



Legislation Review Committee

LEGISLATION REVIEW DIGEST

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

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Membership

CHAIR	Ms Felicity Wilson MP, Member for North Shore
DEPUTY CHAIR	The Hon Trevor Khan MLC
MEMBERS	Mr Lee Evans MP, Member for Heathcote Mr David Mehan MP, Member for The Entrance The Hon Leslie Williams MP, Member for Port Macquarie Ms Wendy Lindsay MP, Member for East Hills The Hon Shaoquett Moselmane MLC Mr David Shoebridge MLC
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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

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. FINES AMENDMENT BILL 2019

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, the Committee acknowledges that administrative arrangements for notification, payment and disputing of fines may be facilitated by a flexible commencement date and makes no further comment.

2. REPRODUCTIVE HEALTH CARE REFORM BILL 2019*

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

Right to freedom of conscience – conscientious objection by registered health practitioners

The Bill requires a registered health practitioner with a conscientious objection to the performance of a termination to disclose that belief. It also requires that they refer a person requesting performance of, or advice about, a termination to a health practitioner or health service provider who they believe is able to provide the service and does not hold a conscientious objection to it.

The requirement to refer the person elsewhere may impact on the health practitioner's right to freedom of conscience/belief as they are required to participate in a process to which they have a conscientious objection. However, the Committee notes that the right of a woman to lawfully access termination of a pregnancy must also be considered; and that the requirement is consistent with the existing code of conduct issued by the Medical Board of Australia. Similarly, the registered health practitioner with a conscientious objection is not required to advise on or perform the termination but rather to refer or transfer care of the person. In the circumstances, the Committee makes no further comment.

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

Matters dealt with by regulations

The Bill allows the category of persons who may assist in the performance of a termination to be expanded by regulations. The Committee generally prefers substantive matters to be dealt with in principal legislation. This is to ensure an appropriate level of parliamentary oversight. However, the Committee notes that any expansion of the category is limited to registered health practitioners. Given this safeguard, the Committee makes no further comment.

3. TRANSPORT ADMINISTRATION AMENDMENT (RMS DISSOLUTION) BILL 2019

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

Commencement by proclamation

The Bill provides that the Act will commence by proclamation. The Committee prefers that an Act commences on a fixed date or on assent. This provides certainty to anyone affected by the provisions of an Act. The object of the Bill is to dissolve RMS and transfer its assets, rights, liabilities and functions to TfNSW. The Committee acknowledges that it may be preferable to have a flexible start date for changes of this kind, where administrative arrangements may need to be put in place. In the circumstances, the Committee makes no further comment.

Part One – Bills

1. Fines Amendment Bill 2019

Date introduced	31 July 2019
House introduced	Legislative Assembly
Minister responsible	The Hon Victor Dominello MP
Portfolio	Customer Service

Purpose and description

1. The object of this Bill is to amend the *Fines Act 1996*:
 - (a) to make further provision for the electronic service of penalty notices and to enable the electronic service of penalty reminder notices and penalty notice enforcement orders,
 - (b) to make further provision for the Commissioner of Fines Administration (the Commissioner) to withdraw penalty notice enforcement orders, on the Commissioner's own initiative or on an application by a person in respect of whom an order has been made,
 - (c) to enable a person to whom a penalty notice is issued to apply for a review of the decision to issue the penalty notice even after a penalty notice enforcement order has been made,
 - (d) to extend the circumstances in which a person with an outstanding fine may seek further time to pay,
 - (e) to make further provision for the Commissioner to use an amount that is repayable to a person to pay another amount owed by the person to the Commissioner, instead of refunding the amount to the person,
 - (f) to enable a person to nominate themselves as the driver responsible for an offence for which a penalty notice has been issued, rather than requiring the owner of the vehicle to nominate that person.
2. The Bill also amends the following Acts and Regulations:
 - (a) the *Fines Regulation 2015* to make consequential amendments,
 - (b) the *Road Transport Act 2013* to enable a person to nominate themselves as the person in charge of a vehicle at the time of a camera recorded offence or parking offence, rather than requiring the owner of the vehicle to nominate the person, and
 - (c) the *Road Transport (General) Regulation 2013* to permit a penalty notice to be issued for an offence of failing to supply a statutory declaration to verify a nomination of a person in charge of a vehicle.

Background

3. In his second reading speech to Parliament, the Hon Victor Dominello stated that the Bill expands the range of electronic delivery methods for notification of fines "to keep up with how technology and customer preferences are changing", while streamlining some of the

administrative procedures for fines. These include enabling self-nomination of the driver of the vehicle as a voluntary admission of liability. Mr Dominello stated:

Currently self-nominations are not legally recognised. They can delay finalisation of the fine and even result in the wrong person being held responsible for the fine and demerit points. To overcome this, the bill recognises a nomination made by the driver in the same way that a nomination made by the vehicle owner is currently recognised. This self-nomination will be considered a voluntary admission of liability that the person committed the offence. A fine would then be issued to the self-nominated driver, relieving the owner of the liability for the offence and fine.

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 commences on a day to be appointed by proclamation.

The Committee generally prefers legislation to commence on assent or a fixed date. However, the Committee acknowledges that administrative arrangements for notification, payment and disputing of fines may be facilitated by a flexible commencement date and makes no further comment.

2. Reproductive Health Care Reform Bill 2019*

Date introduced	1 August 2019
House introduced	Legislative Assembly
Member responsible	Alex Greenwich MP
	Private Members Bill*

Purpose and description

1. The objects of this Bill are:
 - (a) to enable a termination of a pregnancy to be performed by a medical practitioner on a person who is not more than 22 weeks pregnant;
 - (b) to enable a termination of a pregnancy to be performed by a medical practitioner on a person who is more than 22 weeks pregnant in certain circumstances;
 - (c) to identify certain registered health practitioners who may assist in the performance of a termination;
 - (d) to require a registered health practitioner who has a conscientious objection to the performance of a termination on a person to disclose the objection and refer the person to another practitioner who does not have a conscientious objection;
 - (e) to repeal offences relating to abortion in the *Crimes Act 1900* and abolish any common law rules relating to abortion; and
 - (f) to amend the *Crimes Act 1900* to make it an offence for a person who is not a medical practitioner otherwise authorised under the Act to terminate a pregnancy.

Background

2. The *Reproductive Health Care Reform Bill 2019* is co-sponsored by the Hon Shelley Hancock MP, Trish Doyle MP, the Hon Brad Hazzard MP, Ryan Park MP, Jenny Leong MP, the Hon Leslie Williams MP, the Hon Penny Sharpe MLC, Alex Greenwich MP, the Hon Trevor Khan MLC, the Hon Abigail Boyd MLC, Jo Haylen MP, Jenny Aitchison MP, Felicity Wilson MP, Greg Piper MP and the Hon Emma Hurst MLC.
3. In his second reading speech to Parliament, Mr Alex Greenwich MP noted that NSW is the last Australian jurisdiction to decriminalise the termination of a pregnancy. He stated:

Our Crimes Act still makes it a criminal offence to procure an unlawful abortion. The framework that enables pregnancies to be terminated does not come from the law, but from common law interpretations of what "lawful" and "unlawful" terminations constitute. The courts have ruled that terminations are lawful if they protect a woman from serious danger to her life or physical or mental health, taking into account economic, social or medical reasons...

There is no clarity beyond this interpretation in the law itself and determining whether each termination meets the common law criteria for "lawful" remains a grey area in the law...The threat of conviction can obviously create fear and stigma for women wanting an abortion and reluctance by healthcare practitioners to provide services or even advice to women about their options.

4. The Queensland Law Reform Commission has stated that termination should generally be treated as a health issue rather than as a criminal matter. It acknowledged the process of balancing the various rights involved, finding that a woman's autonomy has the greatest weight at the earlier stages of pregnancy whilst the interests of the foetus will have increasing weight at the later stages of pregnancy.¹
5. According to the Victorian Law Reform Commission, "The common law has always taken the view that legal personhood – possession of the legal rights and protections held by all people – does not arise until a fetus becomes a person by being 'born alive'".² However, as acknowledged by The Laws of Australia, "this is not to say that there are not protections against the arbitrary destruction of a foetus through the regulation of abortion".³
6. Mr Greenwich told Parliament that the Bill would ensure that all terminations are lawful for women up to 22 weeks pregnant on request if performed by a registered doctor. He continued:

After this a termination is only lawful if two doctors consider that the procedure should be performed after considering all the relevant medical circumstances and the woman's current and future physical, psychological and social circumstances. The additional provisions after 22 weeks recognise that terminations at this later stage often involve disadvantage, distress, complexities and higher risks to the pregnant woman...

Twenty-two weeks was chosen with the advice of the AMA and follows the recommendations of the Queensland Law Reform Commission and is in line with the Queensland Act. It is supported by Royal Australian New Zealand College of Obstetricians and Gynaecologists.

7. The Committee on the Elimination of Discrimination against Women in its General Recommendation No 24 (20th session, 1999) advised that where possible, legislation criminalising abortion should be amended to remove punitive provisions imposed on women who undergo abortion. Further, the UN Special Rapporteur has found that criminal laws that penalise and restrict abortion are barriers to the realisation of women's right to health and infringe their "dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health".⁴
8. Clause 11 of the Bill provides that the Act must be reviewed within five years of its commencement, with a copy of the report provided to Parliament.

¹ Queensland Law Reform Commission, [Review of termination of pregnancy laws](#), Report No 76, June 2018, p 5.

² Victorian Law Reform Commission, [Law of Abortion](#), Report, 2008, Appendix C, para C.5.

³ The Laws of Australia, [21.7.310].

⁴ United Nations, [Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health](#), 2011, A/66/254, Para 21.

Issues considered by committee

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

Right to freedom of conscience – conscientious objection by registered health practitioners

9. Clauses 8(1) and (2) of the Bill sets out the circumstances in which a registered health practitioner is required to disclose a conscientious objection to termination. These include where: a registered health practitioner is requested to perform or assist with a termination; or make a decision about whether a termination should be performed on a person who is more than 22 weeks pregnant; or advise a person about the performance of a termination on another person.
10. If the circumstances involve a registered health practitioner with a conscientious objection being asked by a person to either perform, or provide advice about, a termination on that person, they must, without delay, refer or transfer the care of that person: clause 8(3). The person must be referred or transferred to another registered health practitioner or health service provider believed to both be able to provide the service and not have a conscientious objection to it.
11. In his second reading speech to Parliament, Mr Greenwich noted that "The existing Medical Board of Australia's *Good medical practice: a code of conduct for doctors in Australia* states that doctors must not use their objection to impede access to legal treatment and the Australian Medical Association position statement *Conscientious Objection 2019* requires doctors to take whatever steps are necessary to ensure the patient's access to care is not impeded". He further stated:

It is vital that this bill, which seeks to ensure women have access to safe and legal abortions, in no way limits or reduces that access. The termination of a pregnancy is a time critical procedure in which even small delays can significantly impede available healthcare options including the type of procedure available to a woman, the setting in which that procedure can take place and potential complications.
12. The duty of care owed by a registered health practitioner to provide a service in an emergency is not limited in any way: clause 8(4).

The Bill requires a registered health practitioner with a conscientious objection to the performance of a termination to disclose that belief. It also requires that they refer a person requesting performance of, or advice about, a termination to a health practitioner or health service provider who they believe is able to provide the service and does not hold a conscientious objection to it.

The requirement to refer the person elsewhere may impact on the health practitioner's right to freedom of conscience/belief as they are required to participate in a process to which they have a conscientious objection. However, the Committee notes that the right of a woman to lawfully access termination of a pregnancy must also be considered; and that the requirement is consistent with the existing code of conduct issued by the Medical Board of Australia. Similarly, the registered health practitioner with a conscientious objection is not required to advise on or perform the termination but rather to refer or transfer care of the person. In the circumstances, the Committee makes no further comment.

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

Matters dealt with by regulations

13. Clause 7 of the Bill lists the categories of persons who may assist a medical practitioner in the performance of a termination of a pregnancy. Categories include medical practitioners, nurses, midwives, pharmacists or Aboriginal Torres Strait Islander health practitioners, or another registered health practitioner prescribed by the regulations. This enables the regulations to expand the category of persons who may assist in the performance of a termination.
14. The Committee generally prefers substantive matters to be dealt with in principal legislation. This is to ensure an appropriate level of parliamentary oversight. Unlike principal legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987*) the statutory rule may have already been in operation for some time before disallowance occurs.⁵

The Bill allows the category of persons who may assist in the performance of a termination to be expanded by regulations. The Committee generally prefers substantive matters to be dealt with in principal legislation. This is to ensure an appropriate level of parliamentary oversight. However, the Committee notes that any expansion of the category is limited to registered health practitioners. Given this safeguard, the Committee makes no further comment.

⁵ See discussion of the limits to parliamentary oversight of subordinate legislation in ACT Standing Committee on Justice and Community Safety, 'Henry VIII FactSheet' November 2011 pp2-3 at https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

3. Transport Administration Amendment (RMS Dissolution) Bill 2019

Date introduced	1 August 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Andrew Constance MP
Portfolio	Transport and Roads

Purpose and description

1. The object of this Bill is to dissolve Roads and Maritime Services (RMS) and transfer its assets, rights, liabilities and functions to Transport for NSW (TfNSW).

Background

2. The Minister, in his Second Reading Speech, stated that the Bill is about creating a single transport agency:

This Bill is about integrating transport. It is about bringing Roads and Maritime Services into the agency in an integrated, constructive way. This will enable a better strategic approach to the integration of transport for everybody in the State. With a single transport agency we will not have roads being built in one corner and transport being delivered in another without anybody talking to each other. I note that in progressing these important reforms we have undertaken extensive consultation with the unions and staff. I again reiterate that the Bill is not going to change the employment status of Roads and Maritime Services [RMS] staff. They will remain part of the transport service in the same way they are now.

3. The Minister also stated that there won't be any changes to 'the RMS functions that will be exercised by Transport for NSW once the dissolution occurs.'

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 commences on a day or days to be appointed by proclamation.

The Bill provides that the Act will commence by proclamation. The Committee prefers that an Act commences on a fixed date or on assent. This provides certainty to anyone affected by the provisions of an Act. The object of the Bill is to dissolve RMS and transfer its assets, rights, liabilities and functions to TfNSW. The Committee acknowledges that it may be preferable to have a flexible start date for changes of this kind, where administrative arrangements may need to be put in place. In the circumstances, 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.