



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”.

Contents

Membership	ii
Guide to the Digest	iii
Conclusions	iv
PART ONE – BILLS	5
1. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT BILL 2016	5
2. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (DISCLOSURE OF INFORMATION) BILL 2016*	7
PART TWO - REGULATIONS	9
1. LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) AMENDMENT (DIRECTIONS UNDER PART 14) REGULATION 2016	9
2. SURVEILLANCE DEVICES AMENDMENT (POLICE BODY-WORN VIDEO) REGULATION 2016	11
APPENDIX ONE – FUNCTIONS OF THE COMMITTEE	13

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. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT BILL 2016

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

Commencement by proclamation

The Committee generally prefers legislation to commence on assent or a fixed date. However, in this instance the Committee notes that the Bill is implementing a number of reforms which alter the structure and governance of the ICAC and its powers and procedures. The Committee considers that flexibility as to its commencement is desirable. The Committee makes no further comment.

2. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (DISCLOSURE OF INFORMATION) 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. LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) AMENDMENT (DIRECTIONS UNDER PART 14) REGULATION 2016

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

Right to peaceful assembly

The Regulation amends an existing Code of Practice so a police officer can give a direction in relation to a genuine demonstration or protest, or a procession or organised assembly in certain circumstances. In some instances, this could engage the right to peaceful assembly. However, as the changes are merely administrative in nature, to ensure the Code of Practice reflects amendments which have already commenced in the principal legislation, the Committee makes no further comments.

2. SURVEILLANCE DEVICES AMENDMENT (POLICE BODY-WORN VIDEO) REGULATION 2016

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

Privacy

The Regulation provides for some additional circumstances in which information obtained from the use of body-worn video equipment by police may be used. The Committee acknowledges that the Regulation and the principal Act contain some safeguards to minimise the risk of unduly trespassing on an individual's privacy. As previously stated in relation to the associated amending Bill, it is likely that many instances of innocent behaviour will be recorded using such equipment, which may impact on the right to privacy. The Committee believes this is reasonable in the circumstances.

Part One – Bills

1. Independent Commission Against Corruption Amendment Bill 2016

Date introduced	15 November 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. Gladys Berejiklian MP
Portfolio	Premier

PURPOSE AND DESCRIPTION

1. The object of this Bill is to change the structure, management and procedures of the Independent Commission Against Corruption (the ICAC) to give effect to recommendations made by the Joint Parliamentary Committee on the Independent Commission Against Corruption in its report entitled “Review of the Independent Commission Against Corruption: Consideration of the Inspector’s Reports” (the Report) tabled in the Legislative Assembly on 27 October 2016.

BACKGROUND

2. This Bill implements changes to the Independent Commission Against Corruption (the ICAC) resulting from the report of the Joint Parliamentary Committee on the ICAC entitled *Review of the Independent Commission Against Corruption: Consideration of the Inspector’s Reports*.
3. The Committee’s report followed the review of the ICAC undertaken by an independent panel consisting of the Hon. Murray Gleeson AC and Mr Bruce McClintock SC. Commissioned in May 2015, the Independent panel was commissioned following the High Court decision in the *ICAC v Cunneen* [2015] HCA 14.

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 that the Act will commence on a day or days to be appointed by proclamation. This delegates to the Executive the power to commence the Act on a day or days of its choosing.

The Committee generally prefers legislation to commence on assent or a fixed date. However, in this instance the Committee notes that the Bill is implementing a number of reforms which alter the structure and governance of the ICAC and its powers and procedures. The Committee considers that

flexibility as to its commencement is desirable. The Committee makes no further comment.

2. Independent Commission Against Corruption Amendment (Disclosure of Information) Bill 2016*

Date introduced	17 November 2016
House introduced	Legislative Assembly
Minister responsible	Mr Jamie Parker MP
Portfolio	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to protect persons who lodge complaints about corrupt conduct with the Independent Commission Against Corruption, or who otherwise voluntarily give statements or documents to the Commission, from any criminal or civil liability that might otherwise arise as a result of the complaint, statement or document, including liability for defamation or breach of confidentiality and the taking of professional action by a professional organisation.

BACKGROUND

2. Mr Jamie Parker MP, in his Second Reading Speech to the Bill, advised the House that the proposed amendments would protect those who voluntarily disclose information to the Independent Commission Against Corruption from criminal and civil liability associated with their disclosure. Mr Parker further advised this would make it easier for the Commission to obtain evidence and will bring the arrangements of the Commission in line with other jurisdictions such as Queensland.
3. Mr Parker highlights that, at present, there is no full disclosure protection for individuals who provide information to the Commission, only partial protection. He refers to an explanation of the issue from a 2014 submission by the Commission to the Parliamentary Committee which oversights it:

A large number of complaints and information accepted by the Commission each year are received directly from public officials who are not required or authorised by law to report or provide that information and in circumstances where the voluntary disclosure of that information is prohibited by a secrecy or confidentiality law. Similarly, private individuals who voluntarily provide information to the Commission may be at risk of incurring civil liability because of contractual or employment undertakings into which they have entered.

Section 109 of the Independent Commission Against Corruption Act gives limited protection to persons providing information to the Commission and then only in circumstances where the Commission has exercised its power to require or obtain that information. This protection is not useful where persons have voluntarily disclosed information to the Commission about corrupt conduct of which the Commission is unaware and not at the time investigating.

LEGISLATION REVIEW COMMITTEE

INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (DISCLOSURE OF INFORMATION) BILL 2016*

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. Law Enforcement (Powers and Responsibilities) Amendment (Directions under Part 14) Regulation 2016

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to update the Code of Practice set out in the *Law Enforcement (Powers and Responsibilities) Regulation 2016* in relation to a police officer's power to give a direction under Part 14 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

ISSUES CONSIDERED BY COMMITTEE

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

Right to peaceful assembly

2. The Code of Practice under the *Law Enforcement (Powers and Responsibilities) Regulation 2016* currently provides that a police officer cannot give a direction under Part 14 of the *Law Enforcement (Powers and Responsibilities) Act 2002* in relation to an industrial dispute, protests, processions or organised assemblies.
3. The *Law Enforcement (Powers and Responsibilities) Amendment (Directions under Part 14) Regulation 2016* amends the Code of Practice so that a police officer can give a direction in relation to an apparently genuine demonstration or protest, or a procession or an organised assembly where:
 - (a) the officer reasonably believes the direction is necessary to deal with a serious risk to the safety of the person to whom the direction is given or to another person, or
 - (b) the demonstration, protest, procession or assembly is obstructing traffic and is not an authorised public assembly, the officer in charge at the scene has authorised the directions and they are limited to the persons obstructing traffic.
4. The amendments follow on from changes to the *Law Enforcement (Powers and Responsibilities) Act 2002* by the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill 2016*, which was passed by the Parliament in early 2016.
5. In Digest 15/56, tabled on 15 March 2016, the Committee commented on right to peaceful assembly issues in that Bill.
6. The Committee noted that the Bill sought to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* to extend the powers available to police officers to give move on directions in relation to a demonstration, protest, procession or assembly.

Under the Bill, police officers would not be precluded from giving a move on direction in relation to any demonstration, protest, procession or assembly where they consider, on reasonable grounds, that a direction is necessary to deal with a serious risk to the safety of the person or others.

7. In relation to that issue, the Committee concluded as follows:

The Committee notes that the powers granted to police under this Bill and the exercise of these powers may trespass upon the personal right of peaceful assembly. Such powers should only be used where there are sufficient checks available to ensure they are only exercised when required to ensure public safety.

The Committee refers to the safeguards relating to the exercise of police powers in the Law Enforcement (Powers and Responsibilities) Act 2002 which require police officers to provide information and warnings before making a direction. Given these safeguards and the objectives of the Bill which include addressing behaviour which may pose a risk to the safety of others, the Committee makes no further comment.

The Regulation amends an existing Code of Practice so a police officer can give a direction in relation to a genuine demonstration or protest, or a procession or organised assembly in certain circumstances. In some instances, this could engage the right to peaceful assembly. However, as the changes are merely administrative in nature, to ensure the Code of Practice reflects amendments which have already commenced in the principal legislation, the Committee makes no further comments.

2. Surveillance Devices Amendment (Police Body-Worn Video) Regulation 2016

PURPOSE AND DESCRIPTION

1. Section 39 of the *Surveillance Devices Act 2007* provides that any information obtained from the use of body-worn video equipment by a police officer is protected information which means that use, communication or publishing of the information is restricted.
2. The object of this Regulation is to provide for some additional circumstances in which it is permitted to use, communicate or publish that information.

ISSUES CONSIDERED BY COMMITTEE

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

Privacy

3. In Digest 64/55, which was tabled on 4 November 2014, the Committee commented on the privacy implications of the *Surveillance Devices Amendment (Police Body-Worn Video) Bill 2014*. The Bill amended the *Surveillance Devices Act 2007* to allow for the use of body-worn video by police officers.
4. The Committee noted that many instances of innocent behaviour would likely be recorded by the use of body-worn video, with significant privacy implications. The Committee highlighted that the Bill would allow material obtained from such equipment to be used, published or communicated for any purpose prescribed in the regulations. The Committee concluded as follows:

In the Committee's view, to ensure proper parliamentary oversight and given the far-reaching privacy implications, rules regarding the acceptable use, publication or communication of material obtained through use of a police body-worn video should be clearly set out in primary legislation – not delegated [or] subordinate legislation. The Committee refers this matter to Parliament for further consideration.
5. The *Surveillance Devices Amendment (Police Body-Worn Video) Regulation 2016* provides for the following additional circumstances in which information obtained from police body-worn video equipment may be used:
 - (a) coronial proceedings under the *Coroners Act 2009*;
 - (b) administrative decisions made under Acts administered by the Police Minister;
 - (c) court or tribunal proceedings in which the police or the State is a party or in which police officers are called as witnesses;
 - (d) investigation of a complaint against, or conduct of, a member of the police;

- (e) investigation of an alleged workplace injury to a member of the police.
6. The Regulation also allows the information to be used for a media production, including via television, radio or internet. However, this is only permitted where:
- (a) the content is approved by the police;
 - (b) the body-worn video equipment was provided specifically for the purposes of the media production; and
 - (c) the use of the information is lawful and does not breach any guidelines by the Police Commissioner.
7. Section 50A of the *Surveillance Devices Act 2007* regulates the use of body-worn video. It provides that use of such equipment will be lawful if:
- (a) the police officer is acting in the execution of his or her duty;
 - (b) the use of body-worn video is overt (including where the person to be recorded has been informed of the use of body-worn video or the use is inadvertent, unexpected or incidental); and
 - (c) where the police officer is recording a private conversation, the officer is in uniform or has provided evidence that he or she is an officer to each party to the conversation.

The Regulation provides for some additional circumstances in which information obtained from the use of body-worn video equipment by police may be used. The Committee acknowledges that the Regulation and the principal Act contain some safeguards to minimise the risk of unduly trespassing on an individual's privacy. As previously stated in relation to the associated amending Bill, it is likely that many instances of innocent behaviour will be recorded using such equipment, which may impact on the right to privacy. The Committee believes this is reasonable in the circumstances.

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,

LEGISLATION REVIEW COMMITTEE

FUNCTIONS OF THE COMMITTEE

- 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.