



## Legislation Review Committee

### LEGISLATION REVIEW DIGEST

No. 29/56 – 15 November 2016



New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Assembly.

Legislation Review Committee Legislation Review Digest, Legislation Review Committee, Parliament NSW [Sydney, NSW]: The Committee, 2016, 33p 30 cm

Chair: Mr Michael Johnsen MP

15 November 2016

ISSN 1448-6954

1. Legislation Review Committee – New South Wales

2. Legislation Review Digest No. 29 of 56

I Title.

II Series: New South Wales. Parliament. Legislation Review Committee Digest; No. 29 of 56

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

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# Membership

<b>CHAIR</b>	Mr Michael Johnsen MP, Member for Upper Hunter
<b>DEPUTY CHAIR</b>	Mr Lee Evans MP, Member for Heathcote
<b>MEMBERS</b>	Ms Melanie Gibbons MP, Member for Holsworthy Mr Alister Henskens SC MP, Member for Ku-ring-gai Mr David Mehan MP, Member for The Entrance The Hon Shaoquett Moselmane MLC The Hon Gregory Pearce MLC Mr David Shoebridge MLC
<b>CONTACT DETAILS</b>	Legislation Review Committee Parliament of New South Wales Macquarie Street Sydney NSW 2000
<b>TELEPHONE</b>	02 9230 2096 / 02 9230 3382
<b>FACSIMILE</b>	02 9230 3309
<b>E-MAIL</b>	<a href="mailto:legislation.review@parliament.nsw.gov.au">legislation.review@parliament.nsw.gov.au</a>
<b>URL</b>	<a href="http://www.parliament.nsw.gov.au/lrc">www.parliament.nsw.gov.au/lrc</a>

# 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. ABORIGINAL LAND RIGHTS AMENDMENT (LOCAL ABORIGINAL LAND COUNCILS) BILL 2016

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

#### *Commencement by proclamation*

The Committee generally prefers Acts to commence on a fixed date, or on assent, rather than by proclamation. However, as the Committee has not identified any potential infringements on rights and liberties in this Bill, the Committee makes no further comments.

### 2. BIODIVERSITY CONSERVATION BILL 2016; LOCAL LAND SERVICES AMENDMENT BILL 2016

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

#### *Reversal of onus of proof*

The Committee notes that in relation to certain offences this presumption applies only when the defendant is carrying out an unlawful activity, for example, development without development consent or clearing not authorised under the *Local Land Services Act 2013*. Where the defendant is carrying out an activity lawfully, this presumption does not apply.

This provision mirrors the existing offence provisions in ss 118C, 118D, and 175 of the *National Parks and Wildlife Act* and ss 95 and 100 of the *Threatened Species Conservation Act*.

In these cases, a defendant need only prove that they did not have the requisite knowledge on the balance of probabilities. This is a significantly lesser standard of proof than that required by the prosecution, that is, beyond reasonable doubt. The prosecutor must still prove each element of the alleged offence beyond reasonable doubt.

The Committee acknowledges the environmental protection principles of the Bill. However, the Committee refers clauses 2.4 and 13.29 of the Bill to Parliament for further consideration as to whether reversing the onus of proof in certain circumstances is justified.

#### *Arrest without warrant or charge*

The Committee notes that a person who refuses to state their name and address to an authorised officer, or who provides false information, may be taken before a court to be dealt with according to law. Such action can be taken without charge and without any other warrant other than the Bill.

#### *Right against self-incrimination*

Clause 12.23 of the Biodiversity Conservation Bill 2016 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 providing for individuals to be warned 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. Despite the frequent occurrence of similar provisions, the Committee refers clause 12.23 of the Biodiversity Conservation Bill 2016 to Parliament for further consideration in relation to whether the interference with the right against self-incrimination is justified in the circumstances.

The Committee notes that while a person is not excused from a requirement to answer questions or furnish information on the grounds of self-incrimination, when this is required in respect of a native vegetation offence under Part 5A of the Local Land Services Act, this information cannot be used against the person in criminal proceedings. There is no requirement for a person to make an objection; this is an automatic protection.

#### *Orders applying to trivial offences*

Part 13, Division 3 of the Biodiversity Conservation Bill 2016 empowers the court to make a number of orders where the court finds an offence proved. These orders are in addition to any penalty that may be imposed for the offence and can apply to situations where the court also makes an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* to dismiss a charge.

The Committee notes that some of the orders may be appropriate for persons who have been dealt with under section 10 of the *Crimes (Sentencing Procedure) Act 1999*. However, in the Committee's view, other orders, such as requiring an offender to publicise their offence, appear to contradict the intention of the scheme established under section 10. This scheme is normally reserved for more trivial offences and convictions are not recorded. Such individuals have additional rights under existing NSW laws, such as the *Criminal Records Act 1991*.

The Committee refers Part 13, Division 3 of the Biodiversity Conservation Bill 2016 to Parliament for further consideration as to whether the extension of those provisions to offences subject to section 10 of the *Crimes (Sentencing Procedure) Act 1999* unfairly conflicts with existing rights.

**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, so the Executive does not have unfettered control over the commencement date. However, the Committee acknowledges that the Biodiversity Conservation Bill 2016 and Local Land Services Amendment Bill 2016 propose a new scheme for biodiversity and native vegetation land management. As such, some flexibility may be desirable with respect to the commencement date to ensure new administrative measures can be put in place in advance.

#### *Regulations creating offences with imprisonment as a penalty*

The Committee highlights that pursuant to clause 2.7 of the Biodiversity Conservation Bill 2016, regulations can create offences with a penalty of imprisonment for up to two years. The Committee notes that regulations can be subject to disallowance in Parliament under section 41 of the Interpretation Act 1987. Nevertheless, the Committee is concerned that the Executive will be empowered to create offences with significant penalties without the same degree of parliamentary scrutiny as offences proposed in a Bill. The Committee acknowledges

the environmental protection principles of the Bill. However, the Committee refers clause 2.7 of the Biodiversity Conservation Bill 2016 to Parliament for further consideration as to whether offences with a penalty of imprisonment should be included in principal legislation rather than regulations.

*Henry VIII clause*

Clause 2.19 of the Biodiversity Conservation Bill 2016 allows the regulations to update certain schedules to the Bill in the future. The Committee generally prefers Acts to be amended by principal legislation, rather than by regulations. However, in this instance, schedules 5 and 6 to the Bill list protected plants and animals. As such, updating these schedules will not impact on personal rights and liberties. The Committee makes no further comment.

**3. FISHERIES MANAGEMENT AMENDMENT (SHARK MANAGEMENT TRIALS) BILL 2016**

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

**4. GREYHOUND RACING (REPEAL OF BAN) BILL 2016\***

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

**5. HUMAN TISSUE AMENDMENT (TRAFFICKING IN HUMAN ORGANS) BILL 2016\***

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

*Increased penalties*

The Bill revises some existing offences and creates aggravated versions of those offences. The offences currently provided for in the *Human Tissue Act 1983* carry a maximum penalty of \$4,400 and/or imprisonment for 6 months. The new aggravated offences will carry a maximum penalty of imprisonment for 25 years. The Committee notes that the new aggravated offences involve a significant increase in existing penalties under the Act. However, the Committee also acknowledges that other serious offences under NSW laws that result in the death of a person or threaten their life also generally carry significant maximum penalties. The Committee therefore makes no further comments.

*Extraterritorial application of criminal laws*

The Committee notes that NSW residents who commit crimes under the Bill while in another State or Territory of Australia or overseas will be liable to punishment in NSW. This may impact on rights relating to the criminal process. For example, a person may find they are liable to punishment for an offence in NSW along with the jurisdiction in which they committed the offence, which could lead to double punishment or vast differences in the criminal process in the two jurisdictions or the punishment to which the individual is liable. On the other hand, conduct by an individual may not be an offence in the jurisdiction in which the conduct occurred, yet that individual may be liable for punishment in NSW despite the fact they were not within the physical borders of the State at the time.

The Committee acknowledges that the rights referred to in the paragraph above also need to be balanced with the right to life, which is one of the rights engaged by the Bill in relation to the aggravated offences where a donor may be killed or their life threatened. The Committee also notes that some other NSW laws, including criminal laws, have extraterritorial application



and that the conduct to be regulated in this Bill is likely to cross borders. The Committee makes no further comments.

#### 6. RETAIL LEASES AMENDMENT (REVIEW) BILL 2016

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

##### *Commencement by proclamation*

The Committee prefers legislation to commence on assent or a fixed date. However, in this case, the Committee notes that the Bill introduces new processes for the registering and operation of retail leases and considers a flexible commencement date is desirable. The Committee makes no further comment.

#### 7. ROCK FISHING SAFETY BILL 2016

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. MARINE SAFETY AMENDMENT REGULATION 2016

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

##### *Property rights*

As the sale of an impounded vessel impacts on property rights, the Committee reiterates its preference that matters of this kind be dealt with in principal legislation, rather than regulations. The Committee acknowledges that the Regulation contains some safeguards in relation to the sale of impounded vessels. However, the Committee also notes its preference for a longer period than 28 days between notifying an owner that their vessel may be sold and actually selling the vessel.



## Part One – Bills

# 1. Aboriginal Land Rights Amendment (Local Aboriginal Land Councils) Bill 2016

Date introduced	8 November 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. Leslie Williams MP
Portfolio	Aboriginal affairs

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Aboriginal Land Rights Act 1983* (the Act) as follows:
  - (a) to authorise the New South Wales Aboriginal Land Council to make a performance improvement order to a Local Aboriginal Land Council if the New South Wales Aboriginal Land Council considers that action must be taken to improve the performance of the Local Aboriginal Land Council,
  - (b) to restore the authority of Local Aboriginal Land Councils to own and operate corporations,
  - (c) to clarify the role and functions of an administrator or interim administrator appointed to an Aboriginal Land Council,
  - (d) to provide for the payment of an interim administrator.

### BACKGROUND

2. The *Aboriginal Land Rights Act 1983* provides for Aboriginal communities to claim certain Crown land and, where land is granted to such communities, hold freehold title to the land. A series of local Aboriginal land councils represent the interests of their members and their Aboriginal populations to ensure economic, social and cultural benefits to these stakeholders.
3. The Minister for Aboriginal Affairs, in her Second Reading Speech to the Bill, explains the two interdependent aims of the Bill:
 

The first is to refine and enhance the regulatory structures and mechanisms of the *Aboriginal Land Rights Act 1983*. The second is to provide better means to build the capacity and strength of local Aboriginal land councils and the Aboriginal people who run them.
4. In particular, the Bill aims to provide less interventionist means to the Minister for Aboriginal Affairs and other regulators to support local Aboriginal land councils where

they are having difficulties complying with their obligations. At the same time, the Bill continues to reinforce the support role of the NSW Aboriginal Land Council, while increasing local decision-making.

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Commencement by proclamation*

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

**The Committee generally prefers Acts to commence on a fixed date, or on assent, rather than by proclamation. However, as the Committee has not identified any potential infringements on rights and liberties in this Bill, the Committee makes no further comments.**

## 2. Biodiversity Conservation Bill 2016; Local Land Services Amendment Bill 2016

Date introduced	9 November 2016
House introduced	Legislative Council
Minister responsible	The Hon. Niall Blair MLC
Portfolio	Primary Industries, Lands and Water

### PURPOSE AND DESCRIPTION

1. The *Biodiversity Conservation Bill 2016* and the *Local Land Services Amendment Bill 2016* are cognate Bills. Therefore they have been considered in one report.

#### *Biodiversity Conservation Bill 2016*

2. The purpose of this Bill is to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development.
3. This Bill, together with the cognate *Local Land Services Amendment Bill 2016*, is proposed to be enacted in response to the Final Report of the Independent Biodiversity Legislation Review Panel provided to the Minister for the Environment on 18 December 2014. Public consultation drafts were released on 3 May 2016 with a range of explanatory and other related material that can be accessed at [www.landmanagement.nsw.gov.au](http://www.landmanagement.nsw.gov.au). This Bill and the cognate Bill have been revised following consideration of submissions made in response to the consultation drafts.
4. This Bill repeals the Threatened Species Conservation Act 1995, the Nature Conservation Trust Act 2001, and the provisions relating to animals and plants in the National Parks and Wildlife Act 1974. The Local Land Services Amendment Bill 2016 repeals the Native Vegetation Act 2003.

#### *Local Land Services Amendment Bill 2016*

5. The object of this Bill is to repeal the *Native Vegetation Act 2003* and to amend the *Local Land Services Act 2013* to deal with native vegetation land management in rural areas.

### BACKGROUND

6. In June 2014, the Minister for the Environment appointed the Independent Biodiversity Legislation Review Panel to carry out a detailed review of the *Native Vegetation Act 2003*, *Threatened Species Conservation Act 1995*, *Nature Conservation Trust Act 2001* and parts of the *National Parks and Wildlife Act 1974* which relate to native plants and animals and private land conservation.

7. On 18 December 2014, the Panel gave its final report to the Minister. The Panel made 43 recommendations for reform. In developing its report, the Panel consulted widely. For example, the Panel met with relevant stakeholders, received a number of submissions in relation to the key issues and obtained advice.
8. In response to the Panel's recommendations, the NSW Government released a draft reform package for consultation on 3 May 2016. The Government received over 7,000 submissions from various stakeholders. The Minister, in his Second Reading Speech, said the draft Bills were modified in response to feedback received through the consultation process.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Reversal of onus of proof*

9. The Biodiversity Conservation Bill 2016 creates an offence relating to a person who knowingly damages any habitat of a threatened species or threatened ecological community.
10. Where the offence is committed in the course of carrying out unlawful activity, the person is taken to know that the habitat was that of a threatened species or threatened ecological community, unless they can rebut this presumption (see clause 2.4 of the Biodiversity Conservation Bill 2016).
11. More generally, the Bill provides that in any criminal proceedings under the Bill, the landholder of any land on which an offence is alleged to have occurred is taken to have carried out the activity constituting the offence unless they can establish:
  - (a) the activity was carried out by another person; and
  - (b) the landholder did not cause or permit the other person to carry out the activity.
12. The Bill preserves the existing frameworks in relation to holding a landholder responsible for the carrying out of activities or unlawful clearing on their land.
13. This principle will not apply to an offence under clause 2.5 relating to dealing in animals or plants, or to any offences to be excluded by the regulations (see clause 13.29 of the Biodiversity Conservation Bill 2016).

**The Committee notes that in relation to certain offences this presumption applies only when the defendant is carrying out an unlawful activity, for example, development without development consent or clearing not authorised under the *Local Land Services Act 2013*. Where the defendant is carrying out an activity lawfully, this presumption does not apply.**

**This provision mirrors the existing offence provisions in ss 118C, 118D, and 175 of the *National Parks and Wildlife Act* and ss 95 and 100 of the *Threatened Species Conservation Act*.**

**In these cases, a defendant need only prove that they did not have the requisite knowledge on the balance of probabilities. This is a significantly lesser standard**

**of proof than that required by the prosecution, that is, beyond reasonable doubt. The prosecutor must still prove each element of the alleged offence beyond reasonable doubt.**

**The Committee acknowledges the environmental protection principles of the Bill. However, the Committee refers clauses 2.4 and 13.29 of the Bill to Parliament for further consideration as to whether reversing the onus of proof in certain circumstances is justified.**

*Arrest without warrant or charge*

14. Under the Biodiversity Conservation Bill 2016, an authorised officer may require a person who they suspect has committed an offence to state his or her name and address.
15. A person who refuses to provide these details, or who provides details which the authorised officer believes to be false, can be apprehended by the officer and taken before a Magistrate or court officer to be dealt with according to law. This action can be taken without any other warrant other than the Act.
16. A Magistrate or court officer may make a bail decision under the *Bail Act 2013* in respect of the person. If the person has not been charged with an offence, the *Bail Act 2013* applies as if the person were accused of an offence (see clause 12.21 of the Biodiversity Conservation Bill 2016).

**The Committee notes that a person who refuses to state their name and address to an authorised officer, or who provides false information, may be taken before a court to be dealt with according to law. Such action can be taken without charge and without any other warrant other than the Bill.**

*Right against self-incrimination*

17. Under the Biodiversity Conservation Bill 2016, a person is not excused from a requirement under Part 12 to furnish records or information or answer a question on the ground that it may incriminate them or make them liable to a penalty.
18. Information or answers given in compliance with a requirement under Part 12 will generally not be admissible in criminal proceedings against the individual if:
  - (a) the individual objected at the time on the ground that it may incriminate them, or
  - (b) the individual was not warned that they could object to providing the information or giving the answer on the ground that it might incriminate them.
19. However, information or answers given may be admissible against the person in proceedings for an offence under Part 12.
20. In addition, records provided in compliance with a requirement under Part 12 may be admissible in evidence against the person in criminal proceedings even though it may incriminate them.

21. Likewise, further information obtained as a result of a record or information furnished or of an answer given in compliance with a requirement under Part 12 will not be inadmissible on the ground that:
  - (a) the record or information had to be furnished or the answer had to be given, or
  - (b) the record or information furnished or answer given might incriminate the individual.
22. A person will not be guilty of an offence for failing to comply with a requirement under Part 12 if they were not warned that a failure to comply is an offence (see clause 12.23 of the Biodiversity Conservation Bill 2016).

**Clause 12.23 of the Biodiversity Conservation Bill 2016 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 providing for individuals to be warned 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. Despite the frequent occurrence of similar provisions, the Committee refers clause 12.23 of the Biodiversity Conservation Bill 2016 to Parliament for further consideration in relation to whether the interference with the right against self-incrimination is justified in the circumstances.

The Committee notes that while a person is not excused from a requirement to answer questions or furnish information on the grounds of self-incrimination, when this is required in respect of a native vegetation offence under Part 5A of the Local Land Services Act, this information cannot be used against the person in criminal proceedings. There is no requirement for a person to make an objection; this is an automatic protection.

#### *Orders applying to trivial offences*

23. Part 13, Division 3 of the Biodiversity Conservation Bill 2016 sets out a scheme of orders a court can make where it finds an offence proved. These orders are in addition to any penalty that may be imposed for the offence. Orders may be made regardless of whether any penalty is imposed, or other action taken, in relation to the offence.
24. The court is empowered to make a large range of orders including in relation to restoration and prevention; costs, expenses and compensation; and payment of monetary benefits acquired by the offender. The court can also make various other kinds of orders such as to require an offender to publicise the offence, including the circumstances of the offence, the consequences of the offence and any other orders made against the person.
25. An individual who refuses or fails to comply with most, but not all, of the orders under Part 13, Division 3 of the Bill will be guilty of an offence.



26. This scheme will extend to situations where the court makes an order against an offender under section 10 of the *Crimes (Sentencing Procedure) Act 1999*. The court may utilise section 10 of that Act to find a person guilty of an offence but dismiss the charge, resulting in no conviction being recorded against the individual. In making such an order, the court considers various matters, including the trivial nature of the offence.
27. Additional rights are afforded to individuals whose charge is dismissed under section 10 of the *Crimes (Sentencing Procedure) Act 1999*. For example, the majority of less serious offences in NSW are capable of becoming 'spent convictions' under the *Criminal Records Act 1991*. When a person has a spent conviction, in most instances, it will not show up on a criminal records check for employment purposes, except in relation to a limited number of professions, for example employment as a judge or police officer. Where a charge is dismissed under section 10 of the *Crimes (Sentencing Procedure) Act 1999*, and the charge is one that is capable of becoming spent, the conviction will become spent immediately.
28. The Committee notes that the Court has an overarching discretion about whether to make such orders. The Court would exercise this discretion such that it would not make orders which are harsh or unreasonable in the circumstances. In addition, a prosecutor has a general legal duty to act fairly; this would include not seeking inappropriate orders.
29. Finally, less serious offences are likely to be dealt with by the Local Court. The Local Court is more restricted in the types of orders it can make.

**Part 13, Division 3 of the Biodiversity Conservation Bill 2016 empowers the court to make a number of orders where the court finds an offence proved. These orders are in addition to any penalty that may be imposed for the offence and can apply to situations where the court also makes an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* to dismiss a charge.**

**The Committee notes that some of the orders may be appropriate for persons who have been dealt with under section 10 of the *Crimes (Sentencing Procedure) Act 1999*. However, in the Committee's view, other orders, such as requiring an offender to publicise their offence, appear to contradict the intention of the scheme established under section 10. This scheme is normally reserved for more trivial offences and convictions are not recorded. Such individuals have additional rights under existing NSW laws, such as the *Criminal Records Act 1991*.**

**The Committee refers Part 13, Division 3 of the Biodiversity Conservation Bill 2016 to Parliament for further consideration as to whether the extension of those provisions to offences subject to section 10 of the *Crimes (Sentencing Procedure) Act 1999* unfairly conflicts with existing rights.**

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

#### ***Commencement by proclamation***

30. The Biodiversity Conservation Bill 2016 and the Local Land Services Amendment Bill 2016 commence on a day or days to be appointed by proclamation (see clause 1.2 and clause 2 respectively).

The Committee generally prefers legislation to commence on a fixed date, or on assent, so the Executive does not have unfettered control over the commencement date. However, the Committee acknowledges that the Biodiversity Conservation Bill 2016 and Local Land Services Amendment Bill 2016 propose a new scheme for biodiversity and native vegetation land management. As such, some flexibility may be desirable with respect to the commencement date to ensure new administrative measures can be put in place in advance.

*Regulations creating offences with imprisonment as a penalty*

31. The Biodiversity Conservation Bill 2016 authorises the regulations to deal with the protection, care or preservation of marine mammals. The regulations can impose monetary penalties for offences against the regulations along with a penalty of imprisonment for up to two years for offences committed in the course of commercial operations relating to the killing of marine mammals (see clause 2.7 of the Biodiversity Conservation Bill 2016).
32. The Committee notes that this is not a general provision and applies in very specific circumstances where activities will impact upon marine mammals. Additionally, these offences will not apply to rural landholders.

The Committee highlights that pursuant to clause 2.7 of the Biodiversity Conservation Bill 2016, regulations can create offences with a penalty of imprisonment for up to two years. The Committee notes that regulations can be subject to disallowance in Parliament under section 41 of the Interpretation Act 1987. Nevertheless, the Committee is concerned that the Executive will be empowered to create offences with significant penalties without the same degree of parliamentary scrutiny as offences proposed in a Bill. The Committee acknowledges the environmental protection principles of the Bill. However, the Committee refers clause 2.7 of the Biodiversity Conservation Bill 2016 to Parliament for further consideration as to whether offences with a penalty of imprisonment should be included in principal legislation rather than regulations.

*Henry VIII clause*

33. The Biodiversity Conservation Bill 2016 authorises the regulations to amend or substitute Schedules 5 and 6 to the Bill. Schedule 5 lists protected animals and Schedule 6 lists protected plants (see clause 2.19 of the Biodiversity Conservation Bill 2016).

Clause 2.19 of the Biodiversity Conservation Bill 2016 allows the regulations to update certain schedules to the Bill in the future. The Committee generally prefers Acts to be amended by principal legislation, rather than by regulations. However, in this instance, schedules 5 and 6 to the Bill list protected plants and animals. As such, updating these schedules will not impact on personal rights and liberties. The Committee makes no further comment.

### 3. Fisheries Management Amendment (Shark Management Trials) Bill 2016

Date introduced	9 November 2016
House introduced	Legislative Council
Minister responsible	The Hon. Niall Blair MLC
Portfolio	Primary Industries, Lands and Water

#### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Fisheries Management Act 1994* and a regulation under that Act to promote the safe use and enjoyment by the public of coastal beaches and other tidal waters by facilitating shark management trials.
2. The particular objects of this Bill, in relation to the shark management trials, are as follows:
  - (a) to reduce the risk to swimmers posed by sharks,
  - (b) to minimise the impact of shark management measures on fauna,
  - (c) to inform future decision making about shark management.
3. A shark management trial is a trial of the use of one or more shark management measures. Each of the following is a shark management measure:
  - (a) nets that are suspended in waters to protect swimmers from sharks,
  - (b) any other thing that is used in or on waters to capture sharks or deter the incursion by sharks into waters that are frequented by swimmers.
4. The Bill permits the Minister to approve the conduct of a shark management trial in accordance with a management plan that is adopted in the approval. The approval is a trial approval.
5. The Minister may approve a shark management trial only if the Minister is of the opinion that sharks pose a significant risk to the safety of swimmers in the area in which the trial is to be conducted.
6. The approved management plan for the trial is to specify:
  - (a) the area in which the trial is to be conducted, and
  - (b) the shark management measures to be used under the trial, and
  - (c) the period of the trial (which must not exceed 12 months).

7. The Bill provides that a trial approval is authority to carry out the shark management measures, and other related activities (such as monitoring, reporting and research activities).
8. The amendments provided for by the Bill will automatically repeal 5 years after the date of assent.

## BACKGROUND

9. The Bill will allow for a trial of shark mesh nets on five beaches on the North Coast: - Sharpes Beach, Shelly Beach, Lighthouse Beach, Seven Mile Beach and Main Beach.
10. Since 1 January 2014, there have been 41 reported shark attacks in New South Wales, with three recent attacks on North Coast beaches.
11. The Minister, in his Second Reading Speech, says online and independent random phone surveys were carried out to obtain feedback on the trial. The Minister notes that 54 per cent of participants in the phone poll of Ballina and Evans Head residents felt the trial would have a positive impact on the community compared to 12 per cent who felt it would have a negative impact.
12. The Minister also highlights that there has been broader consultation on the trial, including with local government, Surf Life Saving NSW, local clubs, chambers of commerce, tourism operators, retail and businesses along with surfers and swimmers.

## 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*.**

## 4. Greyhound Racing (Repeal of Ban) Bill 2016\*

Date introduced	10 November 2016
House introduced	Legislative Assembly
Member responsible	Mr Luke Foley MP
	*Private Member's Bill

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
  - (a) to repeal the Greyhound Racing Prohibition Act 2016,
  - (b) to reverse the amendments made by that Act to the *Greyhound Racing Act 2009*,
  - (c) to restore the Greyhound Racing Regulation 2016.

### BACKGROUND

2. This Bill repeals the legislation introduced in August 2016 banning greyhound racing in New South Wales. In the Second Reading Speech to the Bill, Mr Luke Foley MP stated:

The Greyhound Racing (Repeal of Ban) Bill 2016 simply seeks to give effect to the stated backdown announced by the Premier in recent weeks. It will repeal the Government's ban on greyhound racing. As it currently stands, the law of New South Wales will ban greyhound racing as at 1 July next year.

### 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*.**

## 5. Human Tissue Amendment (Trafficking in Human Organs) Bill 2016\*

Date introduced	10 November 2016
House introduced	Legislative Council
Member responsible	Mr David Shoebridge MLC
	*Private Member's Bill

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
  - (a) to increase the penalty for commercial trading in human organs and other human tissue, and
  - (b) to create offences relating to the use of organs and other tissue taken from people without their consent, and
  - (c) to impose a duty on registered health practitioners to report any reasonable belief they have that a patient or other person has received an organ or tissue that was commercially traded or taken without appropriate consent.

### BACKGROUND

2. Mr Shoebridge, in his Second Reading Speech to the Bill, explains that the Bill will make it a crime for citizens of NSW to obtain organs through illegal and unethical means, including where such conduct occurs overseas. He says we now know dozens of Australians have sourced organs from overseas and that the global organ trade is growing.
3. Mr Shoebridge refers to evidence from the World Health Organization that organ trafficking takes unfair advantage of poor and disadvantaged individuals, undermines altruistic donation and results in human trafficking and profiteering.
4. Mr Shoebridge consulted widely in developing the Bill, which included community members, law reform groups, the medical and legal professions, academics and others. He highlights that petitions signed by 294,745 community members have been tabled in the Legislative Council in support of the Bill.

### ISSUES CONSIDERED BY COMMITTEE

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

##### *Increased penalties*

5. The *Human Tissue Act 1983* already contains some offences in relation to trading in tissue and removal of tissue without consent or authority. These offences currently carry a maximum penalty of \$4,400 and/or imprisonment for 6 months (see for example, sections 32 and 36 of the Act).

6. The Bill revises some of these existing offences but retains the existing penalties. However, it also introduces aggravated versions of the offences of trading in tissue; unlawful removal of tissue; use of tissue removed without consent; and unlawfully receiving for transplantation tissue removed without consent. The maximum penalty for these offences is imprisonment for 25 years (see for example clauses 32D, 32I, 32L and 32N of the Bill).
7. For example, the aggravating factors for the aggravated offence of trading in tissue are where the commercial transplant arrangement concerned involves the sale or supply of:
  - (a) an amount of tissue the taking of which would reasonably be expected to kill, or threaten the life of, the person, or
  - (b) a vital organ (see for example, clause 32D of the Bill).
8. The aggravated circumstances are broadly similar across these offences. However, some aggravated offences also relate to the use of an amount of tissue removed from a deceased person that would, if they were alive, reasonably be expected to kill them or threaten their life (see for example clause 32L of the Bill).

**The Bill revises some existing offences and creates aggravated versions of those offences. The offences currently provided for in the *Human Tissue Act 1983* carry a maximum penalty of \$4,400 and/or imprisonment for 6 months. The new aggravated offences will carry a maximum penalty of imprisonment for 25 years. The Committee notes that the new aggravated offences involve a significant increase in existing penalties under the Act. However, the Committee also acknowledges that other serious offences under NSW laws that result in the death of a person or threaten their life also generally carry significant maximum penalties. The Committee therefore makes no further comments.**

#### *Extraterritorial application of criminal laws*

9. The Bill revises a number of existing offences relating to trading in human tissue and removing tissue without consent and creates some new offences. The offences under Part 6 of the Bill will have extraterritorial application beyond the State of NSW (see clause 32B of the Bill).

**The Committee notes that NSW residents who commit crimes under the Bill while in another State or Territory of Australia or overseas will be liable to punishment in NSW. This may impact on rights relating to the criminal process. For example, a person may find they are liable to punishment for an offence in NSW along with the jurisdiction in which they committed the offence, which could lead to double punishment or vast differences in the criminal process in the two jurisdictions or the punishment to which the individual is liable. On the other hand, conduct by an individual may not be an offence in the jurisdiction in which the conduct occurred, yet that individual may be liable for punishment in NSW despite the fact they were not within the physical borders of the State at the time.**

**The Committee acknowledges that the rights referred to in the paragraph above also need to be balanced with the right to life, which is one of the rights**

**engaged by the Bill in relation to the aggravated offences where a donor may be killed or their life threatened. The Committee also notes that some other NSW laws, including criminal laws, have extraterritorial application and that the conduct to be regulated in this Bill is likely to cross borders. The Committee makes no further comments.**



## 6. Retail Leases Amendment (Review) Bill 2016

Date introduced	8 November 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. John Barilaro MP
Portfolio	Small Business

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to give effect to recommendations arising from the statutory review of the *Retail Leases Act 1994* as follows:
  - (a) to confer a right to compensation on a lessee who terminates a retail shop lease during the first 6 months pursuant to the current right of the lessee to terminate in certain circumstances,
  - (b) to require full disclosure in the lessor's disclosure statement of any obligation of the lessee to contribute to the lessor's outgoings and to prevent the recovery from a lessee of outgoings that are not disclosed,
  - (c) to require the registration of a retail shop lease that is for a term of more than 3 years (or that is required by the terms of the lease to be registered) and to require lodgment for registration within 3 months after the lease is executed,
  - (d) to exclude premises used wholly for certain non-retail purposes from the scope of the Act (including ATMs, vending machines, public telephones, children's rides, internet booths, private post boxes and certain storage uses),
  - (e) to make it clear that a lessor is not entitled to recover any expenses involved in the lessor obtaining the consent of the mortgagee of the premises leased,
  - (f) to remove the requirement for a 5-year minimum term for retail shop leases,
  - (g) to require a lessor to return a bank guarantee to the lessee within 2 months after the lessee has performed all obligations secured by the bank guarantee,
  - (h) to revise and clarify the definition of outgoings in the Act and to extend the definition to include fees charged by a lessor for services provided by the lessor,
  - (i) to allow a retail shop lease with the approval of the Registrar of Retail Tenancy Disputes (the Registrar) to impose requirements for police and security checks on the persons who can be employed in or to do work at a retail shop,
  - (j) to make it clear that lessee protections under the Act in relation to termination on the grounds of proposed demolition of the building of which a retail shop forms part extend to proposed demolition of any part of the building and that termination on the

grounds of proposed demolition is only permissible when demolition requires vacant possession of the shop,

- (k) to change the restriction on when a disputed security bond can be released from a fixed period of 14 days after a judgment to the period within which an appeal against the judgment may be exercised,
- (l) to increase the monetary limit on the jurisdiction of the Civil and Administrative Tribunal (the Tribunal) for claims arising under the Act from \$400,000 to \$750,000,
- (m) to expand the grounds on which the Tribunal can order the rectification of a retail shop lease (currently limited to when the parties consent) to include correction of a mistake, giving effect to the intention of the parties or reflecting the actual disclosure of information between the parties, and to extend the rectification power to rectification of a disclosure statement,
- (n) to provide for specialist retail valuers (who determine current market rent when the parties cannot agree) to be appointed by the Registrar rather than the Tribunal, and to make it clear that experience and training requirements for specialist retail valuers can be prescribed by the regulations,
- (o) to clarify the procedure to be followed by a lessee to obtain the consent of the lessor to an assignment of a retail shop lease and protection from liability to the lessor after assignment,
- (p) to provide that where a retail shop lease has been awarded by public tender, consent to assignment of the lease can be refused if the assignee fails to meet any criteria of the tender,
- (q) to provide that for the purposes of the determination of rent by reference to turnover, turnover does not include turnover from online transactions (with limited exceptions),
- (r) to provide that a lessee cannot be required to provide information to the lessor about turnover from online transactions (with limited exceptions),
- (s) to repeal provision for the payment of interest on lease security bonds deposited with the Secretary,
- (t) to provide for the issue of penalty notices for offences under the Act or the regulations,
- (u) to provide for the establishment of an online retail bond service by the Secretary,
- (v) to clarify the application of the Act to shops that are stalls in a market so that the Act will not apply to stalls in a market except a permanent retail market and to allow the regulations to modify the operation of the Act in relation to shops in a permanent retail market, including by providing for a mandatory code of conduct for lessors and lessees,

- (w) to remove an unnecessary exception from the Act for premises in an office tower that forms part of a retail shopping centre (on the basis that an office tower above a retail shopping centre does not form part of the retail shopping centre),
- (x) to enact consequential savings and transitional provisions and to make miscellaneous minor amendments.

## BACKGROUND

2. This Bill introduces amendments arising from a statutory review of the *Retail Leases Act 1994*.
3. In November 2013, the Office of the NSW Small Business Commissioner released a discussion paper outlining the issues the Review intended to address. Since November, the Office has sought written submissions, conducted industry and regional forums and established an industry working group to assist with the review.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Commencement by proclamation*

4. Clause 2 of the Bill provides for the commencement of the proposed Act on a day or days to be appointed by proclamation. This delegates to the Executive the power to commence the Act on a day of its choosing.

**The Committee prefers legislation to commence on assent or a fixed date. However, in this case, the Committee notes that the Bill introduces new processes for the registering and operation of retail leases and considers a flexible commencement date is desirable. The Committee makes no further comment.**

## 7. Rock Fishing Safety Bill 2016

Date introduced	8 November 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. David Elliott MP
Portfolio	Emergency Services

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to require persons to wear appropriate lifejackets when fishing at certain declared high risk rock fishing locations.

### BACKGROUND

2. This Bill introduces legislation which requires a person to wear a life jacket when rock fishing.
3. In the Second Reading Speech, the Hon David Elliott MP stated that in 2015-16 10 people died while rock fishing and over the past 10 years there have been, on average, eight rock fishing deaths per year.
4. A Rock Fishing Working Group has been established to inform the Government on high risk locations where the law would apply.

### 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. Marine Safety Amendment Regulation 2016

### PURPOSE AND DESCRIPTION

1. This Regulation amends the *Marine Safety Regulation 2016* as a consequence of the proposed commencement of Schedule 1 to the *Marine Legislation Amendment Act 2016* and Schedule 2 to the *Marine Safety Act 1998*. The objects of this Regulation are as follows:
  - (a) to restrict the time a vessel can be at anchor in NSW waters during a calendar year,
  - (b) to ensure towing provisions extend to wake surfing and wake boarding,
  - (c) to make it an offence for a person to interfere with any safety equipment located in the vicinity of navigable waters,
  - (d) to ensure the definition of *operation a personal watercraft in an irregular manner* is not limited to the actions listed in that definition,
  - (e) to prescribe the fees for storage and towing of an impounded vessel,
  - (f) to make provision for the disposal of impounded vessels forfeited to the Crown,
  - (g) to prescribe the laboratory for analysis of oral fluid, blood and urine samples,
  - (h) to insert safety provisions relating to submarine cables, diving operations and carriage of offensive matter,
  - (i) to transfer certain provisions from the *Management of Waters and Waterside Lands Regulations – NSW*,
  - (j) to provide that an immediate boat driving licence suspension notice may be issued when the holder of the boat driving licence is charged with an offence under section 13A of the *Marine Safety Act 1998* (the Act),
  - (k) to transfer the marine pilotage exemption for recreational vessels from the Act,
  - (l) to clarify the meaning of an appropriate lifejacket for a person being towed by a vessel,
  - (m) to prescribe various matters for the camera recorded offence scheme,
  - (n) to insert transitional provisions in relation to certificate evidence for drug and alcohol testing provisions and provisions consequent on the repeal of the *Management of Waters and Waterside Lands Regulations – NSW*,
  - (o) to make other minor review changes.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Property rights*

2. In Digest 9 of 2016, which was tabled on 21 June 2016, the Committee commented on the *Marine Legislation Amendment Bill 2016*. In particular, the Committee highlighted proposed section 19M of the *Marine Safety Act 1998* and noted that the Police or RMS may sell an impounded or forfeited vessel in circumstances to be prescribed in the regulations.
3. The Committee concluded as follows:

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.
4. The *Marine Safety Amendment Regulation 2016* makes amendments to the *Marine Safety Regulation 2016* which flow from the changes brought in by the *Marine Legislation Amendment Bill 2016* earlier in the year.
5. Proposed section 55C of the *Marine Safety Regulation 2016* provides that if a vessel that was impounded has not been released at the end of the impoundment period, the Police or RMS may give the owner notice that the vessel may be offered for sale unless appropriate steps are taken to procure the release of the vessel.
6. A vessel that has been forfeited to the Crown or that remains impounded 28 days after service of such notice may be offered for sale, except:
  - (a) by order of any court; or
  - (b) while an application has been made to the Local Court for early release of a vessel.
7. At any time within 12 months after a vessel has been sold, a person may apply to the Police or RMS for payment of the balance of the proceeds of sale. This would be after deduction of movement, towing and storage fees, along with the reasonable costs of or incidental to the sale.
8. The balance of the sale proceeds may be paid to an applicant who satisfies the Police or RMS that:
  - (a) the applicant was lawfully entitled to the vessel; and
  - (b) there was a reasonable excuse for the applicant's failure to obtain release of the vessel before it was sold.

**As the sale of an impounded vessel impacts on property rights, the Committee reiterates its preference that matters of this kind be dealt with in principal**

legislation, rather than regulations. The Committee acknowledges that the Regulation contains some safeguards in relation to the sale of impounded vessels. However, the Committee also notes its preference for a longer period than 28 days between notifying an owner that their vessel may be sold and actually selling the vessel.

# 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.