



PARLIAMENT OF NEW SOUTH WALES

Legislation Review Committee

LEGISLATION REVIEW DIGEST

NO. 49/56 – 13 FEBRUARY 2018



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, 2018, 15p 30cm

Chair: Mr James Griffin MP

13 February 2018

ISSN 1448-6954

1. Legislation Review Committee – New South Wales

2. Legislation Review Digest No. 49 of 56

I Title.

II Series: New South Wales. Parliament. Legislation Review Committee Digest; No. 49 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”.

Contents

Membership	ii
Guide to the Digest	iii
Conclusions	iv
PART ONE – BILLS	6
1. INDUSTRIAL RELATIONS AMENDMENT (CONTRACTS OF CARRIAGE) BILL 2018*	6
2. JUSTICE LEGISLATION AMENDMENT BILL 2018	7
APPENDIX ONE – FUNCTIONS OF THE COMMITTEE	12

Membership

CHAIR	Mr James Griffin MP, Member for Manly
DEPUTY CHAIR	Mr Lee Evans MP, Member for Heathcote
MEMBERS	Ms Melanie Gibbons MP, Member for Holsworthy Mr Michael Johnsen MP, Member for Upper Hunter Mr David Mehan MP, Member for The Entrance The Hon Natasha Maclaren-Jones MLC The Hon Shaoquett Moselmane MLC Mr David Shoebridge MLC
CONTACT DETAILS	Legislation Review Committee Parliament of New South Wales Macquarie Street Sydney NSW 2000
TELEPHONE	02 9230 2226 / 02 9230 3382
FACSIMILE	02 9230 3309
E-MAIL	legislation.review@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au/lrc

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. INDUSTRIAL RELATIONS AMENDMENT (CONTRACTS OF CARRIAGE) BILL 2018*

The Committee makes no comment on the Bill in respect of issues set out in section 8A of the *Legislation Review Act 1987*.

2. JUSTICE LEGISLATION AMENDMENT BILL 2018

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

Right to request reasons

The Bill removes the current requirement for the NSW Civil and Administrative Tribunal to issue written reasons for certain guardianship decisions if there are three Tribunal members deciding the application. This means that the Tribunal would not have to issue written reasons for decisions relating to: minor medical and dental treatment, recognition of guardians and managers in other states, and ancillary or interlocutory decisions. This may trespass on the right to receive reasons for a decision, particularly in the context of guardianship matters that may involve vulnerable people.

However, as the decisions in question concern relatively minor issues, not requiring written reasons for every guardianship decision promotes the efficiency of the Tribunal. In any event, the Tribunal must provide written reasons upon request. Accordingly, the Committee makes no further comment.

Right to trial by jury

The Bill amends the *Criminal Procedure Act 1986* so that a further four indictable offences must now be tried summarily, two as either 'Table 1' or 'Table 2' offences. Table 2 offences relate to less serious indictable offences involving less than \$5,000. Only the prosecutor can elect to have a Table 2 offence tried on indictment. For Table 1 offences, which ordinarily involve sums greater than \$5,000, either the prosecutor or the person charged can elect to have the matter tried on indictment.

Matters dealt with summarily are shorter and generally do not attract a prison sentence of more than two years. Trials for indictable offences occur in the District Court or Supreme Court, are slower, and can result in longer sentences. The other key differences are that offences which are tried summarily do not involve a jury, and a trial by indictment may involve more evidence and enable the person charged to better understand and respond to the prosecution's case.

Enabling more indictable offences to be dealt with summarily may assist in the efficient administration of justice. However, the proposed amendments do, in some cases, compromise the right to trial by jury and the ability of a person charged to understand and respond to the prosecution's case.

For the reasons above, it may not be appropriate that an offender has no right to elect that a Table 2 offence, which is ordinarily an indictable offence, be tried on indictment. The Committee draws this matter to the attention of Parliament.

Right to privacy

Currently, a Court can order that a person who has been convicted of a drink-driving offence must provide their photograph, fingerprints and palm-prints to police. The Bill extends this to the offence of driving while having drugs in your oral fluid, blood or urine, within the meaning of section 111 of the *Road Transport Act 2013*.

Collecting such personal information may breach an offender's right to privacy. While the amendment treats drink-driving and drug-driving offences consistently, a person will only be found guilty of the similar drink-driving offence under section 110 if they exceed a prescribed blood alcohol concentration. There is no such prescribed limit with the drug-driving offence, and it has been suggested that drug tests in other jurisdictions are aimed at detecting a level of the drug that would affect driving. The offence may therefore capture people whose driving is not impaired by drugs.

For these reasons, the proposed amendment may be seen to inappropriately lower the threshold for the collection of personal information. However, having the power to accurately identify someone convicted of a drug-driving offence can assist in the legitimate aim of proving subsequent offences, and also mirrors the existing approach to drink-driving offences. As such, the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined powers: s 8A(1)(ii) of the LRA

Broad definition of 'member of teaching staff'

Under the Bill, it is an offence for a school employee who has students in his or her care or authority to have sexual intercourse with a student at the school aged between 16 and 18. This can result in prison for up to 8 years. Relevantly, the Bill and the *Crimes Act 1900* do not define what it means to be in the 'care' of a school employee.

The broad wording of the amended provision may make it insufficiently clear who could be found guilty of an offence under the section. Noting that the age of consent is 16, the current provision may unintentionally expose people such as debating and sports coaches (who may be young adults and ex-students) to criminal liability. Although there may be good reasons for this aspect of the expanded definition, the Committee draws this matter to the attention of Parliament.

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. The Bill seeks to delay the commencement of certain provisions, including provisions that allow for more offences to be tried summarily and make changes to family provision claims under the *Succession Act 2006*.

The Local Court (and other justice bodies) may need to update their processes to accommodate an increase in trials for summary offences. Similarly, changes to family provision claims may result in more of these claims and require changes to the Supreme Court's processes. Accordingly, the Committee makes no further comment.

Part One – Bills

1. Industrial Relations Amendment (Contracts of Carriage) Bill 2018*

Date introduced	8 February 2018
House introduced	Legislative Assembly
Member responsible	Mr Greg Warren MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Industrial Relations Act 1996* to include contracts for the transportation of bread, milk or cream for sale or delivery for sale as contracts of carriage under that Act. As a result, any such contract will be subject to the provisions of Chapter 6 of that Act, including enabling the Industrial Relations Commission to make determinations with respect to the remuneration of the carrier, and any conditions, under the contract and to exercise dispute resolution powers in relation to the contract.

BACKGROUND

2. The Bill allows the Industrial Relations Commission the jurisdiction to make and approve contract determinations and contract agreements for the transportation of bread, milk and cream for sale or delivery. This includes determinations about remuneration and any such condition under the contract.
3. In his second reading speech, Mr Warren MP stated that the Bill would improve the industrial relation protections for owner-drivers of bread, milk and cream, and allow them the same protections afforded to other transport workers in New South Wales.

ISSUES CONSIDERED BY COMMITTEE

The Committee makes no comment on the Bill in respect of issues set out in section 8A of the *Legislation Review Act 1987*.

2. Justice Legislation Amendment Bill 2018

Date introduced	7 February 2018
House introduced	Legislative Assembly
Member responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The Bill seeks to:
 - a) amend the *Crimes Act 1990*, so that it will be an offence for any member of the teaching staff at a school, or any other school employee who has students under their care or authority, to have sexual intercourse with a person at that school aged between 16 and 18. Now this offence only applies if the offender is the victim's school teacher.
 - b) amend the *Criminal Procedure Act 1986* so that four offences are now to be dealt with summarily, unless the prosecutor or person charged wants the offence dealt with on indictment.
 - c) remove exemptions that allow an employer to discriminate against a pregnant woman in certain circumstances from the *Anti-Discrimination Act 1997*.
 - d) make changes to the storage and service of documents under the *Crime Commission Act 2012*.
 - e) allow a court to order that the photograph, fingerprints and palm-prints of a person who is guilty of a drug-driving offence may be taken at a police station.
 - f) amend the *Succession Act 2006*, following a statutory review.

BACKGROUND

2. The Bill amends a number of Acts following recent Departmental reviews and Court decisions.
3. For example, according to the second reading speech, a recent Court of Criminal Appeal decision, *R v PJ*, has resulted in a significant amendment to the *Crimes Act 1900* regarding who may be deemed to have a 'special care' relationship with a school student, for the purpose of child sex offences.
4. The second reading speech also suggests that the proposal to try more offences summarily arose from a review of the *Criminal Procedure Act 1986*. The amendments aim to reduce delays in the District Court by allowing some less serious matters to be trialled summarily in the Local Court.

5. The Department of Justice's review of the *Succession Act 2006* also informed the amendments to that Act.
6. Most of the other amendments remove inconsistencies within Acts and update provisions as a result of changes in technology or community expectations.

ISSUES CONSIDERED BY COMMITTEE

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

Right to request reasons

7. The Bill amends clause 11(2) of Schedule 6 of the Civil and Administrative Tribunal Act 2013 (the Act) so that the Tribunal is not required to provide written reasons for three kinds of guardianship decisions:
 - a) a decision as to who can give consent for minor medical or dental treatment;
 - b) a decision to recognise a guardian or manager authorised in another state in NSW; and
 - c) ancillary or interlocutory decisions of the Tribunal.
8. 'Minor treatment' is defined in the Guardianship Act 1987 as treatment that is not major treatment, special treatment, or treatment in the course of a clinical trial. The regulations define 'major treatment' to include almost all treatments involving general anaesthetic or that involve a substantial risk to the patient.
9. Under the Act, a decision is 'ancillary' if it is preliminary or consequential to another decision, or concerns jurisdiction or costs. An 'interlocutory' decision may include decisions on evidentiary matters, extensions of time and the summary dismissal of proceedings.
10. Currently, the Tribunal is only required to provide written reasons in relation to the above decisions if there are three Tribunal members deciding the application. That said, under section 62 of the Act, the Tribunal must always provide written reasons if requested.

The Bill removes the current requirement for the NSW Civil and Administrative Tribunal to issue written reasons for certain guardianship decisions if there are three Tribunal members deciding the application. This means that the Tribunal would not have to issue written reasons for decisions relating to: minor medical and dental treatment, recognition of guardians and managers in other states, and ancillary or interlocutory decisions. This may trespass on the right to receive reasons for a decision, particularly in the context of guardianship matters that may involve vulnerable people.

However, as the decisions in question concern relatively minor issues, not requiring written reasons for every guardianship decision promotes the efficiency of the Tribunal. In any event, the Tribunal must provide written reasons upon request. Accordingly, the Committee makes no further comment.

Right to trial by jury

11. The Bill amends the *Criminal Procedure Act 1986* (the Act) so that four indictable offences must now be tried summarily.
12. Those offences relate to certain types of robbery, perversions of the course of justice, supply of a prohibited drug, and reckless dealings with the proceeds of crime. Two of the new offences, recklessly dealing with the proceeds of crime and stealing, are classified as either 'Table 1' or 'Table 2' offences.
13. Table 2 offences relate to less serious indictable offences involving less than \$5,000 and appear in Table 2 of Schedule 1 to the Act. Only the prosecutor can elect to have the matter tried on indictment. In contrast, the prosecutor or person charged can elect to have a Table 1 offence, which ordinarily involves a sum greater than \$5,000, tried on indictment.
14. Trials for summary offences do not involve a jury and are shorter. Also, the Local Court (which hears summary offences) cannot impose a prison term of more than 2 years.
15. In contrast, indictable offences can be heard in the District Court or Supreme Court and first require a committal hearing. These proceedings usually take longer and result in more significant penalties. However, the person charged may be able to better understand and respond to the prosecution's case because more evidence is involved.
16. The second reading speech suggests that the amendments follow a Departmental review, and are designed to reduce Court delays. They may also allow innocent persons to be acquitted sooner and victims to give their evidence more quickly.

The Bill amends the *Criminal Procedure Act 1986* so that a further four indictable offences must now be tried summarily, two as either 'Table 1' or 'Table 2' offences. Table 2 offences relate to less serious indictable offences involving less than \$5,000. Only the prosecutor can elect to have a Table 2 offence tried on indictment. For Table 1 offences, which ordinarily involve sums greater than \$5,000, either the prosecutor or the person charged can elect to have the matter tried on indictment.

Matters dealt with summarily are shorter and generally do not attract a prison sentence of more than two years. Trials for indictable offences occur in the District Court or Supreme Court, are slower, and can result in longer sentences. The other key differences are that offences which are tried summarily do not involve a jury, and a trial by indictment may involve more evidence and enable the person charged to better understand and respond to the prosecution's case.

Enabling more indictable offences to be dealt with summarily may assist in the efficient administration of justice. However, the proposed amendments do, in some cases, compromise the right to trial by jury and the ability of a person charged to understand and respond to the prosecution's case.

For the reasons above, it may not be appropriate that an offender has no right to elect that a Table 2 offence, which is ordinarily an indictable offence, be tried

on indictment. The Committee draws this matter to the attention of Parliament.

Right to privacy

17. Section 134 of the Law Enforcement (Powers and Responsibilities) Act 2002 (the Act) enables a Court to order that a person convicted of a drink driving offence must provide their photograph, fingerprints and palm-prints at a police station. The Bill expands this power to the offences of driving with illicit drugs, cocaine or morphine in your system under section 111 of the Road Transport Act 2013.

Currently, a Court can order that a person who has been convicted of a drink-driving offence must provide their photograph, fingerprints and palm-prints to police. The Bill extends this to the offence of driving while having drugs in your oral fluid, blood or urine, within the meaning of section 111 of the *Road Transport Act 2013*.

Collecting such personal information may breach an offender's right to privacy. While the amendment treats drink-driving and drug-driving offences consistently, a person will only be found guilty of the similar drink-driving offence under section 110 if they exceed a prescribed blood alcohol concentration. There is no such prescribed limit with the drug-driving offence, and it has been suggested that drug tests in other jurisdictions are aimed at detecting a level of the drug that would affect driving.¹ The offence may therefore capture people whose driving is not impaired by drugs.

For these reasons, the proposed amendment may be seen to inappropriately lower the threshold for the collection of personal information. However, having the power to accurately identify someone convicted of a drug-driving offence can assist in the legitimate aim of proving subsequent offences, and also mirrors the existing approach to drink-driving offences. As such, the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined powers: s 8A(1)(ii) of the LRA

Broad definition of 'member of teaching staff'

18. The Bill amends section 73 of the *Crimes Act 1900* so that a school employee with students in his or her care or authority is deemed a member of the teaching staff. It will be an offence for that employee to have sexual intercourse with a student at the school aged between 16 and 18. Such an offence can result in prison for up to 8 years.
19. The proposed definition of 'member of teaching staff' is broad and may capture a wide variety of other people, such as debating and sports coaches. Also, while 'authority' is defined in the division, 'care' is not. The definition of 'care' is important because it is sufficient for a child to be in an employee's 'care' for that employee to be found guilty of an offence (if other elements are also satisfied).

¹ See for example [Bugden; Halper v R \[2015\] NSWDC 346](#).

20. The second reading speech states that the amendment follows a recent Court of Criminal Appeal decision which highlighted a loophole in the current definition of ‘teacher’.

Under the Bill, it is an offence for a school employee who has students in his or her care or authority to have sexual intercourse with a student at the school aged between 16 and 18. This can result in prison for up to 8 years. Relevantly, the Bill and the *Crimes Act 1900* do not define what it means to be in the ‘care’ of a school employee.

The broad wording of the amended provision may make it insufficiently clear who could be found guilty of an offence under the section. Noting that the age of consent is 16, the current provision may unintentionally expose people such as debating and sports coaches (who may be young adults and ex-students) to criminal liability. Although there may be good reasons for this aspect of the expanded definition, the Committee draws this matter to the attention of Parliament.

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

Commencement by proclamation

21. Certain provisions in the Bill are to commence on a day or days to be appointed by proclamation. This includes provisions that amend the *Criminal Procedure Act 1986* to allow for more offences to be tried summarily, and related amendments to other Acts.
22. The Bill also postpones the commencement of certain amendments to the *Succession Act 2006*, including the provision which states that a family provision order can only be made for property outside NSW if the deceased was domiciled in NSW.
23. The second reading speech states that a delay is required in relation to these provisions to allow agencies to prepare for the changes.

The Committee generally prefers legislation to commence on assent or a fixed date. The Bill seeks to delay the commencement of certain provisions, including provisions that allow for more offences to be tried summarily and make changes to family provision claims under the *Succession Act 2006*.

The Local Court (and other justice bodies) may need to update their processes to accommodate an increase in trials for summary offences. Similarly, changes to family provision claims may result in more of these claims and require changes to the Supreme Court’s processes. Accordingly, the Committee makes no further comment.

Appendix One – Functions of the Committee

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

8A Functions with respect to Bills

- 1 The functions of the Committee with respect to Bills are:
 - (a) to consider any Bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - i trespasses unduly on personal rights and liberties, or
 - ii makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - iii makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - iv inappropriately delegates legislative powers, or
 - v insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- 2 A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations

- 1 The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - i that the regulation trespasses unduly on personal rights and liberties,
 - ii that the regulation may have an adverse impact on the business community,
 - iii that the regulation may not have been within the general objects of the legislation under which it was made,
 - iv that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

- v that the objective of the regulation could have been achieved by alternative and more effective means,
 - vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - vii that the form or intention of the regulation calls for elucidation, or
 - viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

2 Further functions of the Committee are:

- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
- (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.