



Legislation Review Committee

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

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Membership

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

This section contains the Legislation Review Committee's reports on Regulations in accordance with section 9 of the *Legislation Review Act 1987*.

Conclusions

PART ONE – BILLS

1. CHILD PROTECTION (WORKING WITH CHILDREN) AMENDMENT (STATUTORY REVIEW) BILL 2018

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

Presumption of innocence

When conducting a Working with Children Check (WWCC), the Bill now expressly allows the Children’s Guardian to consider a person’s criminal history, rather than simply their criminal record. A person’s criminal history may include charges which were never heard or proven or which were dismissed or discharged. The Committee considers that this provision may be seen to trespass on the presumption of innocence.

However, the presumption of innocence must be balanced against the best interests of children. Moreover, the amendment is consistent with the Children’s Guardian’s internal practices as well as its existing statutory discretion to consider other related matters, and also implements a recommendation of the Royal Commission. Accordingly, the Committee makes no further comment.

Confidentiality

Under the Bill, the Children’s Guardian may require any person to produce a statement or information in order to assess whether a person poses a risk to the safety of children. Failure to comply with such a request, without reasonable excuse, is an offence.

The Committee notes that this may be seen to trespass on the confidentiality of certain types of communication, including between health professional and patient, and lawyer and client. For example, as flagged in the statutory review, the Children’s Guardian may request a statement of information from a private psychologist or specialist. These professionals may be bound by duties of confidentiality or, in the case of lawyers, client legal privilege.

That said, it is a defence that the person had a ‘reasonable excuse’ for not providing the requested information. That the provision of such information is unlawful because it is privileged or would breach confidentiality may be a reasonable excuse. Accordingly, the Committee makes no further comment.

Reverse onus of proof

The Bill creates an offence for failing to comply with a request for information from the Children’s Guardian without reasonable excuse. The Bill imposes a reverse onus of proof by requiring that the person who is served with the notice prove that they had a reasonable excuse.

The Committee generally discourages the imposition of a reverse onus of proof as it undermines the presumption of innocence which is central to our justice system. However, in practice, it may be difficult for the Children’s Guardian to prove that a person did not have a reasonable excuse to withhold the required information. In circumstances where the

maximum penalty in question is modest (i.e. 5 penalty units), the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

No review rights - continuing residence approval

The Bill enables the Children's Guardian to grant a continuing residence approval so that young adults who have just turned 18 and reside with a foster carer may remain at home, even if they have been denied a WWCC clearance. This implements a recommendation of the statutory review.

However, there appears to be no express review right for a young adult who is denied a continuing residence approval or whose approval is cancelled. While section 27 of the Act enables an applicant to seek an administrative review by NCAT of certain clearance decisions, this only relates to a refusal or cancellation of a WWCC clearance or an interim bar.

The lack of opportunity to challenge a decision not to grant a continuing residence approval may be seen to trespass on the right of certain vulnerable young adults to shelter. The Committee draws this matter to the attention of Parliament.

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

Commencement by proclamation

The Committee generally prefers legislation to commence on assent or a fixed date. Given that the Bill implements changes to the WWCC that may involve some degree of administrative complexity, the Committee makes no further comment.

2. COMPANION ANIMALS AMENDMENT (DINING AREAS) 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*.

3. SMOKE-FREE ENVIRONMENT AMENDMENT BILL 2018

Inappropriately delegates legislative powers: s8A(b)(iv) of the LRA

Commencement by proclamation

The Committee generally prefers legislation to commence on a fixed date or on assent. However, the Committee notes that the Bill introduces measures to restrict the use of e-cigarettes in smoke-free areas as well as introduce notification requirements on e-cigarette retailers for compliance purposes. The Committee acknowledges that some flexibility concerning commencement may assist in ensuring that those that are required to comply with the Act are made aware of their obligations.

PART TWO – REGULATIONS

1. WORK HEALTH AND SAFETY AMENDMENT (MISCELLANEOUS) REGULATION 2017

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

Confidentiality of information

The Committee notes that the regulation allows a person to give access to certain information or documents, under the *Work Health and Safety Act 2011*, if it is necessary for an exercise of a power or function under the Act. This may infringe on a person's right to confidentiality of any personal information that is ordinarily protected. However, the Committee notes that information cannot be disclosed unless it is for the enforcement of other laws, which may be justified in certain circumstances. In this case, the Committee makes no further comment.

Part One – Bills

1. Child Protection (Working with Children) Amendment (Statutory Review) Bill 2018

Date introduced	14 March 2018
House introduced	Legislative Council
Minister responsible	The Hon. Pru Goward MP
Portfolio	Family and Community Services

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Child Protection (Working with Children) Act 2012* and other legislation as follows:
 - (a) To change the definition of child-related work (being the work for which a working with children check (WWCC) clearance is required), so that direct contact with children must be a usual part of and more than incidental to the work,
 - (b) To make it an offence for an employer to fail to obtain and verify the details of a worker who is employed to work with children, or to keep a record of the details so obtained,
 - (c) To require a placement agency to obtain and verify the details of a worker who is employed to work with children, and to keep a record of the details so obtained, if required to do so by the regulations,
 - (d) To require a licensing, registration or accreditation authority (a licensing authority) to obtain and verify the details of a person to whom a licence, registration, accreditation or other authority is granted or issued, and to keep a record of the details so obtained, if required to do so by the regulations,
 - (e) To give discretion to the Children’s Guardian to permit a child who turns 18 to continue to reside with an authorised carer despite not holding a WWCC clearance,
 - (f) To make further provision for the powers of the Civil and Administrative Tribunal when carrying out reviews under the Act,
 - (g) To require persons (as well as government agencies) to provide information relevant to the preparation of submissions to the Civil and Administrative Tribunal or the assessment of the risk posed by a person when directed to do so by the Children’s Guardian,
 - (h) To require applicants for a WWCC clearance to notify changes in personal details,
 - (i) To permit penalty notices to be issued for offences under the Act,

- (j) To require parent volunteers on overnight camps to have a WWCC clearance,
- (k) To make other miscellaneous changes.

BACKGROUND

2. The Bill implements the first tranche of recommendations of the statutory review of the *Child Protection (Working with Children) Act 2012*. According to the second reading speech, the second tranche of recommendations is likely to be implemented following consultation with stakeholders.
3. The statutory review process involved a discussion paper for which 60 written submissions were received. The discussion paper also considered relevant recommendations of the interim report of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission).

ISSUES CONSIDERED BY THE COMMITTEE

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

Presumption of innocence

4. The Bill provides that the Children's Guardian, who administers the WWCC, can now have regard to an individual's criminal history rather than simply their criminal record: proposed section 15(4)(h). Criminal history is defined to include criminal charges, 'whether or not heard, proven, dismissed, withdrawn or discharged.' According to the second reading speech, the amendment aligns the legislation with the Children's Guardian's existing internal practices, and is also consistent with a recommendation of the Royal Commission.

When conducting a Working with Children Check (WWCC), the Bill now expressly allows the Children's Guardian to consider a person's criminal history, rather than simply their criminal record. A person's criminal history may include charges which were never heard or proven or which were dismissed or discharged. The Committee considers that this provision may be seen to trespass on the presumption of innocence.

However, the presumption of innocence must be balanced against the best interests of children. Moreover, the amendment is consistent with the Children's Guardian's internal practices as well as its existing statutory discretion to consider other related matters, and also implements a recommendation of the Royal Commission. Accordingly, the Committee makes no further comment.

Confidentiality

5. Proposed section 31 of the Bill provides that the Children's Guardian, by notice in writing, may require any person to provide a statement or information relevant to an assessment of whether a person poses a risk to the safety of children. A similar power currently exists, but is limited to compelling information from government agencies.
6. This amendment relates to a recommendation of the statutory review which sought to improve the ability of the Children's Guardian to obtain information from non-government agencies.

7. Under the Bill, failure to comply with an information request, without reasonable excuse, is an offence.

Under the Bill, the Children’s Guardian may require any person to produce a statement or information in order to assess whether a person poses a risk to the safety of children. Failure to comply with such a request, without reasonable excuse, is an offence.

The Committee notes that this may be seen to trespass on the confidentiality of certain types of communication, including between health professional and patient, and lawyer and client. For example, as flagged in the statutory review, the Children’s Guardian may request a statement of information from a private psychologist or specialist. These professionals may be bound by duties of confidentiality or, in the case of lawyers, client legal privilege.

That said, it is a defence that the person had a ‘reasonable excuse’ for not providing the requested information. That the provision of such information is unlawful because it is privileged or would breach confidentiality may be a reasonable excuse. Accordingly, the Committee makes no further comment.

Reverse onus of proof

8. The Bill enables the Children’s Guardian to require any person to produce information that may be relevant to an assessment of whether a person poses a risk to children. Although failure to comply is an offence, it is a defence that the person had a ‘reasonable excuse.’ However, the onus of proving that a person had a reasonable excuse lies with the defendant: proposed section 31(9).

The Bill creates an offence for failing to comply with a request for information from the Children’s Guardian without reasonable excuse. The Bill imposes a reverse onus of proof by requiring that the person who is served with the notice prove that they had a reasonable excuse.

The Committee generally discourages the imposition of a reverse onus of proof as it undermines the presumption of innocence which is central to our justice system. However, in practice, it may be difficult for the Children’s Guardian to prove that a person did not have a reasonable excuse to withhold the required information. In circumstances where the maximum penalty in question is modest (i.e. 5 penalty units), the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

No review rights - continuing residence approval

9. The Bill empowers the Children’s Guardian under new section 11D to grant a continuing residence approval to persons residing in houses with other children in out-of-home care, even if that person has been refused a WWCC clearance. Such an approval can have effect for up to 5 years, and can be renewed or cancelled by the Children’s Guardian.
10. Relevantly, the Children’s Guardian can only grant such an approval if the person is or was, immediately before turning 18, in the out-of-home care of the authorised carer,

and the Guardian is satisfied that any risks to the safety of the children residing at the property have been sufficiently mitigated.

11. The proposed amendment implements Recommendation 8 in the statutory review. The statutory review noted that the current requirement is that young adults in out-of-home care who have been denied a WWCC clearance leave their home within 48 hours, with the result that they are often separated from siblings.

The Bill enables the Children’s Guardian to grant a continuing residence approval so that young adults who have just turned 18 and reside with a foster carer may remain at home, even if they have been denied a WWCC clearance. This implements a recommendation of the statutory review.

However, there appears to be no express review right for a young adult who is denied a continuing residence approval or whose approval is cancelled. While section 27 of the Act enables an applicant to seek an administrative review by NCAT of certain clearance decisions, this only relates to a refusal or cancellation of a WWCC clearance or an interim bar.

The lack of opportunity to challenge a decision not to grant a continuing residence approval may be seen to trespass on the right of certain vulnerable young adults to shelter. The Committee draws this matter to the attention of Parliament.

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

Commencement by proclamation

12. The Bill provides for the Act to commence on a day or days to be appointed by proclamation.

The Committee generally prefers legislation to commence on assent or a fixed date. Given that the Bill implements changes to the WWCC that may involve some degree of administrative complexity, the Committee makes no further comment.

2. Companion Animals Amendment (Dining Areas) Bill 2018*

Date introduced	15 March 2018
House introduced	Legislative Assembly
Member responsible	Mr Jamie Parker MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to provide that legal restrictions that would otherwise make it an offence to allow a dog to be in an enclosed area of a hotel or small bar where food is consumed do not prohibit a dog from being in such an area, subject to the same restrictions that currently apply to dogs being in outdoor areas of hotels, small bars or other premises. As a result, a person will not be prohibited from allowing a dog in an enclosed dining area of a hotel or small bar if:
 - (a) the dog is under the effective control of some competent person and is restrained by means of an adequate chain, cord or leash that is attached to the dog, and
 - (b) the person does not feed the dog or permit the dog to be fed, and
 - (c) the dog is prevented from being in any part of an area that is used for the preparation of food, and
 - (d) the dog is not a dangerous, menacing or restricted dog.
2. The relevant legal restrictions are:
 - (a) a provision of the Companion Animals Act 1998 that prohibits dogs being in a food preparation or consumption area (that is, any public place within 10 metres of any apparatus provided for the preparation or consumption of food), and
 - (b) provisions of the Australia New Zealand Food Standards Code (compliance with which is made mandatory by the Food Act 2003) that prohibit food businesses from permitting live animals in areas in which food is handled
3. Neither of those restrictions applies to assistance animals being used by a person with a disability, so the new provisions will not limit the access of assistance dogs to any area in a hotel or small bar.
4. The amendments do not confer any entitlement on a person accompanied by a dog to enter or use any part of the dining area of a hotel or small bar that is not within a public place without the permission of the operator of the food business that is being conducted there and do not affect the other requirements of the Australia New Zealand Food Standards Code and the Food Act 2003 relating to hygiene and cleanliness.

BACKGROUND

5. In his second reading speech, Mr Parker MP noted that the Bill had been introduced in response to increased council restrictions on dogs entering pub premises. The Bill seeks to lift these legal restrictions so that it is no longer an offence to allow a dog to be in an area where food is consumed.

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*.

3. Smoke-free Environment Amendment Bill 2018

Date introduced	13 March 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Smoke-free Environment Act 2000* and the *Public Health (Tobacco) Act 2008*:
 - (a) To prohibit the use of e-cigarettes and heat-not-burn tobacco products in places where smoking of tobacco is currently prohibited, and
 - (b) To require persons who intend to engage in e-cigarette retailing to notify the Secretary of the Ministry of Health of that intention and certain other matters.

BACKGROUND

2. In the Second Reading Speech, the Minister for Health commented that this Bill aims to restrict second-hand exposure to e-cigarette vapours. The Minister referred to emerging evidence concerning the potential health risks from e-cigarette vapours and indicated that e-cigarette vapours have been found to contain toxins, metals and chemicals that expose both users and bystanders to adverse health effects.
3. The Minister also highlighted that this Bill will bring New South Wales into line with other jurisdictions that have prohibited the use of e-cigarettes in smoke-free areas.

ISSUES CONSIDERED BY THE COMMITTEE

Inappropriately delegates legislative powers: s8A(b)(iv) of the LRA

Commencement by proclamation

4. The Bill provides for the Act to commence on a day or days to be appointed by proclamation.

The Committee generally prefers legislation to commence on a fixed date or on assent. However, the Committee notes that the Bill introduces measures to restrict the use of e-cigarettes in smoke-free areas as well as introduce notification requirements on e-cigarette retailers for compliance purposes. The Committee acknowledges that some flexibility concerning commencement may assist in ensuring that those that are required to comply with the Act are made aware of their obligations.

Part Two – Regulations

1. Work Health and Safety Amendment (Miscellaneous) Regulation 2017

Date published	15 December 2017
Date tabled	LA: 6 February 2018 LC: 13 February 2018
Disallowance date	LA: 1 May 2018 LC: 15 May 2018
Minister responsible	The Hon. Matt Kean MP
Portfolio	Innovation and Better Regulation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Work Health and Safety Regulation 2017*:
 - (a) to update the definition of the ADG Code (the Australian Code for the Transport of Dangerous Goods by Road and Rail) to the latest version of that Code and to provide that it applies as in force from time to time, and
 - (b) to provide that the disclosure or use of information or documents for the administration or enforcement of the Rail Safety National Law (NSW) is excluded from the application of section 271 of the *Work Health and Safety Act 2011*, which would otherwise prevent a person who obtains information or gains access to a document in exercising any power or function under certain provisions of that Act from disclosing, giving access to or using the information or document, and
 - (c) to provide that Subdivision 2 of Division 3 of Part 5.2 of the *Occupational Health and Safety Regulation 2001* continues to apply until 1 January 2020 (as if that Regulation had not been repealed) to and in respect of the registration of certain items of plant, other than certain mining specific plant and amusement devices that are passenger ropeways or water slides, and
 - (d) to amend a reference to an Australian Standard in the context of outer warning placard requirements.
2. This Regulation is made under the *Work Health and Safety Act 2011*, including section 271 (3) (c) (ii), section 276, Schedule 3 (the general regulation-making powers) and clause 1 of Schedule 4.

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

Confidentiality of information

3. The Regulation inserts Clause 702(ua), which provides that the disclosure or use of information or documents for the administration or enforcement of the Rail Safety National Law (NSW) is excluded from the application of section 271 of the *Work Health and Safety Act 2011*. This would otherwise prevent a person (who obtains information or gains access to a document) in exercising any power or function under certain provisions of that Act from disclosing, giving access to or using the information or document.

The Committee notes that the regulation allows a person to give access to certain information or documents, under the *Work Health and Safety Act 2011*, if it is necessary for an exercise of a power or function under the Act. This may infringe on a person's right to confidentiality of any personal information that is ordinarily protected. However, the Committee notes that information cannot be disclosed unless it is for the enforcement of other laws, which may be justified in certain circumstances. In this case, 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.