



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. CRIMES AND ANTI-DISCRIMINATION LEGISLATION AMENDMENT (VILIFICATION) BILL 2016*

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

2. MARINE LEGISLATION AMENDMENT BILL 2016

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

Property rights and limiting the discretion of the judiciary

Forfeiture of a vessel to the Crown will apply automatically once an offender meets the threshold criteria for forfeiture. The Committee notes that this type of automatic sentencing impacts on the role of the judiciary to tailor an appropriate punishment to the circumstances of each individual case. However, the Committee notes the public safety objectives of the Bill and that the court has discretion to commute the forfeiture to impoundment in circumstances of extreme hardship. An offender also has some appeal rights. The Committee makes no further comments.

Personal physical integrity and arrest without warrant

The provisions in the Bill relating to drug and alcohol testing may impact on the right to personal physical integrity and other possible rights by allowing officers to use such force as may be necessary to require persons to undergo certain tests, including blood tests. However, the Committee notes that there are specified circumstances in which a person will not be required to undergo a test, such as if it is detrimental to their health. The Committee also notes that the rights of vessel operators who have failed drug and alcohol tests, or who have refused to take such tests, need to be balanced against the broader rights of the public to safely use and enjoy the waterways. The Committee therefore makes no further comments.

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

Commencement by proclamation

The Committee generally prefers legislation to commence on a fixed date, or on assent, rather than by proclamation. However, the Committee notes that the Bill proposes a number of different reforms to marine legislation and it may be useful to have some flexibility with regards to the start date of some of those reforms.

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

Matters which should be considered by the Parliament

The Committee notes that provisions specifying the circumstances in which authorities may sell an impounded vessel will be in the regulations rather than the Act. The Committee questions in what kind of circumstances it would be appropriate to sell an impounded vessel given that the authorities may only impound vessels for up to three months. The Committee refers to Parliament for consideration whether these matters should be included in the

principal legislation rather than the regulations, so they are subject to appropriate parliamentary scrutiny.

3. POINT TO POINT TRANSPORT (TAXIS AND HIRE VEHICLES) BILL 2016

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

Strict liability

The Committee notes that while the Bill introduces offences with financial implications that are strict liability offences, it is also accepted that these provisions are aimed at ensuring compliance with the regulatory framework for the point to point transport industry. The Committee makes no further comment.

Right against self-incrimination

Clause 124 of the Bill impacts on the right against self-incrimination by requiring individuals to provide records, information or answers even though it might incriminate them or make them liable to a penalty. It also interferes with this right by providing that certain self-incriminating information may be admissible in evidence against the person in criminal proceedings. The provision includes some safeguards, such as limiting the kinds of proceedings in which evidence of this nature can be admissible and warning individuals that they can object to providing self-incriminating information.

The Committee notes that similar provisions which abrogate the privilege against self-incrimination occur frequently in legislation in order to assist agencies investigate crime or maintain regulatory schemes. In this instance, the Committee considers the provisions justified as they will assist Authorised Officers under the new regulatory scheme to conduct investigations and identify risks to the safety of the public. The Committee makes no further comment.

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

Commencement by proclamation

The Committee generally prefers legislation to commence on a fixed date, or on assent, rather than by proclamation. However, the Committee notes that the Bill proposes a new regulatory framework for the point to point transport industry and as such may require flexibility with regards to commencement of specific provisions.

Part One – Bills

1. Crimes and Anti-Discrimination Legislation Amendment (Vilification) Bill 2016*

Date introduced	2 June 2016
House introduced	Legislative Assembly
Member responsible	Mr Paul Lynch MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to make amendments to the *Crimes Act 1900* and the *Anti-Discrimination Act 1977* in relation to racial, transgender, homosexual and HIV/AIDS vilification. This Bill has been prepared in response to the report of the Legislative Council Standing Committee on Law and Justice entitled *Racial vilification law in New South Wales*. The Bill deals with the following:
 - (a) moves the offence of serious racial, transgender, homosexual or HIV/AIDS vilification by means of threat or incitement of physical harm into the *Crimes Act 1900* from the *Anti-Discrimination Act 1977*,
 - (b) in doing so, removes the requirement that the Attorney General must give consent to a prosecution for that offence,
 - (c) extends the time within which prosecutions for such offences may be commenced to not later than 12 months from the date when the offence was alleged to have been committed (rather than 6 months, which is the limitation period that currently applies under the *Criminal Procedure Act 1986*),
 - (d) brings together into a new Part (proposed Part 4H) all the provisions of the *Anti-Discrimination Act 1977* dealing with racial, transgender, homosexual and HIV/AIDS vilification and makes those provisions consistent,
 - (e) clarifies that unlawful vilification under the *Anti-Discrimination Act 1977* occurs when a person, by a public act, intentionally or recklessly promotes (rather than incites) hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on racial, transgender, homosexual and HIV/AIDS grounds,
 - (f) clarifies which public acts constitute such unlawful vilification,
 - (g) provides that the proposed Part applies whether or not the person or members of the group vilified have the characteristic that was the ground for the promotion of hatred, contempt or ridicule concerned,

- (h) provides that the President of the Anti-Discrimination Board, after accepting a vilification complaint under the *Anti-Discrimination Act 1977*, is to refer the complaint to the Commissioner of Police if the President considers that the offence of serious racial, transgender, homosexual or HIV/AIDS vilification may have been committed (rather than investigating the complaint first and then referring such a complaint to the Attorney General).

BACKGROUND

- 2. As stated above, the Bill has been prepared in response to the recommendations of the Legislative Council Standing Committee on Law and Justice in its report, *Racial vilification law in New South Wales*, dated December 2013. The inquiry was referred to the Committee by the then Premier, the Hon. Barry O'Farrell, in November 2012. The Committee received 45 submissions and held public hearings.
- 3. The Bill also implements a number of policy commitments made by the Opposition.
- 4. Mr Lynch, in his Second Reading Speech, highlights that the Bill makes changes to various provisions, including section 20D of the *Anti-Discrimination Act 1977*, which contains an offence for serious racial vilification. However, Mr Lynch notes that there has never been a prosecution or conviction under the existing section, despite more than 30 referrals to the Director of Public Prosecutions.

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.

2. Marine Legislation Amendment Bill 2016

Date introduced	31 May 2016
House introduced	Legislative Council
Minister responsible	The Hon. Duncan Gay MLC
Portfolio	Roads, Maritime and Freight

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Marine Safety Act 1998* (the Marine Act) and the *Ports and Maritime Administration Act 1995* (the Ports Act) to:
 - (a) introduce new offences into the Marine Act for operating a vessel in a menacing manner, and
 - (b) provide for the seizure, impoundment or forfeiture of recreational vessels if an authorised officer reasonably believes certain serious offences have been committed, and
 - (c) allow for random drug testing of vessel operators, and
 - (d) provide consistency in penalties and disqualification periods for drug and alcohol offences under roads and maritime law, and
 - (e) clarify and streamline marine compliance and investigation powers, and
 - (f) establish a scheme for camera recorded offences, and
 - (g) enable marine exclusion zones to be declared for special events, and
 - (h) provide for the management of wharves, moorings, port facilities and works, and
 - (i) make other consequential changes to give effect to recommendations made during the statutory review of the Marine Act by the Maritime Management Centre and Transport for NSW, and
 - (j) save any provisions from the *Maritime Services Act 1935* and the regulations under that Act that are still in use.

BACKGROUND

2. The Minister's Second Reading Speech highlights that the main purposes of the Bill are to enhance enforcement, improve the safety and amenity of waterways and consolidate marine legislation.

3. The Bill includes some improvements resulting from the review of the *Marine Safety Act 1998* in 2014, which involved extensive consultation. The proposals in the Bill are also informed by the Regional Boating Plans, which were finalised in 2015.
4. In addition, the Bill incorporates reforms arising from community concerns about antisocial and menacing behaviour by some jet ski users, particularly in the south of Sydney.
5. Roads and Maritime Services, the Department of Justice, NSW Police Marine Area Command and the Marine Advisory Council have been consulted in developing the Bill.

ISSUES CONSIDERED BY COMMITTEE

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

Property rights and limiting the discretion of the judiciary

6. The Bill proposes that vessels will be forfeited to the Crown in certain circumstances. For example, an authorised officer will be permitted to seize a recreational vessel if they reasonably believe the user has committed a specified offence. Examples of relevant offences include operating a vessel in a menacing manner or offences involving the death of, or grievous bodily harm to, another person. Vessels may be impounded by RMS or the Police for up to three months (see proposed sections 19A, 19D and 19I of the *Marine Safety Act 1998*).
7. If a vessel is used in connection with a second or subsequent offence within a five year period, the vessel is forfeited to the Crown on the finding of guilt. This is in addition to any other penalty that may be imposed for the offence. However, any forfeiture is taken to be part of the penalty for the purposes of any appeal rights (see proposed section 19F of the *Marine Safety Act 1998*).
8. Apart from seizing a vessel that may have been used in committing an offence, an authorised officer can alternatively require the owner to produce the vessel at a particular place. Vessels seized or produced may be impounded by the Police or RMS (see proposed sections 19A and 19D of the *Marine Safety Act 1998*).
9. An owner of a recreational vessel may be guilty of an offence if they fail to move their vessel or comply with a production notice without reasonable excuse. If the owner fails to comply with a second notice, the vessel will be forfeited to the Crown (see proposed section 19E of the *Marine Safety Act 1998*).
10. If the court is satisfied that the forfeiture of a vessel in any of the circumstances described above would cause extreme hardship to its owner or any other person, the court can commute the forfeiture to a period of impounding (see proposed section 19G of the *Marine Safety Act 1998*).

Forfeiture of a vessel to the Crown will apply automatically once an offender meets the threshold criteria for forfeiture. The Committee notes that this type of automatic sentencing impacts on the role of the judiciary to tailor an appropriate punishment to the circumstances of each individual case. However, the Committee notes the public safety objectives of the Bill and that the court has discretion to commute the forfeiture to impoundment in circumstances of

extreme hardship. An offender also has some appeal rights. The Committee makes no further comments.

Personal physical integrity and arrest without warrant

11. The Bill proposes to re-work Schedule 1 of the *Marine Safety Act 1998*. This includes re-making, with amendments and additions in some cases, provisions relating to drug and alcohol testing. In particular, there are various provisions empowering authorised officers to arrest an individual without a warrant after:
 - (a) a failed breath test;
 - (b) a failed oral fluid test;
 - (c) a failed sobriety assessment; or
 - (d) a fatal accident.
12. Authorised officers may use 'such force as may be necessary' to take individuals to a police station, hospital or other place and detain them until they submit to a breath analysis, oral fluid test or blood test or provide a urine sample, depending on the circumstances (see for example proposed Schedule 1, clauses 4, 8, 13 and 15 of the Bill).
13. The Bill also re-instates an existing provision which provides that a medical practitioner is under a duty to take a blood sample from a patient arriving at hospital following an accident, whether or not the patient consents to the taking of that sample (see proposed Schedule 1, clause 12 of the Bill).
14. However, the Bill also contains a list of circumstances in which an authorised officer cannot require a person to submit to a test, analysis or assessment, or provide a sample, such as:
 - (a) unless the medical practitioner in charge of a patient in hospital for medical treatment does not object on the grounds that compliance would be prejudicial to the person's treatment; or
 - (b) in relation to taking a sample from an accident patient, if an authorised sample taker has objected on the basis that compliance would be dangerous to the person's health; or
 - (c) if it appears to the officer that it would be dangerous to the person's medical condition due to their injuries (see proposed Schedule 1, clause 2 of the Bill).

The provisions in the Bill relating to drug and alcohol testing may impact on the right to personal physical integrity and other possible rights by allowing officers to use such force as may be necessary to require persons to undergo certain tests, including blood tests. However, the Committee notes that there are specified circumstances in which a person will not be required to undergo a test, such as if it is detrimental to their health. The Committee also notes that the rights of vessel operators who have failed drug and alcohol tests, or who have refused to take such tests, need to be balanced against the broader rights of the public to safely use and enjoy the waterways. The Committee therefore makes no further comments.

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

Commencement by proclamation

15. Clause 2 of the Bill provides that the Act commences on a day or days to be appointed by proclamation.

The Committee generally prefers legislation to commence on a fixed date, or on assent, rather than by proclamation. However, the Committee notes that the Bill proposes a number of different reforms to marine legislation and it may be useful to have some flexibility with regards to the start date of some of those reforms.

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

Matters which should be considered by the Parliament

16. As stated earlier in this report, an authorised officer will be permitted to seize vessels in certain circumstances and the Police or RMS will be able to impound those vessels for up to three months (see proposed sections 19A, 19D and 19I of the *Marine Safety Act 1998*).
17. The Police or RMS may sell an impounded or forfeited vessel in circumstances to be prescribed in the regulations. The regulations may also include provisions entitling persons to be paid proceed from the sale (see proposed section 19M of the *Marine Safety Act 1998*).

The Committee notes that provisions specifying the circumstances in which authorities may sell an impounded vessel will be in the regulations rather than the Act. The Committee questions in what kind of circumstances it would be appropriate to sell an impounded vessel given that the authorities may only impound vessels for up to three months. The Committee refers to Parliament for consideration whether these matters should be included in the principal legislation rather than the regulations, so they are subject to appropriate parliamentary scrutiny.

3. Point to Point Transport (Taxis and Hire Vehicles) Bill 2016

Date introduced	2 June 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. Andrew Constance MP
Portfolio	Transport and Infrastructure

PURPOSE AND DESCRIPTION

1. The objects of this Bill are to provide for the following matters:
 - (a) the safety duties and safety standards for providers of taxi services and of booking services for taxi and hire vehicle services, as well as for taxi and hire vehicle owners and drivers and taxi licence holders,
 - (b) the authorisation of providers of taxi services and of booking services for taxi and hire vehicle services,
 - (c) licences for taxis and processes for the determination of taxi licence numbers,
 - (d) maximum fares for passenger services and schemes for Government subsidised travel, including fare concessions,
 - (e) enforcement of safety and other requirements, including through improvement and prohibition orders, enforceable undertakings and auditing of providers,
 - (f) the functions of the Point to Point Transport Commissioner (the Commissioner) and enforcement powers of authorised officers,
 - (g) to establish a Taxis and Hire Vehicles Industries Assistance Panel to determine procedures and criteria for disbursement of assistance funds for existing holders of indefinite taxi and hire vehicle licences, as well as arrangements for an industry assistance package,
 - (h) to impose a passenger service levy on particular transactions that is to be paid by providers of booking services and taxi services,
 - (i) consequential repeals and amendments, savings and transitional provisions and other ancillary matters.

BACKGROUND

2. This Bill continues the reforms to the point to point transport industry following the report published in November 2015 by the Point to Point Taskforce. The Taskforce was requested to examine the future sustainability of the taxis, hire cars and other emerging point to point transport providers.

3. The reforms contained in this Bill primarily relate to the establishment of a new regulatory framework, including a dedicated regulator, the Commissioner for point to point transport.

ISSUES CONSIDERED BY COMMITTEE

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

Strict liability

4. The Bill introduces a number of strict liability clauses in relation to offences. That is, only particular acts or omissions need to be provided to meet the criminal threshold, and the Crown is not required to demonstrate intent, negligence or recklessness on the part of the accused.
5. For example, under proposed section 17 a person commits an offence if they have a safety duty and fail to comply with the duty. The maximum penalty is \$50 000 for an individual or \$500 000 for a body corporate. In addition, under proposed section 24 the provider of a passenger service or booking service must report to the Commissioner any notifiable occurrence that affects the service. The maximum penalty for non-compliance is 100 penalty units (\$11 000).
6. In these and other instances, the Bill has not provided exceptions or defences for failure to comply with the statutory requirements. However, the Committee notes that these types of provisions are not uncommon in regulatory settings.

The Committee notes that while the Bill introduces offences with financial implications that are strict liability offences, it is also accepted that these provisions are aimed at ensuring compliance with the regulatory framework for the point to point transport industry. The Committee makes no further comment.

Right against self-incrimination

7. If a person is required to provide documents or information or answer a question in accordance with the Bill, they are not excused from this requirement on the basis that the document, information or answer might incriminate them or make them liable to a penalty.
8. Potentially self-incriminating information or answers given in compliance with a requirement under the Bill may be admissible against that person in proceedings for an offence under proposed section 126 of the Bill, which deals with offences relating to inspections. Information or answers given in compliance with a requirement under the Bill will not be admissible in any other criminal proceedings if the person objected at the time to giving the information on the ground that it might incriminate them, or they were not warned that they could object.
9. A document provided by a person in compliance with a requirement under the Bill is not inadmissible in evidence against the person in criminal proceedings on the ground that the document might incriminate them.
10. If a person provides a document or information or gives an answer in compliance with the Bill, any further information obtained is not inadmissible on the ground that:

- (a) the document, information or answer had to be given, or
- (b) the document, information or answer given might incriminate the person (proposed clause 124 of the Bill).

Clause 124 of the Bill impacts on the right against self-incrimination by requiring individuals to provide records, information or answers even though it might incriminate them or make them liable to a penalty. It also interferes with this right by providing that certain self-incriminating information may be admissible in evidence against the person in criminal proceedings. The provision includes some safeguards, such as limiting the kinds of proceedings in which evidence of this nature can be admissible and warning individuals that they can object to providing self-incriminating information.

The Committee notes that similar provisions which abrogate the privilege against self-incrimination occur frequently in legislation in order to assist agencies investigate crime or maintain regulatory schemes. In this instance, the Committee considers the provisions justified as they will assist Authorised Officers under the new regulatory scheme to conduct investigations and identify risks to the safety of the public. The Committee makes no further comment.

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

Commencement by proclamation

- 11. Clause 2 of the Bill provides that a majority of the provisions in the Act will not commence until a day or days to be appointed by proclamation.

The Committee generally prefers legislation to commence on a fixed date, or on assent, rather than by proclamation. However, the Committee notes that the Bill proposes a new regulatory framework for the point to point transport industry and as such may require flexibility with regards to commencement of specific provisions.

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.