



Legislation Review Committee

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

CHAIR	Mr Michael Johnsen MP, Member for Upper Hunter
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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

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the Digest. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the Digest drawing the regulation to the Parliament's "special attention". The criteria for the Committee's consideration of regulations are set out in s 9 of the *Legislation Review Act 1987*.

Regulations for the special attention of Parliament

When required, this section contains any reports on regulations subject to disallowance to which the Committee wishes to draw the special attention of Parliament.

Conclusions

PART ONE - BILLS

1. BIOSECURITY BILL 2015

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

Personal physical integrity

Requiring individuals to undergo treatment in the form of cleaning or disinfecting their body may impact on the right to personal physical integrity. However, the Committee notes that officers are not permitted to carry out invasive treatment such as taking blood or other bodily samples. The provisions also apply in emergency situations. As such the treatment may be considered necessary to preserve an individual's health or to prevent the further spread of disease. On balance, the Committee does not consider that the proposed provisions unduly impact on personal rights and liberties.

Right against self-incrimination

Clauses 34, 42 and 94 of the Bill may impact on an individual's right to protect themselves against self-incrimination. The Committee notes that there are some limitations placed on these clauses, for example, clause 94 only applies in emergency situations. However, the Committee nevertheless refers these issues to Parliament for further consideration on the basis that clauses 34, 42 and 94 may interfere with the right against self-incrimination.

Search without warrant

The Committee notes that clauses 59, 74, 85, 130 and 144 of the Bill may impact on an individual's right to privacy in their home by permitting authorised officers to enter residential premises without a search warrant or the occupier's consent. However, the Committee notes that entry is only authorised where a person has failed to comply with an order or direction made, or an undertaking given, under the Bill. The Committee therefore makes no further comments.

Right to privacy

The use of surveillance devices pursuant to clause 387 of the Bill to detect biosecurity matter on properties could impact on the privacy of individuals on the property or their neighbours. However, the Committee notes the various safeguards in place to limit the use of material obtained from such devices. The Committee therefore makes no further comments.

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

Commencement by proclamation

The Committee prefers legislation to commence on a fixed date or on assent, particularly in relation to Bills such as this one, which may impact on rights and liberties.

Extraterritorial application of the Bill

The effect of clause 5 of the Bill is that provisions of the Bill, including the criminal provisions, may impact on individuals who are not within the territorial limits of New South Wales. However, the Committee notes that biosecurity threats, if not managed properly, could result

in significant consequences for the people of New South Wales. On balance, the Committee does not consider the extraterritorial application of the Bill to be an inappropriate delegation of legislative power in these circumstances.

Henry VIII clause

The Committee refers clauses 148 and 150 of the Bill to Parliament for further consideration as to whether the provisions amount to an inappropriate delegation of legislative power. The Committee generally prefers that an Act of Parliament, rather than a Regulation, amends provisions of Principal legislation. The Committee notes that any proposed Regulation seeking to amend the list of prohibited dealings and registrable dealings in Schedules 3 and 4 of the Bill would be subject to disallowance under section 41 of the *Interpretation Act 1987*. However, the Committee is concerned that Schedules 3 and 4 of the Bill relate to dealings which can be criminal offences.

2. RURAL FIRES AMENDMENT (BUSH FIRE PREVENTION) BILL 2015

The Committee has not identified any issues arising under s8(A)(1) of the Legislation Review Act 1987.

3. STATE SENATE BILL 2015*

The Committee makes no comment on the Bill in respect of issues set out in s8A of the *Legislation Review Act 1987*.

PART TWO - REGULATIONS

1. GOVERNMENT SECTOR EMPLOYMENT AMENDMENT (TRANSITIONAL STAFF ARRANGEMENTS)REGULATION 2015

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

Henry VIII Clause

The Committee generally prefers that an Act of Parliament, rather than a Regulation, amends the provisions of principal legislation. The Committee makes no further comment.

Part One - Bills

1. Biosecurity Bill 2015

Date introduced	12 August 2015
House introduced	Legislative Council
Minister responsible	The Hon Niall Blair MLC
Portfolio	Primary Industries and Lands and Water

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
 - (a) to provide a framework for the prevention, elimination and minimisation of biosecurity risks posed by biosecurity matter, dealing with biosecurity matter, carriers and potential carriers, and other activities that involve biosecurity matter, carriers or potential carriers,
 - (b) to promote biosecurity as a shared responsibility between government, industry and communities,
 - (c) to provide a framework for the timely and effective management of the following:
 - i pests, diseases, contaminants and other biosecurity matter that are economically significant for primary production industries,
 - ii threats to terrestrial and aquatic environments arising from pests, diseases, contaminants and other biosecurity matter,
 - iii public health and safety risks arising from contaminants, non-indigenous animals, bees, weeds and other biosecurity matter known to contribute to human health problems,
 - iv pests, diseases, contaminants and other biosecurity matter that may have an adverse effect on community activities and infrastructure,
 - (d) to provide a framework for risk-based decision-making in relation to biosecurity,
 - (e) to give effect to intergovernmental biosecurity agreements to which the State is a party,
 - (f) to provide the means by which biosecurity requirements in other jurisdictions can be met, so as to maintain market access for industry.

BACKGROUND

2. In 2013, the NSW Government released a proposed framework for new biosecurity legislation and commenced public consultation. In October 2014, the Biosecurity Bill

2014 was introduced into NSW Parliament, but did not pass. The NSW Government then sought further stakeholder input, which has resulted in some amendments to the Bill.

ISSUES CONSIDERED BY COMMITTEE

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

Personal physical integrity

3. Clause 52 of the Bill permits authorised officers to carry out external treatment measures in relation to individuals in emergency biosecurity situations. The Minister, in his second reading speech, suggested that outbreaks of Avian Influenza, Mad Cow Disease or the Hendra virus could be examples of future emergency biosecurity situations.
4. An external treatment measure refers to cleaning or disinfecting the external parts of an individual's body. It does not allow penetration of the individual's skin or require the individual to take any substance. Officers also cannot take samples of a person's blood, hair, saliva or any other body part or fluid.
5. Authorised officers can prohibit a person from entering or leaving a particular area until they have received an external treatment measure. Clause 54 also permits authorised officers to require individuals to submit to a visual inspection (including the exterior of their clothing and shoes) and to shake or move their hair.

Requiring individuals to undergo treatment in the form of cleaning or disinfecting their body may impact on the right to personal physical integrity. However, the Committee notes that officers are not permitted to carry out invasive treatment such as taking blood or other bodily samples. The provisions also apply in emergency situations. As such the treatment may be considered necessary to preserve an individual's health or to prevent the further spread of disease. On balance, the Committee does not consider that the proposed provisions unduly impact on personal rights and liberties.

Right against self-incrimination

6. Clauses 34 and 42 of the Bill provide that information furnished or an answer given in compliance with the Bill is not admissible in evidence against the person in criminal proceedings except in relation to obstruction offences. However, further information obtained is not inadmissible on the ground that the information had to be furnished, or the answer had to be given, or that the information furnished or answer given might incriminate the individual.
7. Clause 94 of the Bill applies in emergency situations and provides that an individual is not excused from a requirement to provide information on the ground that it may incriminate them or make them liable to a penalty. However, an authorised officer must firstly warn the person of this requirement. Information provided will generally be admissible against the individual as evidence in criminal proceedings unless they objected to providing the information at the time on the ground that it might incriminate them, or the individual was not properly warned that they could object on the basis that the answer might incriminate them.

Clauses 34, 42 and 94 of the Bill may impact on an individual's right to protect themselves against self-incrimination. The Committee notes that there are some limitations placed on these clauses, for example, clause 94 only applies in emergency situations. However, the Committee nevertheless refers these issues to Parliament for further consideration on the basis that clauses 34, 42 and 94 may interfere with the right against self-incrimination.

Search without warrant

8. Where an owner or occupier of residential premises has not complied with certain orders or directions made, or undertakings given, pursuant to the Bill, clauses 59, 74, 85, 130 and 144 empower authorised officers to enter premises and take any action in relation to the premises. However, the officer must give the person notice prior to entry. Notice is not required if entry is made with the consent of the occupier or under the authority of a search warrant.
9. The orders, directions or undertakings that may be made or given under the Bill are intended to prevent, eliminate or manage biosecurity risks. An Emergency Order, made pursuant to Part 5 of the Bill, is an example of the kind of order that may be subject to provisions authorising searches without a warrant in certain circumstances. The Secretary of the relevant Department may declare a biosecurity emergency and make an Emergency Order that specifies certain emergency zones, emergency measures, and the persons or classes of persons to whom the emergency measures apply.

The Committee notes that clauses 59, 74, 85, 130 and 144 of the Bill may impact on an individual's right to privacy in their home by permitting authorised officers to enter residential premises without a search warrant or the occupier's consent. However, the Committee notes that entry is only authorised where a person has failed to comply with an order or direction made, or an undertaking given, under the Bill. The Committee therefore makes no further comments.

Right to privacy

10. Clause 387 of the Bill provides that, despite the *Surveillance Devices Act 2007*, an owner or occupier of premises may be required to install or use a device for detecting or monitoring the presence of any biosecurity matter or other thing on their premises. However, the provision does not authorise installation or use of a device for monitoring individuals or listening to conversations. The provision also does not authorise the possession, publication or communication of a record of a private conversation obtained from the device.
11. Records of conversations obtained by the device that would contravene the *Surveillance Devices Act 2007* are inadmissible as evidence in criminal proceedings. Likewise, images of individuals are also inadmissible in criminal proceedings, except with the consent of the person.

The use of surveillance devices pursuant to clause 387 of the Bill to detect biosecurity matter on properties could impact on the privacy of individuals on the property or their neighbours. However, the Committee notes the various safeguards in place to limit the use of material obtained from such devices. The Committee therefore makes no further comments.

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

Commencement by proclamation

12. The Bill provides for commencement on a day or days to be appointed by proclamation.

The Committee prefers legislation to commence on a fixed date or on assent, particularly in relation to Bills such as this one, which may impact on rights and liberties.

Extraterritorial application of the Bill

13. Clause 5 of the Bill provides that the Bill will apply within the State and outside the State to the full extent of the extraterritorial legislative capacity of the NSW Parliament. This includes acts or transactions entered into outside the territorial limits of the State that would (apart from the Bill) be governed or otherwise affected by another jurisdiction's law.

The effect of clause 5 of the Bill is that provisions of the Bill, including the criminal provisions, may impact on individuals who are not within the territorial limits of New South Wales. However, the Committee notes that biosecurity threats, if not managed properly, could result in significant consequences for the people of New South Wales. On balance, the Committee does not consider the extraterritorial application of the Bill to be an inappropriate delegation of legislative power in these circumstances.

Henry VIII clause

14. Clauses 148 and 150 of the Bill permit the regulations to amend Schedules 3 and 4 of the Bill. Schedule 3 of the Bill lists dealings with biosecurity matter that are prohibited dealings and Schedule 4 of the Bill lists registrable dealings. Clause 149 provides that a person who engages in a prohibited dealing is guilty of an offence. Clause 151 provides that a person who engages in a registrable dealing is also guilty of an offence unless the person is a registered entity and the dealing is authorised by the person's biosecurity registration.

The Committee refers clauses 148 and 150 of the Bill to Parliament for further consideration as to whether the provisions amount to an inappropriate delegation of legislative power. The Committee generally prefers that an Act of Parliament, rather than a Regulation, amends provisions of Principal legislation. The Committee notes that any proposed Regulation seeking to amend the list of prohibited dealings and registrable dealings in Schedules 3 and 4 of the Bill would be subject to disallowance under section 41 of the *Interpretation Act 1987*. However, the Committee is concerned that Schedules 3 and 4 of the Bill relate to dealings which can be criminal offences.

2. Rural Fires Amendment (Bush Fire Prevention) Bill 2015

Date introduced	12 August 2015
House introduced	Legislative Assembly
Minister responsible	The Hon David Elliott MP
Portfolio	Emergency Services

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

- (a) to provide that persons are not guilty of offences under environmental legislation merely for carrying out bush fire hazard reduction work or vegetation clearing work if the work is carried out under, and in accordance with, the *Rural Fires Act 1997*,
- (b) to permit vegetation clearing work to be carried out in certain areas near farm sheds in order to reduce bush fire risk,
- (c) to clarify how provisions authorising vegetation clearing work apply to the removal of trees,
- (d) to ensure that the written consent of adjoining neighbours is obtained before certain vegetation clearing work is carried out.

BACKGROUND

1. This Bill amends the legislative framework of the 10/50 Vegetation Clearing Code of Practice which was introduced into New South Wales following the destruction of the 2013 bush fires. On the 1st of October 2014, the NSW Rural Fire Service announced its review of the scheme. The Bill provides further amendments requiring a landowner to obtain written consent from their neighbour if they want to remove a tree or vegetation on their property that falls within 10 metres or 50 metres of their neighbour's home. It also extends the 10/50 scheme for farm sheds.

ISSUES CONSIDERED BY COMMITTEE

The Committee has not identified any issues arising under s8(A)(1) of the Legislation Review Act 1987.

3. State Senate Bill 2015*

Date introduced	13 August 2015
House introduced	Legislative Council
Member responsible	Revd the Hon F J Nile MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to authorise the use of the term "State Senate" as a reference to the Legislative Council and "State Senator" as a reference to a Member of the Legislative Council.

BACKGROUND

1. This Bill allows for the interchange between the terms "the Honourable" and "State Senator" and between the terms "Legislative Council" and "State Senate."
2. In the Second Reading Speech, Revd the Hon Fred Nile MLC commented that the term "State Senator" is a more accurate description of the work Council members do and therefore a more suitable title.

ISSUES CONSIDERED BY COMMITTEE

The Committee makes no comment on the Bill in respect of issues set out in s8A of the *Legislation Review Act 1987*.

Part Two - Regulations

1. Government Sector Employment Amendment (Transitional Staff Arrangements)Regulation 2015

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to extend the transitional arrangements for the staff of the Internal Audit Bureau and the SAS Trustee Corporation to continue to be employed under Chapter 1A of the *Public Sector Employment and Management Act 2002* despite the repeal of that Act. This Regulation is made under the *Government Sector Employment Act 2013*, including section 88 (the general regulation-making power) and clause 2 of Schedule 4 (Savings, transitional and other provisions).

ISSUES CONSIDERED BY COMMITTEE

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

Henry VIII Clause

2. Clause 3 of the Regulation amends Schedule 4 of the *Government Sector Employment Act 2013* by maintaining the operability of a repealed Act for a further year.

The Committee generally prefers that an Act of Parliament, rather than a Regulation, amends the provisions of principal legislation. The Committee makes no further comment.

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.