosed could (among other things) prejudice a criminal or intelligence investigation: section 4.
16. Under the amendments, the Supreme Court must (rather than may) grant a terrorism intelligence application if satisfied that the relevant information was provided to the Attorney General under the Part and that the information is terrorism intelligence.
17. The effect of a terrorism intelligence application being granted is that the Supreme Court is then to take steps to maintain the confidentiality of that intelligence. One way this is achieved is by restricting access to the intelligence to the parties to the proceedings or a party's legal representatives.
18. If an accused is unrepresented, the Court must appoint an independent third party representative for the purposes of a terrorism intelligence application. While the section indicates that the qualifications required by such a person will be set out in the regulations, the second reading speech suggests that the representative could be a former judge or a lawyer who is eligible for judicial appointment.
19. That representative will be allowed access to the information or terrorism intelligence and may make such submissions to the Court as the representative considers to be in the best interests of the offender, concerning whether the information is terrorism intelligence or the level of access that should be granted.
20. The Bill then provides that the accused person will be responsible for paying the representative's costs.
21. If a Court agrees to a terrorism evidence application, an unrepresented accused will be provided with 'cascading access' to the evidence in question; for example, a copy of a redacted intelligence document, a written summary of the redacted intelligence, or a written summary of the facts that the intelligence would (or would be likely) to establish. However, the discretion of the Court is subject to the regulations and any agreement by the parties.

22. Should the Court not be satisfied that information is terrorism intelligence, it must give the applicant or relevant authority an opportunity to withdraw the information. Withdrawn information must not be disclosed to a party to the proceedings and must be disregarded by the Court.

In amending existing provisions relating to terrorism intelligence applications, the Bill raises a number of issues relating to the right to a fair trial.

Under the Bill, the Supreme Court must (rather than may) grant a terrorism intelligence application if satisfied that the relevant information is terrorism intelligence, among other things. If granted, special confidentiality provisions apply which may significantly restrict the accused's access.

If the Court is not satisfied that the information in question is terrorism intelligence, the applicant must be provided with an opportunity to withdraw the information from the proceedings. The accused then has no access to the information and the Court must disregard it.

These amendments may trespass on the accused's right to a fair trial, including by potentially impairing the ability of the accused to properly understand and respond to the case against them.

If an accused person is unrepresented, the Court must appoint an independent third party representative to make submissions on the accused's behalf. While this may be considered a safeguard, there is no requirement in the Act that such person be legally qualified.

The penalties attached to terrorism convictions are significant. In such circumstances it is especially important that the right to a fair trial is protected. For these reasons the Committee draws these amendments to the attention of Parliament.

Right to a fair trial: issue three

23. The Bill inserts a new section 60A in the *Terrorism (High Risk Offenders) Act 2017* so that the State or a relevant authority may make a claim in proceedings under the Act that a certain document or report is subject to public interest immunity.
24. Public interest immunity limits the production of evidence in circumstances where the public interest in disclosing that evidence is outweighed by the public interest in maintaining its secrecy or confidentiality.
25. Although the Court may determine that the document or report is not subject to public interest immunity, the Court must still give the claimant an opportunity to withdraw the document or report from consideration.
26. The document or report cannot be withdrawn if the Court considers that the withdrawal will be 'manifestly unfair' to a party to the proceedings who is an eligible offender. However, proposed section 17A also provides that nothing in the Act abrogates public interest immunity.

The Bill allows the State or a relevant authority to claim public interest immunity over a document or report in proceedings under the Act. However, if the Court is not satisfied that public interest immunity applies, the State or authority must be given the opportunity to withdraw that document or report.

The Court is not required to allow a document or report to be withdrawn from consideration if the Court considers its withdrawal would be 'manifestly unfair' to the accused. However, the Bill also provides that nothing in the Act abrogates public interest immunity.

The Committee notes that the ability of the State to withdraw evidence from the proceedings even where a claim of public interest immunity is not made out trespasses on the right to a fair trial. Although the Court is not required to allow such evidence to be withdrawn if it considers that it would be 'manifestly unfair' to the accused, 'manifestly unfair' is not defined and may be an inappropriately high threshold.

The Committee refers these matters to Parliament for its further consideration.

Access to government information

27. Schedule 1.13 of the Bill amends the *Government Information (Public Access) Act 2009* to create a conclusive presumption that there is an overriding public interest against disclosure of information contained in any document prepared for the High Risk Offenders Assessment Committee.
28. The High Risk Offenders Assessment Committee is established under the *Crime (High Risk Offenders) Act 2006* and is responsible for reviewing the risk assessments of offenders and making recommendations to the Commissioner of Corrective Services for the action by the State in relation to those offenders. That Act allows the State to apply to the Court for an extended supervision order or continuing detention order, even if an offender's term of imprisonment has been served.
29. Among other functions, the Committee also oversees the exercise of the high risk offender functions of relevant agencies and identifies gaps which may impact on the proper and effective exercise of those functions.
30. The effect of creating a conclusive presumption that there is an overriding public interest against disclosure is that the relevant government body can refuse access to that information without weighing up the public interest in disclosing that information.

Under the Bill, there will be a conclusive presumption that there is an overriding public interest against disclosing information contained in any document prepared for the High Risk Offenders Assessment Committee.

A core function of that Committee is to review risk assessments of offenders and make recommendations to the Commissioner of Corrective Services for action which can be taken by the State in relation to those offenders. Such action may include applying to the Court for an extended supervision order or continuing detention order. The Committee is also responsible for overseeing the exercise of high risk offender functions of relevant agencies and identifying gaps. The Committee may also have other information, such as research into the

effectiveness of the High Risk Offenders scheme, which will be captured by the conclusive presumption against disclosure.

This Committee notes that the provision may unduly trespass on the public interest in accessing government information, particularly in relation to decisions by the State concerning the ongoing supervision and detention of individuals in circumstances where a term of imprisonment has already been served. The Committee draws this matter to the attention of Parliament.

Search and seizure without warrant

31. Schedule 1.17 of the Bill amends the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) to introduce a power to search persons for dangerous implements without warrant in public places and schools: proposed section 23. This consolidates and updates existing search and confiscation powers found in Division 4 of LEPRA.
32. The definition of 'dangerous implement', as amended by the Bill, is:
 - a) a dangerous article
 - b) a knife (*including a knife blade, razor blade or any other blade*)
 - c) any other implement made or adapted for use for causing injury to a person,
 - d) anything intended by the person having custody of the thing, to be used to injure or menace a person or damage property, or
 - e) a laser pointer

[amendments italicised]
33. The main differences between the existing powers and new power are:
 - a) a police officer who reasonably suspects that a person in a public place or school has a knife or other dangerous implement unlawfully in the person's possession may stop, search and detain the person, rather than requiring the person to submit to a search, and
 - b) a police officer may seize any knife or other dangerous implement found during such a search, rather than requiring the person to produce the knife or implement.
34. The provisions also now expressly provide that the power can be exercised 'without warrant'.
35. The existing search power also provides that a 'laser pointer' is not a dangerous implement for the purposes of the section.
36. As a result of the amendments, the section 25 offence of 'failing to comply with requirements relating to a search and dangerous implements' will no longer exist.

The Bill introduces a standalone power to search persons for dangerous implements without warrant in public places and schools, rather than requiring

the person to submit to a search: proposed section 23 of LEPR. This power also allows a police officer to seize and detain certain items found in the course of a search, rather than requiring the person to produce the knife or implement. However, the power consolidates and updates existing search and confiscation powers already found in Division 4 of LEPR.

The Committee notes that the amendments extend existing search and seizure powers and draws this to the attention of Parliament.

Right to liberty and freedom of movement

37. Schedule 1.22[5] and [6] of the Bill amend the *Terrorism (High Risk Offenders) Act 2017* so that extended supervision orders and continuing detention orders can now be made by the Court in respect of persons who are no longer in custody or subject to supervision. This is because the relevant sections are to be amended such that the new minimum requirement is that the relevant offender was in custody or under supervision at the time the original application for the order was filed. A person will therefore no longer need to be in custody or under supervision at the time the order is made.
38. The second reading speech indicates that these amendments reflect existing provisions applying to other high risk sex offenders and high risk violent offenders.

In the context of terrorism offenders, extended supervision orders and continuing detention orders are proposed to now be imposed on persons who are no longer in custody or subject to supervision. The new minimum requirement is that the offender was in custody or subject to supervision at the time the order was filed.

The Committee acknowledges there may be practical reasons for such a provision; for example, where unforeseeable delays mean that proceedings to extend an order remain undetermined on expiry of an existing order.

Nonetheless, the Committee is of the view that the ability for a Court to impose an extended supervision order or continuing detention order on persons who are no longer subject to supervision or detention and have otherwise served their custodial sentence may trespass on a person's right to liberty and freedom of movement. The Committee draws this to the attention of Parliament.

Right to personal physical integrity and freedom of movement

39. The Bill amends the *Mental Health (Forensic Provisions) Act 1990* so that if an order is made which requires a juvenile justice officer or corrective services officer to take a defendant who appears mentally ill to a hospital for assessment, that officer has the same functions in respect of the defendant as they would have for a detainee.
40. The explanatory notes indicate that these include powers to restrain, search and use reasonable force.

The Bill enables a juvenile justice officer or corrective services officer who is ordered by a court to take a defendant to hospital for a mental health assessment to exercise the same functions in respect of the defendant as they would have for a detainee. These include powers to restrain, search and use reasonable force.

This amendment may trespass on the right to personal physical integrity and the right to freedom of movement. However, the existing section already provides that a Court can nominate a juvenile justice or corrective services officer to take a defendant to the hospital. Accordingly, and given that such powers may be reasonably necessary for the officers to perform that role, the Committee makes no further comment.

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

Commencement by proclamation

41. Schedule 1.10 [14], 1.14, 1.15, 1.17 [1] – [4] and [8], 1.18 [1] – [4], 1.19 and 1.20 commence on a day or days to be appointed by proclamation.

Most of the Bill commences on assent. However, part of the Bill commences on a day or days to be appointed by proclamation. This includes provisions relating to terrorism evidence, guardianship, industrial relations and police powers to search without warrant.

The Committee generally prefers legislation to commence on assent or a fixed date. However, the provisions which are to commence on proclamation may involve some administrative complexity, and also noting that most of the Bill commences on assent, the Committee makes no further comment.

5. Kosciuszko Wild Horse Heritage Bill 2018

Date introduced	23 May 2018
House introduced	Legislative Assembly
Minister responsible	The Hon John Barilaro MP
Portfolio	Regional New South Wales

PURPOSE AND DESCRIPTION

1. The object of this Bill is to recognise the heritage value of sustainable wild horse populations within parts of Kosciuszko National Park and to protect that heritage through a wild horse heritage management plan.

BACKGROUND

2. The Bill introduces a requirement for the Minister for the Environment to prepare a heritage management plan for wild brumbies in the Kosciuszko National Park. The new framework for the management of the area will include a research and monitoring program and also establish a Wild Horse Community Advisory Panel.
3. In the Second Reading Speech, the Hon John Barilaro MP commented that the previous draft plan for the management of brumbies set targets for reducing the number of brumbies. Minister Barilaro stated that under the new plan no brumbies will be shot. Alternatively, resources will be directed to other measures such as passive trapping and rehoming as a means of controlling the numbers of brumbies in the national park.

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*.

6. Miscellaneous Acts Amendment (Marriage) Bill 2018

Date introduced	23 May 2018
House introduced	Legislative Council
Minister responsible	The Hon Don Harwin MLC
Portfolio	Resources, Energy and Utilities, Arts

PURPOSE AND DESCRIPTION

1. The objects of the Bill are to provide for the following consequent on the commencement of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* of the Commonwealth (the Commonwealth Act):
 - a) To update terminology relating to marriage and parentage across a number of Acts and instruments (Schedules 1, 2 and 6);
 - b) To provide that exceptions to the hearsay rule and the entitlement to register a change of sex apply to any married persons (Schedules 3 and 4); and
 - c) To set out the effect to certain enduring guardianship appointments and registered relationships (Schedules 5 and 7).

BACKGROUND

2. In December 2017, the Federal Parliament passed the Commonwealth Act so that the right to marry extended to any two adults, including same-sex couples. The Commonwealth Act also recognised marriages solemnised overseas that had not previously been recognised.
3. Although the Australian Constitution provides that the Commonwealth can make laws with respect to marriage, the purpose of the NSW Bill is to make consequential amendments to a large number of Acts and regulations as a result of the Commonwealth Act.
4. Most of the proposed amendments update the technical terms used in legislation to adopt gender-neutral words such as 'spouse', 'surviving spouse' and 'parent'.
5. The second reading speech indicates that the proposed amendments are 'not intended to change rights, obligations or entitlements beyond the changes conveyed by amendments to the Commonwealth Marriage Act.'

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.

7. Public Accountability Legislation Amendment (Sydney Motorway Corporation) Bill 2018*

Date introduced	24 May 2018
House introduced	Legislative Assembly
Member responsible	Ms Jodi McKay MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
 - a) to amend the *Government Information (Public Access) Act 2009* to provide that information held by the Sydney Motorway Corporation may be accessed under that Act,
 - b) to amend the *Independent Commission Against Corruption Act 1988* to enable the ICAC to investigate allegations or complaints of corrupt conduct that relate to the Sydney Motorway Corporation and its employees,
 - c) to amend the *Ombudsman Act 1974* to enable complaints to be made to the Ombudsman about the conduct of the Sydney Motorway Corporation,
 - d) to amend the *Public Finance and Audit Act 1983* to provide for the financial reports and transactions of the Sydney Motorway Corporation to be inspected and audited by the Auditor-General,
 - e) to amend the *Public Interest Disclosures Act 1994* to extend the protections under that Act to employees of the Sydney Motorway Corporation who make disclosures in the public interest about any wrongdoing.

BACKGROUND

2. In the Second Reading Speech, Ms Jodi McKay MP stated that the Bill seeks to 'restore accountability and transparency to the Sydney Motorway Corporation and in turn the project it manages, WestConnex.'
3. This is the second time this Bill has been introduced into Parliament. In the previous report on this Bill the Committee made no comment on the Bill in respect of the issues set out in section 8A of the *Legislation Review Act 1987*.¹

¹ Legislation Review Committee, *Legislation Review Digest No. 42/56*, p 20.

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. Statute Law (Miscellaneous Provisions) Bill 2018

Date introduced	23 May 2018
House introduced	Legislative Council
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Minister for Resources, Minister for Energy and Utilities and Minister for the Arts

PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
 - a) to make minor amendments to various Acts and instruments (Schedules 1 and 2), and
 - b) to amend certain other Acts and instruments for the purpose of effecting statute law revision (Schedules 3–5), and
 - c) to repeal various Acts and provisions of Acts and instruments (Schedule 6), and
 - d) to make other provisions of a consequential or ancillary nature (Schedule 7).

BACKGROUND

2. In his second reading speech, the Minister noted that the *Statute Law (Miscellaneous) Bill 2018* continues the statute revision program and contains amendments to 20 Acts and related amendments to four legislative instruments.
3. The Bill consists of minor amendments to policy and terminology in various Acts and legislative instruments and the repeal of Acts and legislative instruments that are deemed redundant or of no practical utility.

ISSUES CONSIDERED BY COMMITTEE

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

Commencement by proclamation

4. Schedule 1 of the Bill provides that amendments to the *Children (Detention Centres) Act 1987* will commence on a day or days to be appointed by proclamation.

The Committee generally prefers legislation to commence on assent or a fixed date. However, the Committee notes that the amendments to the *Children (Detention Centres) Act 1987* will apply after certain provisions in the *Crimes Sentencing Procedure Amendment (Sentencing Options) Act 2017* have commenced. The Committee makes no further comment.

Part Two – Regulations

1. Crown Land Management Regulation 2018

Date published	16 March 2018
Date tabled	10 April 2018
Disallowance date	19 June 2018

PURPOSE AND DESCRIPTION

1. The object of this Regulation to make provision with respect to the following matters in connection with the commencement of the *Crown Land Management Act 2016* (the principal Act):
 - a) the regulation of entry to, and conduct on, certain Crown land (including activities that may be prohibited, the setting of fees and charges in relation to use and the parking or use of vehicles),
 - b) the management of dedicated or reserved Crown land by non-council managers and statutory land managers (including record keeping requirements),
 - c) administrative matters relating to statutory land managers (including appointment and duties of certain office holders and the procedures to be followed in respect of receipts and expenditure),
 - d) development applications in respect of dedicated or reserved Crown land that do not require the Minister's consent,
 - e) the local land criteria to be applied in deciding whether to vest Crown land in local councils,
 - f) indemnification of the State by local councils for conduct by them that affects native title rights and interests,
 - g) certain matters in relation to dealings with, and holdings and enclosure permits over, Crown land and former Crown land (including notifications, applications, fees, prohibited activities on easements for public access and short-term licences over dedicated or reserved Crown land),
 - h) minimum annual rents and rates of interest on arrears,
 - i) holdings over Crown land in the Western Division, including:
 - i. approved activities on land under a perpetual lease, and
 - ii. annual rent for land under certain continued rural and urban leases, and
 - iii. the extension of the terms of leases, and
 - iv. the conversion of term leases into perpetual leases, and

- v. the circumstances in which cultivation consents are not required,
 - j) the provision of information about holdings to local councils,
 - k) the standard form trust instrument for trusts over institutional trust land,
 - l) offences that may be dealt with by way of penalty notice,
 - m) other fees and charges,
 - n) savings and transitional matters consequent on the enactment of the Act,
 - o) other minor, consequential or ancillary matters.
2. This Regulation is made under the *Crown Land Management Act 2016*, including sections 1.5 (1) (definition of mineral), 1.6 (5) (a), 2.20 (1), 2.23 (2) (a) (i) and (3) (b), 3.25 (2) (c), 3.29 (2), 3.30, 3.31, 4.6 (2), 4.11 (1) (a) (ii), 5.2 (2) (f), 5.9 (1) (c), 5.26 (4), 5.27 (5), 5.37 (2), 5.51 (5), 5.52 (2) (b), 5.57 (5), 6.4 (5) (definition of minimum base rent), 7.8 (5), 8.13 (3), 9.2 (1) (g) (ii), 9.4 (1) (b), 9.5 (1) (b) and (2), 9.25, 11.3, 12.12 (2), 12.21 (2), 12.32 (1) (e) and 13.5 (the general regulation-making power), clause 22 (2) of Schedule 2, clauses 19 (1), 30, 32 (3), 33 (2), 35 (2) (f) and 42 (5) of Schedule 3, clauses 5 (2), 11 (5) and 24 (3) (b) of Schedule 4, clauses 8 and 16 of Schedule 5 and clauses 1 and 22 of Schedule 7.

ISSUES CONSIDERED BY THE COMMITTEE

Trespasses unduly on personal rights and liberties: s9(1)(b)(i) of the LRA

Freedom of assembly

3. Clause 13 of the Regulation lists activities that can be prohibited on Crown land by direction or notice under Part 9 of the principal Act. Included in the list of activities that can be prohibited by direction or notice are:
- taking part in any gathering, meeting or assembly (except, in the case of a cemetery, for the purpose of a religious or other ceremony of burial or commemoration).
4. Part 9 of the principal Act provides no guidance on how a decision to prohibit activity on Crown land is to be made.

The Committee notes that the Regulation provides that taking part in any gathering, meeting or assembly on Crown land may be prohibited by direction or notice. There is no guidance on what basis a decision to prohibit activity on Crown land may be made. Prohibiting individuals from taking part in any gathering, meeting or assembly may unduly trespass upon the right of individuals to peacefully assemble for a common purpose and express their views. The Committee draws this issue to the special attention of Parliament.

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

Ill-defined terms

5. Clause 15 of the Regulation permits a responsible manager of dedicated or reserved Crown land from authorising:

- a) the destruction on the land of any plant or animal that is a pest; or
 - b) subject to the provisions of any Act, the taking from the land of any plant or animal that, in the opinion of the manager, has assumed pest proportions or is required for scientific purposes.
6. The Regulation, nor the principal Act, provide guidance on what is considered a pest animal or plant.

The Committee notes that the Regulation permits the destruction and taking of plants or animals that are pests or have assumed pest proportions. There is no guidance provided in the Regulation or the principal Act concerning what a pest animal or plant is. The Committee considers the lack of guidance may provide responsible managers of dedicated or reserved Crown land a wide discretion to determine what a pest animal or plant is. It may also lead to an inconsistent application of the provision. The Committee draws this clause to the special attention of Parliament.

Matters not addressed

7. Section 5.9 of the principal Act concerns restrictions on the sale or disposal of land in the Western Division. Under the section the Minister cannot sell Crown land in the Western Division unless the Minister is satisfied of a number of criteria. Amongst the criteria are the following:
- the land is in an urban area;
 - the land is an area required for urban expansion;
 - the land is located within a distance prescribed by the regulations from an urban area and its sale will contribute to the economic growth of the region in which both the land and urban area are located; or
 - the land is in a rural area and is used predominately for residential, business, industrial or community purposes.
8. Section 5.9 (2)(a) of the principal Act provides that the Regulations may make provision for the classification or identification of land in question in respect of the four criteria listed above.
9. Clause 30 of the Regulation makes provision for only one of the four criteria listed above, namely, that the land is located within 20 kilometres of an urban area. The Regulation provides no clarification on other terms used such as 'urban area' or 'required for urban expansion.'

The Committee notes the lack of clarification in the Regulation of terms used in the principal Act. The Committee also notes that the principal Act has specifically provided the Regulations with a power to clarify such terms. Given the importance these terms have in identifying Crown land in the Western Division that may be sold, the Committee draws this to the special attention of Parliament.

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.
- 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.

The functions of the Committee 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.