



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

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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. ASSOCIATIONS INCORPORATION AMENDMENT (REVIEW) BILL 2016

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

Retrospectivity

The Committee notes that Schedule 1[9] of the Bill is drafted to have retrospective effect. However, the Committee also notes that this retrospectivity only applies so as to ensure that model constitutions adopted under the existing section 25 will be deemed as having been validly applied under the proposed section 25. Given the consequential nature of the provision, the Committee makes no further comment.

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

Commencement by Proclamation

Section 2 of the Bill provides that the Act is to commence on a day or days to be appointed by proclamation. It is the Committee's longstanding preference that Acts either commence on assent or on a fixed, future date. However, given that the Bill does not impact on personal rights and liberties, and given the administrative requirement to prepare a regulation to support the changes, the Committee makes no further comment.

2. GOVERNMENT SECTOR EMPLOYMENT LEGISLATION AMENDMENT BILL 2016

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

Lowering the threshold for misconduct in employment

Lowering the threshold for misconduct in employment could interfere with an individual's right to work. However, the Committee notes an employer has a broad range of actions they can take against an employee who has engaged in misconduct – from cautioning the employee to terminating their employment without giving them the opportunity to resign. As such, action can be tailored to individuals on a case by case basis. The Committee therefore makes no further comments.

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

Commencement by proclamation

While there is a fixed date for the commencement of this Bill, there is also scope for certain provisions to commence by proclamation. However, any such proclamation cannot appoint a date earlier than the fixed date for commencement of the provisions aligning employment arrangements for health, police force and transport workers with the general public service. As such, these workers are given some certainty that the amendments will not commence before a set date. The Committee therefore makes no further comments.

3. LIMITATION AMENDMENT (CHILD ABUSE) BILL 2016

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

Removal of limitation period

The Bill removes any limitation period for an action for damages relating to death or personal injury resulting from child abuse. However, the amendments will not permit an action to be re-opened if it has already been determined by the court on the merits, or settled by the parties. The Committee also highlights that the amendments benefit child abuse victims. The Committee notes there can be a delay of decades before such abuse is reported. The Committee therefore makes no further comments.

PART TWO - REGULATIONS**1. CRIMES (FORENSIC PROCEDURES) AMENDMENT (DNA DATABASE) REGULATION 2016**

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

Privacy

The DNA information of former offenders and registrable persons is sensitive health information. The Committee notes that using and disclosing such information could sometimes interfere with an individual's right to privacy. However, the NSW Forensic and Analytical Science Service will be using this information for purposes connected to the *Crimes (Forensic Procedures) Act 2000* whereby untested individuals can, in some cases, be required to undergo certain forensic procedures. The Committee therefore makes no further comment.

2. HEAVY VEHICLE (ADOPTION OF NATIONAL LAW) AMENDMENT (PENALTIES) REGULATION 2016

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

Increased penalties

Certain penalties for offences against the *Heavy Vehicle National Law (NSW)* have increased; sometimes by double. In this instance, the Committee highlights that while the percentage increases are significant, the actual increases are not. The Committee also notes that the amendments relate to a National Law, requiring the co-operation of various jurisdictions. The Committee therefore makes no further comments.

Part One – Bills

1. Associations Incorporation Amendment (Review) Bill 2016

Date introduced	16 February 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Innovation and Better Regulation

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Associations Incorporation Act 1009* to give effect to the recommendations for amendment made in the statutory review of that Act tabled in Parliament on 17 November 2015

BACKGROUND

2. This Bill is the result of the statutory review of the *Associations Incorporation Act 2009*. The review of the Act was completed and tabled in both Houses of Parliament on 17 November 2015.
3. The requirement for the Minister to review the Act is imposed by the Act itself. The purpose of the review is to determine whether the policy objectives of the Act remain valid with respect to incorporated associations, and whether the terms of the Act remain appropriate for securing those objectives.
4. In its review, the Government engaged in consultations with relevant stakeholders in 2013 and again in 2015. The review recommended 12 amendments to the Act, all of which are to be adopted by the Government through this Bill and through the associated regulation to be made later in the year.

ISSUES CONSIDERED BY COMMITTEE

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

Retrospectivity

5. Schedule 1[9] of the Bill seeks to amend section 25 of the Act, a provision that relates to the application of the model constitution to incorporated associations. Schedule 1[31] provides that this amendment extends to the constitutions of incorporated associations registered before the commencement of the section 25 substitution.

The Committee notes that Schedule 1[9] of the Bill is drafted to have retrospective effect. However, the Committee also notes that this retrospectivity only applies so as to ensure that model constitutions adopted under the existing section 25 will be deemed as having been validly applied

under the proposed section 25. Given the consequential nature of the provision, the Committee makes no further comment.

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

Commencement by Proclamation

Section 2 of the Bill provides that the Act is to commence on a day or days to be appointed by proclamation. It is the Committee's longstanding preference that Acts either commence on assent or on a fixed, future date. However, given that the Bill does not impact on personal rights and liberties, and given the administrative requirement to prepare a regulation to support the changes, the Committee makes no further comment.

2. Government Sector Employment Legislation Amendment Bill 2016

Date introduced	17 February 2016
House introduced	Legislative Assembly
Member responsible	Mr Ray Williams MP on behalf of The Hon. Mike Baird MP
Portfolio	Premier and Minister for Western Sydney

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
 - (a) to align employment arrangements for senior executives in the NSW Health Service, the NSW Police Force and the Transport Service of NSW generally with the new employment arrangements for Public Service senior executives under the *Government Sector Employment Act 2013* (the GSE Act),
 - (b) to align employment arrangements for employees of the NSW Police Force who are not police officers (ie administrative employees) generally with the new employment arrangements for non-executive employees of the Public Service under the GSE Act,
 - (c) to amend the GSE Act to make further provision with respect to misconduct and other matters,
 - (d) to make amendments of a minor or consequential nature to certain other legislation.

BACKGROUND

2. The amendments proposed by the Bill are part of reforms first commenced in 2011, when the Government established the Commission of Audit, led by Dr Kerry Schott, to develop a framework for the future of the NSW public sector.
3. The Commission of Audit's report noted the benefits of a single, sector-wide executive structure for the NSW public service. While some reforms of this nature have already taken place, this Bill furthers these reforms by aligning the police, transport and health executive services with that of the general public service.

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

Lowering the threshold for misconduct in employment

4. Under section 69 of the *Government Sector Employment Act 2013*, an employer can take action against an employee who has been convicted of a serious offence. A serious offence is one punishable by imprisonment for 12 months or more.
5. The Bill will also allow employers to take action against employees who have a finding of guilt made against them in relation to a serious offence. This will now include, for example, matters dealt with under section 10 of the *Crimes (Sentencing Procedure) Act*

1999 where the court finds a person guilty of an offence, but does not proceed to a conviction and dismisses the charge.

6. The definition of a 'serious offence' will also be updated to include offences committed outside NSW that would also be offences in NSW if committed here (see Schedule 1, clauses [52] and [53] of the Bill).

Lowering the threshold for misconduct in employment could interfere with an individual's right to work. However, the Committee notes an employer has a broad range of actions they can take against an employee who has engaged in misconduct – from cautioning the employee to terminating their employment without giving them the opportunity to resign. As such, action can be tailored to individuals on a case by case basis. The Committee therefore makes no further comments.

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

Commencement by proclamation

7. While clause 2 of the Bill provides that the Act generally commences on 1 January 2017, the Governor may appoint a day or days by proclamation for the commencement of certain provisions of the Act.
8. However, any such proclamation cannot appoint a date earlier than 1 January 2017 for the commencement of Schedules 2, 3, 4, 5.4 [1]-[3] or 5.6.

While there is a fixed date for the commencement of this Bill, there is also scope for certain provisions to commence by proclamation. However, any such proclamation cannot appoint a date earlier than the fixed date for commencement of the provisions aligning employment arrangements for health, police force and transport workers with the general public service. As such, these workers are given some certainty that the amendments will not commence before a set date. The Committee therefore makes no further comments.

3. Limitation Amendment (Child Abuse) Bill 2016

Date introduced	16 February 2016
House introduced	Legislative Assembly
Member responsible	The Hon. Gabrielle Upton MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Limitation Act 1969* (the Act) to provide that there is to be no limitation period for an action for damages that relates to death or personal injury resulting from child abuse (a child abuse action).
2. The amendments define child abuse to mean abuse perpetrated against a person when the person is under 18 that is sexual abuse, serious physical abuse, or other abuse perpetrated in connection with sexual abuse or serious physical abuse.

BACKGROUND

3. The Bill responds to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse in September 2015 about removing limitation periods that apply to claims for damages resulting from child sexual abuse.
4. The Bill is also informed by community consultation on this issue. In January 2015, the NSW Department of Justice released a discussion paper on limitation period reform options and received 48 submissions from a broad range of stakeholders.

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

Removal of limitation period

5. The Bill proposes that actions for damages relating to the death of, or personal injury to, a person from child abuse can be brought at any time. Such actions will not be subject to any limitation period.
6. Child abuse is defined to include sexual abuse, serious physical abuse or any other connected abuse against a person under 18 years of age (see Schedule 1, clause [2] of the Bill, which inserts a new section 6A into the *Limitation Act 1969*).
7. The new provisions will extend to certain causes of action that arose before the provisions commence and apply where:
 - the relevant limitation period has already expired;
 - an action has been commenced previously on the cause of action; or
 - judgment on the cause of action has previously been given on the ground that the action was statute barred (see Schedule 1, clause [4] of the Bill,

which inserts new provisions into Schedule 5, Part 3 of the *Limitation Act 1969*).

The Bill removes any limitation period for an action for damages relating to death or personal injury resulting from child abuse. However, the amendments will not permit an action to be re-opened if it has already been determined by the court on the merits, or settled by the parties. The Committee also highlights that the amendments benefit child abuse victims. The Committee notes there can be a delay of decades before such abuse is reported. The Committee therefore makes no further comments.

Part Two - Regulations

1. Crimes (Forensic Procedures) Amendment (DNA Database) Regulation 2016

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are:
 - (a) to declare the Secretary of the Ministry of Health to be the person responsible for the care, control and management of the DNA database system established and maintained under the *Crimes (Forensic Procedures) Act 2000*, and
 - (b) to allow access to, and disclosure of, information stored on that DNA database system for the purpose of allowing the NSW Forensic and Analytical Science Service to check whether or not the DNA profile of a person suspected of being an untested former offender or untested registrable person (within the meaning of that Act) is already on the offenders index of that DNA database system.
2. This Regulation is made under the *Crimes (Forensic Procedures) Act 2000*, including the definition of **responsible person** in section 3 (1) and sections 92 (2) (j) (Use of information on DNA database system), 109 (2) (g) (Disclosure of information) and 118 (the general regulation-making power).

ISSUES CONSIDERED BY COMMITTEE

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

Privacy

3. This Regulation amends clause 14 of the *Crimes (Forensic Procedures) Regulation 2014* to allow the NSW Forensic and Analytical Science Service to access the DNA database held by the Ministry of Health to check whether the DNA profiles of individuals who may be untested former offenders or untested registrable persons are in the offenders index on the database (see Schedule 1, clause [3] of the Amending Regulation).
4. An untested former offender is a person:
 - who has served a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention; and
 - who is served with a court attendance notice in respect of an indictable offence; and
 - whose DNA profile appears not to be on the offenders index in the DNA database system (see section 75A of the *Crimes (Forensic Procedures) Act 2000*).
5. An untested registrable person is a person:

- who is a registrable person required to comply with the reporting obligations under the *Child Protection (Offenders Registration) Act 2000*; and
 - whose DNA profile appears not to be on the offenders index in the DNA database system (see section 75P of the *Crimes (Forensic Procedures) Act 2000*).
6. The Regulation also amends clause 15 of the *Crimes (Forensic Procedures) Regulation 2014* to allow persons responsible for the DNA database to disclose information stored on the database for the purpose of allowing the NSW Forensic and Analytical Science Service to check whether the DNA profiles of these kind of offenders are on the database (see Schedule 1, clause [4] of the Amending Regulation).
7. If an untested former offender or an untested registrable person is not on the offenders index in the DNA database, there are provisions in Parts 7A and 7B of the *Crimes (Forensic Procedures) Act 2000* to require the carrying out of certain forensic procedures on such persons in certain circumstances.

The DNA information of former offenders and registrable persons is sensitive health information. The Committee notes that using and disclosing such information could sometimes interfere with an individual's right to privacy. However, the NSW Forensic and Analytical Science Service will be using this information for purposes connected to the *Crimes (Forensic Procedures) Act 2000* whereby untested individuals can, in some cases, be required to undergo certain forensic procedures. The Committee therefore makes no further comment.

2. Heavy Vehicle (Adoption of National Law) Amendment (Penalties) Regulation 2016

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to prescribe, and increase certain penalties for, offences against the *Heavy Vehicle National Law (NSW)*, and prescribe an offence against the *Heavy Vehicle (Fatigue Management) National Regulation (NSW)*, for which an infringement notice may be issued.
2. This Regulation is made under the *Heavy Vehicle (Adoption of National Law) Act 2013*, including sections 12(6) and 28 (the local regulation-making power).

ISSUES CONSIDERED BY COMMITTEE

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

Increased penalties

3. This Regulation amends Schedule 1 of the *Heavy Vehicle (Adoption of National Law) Regulation 2013* to prescribe and increase certain penalties for offences against the *Heavy Vehicle National Law (NSW)*.
4. In some cases, the existing penalties for offences have increased quite significantly, or even doubled. For example, the penalty for an offence against section 297(2) of the National Law, which relates to information required to be recorded after starting work, has doubled from \$315 to \$630. Likewise, the penalty for an offence against section 529, relating to using a defective heavy vehicle contrary to a vehicle defect notice, has also doubled.
5. The penalties for offences against sections 81(1), 81(2), 81(3) and 488 of the National Law have also increased from \$315 to \$420.

Certain penalties for offences against the *Heavy Vehicle National Law (NSW)* have increased; sometimes by double. In this instance, the Committee highlights that while the percentage increases are significant, the actual increases are not. The Committee also notes that the amendments relate to a National Law, requiring the co-operation of various jurisdictions. The Committee therefore makes no further comments.

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.