

PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 5 of 2009

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* Denotes Private Member's Bill

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FUNCTIONS OF THE LEGISLATION REVIEW 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.
- (3) 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.

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

This section contains the Legislation Review Committee’s reports on Bills introduced into Parliament. Following a brief description of the Bill, the Committee considers each Bill against the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987* (see page 3).

Section B: Ministerial correspondence – Bills previously considered

This section contains the Committee’s reports on correspondence it has received relating to Bills and copies of that correspondence. The Committee may write to the Minister responsible for a Bill, or a Private Member of Parliament in relation to his or her Bill, to seek advice on any matter concerning that Bill that relates to the Committee’s scrutiny criteria.

Part Two – 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 is set out in s 9 of the *Legislation Review Act 1987* (see page 3).

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.

Regulations about which the Committee is seeking further information

This table lists the Regulations about which the Committee is seeking further information from the Minister responsible for the instrument, when that request was made and when any reply was received.

Copies of Correspondence on Regulations

This part of the *Digest* contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought information. The Committee’s letter to the Minister is published together with the Minister’s reply.

Appendix 1: Index of Bills Reported on in 2009

This table lists the Bills reported on in the calendar year and the *Digests* in which any reports in relation to the Bill appear.

Appendix 2: Index of Ministerial Correspondence on Bills for 2009

This table lists the recipient and date on which the Committee sent correspondence to a Minister or Private Member of Parliament in relation to Bills reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Bill and correspondence appear.

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2009

This table specifies the action the Committee has taken with respect to Bills that received comment in 2008 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

Appendix 4: Index of correspondence on Regulations reported on in 2009

This table lists the recipient and date on which the Committee sent correspondence to a Minister in relation to Regulations reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Regulation and correspondence appear.

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Crimes (Criminal Organisations Control) Bill 2009

Issue: Section 11 (3) of Part 2 – Duration of declaration – Presumption of Innocence:

13. The Committee is concerned that a change in membership may mean that it is no longer the same organisation made up by the same members. If a declaration cannot be affected by a change in the membership of a declared organisation, the Committee is of the view that section 11 (3) may then be inconsistent with a presumption of innocence, a fundamental right established by Article 14 (2) of the *International Covenant on Civil and Political Rights*. Any change in the nature or membership of the organisation should require the eligible Judge to be satisfied that: (a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and (b) the organisation represents a risk to public safety and order in this State, as stated by section 9 (1) when initially making a declaration.
14. The Committee refers section 11 (3) to Parliament as the Committee considers it to be inconsistent with a presumption of innocence when a change in the membership of the organisation may change the nature of the organisation or it may mean that it is no longer the same organisation to which the initial declaration was made in respect of.

Issues: Part 3 Control of members of declared organisations – Freedom of Association; Presumption of Innocence; Strict Liability; Right To Work; Rights of the Child; and Schedule 1.1 Amendment of *Bail Act 1978* – Presumption of Innocence:

Freedom of Association:

18. The Committee notes that the Victorian Scrutiny of Acts and Regulations Committee in 2002, made the recommendation to repeal the similar offence of consorting, where the Victorian Scrutiny of Acts and Regulations Committee concluded that the offence was predicated on the principle of guilt by association (in breach of community belief in the principle of freedom of association). Law reform bodies in Australia that have examined the offence of consorting have also recommended its repeal. In 1992, the Law Reform Commission of Western Australia stated that it was: “inconsistent with the principles of criminal law to make it an offence to associate with particular people. Offences should proscribe conduct thought deserving of punishment. Merely associating with people, whether they are known to be in a particular category or are merely reputed to be in a particular category, should not be criminal”.
19. Accordingly, by noting the above recommendations of the Victorian Scrutiny of Acts and Regulations Committee in 2002 and that of the Law Reform Commission of Western Australia in 1992 in the comparable context of the offence of consorting, the Committee refers Part 3 of this Bill to Parliament, as constituting an undue trespass on personal rights and liberties by undermining the right of freedom of association and an undue interference on a person’s honour and reputation.

20. The Committee also observes that unlike the South Australian *Serious and Organised Crime (Control) Act 2008* where it states that under section 4 (2) of its Objects, it is not the intention of Parliament that the powers in this Act be used in a manner that would diminish the freedom of persons in this State to participate in advocacy, protest, dissent or industrial action, this Bill, however, does not contain such similarly stated intent in its provisions.
21. The Committee further notes that this Bill does not determine the minimum level of association that may be defined as 'habitual' or 'regular' and is therefore, concerned with its broad scope to unduly trespass on individual rights of freedom of association. Therefore, the Committee refers it to Parliament.

Presumption of Innocence:

23. The Committee notes that the current non-association and place restriction orders under section 17A (2) of the *Crimes (Sentencing Procedure) Act 1999*, can only be made following conviction of an offence. Therefore, the restriction on the freedom to associate could only be imposed on a person who has been convicted of an offence during the sentencing phase. In addition, these orders must specify each person with whom the offender may not associate and the orders must be made for a specified duration.
24. Therefore, the Committee is concerned that the fundamental right to a presumption of innocence established by Article 14 (2) of the *International Covenant on Civil and Political Rights* may be eroded by this Bill since the proposal on interim control orders and control orders under Part 3 will be applied to people without being convicted of a specific crime such as associating with another person for any particular purpose or the association would have led to the commission of an offence. The Committee further notes that section 26 (6) of Division 3 of Part 3 of the Bill states that: For the avoidance of doubt, in proceedings for an offence against this section, it is not necessary for the prosecution to prove that the defendant associated with another person for any particular purpose or that the association would have led to the commission of any offence.
25. This is a departure from the current non-association orders imposed under section 17A (2) of the *Crimes (Sentencing Procedure) Act 1999*, which can only be made following conviction of an offence as part of the person's sentence.
28. The Committee notes the comparison with the offence of consorting, where association with or membership of an organisation and the company which the person keeps, will be punished (or controlled) rather than a specific criminal conduct or guilty act (*actus reus*).
29. In light of the above comments made in *Jan v Fingleton* and the non-association orders that can be made during sentencing under the *Crimes (Sentencing Procedure) Act 1999*, the Committee refers the Bill's Part 3 and its section 26 (6) to Parliament as undue trespasses on personal rights and liberties. The Committee is of the view that they may erode the fundamental right of a presumption of innocence, since no specific crime or criminal activity needs to be established or proven yet a person would be subject to a control order.

Summary of Conclusions

30. The Committee also refers Parliament to section 23 of Part 3 where a control order remains in force until it is revoked. This departs from the non-association and place restriction orders that are currently imposed under the *Crimes (Sentencing Procedure) Act 1999*, where such orders must be made for a specified duration. In addition, these orders made under the *Crimes (Sentencing Procedure) Act* must specify each person with whom the offender may not associate. The Committee is concerned that the scope of the Bill is unclear on whether the control orders must specify each person with whom the offender may not associate since section 26 (2) of Part 3 ambiguously states that: A person may be guilty of an offence under subsection (1) in respect of associations with the same person or with different people.
31. The Committee also holds concerns with regard to Schedule 1.1 – amendment of *Bail Act 1978*. This proposes to amend the *Bail Act* so that there will no longer be a presumption in favour of bail in relation to the offence under section 26 (Association between members of declared organisations subject to interim control order or control order) of the proposed Act. The Committee considers this could be contrary to the presumption of innocence, compared to the general presumption in favour of bail for other offences, and views it as undermining the right to be treated as innocent, and refers this to Parliament.

Strict Liability:

35. The Committee observes that under the South Australian legislation, there is a limitation on the type of association with regard to their control orders, such that the defendant has to engage or has engaged in serious criminal activity as well as having regularly associated with members of a declared organisation or having regularly associated with other persons who engage or have engaged in serious criminal activity.
36. The NSW Bill does not impose such requirements. Therefore, the controlled member of a declared organisation who associates with another controlled member of the declared organisation would be guilty of an offence irrespective of whether the association has been regular or whether they have engaged in serious criminal activity.
37. The Committee is of the view that the scope of Part 3 of the Bill is excessively wide since it may include mere accidental or one-off meetings or short communications rather than 'regular' or 'habitual' dealings.
39. Mayo J in *Dias v O'Sullivan* found that mere repetition of meetings does not constitute proof of habit in consorting. Instead, he found that there must be some mental element in favour of such meetings. This approach was also approved in *Johanson v Dixon* (1979) 143 CLR 376, 383. In case law, at least frequency of meeting is usually required to establish the proof of habit. It is also arguable that the common law approach to the issue of 'habit' or 'frequency' is related to the intention or expectation of meeting and an intention to seek out the company rather than an expectation of conversation in an accidental meeting.
41. The Committee refers to Justice Mayo's judgment in *Dias v O'Sullivan*, which has also been approved in *Johanson v Dixon*, both cited above in the comparable context of the offence of consorting. These cases found support that there must be some mental element in respect of such meetings such as the intention or expectation of meeting or an intention to seek out the company (or association) rather than an accidental meeting (or association).

42. Accordingly, in light of the wide scope of Part 3 which may cover accidental or one-off meetings or short communications rather than any requirement for 'regular' or 'habitual' dealings, the Committee finds the offence of strict liability under sections 26 (1) and (2) where the prosecution is not required to establish that there was an intention to seek out the company or association or intention to 'regularly' associate instead of an accidental or one-off association, could constitute an undue trespass on individual rights and be contrary to the right to a presumption of innocence. The Committee notes that terms of imprisonment are also generally considered inappropriate in relation to strict liability offences. Therefore, the Committee refers this to Parliament.

Right To Work:

43. The Committee is concerned that section 27 on the prohibition on carrying of certain activities when interim control order or control order takes effect may deny a person's right to work as established by Article 6 (1) of the *International Covenant on Economic, Social and Cultural Rights*. The Committee notes that Article 6 (1) of the *International Covenant on Economic, Social and Cultural Rights* establishes that: The State Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely choose or accepts, and will take appropriate steps to safeguard this right".
44. Unlike the South Australian legislation, this Bill includes a broad list of prescribed activity which will be automatically suspended on an interim control order and revoked on a control order under section 27 of Division 3 of Part 3. Under its section 27 (4): A controlled member of a declared organisation is prohibited from applying for any authorisation to carry on a prescribed activity so long as an interim control order or control order in relation to the member is in force.
46. The Committee considers the above list in section 27 (6) as excessively broad in the absence of a requirement for the authority or prosecution to establish that there is a strong connection between the particular prescribed activity or occupation and serious criminal activity. The Committee holds the view that in the absence of a legal requirement and onus on the prosecution to establish a strong connection between the prescribed activity or occupation and serious criminal activity, section 27 and in particular, the ill-defined and wide administrative powers contained in section 27 (6) (m) where any other activity may be prescribed by the regulations, could unduly interfere with the right and opportunity of a person to gain their living by work which they choose or accept, as established under Article 6 (1) the *International Covenant of Economic, Social and Cultural Right*. Accordingly, the Committee refers this to Parliament.
47. The Committee also notes that unlike the South Australian legislation, this Bill is not subject to a sunset clause. The South Australian *Serious and Organised Crime (Control) Act 2008* under its section 39, expires 5 years after the date on which the section comes into operation in addition to a review of the operation of that Act under its section 38. The Committee considers that given the wide scope of Part 3 and the ill-defined and broad powers contained in some of its provisions, which may trespass unduly on individual rights and liberties, a sunset clause with an expiry date of the legislation may be an appropriate step to safeguard some of the fundamental rights of concern. The Committee refers this to Parliament accordingly.

Rights of the Child:

49. The Committee notes that Part 3 of the Bill and section 26 (1) may undermine the rights of a child such as established by Article 37 (b) of the *Convention on the Rights of the Child*: No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and *shall be used only as a measure of last resort and for the shortest appropriate period of time*.
50. The Committee is concerned that for a first offence under the section 26 (1)(a), imprisonment is for 2 years and under section 26 (1)(b) for a second or subsequent offence, imprisonment is for 5 years. The Committee is of the view that imprisonment for such offences could erode the rights of the child under Article 37 (b) of the *Convention on the Rights of the Child*, especially in respect of detention or imprisonment of a child shall only be used as a measure of last resort and for the shortest appropriate period of time. Therefore, the Committee refers this as an undue trespass on the rights of the child, to Parliament.

Issue: Section 13 (2) of Part 2 – Conduct of hearings of applications for declarations under this Part – Not required to provide reasons:

52. The Committee is concerned that the eligible Judge is not required to provide any reasons or grounds for the decision that a particular organisation is a declared organisation for the purposes of this Act. This is particularly of concern when section 11 (2) states that the declaration remains in force for a period of 3 years after the day on which it takes effect (unless it is sooner revoked or renewed). The effect is that the applicant will not know the grounds for appeal if reasons were not given and as such, this means the declaration will remain in force for 3 years without review. The Committee refers this to Parliament, as it considers that section 13 (2) in light of section 11 (2), may in effect, unduly trespass on individual rights and liberties by precluding a merits review.

2. Crimes (Sentencing Procedure) Amendment (Council Law Enforcement Officers) Bill 2009

7. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

3. Garling Inquiry (Clinician and Community Council) bill 2009*

4. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

4. Gas Supply Amendment (Ombudsman Scheme) Bill 2009

Issue: Clause 2 – Commencement by Proclamation – Provide the Executive with unfettered control over the commencement of an Act

8. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

5. Greyhound Racing Bill 2009

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

26. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

6. Harness Racing Bill 2009

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

26. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

7. Racing Legislation Amendment Bill 2009

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

22. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

8. Succession Amendment (Intestacy) Bill 2009

Issue: Proposed Section 112 – Right to Property, Rights of Children

10. The Committee does not consider that proposed Section 112, which now leaves the entire estate to the spouse or partner, will unduly trespass upon the inheritance rights of the children of the relationship given the rights conveyed to children of a relationship under Chapter 3 of the Succession Act 2006 should that spouse or partner not subsequently name those children beneficiaries.

Issue: Clause 2 – Commencement by Proclamation – Provide the Executive with unfettered control over the commencement of an Act

12. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. CRIMES (CRIMINAL ORGANISATIONS CONTROL) BILL 2009

Date Introduced:	2 April 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General

The Bill passed both Houses on 2 April 2009 and was assented to on 3 April 2009. The preparation of this report was done in accordance with the *Legislation Review Act 1987* with respect to commenting on Bills as originally presented to Parliament.

Purpose and Description

1. This Bill provides for the making of declarations and orders for the purpose of disrupting and restricting the activities of criminal organisations and their members; to make related amendments to various Acts; and for other purposes.
2. It proposes that the Commissioner of Police be able to seek a declaration from a Supreme Court judge acting, as *persona designata*, that a gang is a declared criminal organisation. An eligible judge may make a declaration if they are satisfied that an organisation's members associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and that the organisation represents a risk to public safety and order in New South Wales.
3. Once the organisation is declared, the Commissioner may then seek control orders from the Supreme Court in respect of one or more persons on the basis that those persons are members of a declared criminal organisation and there are sufficient grounds for making the order. The controlled member will not be able to associate with another controlled member of that gang. Otherwise, they will risk two years jail for the first offence or they will risk five years in jail for a second or subsequent offence of breaching that control order.
4. The Bill amends the Bail Act so that there will be no presumption in favour of bail for this offence.
5. Members of declared criminal gangs will also be stripped of their licence for working in high-risk industries that are vulnerable to bkie and organised crime. Some of these industries are the security, tow truck, car repair and motor trading industries. They will be stripped of any firearm licence.
6. This Bill will also amend section 6 of the *Criminal Assets Recovery Act 1990* by taking away dishonest earnings through the addition of the offences in section 93T of the *Crimes Act 1900* of participating in a criminal group. The effect of this amendment is that the New South Wales Crime Commission will be able to pursue people who participate in criminal groups, either knowingly or recklessly, regardless of whether they are a controlled member of a declared criminal organisation.

Background

7. According to the Agreement in Principle speech:

The legislation is specific to outlaw motorcycle gangs and their members and in targeting outlaw motorcycle gangs, seeking to declare them as criminal organisations, we will put in place strong safeguards to ensure that the gangs alone are the subject of the bill. Sensibly and prudently, we have sought expert legal advice from the Solicitor General on this bill. I am advised that these laws are backed by that advice, which says that they are well protected against any future High Court appeals... Since the terrible incident at Sydney Airport, 12 members of various outlaw motorcycle gangs have been arrested. I am advised that yesterday afternoon, officers attached to Strike Force Raptor arrested another man linked to outlaw motorcycle gang crime. A 36-year-old Rockdale man has been charged with a range of firearm offences. Strike Force Raptor is just one element of the Government's strategy to fight outlaw motorcycle gangs.

8. The New South Wales Attorney General will also be discussing with the State and Territory counter-parts and with the Commonwealth the need for a national approach as the problem of international crime crosses State borders.

The Bill

9. The object of this Bill is to disrupt and restrict the activities of organizations (**declared organisations**):

- (a) whose members associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and that represent a risk to public safety and order in New South Wales, and
- (b) which are the subject of a declaration by an eligible Judge (a Supreme Court judge acting as *persona designata*).

10. The Bill provides for the Supreme Court to make interim control orders in relation to members (**controlled members**) of declared organisations, which may later be confirmed (or confirmed with variations) by confirmatory control orders. The making of orders has the following ramifications for the controlled member:

- (a) the controlled member will commit an offence if he or she associates with another controlled member of the particular declared organisation,
- (b) any authorisation to carry on certain specified activities will, on the making of an interim control order, be suspended and, on the making of the confirmatory control order, be cancelled.

11. Outline of provisions

Part 2 Declared organisations

Clause 5 provides for Judges of the Supreme Court who consent to being eligible Judges for the purposes of the proposed Part to be declared to be eligible Judges by the Attorney General.

Clause 6 enables the Commissioner of Police to apply for a declaration in relation to a particular organisation as described in the Overview above and sets out the requirements for such an application.

Clause 7 requires notice of the making of the application to be published in the Gazette and in at least one newspaper circulating throughout New South Wales inviting members of the organisation concerned and other persons who may be directly affected (whether or not

adversely) by the outcome of the application to make submissions to the eligible Judge at a hearing to be held on a date specified in the notice.

Clause 8 gives the persons referred to in the notice the right to be present and to make submissions at the hearing unless information to be disclosed at the hearing involves criminal intelligence. Other persons who may be directly affected may also be present and make submissions with leave. Provision is also made to enable submissions to be made in private in certain circumstances.

Clause 9 enables the eligible Judge to make the declaration sought by the Commissioner if the eligible Judge is satisfied that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and the organisation represents a risk to public safety and order in this State. The section sets out the matters the eligible Judge may take into account in deciding whether or not to make a declaration.

Clause 10 requires notice to be given of the making of the declaration in the Gazette and in at least one newspaper circulating throughout the State.

Clause 11 provides for the duration of declarations.

Clause 12 provides for the revocation of declarations.

Clause 13 provides that the rules of evidence do not apply to the hearing of an application for a declaration and that the eligible Judge is not required to provide reasons for making a declaration.

Part 3 Control of members of declared organisations

Division 1 Interim control orders

Clause 14 enables the Supreme Court, on the application of the Commissioner of Police, to make an interim control order in relation to one or more members of a declared organisation pending the hearing and final determination of a confirmatory control order in relation to the member or members concerned. The order may be made in the absence of, and without notice to, the member concerned but only takes effect when the member is notified of its making in accordance with sections 15 and 16.

Clause 15 states that an interim control order takes effect when notice of it is served personally on the member concerned.

Clause 16 sets out the information that must be included in the notice served on the member. This includes the grounds on which the interim control order was made, an explanation of the ramifications of the making of the order and an explanation of the right to object to the making of the order at the hearing for the making of the confirmatory control order.

Clause 17 provides for the duration of interim control orders.

Clause 18 requires the Supreme Court to hear applications for confirmatory control orders as expeditiously as possible in hardship cases.

Division 2 Control orders

Clause 19 provides for the making by the Supreme Court of confirmatory control orders.

Clause 20 enables the member the subject of an order to appear at the hearing for the making of the order and to make submissions in relation to the application for the control order.

Clause 21 provides for the form of a control order, including a requirement that it specify the right to appeal against its making.

Clause 22 provides for when control orders take effect.

Clause 23 provides for the duration of control orders.

Clause 24 provides for appeals against the making of control orders.

Clause 25 provides for the variation and revocation of control orders.

Division 3 Consequences of making of interim control orders and control orders

Clause 26 makes it an offence for a controlled member of a particular declared organisation to associate with another controlled member of the same organisation.

Clause 27 provides for the suspension and revocation of authorisations to carry on prescribed activities held by a controlled member on the taking of effect of interim control orders and control orders, respectively.

Part 4 Miscellaneous

Clause 28 provides protections for criminal intelligence.

Clause 29 provides protections for certain submissions.

Clause 30 provides for the Commissioner of Police to keep a register of information relating to declared organisations and controlled members.

Clause 31 requires the Attorney General to be given notice of applications under the proposed Act and the right to be present and to make submissions at the hearings of the applications.

Clause 32 states the burden of proof in proceedings under the proposed Act.

Clause 33 enables the Commissioner of Police to delegate functions with respect to the categorisation of information as criminal intelligence.

Clause 34 provides immunity from civil and criminal liability for persons exercising functions under the proposed Act and for the Crown.

Clause 35 prevents challenge or review by a court (other than by way of appeal under section 24) or administrative body of the exercise of certain functions under the proposed Act.

Clause 36 provides for proceedings for offences under the proposed Act or regulations made under the proposed Act.

Clause 37 enables the making of rules of court.

Clause 38 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 39 provides for the Ombudsman to keep under scrutiny, and report on, the exercise of powers by police under the proposed Act for a period of 2 years after the commencement of the proposed Act.

Clause 40 provides for the review of the proposed Act in 5 years from the date of assent to the proposed Act.

Schedule 1 Amendment of Acts

Schedule 1.1 amends the *Bail Act 1978* so that there will be a neutral presumption against bail in relation to the offence under section 26 (Association between members of declared organisations subject to interim control order or control order) of the proposed Act.

Schedule 1.2 amends the *Criminal Assets Recovery Act 1990* so that its provisions will apply to persons engaged in offences under section 93T (Participation in criminal groups) of the *Crimes Act 1900*.

Schedule 1.3 amends the *Criminal Procedure Act 1986* so that the indictable offence in section 26 of the proposed Act may be prosecuted summarily.

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

Issue: Section 11 (3) of Part 2 – Duration of declaration – Presumption of Innocence:

12. Section 11 (3) provides that: A change in the name or membership of a declared organisation does not affect the declaration.

13. The Committee is concerned that a change in membership may mean that it is no longer the same organisation made up by the same members¹. If a declaration cannot be affected by a change in the membership of a declared organisation, the Committee is of the view that section 11 (3) may then be inconsistent with a presumption of innocence, a fundamental right established by Article 14 (2) of the *International Covenant on Civil and Political Rights*. Any change in the nature or membership of the organisation should require the eligible Judge to be satisfied that: (a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and (b) the organisation represents a risk to public safety and order in this State, as stated by section 9 (1) when initially making a declaration.
14. The Committee refers section 11 (3) to Parliament as the Committee considers it to be inconsistent with a presumption of innocence when a change in the membership of the organisation may change the nature of the organisation or it may mean that it is no longer the same organisation to which the initial declaration was made in respect of.

Issues: Part 3 Control of members of declared organisations – Freedom of Association; Presumption of Innocence; Strict Liability; Right To Work; Rights of the Child; and Schedule 1.1 Amendment of *Bail Act 1978* – Presumption of Innocence:

15. Part 3 of the Bill deals with the control of members of declared organisations. Division 1 deals with interim control orders. Division 2 deals with confirmatory or final control orders. Division 3 deals with consequences of making of interim control orders and control orders.

Freedom of Association:

16. The Committee is concerned that Part 3 of the Bill will criminalise a person's associations instead of a guilty act of a specific criminal conduct, and will deny a person's right of freedom of association with others, a fundamental right established by Article 22 (1) of the *International Covenant on Civil and Political Rights*. The Committee notes that Article 17 of the *International Covenant on Civil and Political Rights* also establishes that: (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; and: (2) Everyone has the right to the protection of the law against such interference or attacks.
17. The Committee refers to the comparisons between the offence of consorting (*Crimes Act 1900*: section 546A consorting with convicted persons) and the aim of this Bill to control a member that associates with another controlled member of a declared organisation.

¹ The New South Wales Bar Association also expressed similar concern on this matter. Refer to the Hansard during the debate on the Bill, Legislative Council, 2 April 2009.

18. **The Committee notes that the Victorian Scrutiny of Acts and Regulations Committee in 2002, made the recommendation to repeal the similar offence of consorting, where the Victorian Scrutiny of Acts and Regulations Committee concluded that the offence was predicated on the principle of guilt by association (in breach of community belief in the principle of freedom of association)². Law reform bodies in Australia that have examined the offence of consorting have also recommended its repeal. In 1992, the Law Reform Commission of Western Australia stated that it was: “inconsistent with the principles of criminal law to make it an offence to associate with particular people. Offences should proscribe conduct thought deserving of punishment. Merely associating with people, whether they are known to be in a particular category or are merely reputed to be in a particular category, should not be criminal”³.**
19. **Accordingly, by noting the above recommendations of the Victorian Scrutiny of Acts and Regulations Committee in 2002 and that of the Law Reform Commission of Western Australia in 1992 in the comparable context of the offence of consorting, the Committee refers Part 3 of this Bill to Parliament, as constituting an undue trespass on personal rights and liberties by undermining the right of freedom of association and an undue interference on a person’s honour and reputation.**
20. **The Committee also observes that unlike the South Australian *Serious and Organised Crime (Control) Act 2008* where it states that under section 4 (2) of its Objects⁴, it is not the intention of Parliament that the powers in this Act be used in a manner that would diminish the freedom of persons in this State to participate in advocacy, protest, dissent or industrial action, this Bill, however, does not contain such similarly stated intent in its provisions.**
21. **The Committee further notes that this Bill does not determine the minimum level of association that may be defined as ‘habitual’ or ‘regular’ and is therefore, concerned with its broad scope to unduly trespass on individual rights of freedom of association. Therefore, the Committee refers it to Parliament.**

Presumption of Innocence:

22. The current *Crimes (Sentencing Procedure) Act 1999* provides that a court sentencing for an offence carrying a maximum term of 6 months or more may make an order prohibiting the person from associating with nominated persons or banning them from visiting a certain place or district under that Act’s current section 17A and

² Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Vagrancy Act 1966: Final Report*, 2002: 12 – 13.

³ Law Reform Commission of Western Australia, *Report on Police Act Offences*, Project No 85, 1992: 41 – 42.

⁴ The South Australian *Serious and Organised Crime (Control) Act 2008* provides for other similar provisions in relation to the making of public safety orders under its Part 4, Division 1: section 23 (2)(c): if advocacy, protest, dissent or industrial action is the likely reason for the person or members of the class of persons being present at the relevant premises or event, or within the relevant area – the public interest in maintaining freedom to participate in such activities; and also under section 23 (5): Despite any other provision of this section, a senior police officer must not make a public safety order that would prohibit a person or class of persons from being present at any premises or event, or within an area, if – (a) those persons are members of an organisation formed for, or whose primary purpose is, non-violent advocacy, protest, dissent or industrial action; and (b) the officer believes that advocacy, protest, dissent or industrial action is the likely reason for those persons to be present at the premises or event or within the area.

part 8A. At present, such non-association and place restriction orders cannot be made by the sentencing court if only section 10 (dismissal of charges and conditional discharge of offender) or section 11 (deferral of sentencing for rehabilitation, participation in an intervention program or other purposes) are applied under the *Crimes (Sentencing Procedure) Act 1999*. Any non-association and place restriction orders under that Act must also be for a specified term.

- 23. The Committee notes that the current non-association and place restriction orders under section 17A (2) of the *Crimes (Sentencing Procedure) Act 1999*, can only be made following conviction of an offence. Therefore, the restriction on the freedom to associate could only be imposed on a person who has been convicted of an offence during the sentencing phase. In addition, these orders must specify each person with whom the offender may not associate and the orders must be made for a specified duration.**
- 24. Therefore, the Committee is concerned that the fundamental right to a presumption of innocence established by Article 14 (2) of the *International Covenant on Civil and Political Rights* may be eroded by this Bill since the proposal on interim control orders and control orders under Part 3 will be applied to people without being convicted of a specific crime such as associating with another person for any particular purpose or the association would have led to the commission of an offence. The Committee further notes that section 26 (6) of Division 3 of Part 3 of the Bill states that: For the avoidance of doubt, in proceedings for an offence against this section, it is not necessary for the prosecution to prove that the defendant associated with another person for any particular purpose or that the association would have led to the commission of any offence.**
- 25. This is a departure from the current non-association orders imposed under section 17A (2) of the *Crimes (Sentencing Procedure) Act 1999*, which can only be made following conviction of an offence as part of the person's sentence.**
26. The Committee considers this as punishing a person merely for the association or company which the defendant is keeping rather than for any criminal act or conduct. This is similar to the comments made by the then Attorney General, Mr Walker in 1979 in the Legislative Assembly of Parliament of New South Wales during Parliamentary Debates in his Second Reading Speech on the offence of habitually consorting with someone convicted of an indictable offence:
- “This offence is presently objectionable for the following reasons: first, because it equates association with a particular class of individuals with the commission of a criminal offence. Unless there are exceptional and compelling reasons for otherwise providing, the basis of criminal liability should be what a person does, or, in appropriate cases, omits to do, rather than the identity of the person...”
27. The Committee notes that the Committee's concern is analogous to the comments made by King CJ of the South Australian Supreme Court in the context of sentencing for the offence of consorting, where in *Jan v Fingleton* (1983) 32 SASR 379 at 380, King CJ stated:
- “...Apart from the statute the conduct to be punished may be quite innocent. A person may find, by reason of the family into which he was born and the environment in which he must live, that it is virtually impossible to avoid mixing with people who must be classed reputed thieves. He is to be punished not for any harm which he has done

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to others, but merely for the company which he has been keeping, however difficult or even disloyal it might be to avoid it. The wisdom and even the justice of such a law may be, and often has been, questioned.”

28. **The Committee notes the comparison with the offence of consorting, where association with or membership of an organisation and the company which the person keeps, will be punished (or controlled) rather than a specific criminal conduct or guilty act (actus reus).**
29. **In light of the above comments made in *Jan v Fingleton* and the non-association orders that can be made during sentencing under the *Crimes (Sentencing Procedure) Act 1999*, the Committee refers the Bill’s Part 3 and its section 26 (6) to Parliament as undue trespasses on personal rights and liberties. The Committee is of the view that they may erode the fundamental right of a presumption of innocence, since no specific crime or criminal activity needs to be established or proven yet a person would be subject to a control order.**
30. **The Committee also refers Parliament to section 23 of Part 3 where a control order remains in force until it is revoked. This departs from the non-association and place restriction orders that are currently imposed under the *Crimes (Sentencing Procedure) Act 1999*, where such orders must be made for a specified duration. In addition, these orders made under the *Crimes (Sentencing Procedure) Act* must specify each person with whom the offender may not associate. The Committee is concerned that the scope of the Bill is unclear on whether the control orders must specify each person with whom the offender may not associate since section 26 (2) of Part 3 ambiguously states that: A person may be guilty of an offence under subsection (1) in respect of associations with the same person or with different people.**
31. **The Committee also holds concerns with regard to Schedule 1.1 – amendment of *Bail Act 1978*. This proposes to amend the *Bail Act* so that there will no longer be a presumption in favour of bail in relation to the offence under section 26 (Association between members of declared organisations subject to interim control order or control order) of the proposed Act. The Committee considers this could be contrary to the presumption of innocence, compared to the general presumption in favour of bail for other offences, and views it as undermining the right to be treated as innocent, and refers this to Parliament.**

Strict Liability:

32. Section 19 (1) of Division 2 of Part 3 of this Bill is also wider in scope than the control orders under Part 3, section 14 of the South Australian *Serious and Organised Crime (Control) Act 2008*.
33. Under the South Australian legislation, section 14 (2) sets out that the Court may make a control order against a person if the Court is satisfied that:
 - (a) the defendant –
 - (i) has been a member of an organisation which, at the time of the application, is a declared organisation; or

- (ii) engages, or has engaged, in serious criminal activity, **and regularly associates** with members of a declared organisation; or
- (b) the defendant engages, or has engaged, in serious criminal activity **and regularly associates** with other persons who engage, or have engaged, in serious criminal activity,

and that the making of the order is appropriate in the circumstances.

34. By contrast, section 19 (1) of Part 3 of this Bill states that:

- (1) The Court may make a control order in relation to a person on whom notice of an interim order has been served under section 16 if the Court is satisfied that:
 - (a) the person is a member of a particular declared organisation, and
 - (b) sufficient grounds exist for making the control order.

35. The Committee observes that under the South Australian legislation, there is a limitation on the type of association with regard to their control orders, such that the defendant has to engage or has engaged in serious criminal activity as well as having regularly associated with members of a declared organisation or having regularly associated with other persons who engage or have engaged in serious criminal activity.

36. The NSW Bill does not impose such requirements. Therefore, the controlled member of a declared organisation who associates with another controlled member of the declared organisation would be guilty of an offence irrespective of whether the association has been regular or whether they have engaged in serious criminal activity.

37. The Committee is of the view that the scope of Part 3 of the Bill is excessively wide since it may include mere accidental or one-off meetings or short communications rather than 'regular' or 'habitual' dealings.

38. At common law in relation to consorting, a distinction has been raised between 'occasionally' and 'habitually'. In *Dias v O'Sullivan* (1949) SASR 195, Mayo J at 200 – 1, explained that:

“ 'Habitually' requires a continuance and permanence of some tendency, something that has evolved into a propensity, that is present from day to day...The tendency will ordinarily be required to be demonstrated by numerous instances of reiteration”.

39. Mayo J in *Dias v O'Sullivan* found that mere repetition of meetings does not constitute proof of habit in consorting. Instead, he found that there must be some mental element in favour of such meetings. This approach was also approved in *Johanson v Dixon* (1979) 143 CLR 376, 383. In case law, at least frequency of meeting is usually required to establish the proof of habit. It is also arguable that the common law approach to the issue of 'habit' or 'frequency' is related to the intention or expectation of meeting and an intention to seek out the company rather than an expectation of conversation in an accidental meeting.

40. However, the Committee observes that sections 26 (1) and (2) of Division 3 of Part 3 provide for strict liability offences. Section 26 (1) reads that: A controlled member of a declared organisation who associates with another controlled member of the declared organisation is guilty of an offence. Maximum penalty: (a) for a first offence – imprisonment for 2 years, and (b) for a second or subsequent offence – imprisonment for 5 years. Section 26 (2) provides that a person may be guilty of an offence under subsection (1) in respect of associations with the same person or with different people.

41. **The Committee refers to Justice Mayo’s judgment in *Dias v O’Sullivan*, which has also been approved in *Johanson v Dixon*, both cited above in the comparable context of the offence of consorting. These cases found support that there must be some mental element in respect of such meetings such as the intention or expectation of meeting or an intention to seek out the company (or association) rather than an accidental meeting (or association).**

42. **Accordingly, in light of the wide scope of Part 3 which may cover accidental or one-off meetings or short communications rather than any requirement for ‘regular’ or ‘habitual’ dealings, the Committee finds the offence of strict liability under sections 26 (1) and (2) where the prosecution is not required to establish that there was an intention to seek out the company or association or intention to ‘regularly’ associate instead of an accidental or one-off association, could constitute an undue trespass on individual rights and be contrary to the right to a presumption of innocence. The Committee notes that terms of imprisonment are also generally considered inappropriate in relation to strict liability offences. Therefore, the Committee refers this to Parliament.**

Right To Work:

43. **The Committee is concerned that section 27 on the prohibition on carrying of certain activities when interim control order or control order takes effect may deny a person’s right to work as established by Article 6 (1) of the *International Covenant on Economic, Social and Cultural Rights*. The Committee notes that Article 6 (1) of the *International Covenant on Economic, Social and Cultural Rights* establishes that: The State Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely choose or accepts, and will take appropriate steps to safeguard this right”.**

44. **Unlike the South Australian legislation, this Bill includes a broad list of prescribed activity which will be automatically suspended on an interim control order and revoked on a control order under section 27 of Division 3 of Part 3. Under its section 27 (4): A controlled member of a declared organisation is prohibited from applying for any authorisation to carry on a prescribed activity so long as an interim control order or control order in relation to the member is in force.**

45. The prescribed activity is explained under section 27 (6):

Authorisation includes the licensing, registration, approval, certification or any other form of authorisation of a person required by or under legislation for the carrying on of an occupation or activity.

Occupation means an occupation, trade, profession or calling of any kind that may only be carried on by a person holding an authorisation.

Prescribed activity means the following:

- (a) operating a casino within the meaning of the *Casino Control Act 1992*, or being a special employee within the meaning of Part 4 of that Act,
- (b) carrying on a security activity *within the meaning of the Security Industry Act 1997*,
- (c) carrying on the business of a pawnbroker within the meaning of the *Pawnbrokers and Second-hand Dealers Act 1996*,
- (d) carrying on business as a commercial agent or private inquiry agent within the meaning of the *Commercial Agents and Private Inquiry Agents Act 2004*,
- (e) possessing or using a firearm within the meaning of the *Firearms Act 1996* or carrying on business as a firearms dealer within the meaning of that Act,
- (f) operating a tow truck within the meaning of the *Tow Truck Industry Act 1998*,
- (g) carrying on business as a dealer within the meaning of the *Motor Dealers Act 1974*,
- (h) carrying on business as a repairer within the meaning of the *Motor Vehicle Repairs Act 1980*,
- (i) selling or supplying liquor within the meaning of the *Liquor Act 2007*,
- (j) carrying on the business of a bookmaker within the meaning of the *Racing Administration Act 1998*,
- (k) carrying out the activities of an owner, trainer, jockey, stablehand, bookmaker, bookmaker's clerk or another person associated with racing who is required to be registered or licensed under the *Thoroughbred Racing Act 1996*,
- (l) carrying out the activities of an owner, trainer or other person associated with greyhound or harness racing who is required to be registered under the *Greyhound and Harness Racing Administration Act 2004*,
- (m) any other activity prescribed by the regulations.

46. The Committee considers the above list in section 27 (6) as excessively broad in the absence of a requirement for the authority or prosecution to establish that there is a strong connection between the particular prescribed activity or occupation and serious criminal activity. The Committee holds the view that in the absence of a legal requirement and onus on the prosecution to establish a strong connection between the prescribed activity or occupation and serious criminal activity, section 27 and in particular, the ill-defined and wide administrative powers contained in section 27 (6) (m) where any other activity may be prescribed by the regulations, could unduly interfere with the right and opportunity of a person to gain their living by work which they choose or accept, as established under Article 6 (1) the *International Covenant of Economic, Social and Cultural Right*. Accordingly, the Committee refers this to Parliament.

47. The Committee also notes that unlike the South Australian legislation, this Bill is not subject to a sunset clause. The South Australian *Serious and Organised Crime (Control) Act 2008* under its section 39, expires 5 years after the date on which the section comes into operation in addition to a review of the operation of that Act under its section 38. The Committee considers that given the wide scope of Part 3 and the ill-defined and broad powers contained in some of its provisions, which may trespass unduly on individual rights and liberties, a sunset clause with an expiry date of the legislation may be an appropriate step to safeguard some of the fundamental rights of concern. The Committee refers this to Parliament accordingly.

Rights of the Child:

48. This Bill is silent with regard to a person or member of a declared organisation who is under the age of 18 years old and how Part 3 in respect of the interim control orders and control orders and the offence committed under clause 26 will address any such a member who is under the age of 18 years.

49. The Committee notes that Part 3 of the Bill and section 26 (1) may undermine the rights of a child such as established by Article 37 (b) of the *Convention on the Rights of the Child*: No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and *shall be used only as a measure of last resort and for the shortest appropriate period of time.*

50. The Committee is concerned that for a first offence under the section 26 (1)(a), imprisonment is for 2 years and under section 26 (1)(b) for a second or subsequent offence, imprisonment is for 5 years. The Committee is of the view that imprisonment for such offences could erode the rights of the child under Article 37 (b) of the *Convention on the Rights of the Child*, especially in respect of detention or imprisonment of a child shall only be used as a measure of last resort and for the shortest appropriate period of time. Therefore, the Committee refers this as an undue trespass on the rights of the child, to Parliament.

Non-reviewable decisions [s 8A(1)(b)(iii) LRA]

Issue: Section 13 (2) of Part 2 – Conduct of hearings of applications for declarations under this Part – Not required to provide reasons:

51. Section 13 (2) provides that: If an eligible Judge makes a declaration or decision under this Part, the eligible Judge is not required to provide any grounds or reasons for the declaration or decision (other than to a person conducting a review under section 39 if that person so requests). Section 39 refers to the reporting to Ombudsman on exercise of powers and the monitoring by Ombudsman.

- 52. The Committee is concerned that the eligible Judge is not required to provide any reasons or grounds for the decision that a particular organisation is a declared organisation for the purposes of this Act. This is particularly of concern when section 11 (2) states that the declaration remains in force for a period of 3 years after the day on which it takes effect (unless it is sooner revoked or renewed). The effect is that the applicant will not know the grounds for appeal if reasons were not given⁵ and as such, this means the declaration will remain in force for 3 years without review. The Committee refers this to Parliament, as it considers that section 13 (2) in light of section 11 (2), may in effect, unduly trespass on individual rights and liberties by precluding a merits review.**

The Committee makes no further comment on this Bill.

⁵ The Law Society of NSW (Criminal Law Committee) and the New South Wales Bar Association have raised a similar concern. Refer to the Hansard during the debate on the Bill, Legislative Council, 2 April 2009.

2. CRIMES (SENTENCING PROCEDURE) AMENDMENT (COUNCIL LAW ENFORCEMENT OFFICERS) BILL 2009

Date Introduced:	2 April 2009
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. Currently, section 21A of the Crimes (Sentencing Procedure) Act 1999 (**the *Principal Act***) sets out aggravating and mitigating factors that are to be taken into account by a court when determining the appropriate sentence in respect of an offence. For that purpose, it is an aggravating factor for an offence if, among other things, the victim of the offence was a police officer or other public or community official or worker listed in that section and the offence arose because of the victim's occupation or work. Division 1A of Part 4 of the Principal Act also currently provides that the murder of a similar official or worker carries a standard non-parole period of imprisonment for 25 years.
2. The object of this Bill is to amend the Principal Act to specifically include council law enforcement officers in the list of officials or workers in those provisions of the Principal Act.

Background

3. According to the Minister's Agreement in Principle Speech, the object of the bill is to amend the Crimes (Sentencing Procedure) Act 1999 with respect to sentencing for crimes committed against parking officers, council rangers and other employees of local councils who are exercising enforcement functions. The Southern Sydney Regional Organisation of Councils has advised the Government that between July 2007 and June 2008 some 31 serious assaults, 41 common assaults and more than 1,000 incidents of verbal abuse, intimidation and harassment had been recorded against their officers.
4. Under recent changes introduced by this Government to help reduce incidents of alcohol-related violence, enforcement officers have been granted new powers to confiscate and pour out alcohol when people are drinking in alcohol-free zones.

The Bill

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Clause 3 (1) amends section 21A of the Principal Act to give effect to the object outlined in the above Overview.

Clause 3 (2) amends the Table to Division 1A of Part 4 of the Principal Act to give effect to the object outlined in the above Overview.

Issues Considered by the Committee

5. Section 21A (2) (a) of the *Crimes Sentencing and Procedure Act 1999* currently states that one of the aggravating factors which can be taken into account in determining the appropriate sentence for an offence is if:

The victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work.

6. While it could be argued that council law enforcement officers would already fall within the definition of "other public official" for the purposes of the Act, specifically naming these officers and thus clarifying their position under the law does not appear to have any adverse effect on personal rights and liberties given the diversity of public workers already specifically named within the Act.

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| <p>7. The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987.</p> |
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The Committee makes no further comment on this Bill.

3. GARLING INQUIRY (CLINICIAN AND COMMUNITY COUNCIL) BILL 2009*

Date Introduced:	3 April 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Jillian Skinner MP
Portfolio:	Non-Government

Purpose and Description

1. The object of this Bill is to establish a Clinician and Community Council (the Council) that will be responsible for monitoring and evaluating, and reporting to the public through Parliament on, the implementation of the recommendations of the Special Commission of Inquiry into Acute Care Services in NSW Public Hospitals (the Garling inquiry).

Background

2. According to the Agreement in Principle Speech the object of the bill is to establish a high-level independent clinician and community council to monitor, evaluate and report on the implementation of recommendations of the Special Commission of Inquiry into Acute Care Services in New South Wales Public Hospitals. The council will comprise qualified persons whom the Minister considers to have expertise in matters raised during the Garling inquiry and will include a medical practitioner, a nurse, other health professionals and community members. It will be important for the Minister to appoint persons who are respected by their peers and trusted by the community.
3. The council will not be subject to any ministerial control or direction. To be truly independent the council will report to the Parliament, not the Minister. It will report every six months for the next two years.

The Bill

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Clause 3 defines certain words and expressions used in the proposed Act.

Clause 4 establishes the Council and makes provision in relation to the eligibility of persons for appointment as members of the Council. The Minister is to appoint the members however the Council is not subject to any Ministerial control or direction.

Schedule 1 makes further provision in relation to the members and procedure of the Council.

Clause 5 requires the Council to report biannually to Parliament, during the 2-year period following the commencement of the proposed Act, in relation to its activities (including a description of the extent to which the recommendations of the Garling inquiry have been implemented).

Issues Considered by the Committee

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| <p>4. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p> |
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The Committee makes no further comment on this Bill.

4. GAS SUPPLY AMENDMENT (OMBUDSMAN SCHEME) BILL 2009

Date Introduced:	2 April 2009
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Ian Macdonald MLC
Portfolio:	Energy

Purpose and Description

1. The object of this Bill is to amend the Gas Supply Act 1996 to require gas reticulators to join a gas industry ombudsman scheme approved by the Minister for Energy and to comply with any decisions of the ombudsman relating to a dispute or complaint. Currently, gas suppliers are required to be members of the scheme.

Background

2. According to the Agreement in Principle Speech, the Government established an industry Ombudsman scheme more than 10 years ago—the Energy and Water Ombudsman New South Wales [EWON]. EWON provides households and small businesses with an independent and free service to help resolve complaints against energy providers.
3. The Government requires all electricity retailers to be a member of this Ombudsman scheme to protect New South Wales householders. EWON already provides an especially valuable role to homeowners and residents. Last year, EWON assisted more than 8,500 customers resolve disputes with energy and water providers.
4. However, to date natural gas networks, which are also known as reticulators, have not been required to join EWON. The objective of this bill is to remedy this situation by introducing a requirement that natural gas networks be required to join EWON as well.
5. The bill will create an obligation on any natural gas network that supplies gas to small customers to join the EWON scheme, if they wish to be authorised under the Gas Supply Act. This will mean that EWON will be given jurisdiction over complaints from customers with small accounts that concern the actions of gas networks. New South Wales households and small businesses who have complaints that involve the actions of a gas network will then be able to have the assistance of an independent body.
6. In order to ensure that the bill has no unfair impacts on businesses the Government has decided to ensure that only those natural gas networks actually supplying small energy customers will be required to meet this obligation. The bill does this by giving the Minister for Energy the power to exempt a natural gas network that is not actually supplying small energy customers from the requirement to join EWON.

The Bill

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day to be appointed by proclamation.

Schedule 1 Amendment of Gas Supply Act 1996 No 38

Schedule 1 [4] makes it a condition of a gas reticulator's authorisation that it must be a member of an approved gas industry ombudsman scheme and that it is bound by, and must comply with, any decision of the ombudsman relating to a dispute or complaint between the gas reticulator and a small retail customer. This condition currently applies to gas suppliers' authorisations. Schedule 1 [4] also provides that the Minister may exempt certain authorised gas reticulators from the requirement to join the scheme. **Schedule 1 [1]–[3]** are consequential amendments.

Schedule 1 [5] provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.

Schedule 1 [6] inserts a transitional provision that allows a gas industry ombudsman scheme that has already been approved by the Minister for Energy for gas suppliers to be extended to gas reticulators without the need for further approval.

Issues Considered by the Committee

Issue: Clause 2 – Commencement by Proclamation – Provide the Executive with unfettered control over the commencement of an Act

7. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

8. **Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

5. GREYHOUND RACING BILL 2009

Date Introduced:	2 April 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Kevin Greene MP
Portfolio:	Gaming and Racing

Purpose and Description

1. This Bill makes provision with respect to the control and regulation of greyhound racing; and for other purposes
2. The *Harness Racing Bill 2009* and the *Racing Legislation Amendment Bill 2009* are cognate with this Bill. The main purposes of the three Bills are to:
 - reform the statutory arrangements that underpin the governance arrangements for the greyhound and harness racing industries;
 - repeal the *Greyhound and Harness Racing Administration Act 2004*;
 - dissolve the Greyhound and Harness Racing Regulatory Authority;
 - repeal the *Greyhound Racing Act 2002* and *Harness Racing Act 2002*;
 - transfer the functions and responsibilities of the dissolved authority to a single controlling body for each of the greyhound and harness racing codes;
 - provide an independent board structure for Greyhound Racing New South Wales and Harness Racing New South Wales based on the recently introduced Racing New South Wales model;
 - provide for an independent integrity auditor function across all three codes to receive and consider complaints about the conduct of racing officials.
3. This is the lead Bill. It formally dissolves the Greyhound and Harness Racing Regulatory Authority.
4. In respect of their individual codes of racing, this Bill and the *Harness Racing Bill 2009* provide for the following matters:
 - to re-enact the *Greyhound Racing Act 2002* and *Harness Racing Act 2002* to provide for the new arrangements;
 - to reconstitute Greyhound Racing New South Wales and Harness Racing New South Wales, including with a board structure which provides for members to be appointed on merit, and in accordance with skills-based criteria;
 - the transfer of the functions and responsibilities of the former authority to Greyhound Racing New South Wales or Harness Racing New South Wales, as appropriate;

- to create the Office of Integrity Auditor to receive and investigate complaints in relation to the conduct of racing officials;
 - to establish a greyhound racing industry consultation group and a harness racing industry consultation group, and other related formal requirements, aimed at facilitating consultation between the controlling body and industry stakeholders.
5. The five-member board of each controlling body is to be independent and appointments are based on merit in accordance with skills based criteria. The Bills prescribe the following skills criteria: experience in a senior administrative role, or experience at a senior level in one or more of the fields of business, finance, law, marketing, technology, commerce, regulatory administration or regulatory enforcement. The chairperson of the five-member board will be elected by a simple majority of the members of the board and will serve as chairperson subject to holding that majority.
6. The functions of each single board will be:
- to control, supervise and regulate greyhound or harness racing in the State;
 - the licensing and registration functions in relation to racing clubs, trial tracks, racing animals and prescribed participants, such as trainers, drivers, bookmakers;
 - to initiate, develop and implement policies considered conducive to the promotion, strategic development and welfare of the greyhound or harness racing code in the State;
 - to distribute money received as a result of the of commercial arrangements required by the *Totalizator Act 1997*;
 - to allocate dates on which races may be conducted; and
 - to develop and review policy in relation to the breeding and grading of greyhounds, and in relation to the breeding and handicapping of harness horses.
7. Under the Bill, Greyhound Racing New South Wales and Harness Racing New South Wales may appoint, with the Minister's approval, one person to the Integrity Auditor for both codes, or a different person for each code. The *Thoroughbred Racing Act 1996* makes provision for the Integrity Assurance Committee.
8. The Integrity Auditor is a new role. The Integrity Auditor will be a person with legal qualifications and be responsible for receiving and investigating complaints about the conduct of racing officials in relation to responsibilities and obligations under statute, and also the code of conduct of the relevant controlling body.
9. The Integrity Auditor may decide that a complaint is frivolous, vexatious, trivial or not in good faith, or it does not relate to the exercise of functions by the racing official in a corrupt, improper or unethical manner.
10. The Bills provide for the Integrity Auditor to exercise his or her function independently of the controlling body. Each controlling body may request advice from the Integrity Auditor on specific matters, for example, settling the code of conduct.

Greyhound Racing Bill 2009

11. The Bills also mirror the provisions in the *Thoroughbred Racing Act 1996* which provide for the controlling body to set minimum standards in respect of the conduct of races and race meetings. This means a controlling body can set standards in relation to such matters as the design and construction of racecourses, and also the level of prize money to be paid in connection with races. Greyhound Racing New South Wales and Harness Racing New South Wales will also be able to give directions to a race club to ensure compliance with the standards.
12. Provisions have been included in the Bills to provide for continuity of decisions and operational arrangements. There are special provisions in relation to transferring greyhound or harness assets, rights and liabilities from the authority to the new industry boards.
13. A special review provision has been included in the Bills that the review must report before February 2012. This corresponds with the Racing New South Wales requirement in the 2008 amendments that such a review must be completed within three years of the commencement of that legislation.

Background

14. The proposals are based on the recommendations made in the Malcolm Scott Review and the statutory five-year review of the greyhound and harness racing legislation.
15. From the Agreement in Principle speech:

Its approach includes enacting the race field laws, and also seeking independent input from the Alan Cameron Wagering Review. The proposals before us are based on amendments made last year to the *Thoroughbred Racing Act 1996*, which provides for the arrangements under which Racing New South Wales operates. The proposals are also based on the recommendations made in the Malcolm Scott Review and the statutory five-year review of the greyhound and harness racing legislation. All of these have involved substantial consultation and consideration of what is the best way forward...The Government acknowledges that all three codes of racing consider self-management of their respective industries, free of Government intervention, as a fundamental aspect of their governance arrangements. The racing industry is traditionally self-funding and provides a significant contribution to the economy of this State. A billion dollars annually and up to 50,000 full time and part time jobs represents a place in the top three industries. The governance arrangements to be implemented are based on the Racing New South Wales model introduced last year. This features a single board for each of the three codes that are responsible for all aspects of the control and regulation of the relevant sector; that is, both regulatory and commercial responsibilities. The model for the controlling bodies is that they are a body corporate created by statute, which does not represent the Crown and which is not subject to Government direction.

16. Further, the Agreement in Principle speech explained that:

The disbandment of the authority and the transfer of its regulatory functions to Greyhound Racing New South Wales and to Harness Racing New South Wales have been in the public domain since the tabling in Parliament on 26 June 2008 of the Malcolm Scott Review and the five-year review of the greyhound and harness racing legislation. A return to a single industry board for each of the greyhound and harness racing codes reflects the Racing New South Wales model, and is the norm nationally.

17. The transfer process is being oversighted by a transition working party chaired by Michael Foggo, the Commissioner of the Office of Liquor, Gaming and Racing.
18. The Bills will provide for an industry consultation group in each of the greyhound and harness codes and other requirements aimed at facilitating formal consultation between Racing New South Wales and stakeholders. The five members of the industry consultation group will consist of: one person nominated by either the New South Wales Harness Racing Club, or the New South Wales Greyhound Breeders, Owners and Trainers Association; one person nominated by TAB clubs; one person nominated by country clubs, or non-TAB clubs in the case of the harness racing industry; and no more than three persons, each to be nominated by an eligible industry body.
19. The Bills require Greyhound Racing New South Wales and Harness Racing New South Wales, in consultation with the relevant industry consultation group and industry stakeholders, to prepare an industry strategic plan within twelve months of the commencement of the amending legislation, and regularly conduct formal consultation in relation to the initiation, development and implementation of policies for the promotion, strategic development and welfare of the industry.
20. The Agreement in Principle speech also stated that:

...the transfer arrangements are essentially the equivalent of the 2002 restructure arrangements. Greyhound Racing New South Wales and Harness Racing New South Wales have undertaken detailed consideration of their future needs. I am advised by the working party that there are a significant number of comparable positions in either Greyhound Racing New South Wales or Harness Racing New South Wales. A comparable position in a receiving body is one that has substantially the same duties as a former position in the authority. Staff in that situation have the right to apply to transfer to the new body. If they elect to do so they enjoy the following arrangements: their application will receive preference; they will have a guarantee of 12 months employment; they will receive a compensation payment for relinquishing public sector conditions on a scale which includes up to a maximum of 20 weeks pay for those over 45 years of age with six or more years of service; they will receive a starting salary with the new body which matches their existing base salary; and there will be payment or transfer of their accrued recreation and long service leave entitlements...Staff who do not fall into that category, and staff in that category who do not elect to transfer, will be subject to the public sector arrangements for excess staff—that is, a voluntary redundancy or redeployment.
21. The Bills provide for the three codes to enter into a stewards' tri-code arrangement if they wish to do so, subject to the agreement of the Minister. Reasons to consider such an approach include shared training opportunities, succession planning and providing a career path, as identified by Malcolm Smith in his review.

The Bill

22. The following Bills are cognate with this Bill:
 - (a) the *Harness Racing Bill 2009*,
 - (b) the *Racing Legislation Amendment Bill 2009*.

The *Racing Legislation Amendment Bill 2009* will repeal the *Greyhound and Harness Racing Administration Act 2004*, the *Greyhound Racing Act 2002* and the *Harness Racing Act 2002*.

23. The object of this Bill is to re-enact the *Greyhound Racing Act 2002*:

- (a) to continue Greyhound Racing New South Wales (**GRNSW**) which was constituted under the *Greyhound Racing Act 2002*, and
- (b) to dissolve the Greyhound and Harness Racing Regulatory Authority and the Greyhound and Harness Racing Appeals Tribunal, constituted under the *Greyhound and Harness Racing Administration Act 2004*, and
- (c) to provide for the transfer to GRNSW of functions relating to greyhound racing currently exercised by the Greyhound and Harness Racing Regulatory Authority, and
- (d) to provide for a new method of appointment of the members of GRNSW in line with recent amendments to the *Thoroughbred Racing Act 1996*, and
- (e) to provide for the appointment of a Greyhound Racing Integrity Auditor to have primary oversight over functions of GRNSW relating to stewards, drug testing and control and registration and to deal with complaints about greyhound racing officials.

24. Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines terms used in the proposed Act.

Part 2 deals with Greyhound Racing New South Wales

Part 3 deals with the control and regulation of greyhound racing:

Division 1 covers Registration

Division 2 covers Rules

Division 3 deals with the Greyhound Racing Integrity Auditor

Part 4 deals with directions and minimum standards

Part 5 deals with the Greyhound Racing Industry Consultation Group

Part 6 covers Finance

Part 7 Miscellaneous

Schedule 1 Provisions relating to members of GRNSW

Schedule 2 Provisions relating to GRICG

Schedule 3 Savings, transitional and other provisions

Issues Considered by the Committee

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

25. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

- 26. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

6. HARNESS RACING BILL 2009

Date Introduced:	2 April 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Kevin Greene MP
Portfolio:	Gaming and Racing

Purpose and Description

1. This Bill makes provision with respect to the control and regulation of harness racing; and for other purposes.
2. This Bill is cognate with the *Greyhound Racing Bill 2009*. The *Racing Legislation Amendment Bill 2009* is also cognate with the *Greyhound Racing Bill 2009*.
3. The main purposes of the three Bills are to:
 - reform the statutory arrangements that underpin the governance arrangements for the greyhound and harness racing industries;
 - repeal the *Greyhound and Harness Racing Administration Act 2004*;
 - dissolve the Greyhound and Harness Racing Regulatory Authority;
 - repeal the *Greyhound Racing Act 2002* and *Harness Racing Act 2002*;
 - transfer the functions and responsibilities of the dissolved authority to a single controlling body for each of the greyhound and harness racing codes;
 - provide an independent board structure for Greyhound Racing New South Wales and Harness Racing New South Wales based on the recently introduced Racing New South Wales model;
 - provide for an independent integrity auditor function across all three codes to receive and consider complaints about the conduct of racing officials.
4. In respect of their individual codes of racing, this Bill and the *Greyhound Racing Bill 2009* provide for the following matters:
 - to re-enact the *Greyhound Racing Act 2002* and *Harness Racing Act 2002* to provide for the new arrangements;
 - to reconstitute Greyhound Racing New South Wales and Harness Racing New South Wales, including with a board structure which provides for members to be appointed on merit, and in accordance with skills-based criteria;
 - the transfer of the functions and responsibilities of the former authority to Greyhound Racing New South Wales or Harness Racing New South Wales, as appropriate;

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- to create the Office of Integrity Auditor to receive and investigate complaints in relation to the conduct of racing officials;
 - to establish a greyhound racing industry consultation group and a harness racing industry consultation group, and other related formal requirements, aimed at facilitating consultation between the controlling body and industry stakeholders.
5. The five-member board of each controlling body is to be independent and appointments are based on merit in accordance with skills based criteria. The Bills prescribe the following skills criteria: experience in a senior administrative role, or experience at a senior level in one or more of the fields of business, finance, law, marketing, technology, commerce, regulatory administration or regulatory enforcement. The chairperson of the five-member board will be elected by a simple majority of the members of the board and will serve as chairperson subject to holding that majority.
6. The functions of each single board will be:
- to control, supervise and regulate greyhound or harness racing in the State;
 - the licensing and registration functions in relation to racing clubs, trial tracks, racing animals and prescribed participants, such as trainers, drivers, bookmakers;
 - to initiate, develop and implement policies considered conducive to the promotion, strategic development and welfare of the greyhound or harness racing code in the State;
 - to distribute money received as a result of the of commercial arrangements required by the *Totalizator Act 1997*;
 - to allocate dates on which races may be conducted; and
 - to develop and review policy in relation to the breeding and grading of greyhounds, and in relation to the breeding and handicapping of harness horses.
7. Under the Bill, Greyhound Racing New South Wales and Harness Racing New South Wales may appoint, with the Minister's approval, one person to the Integrity Auditor for both codes, or a different person for each code. The *Thoroughbred Racing Act 1996* makes provision for the Integrity Assurance Committee.
8. The Integrity Auditor is a new role. The Integrity Auditor will be a person with legal qualifications and be responsible for receiving and investigating complaints about the conduct of racing officials in relation to responsibilities and obligations under statute, and also the code of conduct of the relevant controlling body.
9. The Integrity Auditor may decide that a complaint is frivolous, vexatious, trivial or not in good faith, or it does not relate to the exercise of functions by the racing official in a corrupt, improper or unethical manner.
10. The Bills provide for the Integrity Auditor to exercise his or her function independently of the controlling body. Each controlling body may request advice from the Integrity Auditor on specific matters, for example, settling the code of conduct.

Harness Racing Bill 2009

11. The Bills also mirror the provisions in the *Thoroughbred Racing Act 1996* which provide for the controlling body to set minimum standards in respect of the conduct of races and race meetings. This means a controlling body can set standards in relation to such matters as the design and construction of racecourses, and also the level of prize money to be paid in connection with races. Greyhound Racing New South Wales and Harness Racing New South Wales will also be able to give directions to a race club to ensure compliance with the standards.
12. Provisions have been included in the Bills to provide for continuity of decisions and operational arrangements. There are special provisions in relation to transferring greyhound or harness assets, rights and liabilities from the authority to the new industry boards.
13. A special review provision has been included in the Bills that the review must report before February 2012. This corresponds with the Racing New South Wales requirement in the 2008 amendments that such a review must be completed within three years of the commencement of that legislation.

Background

14. The proposals are based on the recommendations made in the Malcolm Scott Review and the statutory five-year review of the greyhound and harness racing legislation.
15. From the Agreement in Principle speech:

Its approach includes enacting the race field laws, and also seeking independent input from the Alan Cameron Wagering Review. The proposals before us are based on amendments made last year to the *Thoroughbred Racing Act 1996*, which provides for the arrangements under which Racing New South Wales operates. The proposals are also based on the recommendations made in the Malcolm Scott Review and the statutory five-year review of the greyhound and harness racing legislation. All of these have involved substantial consultation and consideration of what is the best way forward...The Government acknowledges that all three codes of racing consider self-management of their respective industries, free of Government intervention, as a fundamental aspect of their governance arrangements. The racing industry is traditionally self-funding and provides a significant contribution to the economy of this State. A billion dollars annually and up to 50,000 full time and part time jobs represents a place in the top three industries. The governance arrangements to be implemented are based on the Racing New South Wales model introduced last year. This features a single board for each of the three codes that are responsible for all aspects of the control and regulation of the relevant sector; that is, both regulatory and commercial responsibilities. The model for the controlling bodies is that they are a body corporate created by statute, which does not represent the Crown and which is not subject to Government direction.

16. Further, the Agreement in Principle speech explained that:

The disbandment of the authority and the transfer of its regulatory functions to Greyhound Racing New South Wales and to Harness Racing New South Wales have been in the public domain since the tabling in Parliament on 26 June 2008 of the Malcolm Scott Review and the five-year review of the greyhound and harness racing legislation. A return to a single industry board for each of the greyhound and harness racing codes reflects the Racing New South Wales model, and is the norm nationally.

17. The transfer process is being oversighted by a transition working party chaired by Michael Foggo, the Commissioner of the Office of Liquor, Gaming and Racing.
18. The Bills will provide for an industry consultation group in each of the greyhound and harness codes and other requirements aimed at facilitating formal consultation between Racing New South Wales and stakeholders. The five members of the industry consultation group will consist of: one person nominated by either the New South Wales Harness Racing Club, or the New South Wales Greyhound Breeders, Owners and Trainers Association; one person nominated by TAB clubs; one person nominated by country clubs, or non-TAB clubs in the case of the harness racing industry; and no more than three persons, each to be nominated by an eligible industry body.
19. The Bills require Greyhound Racing New South Wales and Harness Racing New South Wales, in consultation with the relevant industry consultation group and industry stakeholders, to prepare an industry strategic plan within twelve months of the commencement of the amending legislation, and regularly conduct formal consultation in relation to the initiation, development and implementation of policies for the promotion, strategic development and welfare of the industry.
20. The Agreement in Principle speech also stated that:

...the transfer arrangements are essentially the equivalent of the 2002 restructure arrangements. Greyhound Racing New South Wales and Harness Racing New South Wales have undertaken detailed consideration of their future needs. I am advised by the working party that there are a significant number of comparable positions in either Greyhound Racing New South Wales or Harness Racing New South Wales. A comparable position in a receiving body is one that has substantially the same duties as a former position in the authority. Staff in that situation have the right to apply to transfer to the new body. If they elect to do so they enjoy the following arrangements: their application will receive preference; they will have a guarantee of 12 months employment; they will receive a compensation payment for relinquishing public sector conditions on a scale which includes up to a maximum of 20 weeks pay for those over 45 years of age with six or more years of service; they will receive a starting salary with the new body which matches their existing base salary; and there will be payment or transfer of their accrued recreation and long service leave entitlements...Staff who do not fall into that category, and staff in that category who do not elect to transfer, will be subject to the public sector arrangements for excess staff—that is, a voluntary redundancy or redeployment.
21. The Bills provide for the three codes to enter into a stewards' tri-code arrangement if they wish to do so, subject to the agreement of the Minister. Reasons to consider such an approach include shared training opportunities, succession planning and providing a career path, as identified by Malcolm Smith in his review.

The Bill

22. This Bill is cognate with the *Greyhound Racing Bill 2009*. The *Racing Legislation Amendment Bill 2009* will repeal the *Greyhound and Harness Racing Administration Act 2004*, the *Greyhound Racing Act 2002* and the *Harness Racing Act 2002*.
23. The object of this Bill is to re-enact the *Harness Racing Act 2002*:
 - (a) to continue Harness Racing New South Wales (**HRNSW**) which was constituted under the *Harness Racing Act 2002*, and

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- (b) to provide for the transfer to HRNSW of functions relating to harness racing currently exercised by the Greyhound and Harness Racing Regulatory Authority (which is to be dissolved by the *Greyhound Racing Bill 2009*), and
- (c) to provide for a new method of appointment of the members of HRNSW in line with recent amendments to the *Thoroughbred Racing Act 1996*, and
- (d) to provide for the appointment of a Harness Racing Integrity Auditor to have primary oversight over functions of HRNSW relating to stewards, drug testing and control and registration and to deal with complaints about harness racing officials.

24. Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines terms used in the proposed Act.

Part 2 deals with Harness Racing New South Wales

Part 3 deals with control and regulation of harness racing:

Division 1 covers Registration

Division 2 covers Rules

Division 3 deals with the Harness Racing Integrity Auditor

Part 4 covers directions and minimum standards

Part 5 deals with the Harness Racing Industry Consultation Group

Part 6 covers Finance

Part 7 Miscellaneous

Schedule 1 Provisions relating to members of HRNSW

Schedule 2 Provisions relating to HRICG

Schedule 3 Savings, transitional and other provisions

Issues Considered by the Committee

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

25. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

26. **Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

7. RACING LEGISLATION AMENDMENT BILL 2009

Date Introduced:	2 April 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Kevin Greene MP
Portfolio:	Gaming and Racing

Purpose and Description

1. This Bill repeals the *Greyhound and Harness Racing Administration Act 2004*, the *Greyhound Racing Act 2002* and the *Harness Racing Act 2002*; to amend other Acts and instruments consequentially; and for other purposes.
2. It is cognate with the *Greyhound Racing Bill 2009*. The *Harness Racing Bill 2009* is also cognate with the *Greyhound Racing Bill 2009*. The main purposes of the three Bills are to:
 - reform the statutory arrangements that underpin the governance arrangements for the greyhound and harness racing industries;
 - repeal the *Greyhound and Harness Racing Administration Act 2004*;
 - dissolve the Greyhound and Harness Racing Regulatory Authority;
 - repeal the *Greyhound Racing Act 2002* and *Harness Racing Act 2002*;
 - transfer the functions and responsibilities of the dissolved authority to a single controlling body for each of the greyhound and harness racing codes;
 - provide an independent board structure for Greyhound Racing New South Wales and Harness Racing New South Wales based on the recently introduced Racing New South Wales model;
 - provide for an independent integrity auditor function across all three codes to receive and consider complaints about the conduct of racing officials.
3. The five-member board of each controlling body is to be independent and appointments are based on merit in accordance with skills based criteria. The Bills prescribe the following skills criteria: experience in a senior administrative role, or experience at a senior level in one or more of the fields of business, finance, law, marketing, technology, commerce, regulatory administration or regulatory enforcement. The chairperson of the five-member board will be elected by a simple majority of the members of the board and will serve as chairperson subject to holding that majority.
4. The functions of each single board will be:
 - to control, supervise and regulate greyhound or harness racing in the State;

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- the licensing and registration functions in relation to racing clubs, trial tracks, racing animals and prescribed participants, such as trainers, drivers, bookmakers;
 - to initiate, develop and implement policies considered conducive to the promotion, strategic development and welfare of the greyhound or harness racing code in the State;
 - to distribute money received as a result of the of commercial arrangements required by the *Totalizator Act 1997*;
 - to allocate dates on which races may be conducted; and
 - to develop and review policy in relation to the breeding and grading of greyhounds, and in relation to the breeding and handicapping of harness horses.
5. The Integrity Auditor is a new role. The Integrity Auditor will be a person with legal qualifications and be responsible for receiving and investigating complaints about the conduct of racing officials in relation to responsibilities and obligations under statute, and also the code of conduct of the relevant controlling body.
 6. The Integrity Auditor may decide that a complaint is frivolous, vexatious, trivial or not in good faith, or it does not relate to the exercise of functions by the racing official in a corrupt, improper or unethical manner.
 7. The Bills provide for the Integrity Auditor to exercise his or her function independently of the controlling body. Each controlling body may request advice from the Integrity Auditor on specific matters, for example, settling the code of conduct.
 8. This particular Bill deals with four matters. It provides for the repeal of the *Greyhound Racing Act 2002*, the *Harness Racing Act 2002* and the *Greyhound and Harness Racing Administration Act 2004*, which is the statute that establishes the Greyhound and Harness Racing Regulatory Authority.
 9. This Bill also provides for the Greyhound and Harness Racing Appeals Tribunal to be dissolved and its functions to be amalgamated under a single statute under the Racing Appeals Tribunal. This amalgamated appeal body will be known as the Racing Appeals Tribunal and will operate under the *Racing Appeals Tribunal Act 1983*. The procedure applicable in relation to appeals will largely be carried forward, except that, in the case of the greyhound and harness arrangements, appeals from a decision of stewards will fall directly to the Racing Appeals Tribunal as there will be no avenue of appeal to Greyhound Racing New South Wales and Harness Racing New South Wales.
 10. The judicial officers who are now appointed as the Racing Appeals Tribunal and the Greyhound and Harness Racing Appeals Tribunal will continue their terms under the amalgamated body with the same responsibilities.
 11. The Bill also proposes an amendment to the *Sporting Venues (Pitch Invasions) Act 2003* to include invasions at racecourses. The proposed offence is that a person must not enter or remain on a restricted area of a racecourse during a race meeting or trial meeting unless that person has appropriate authorisation. A police officer is an authorised person for these purposes and so are the following: a jockey or driver, or another person authorised by the relevant controlling body or engaged in the control

and management of the race meeting. The restricted area would include any racecourse, parade ring, stable, kennel or swabbing area and includes pathways connecting those places. Penalties range from expulsion, a penalty notice of \$500, a 12-month ban, a life ban and a maximum penalty of \$5,500.

12. A special review provision has been included in the Bills that the review must report before February 2012. This corresponds with the Racing New South Wales requirement in the 2008 amendments that such a review must be completed within three years of the commencement of that legislation.

Background

13. The lead Bill is the *Greyhound Racing Bill 2009*. The *Greyhound Racing Bill 2009* formally dissolves the Greyhound and Harness Racing Regulatory Authority.

14. From the Agreement in Principle speech:

Its approach includes enacting the race field laws, and also seeking independent input from the Alan Cameron Wagering Review. The proposals before us are based on amendments made last year to the Thoroughbred Racing Act 1996, which provides for the arrangements under which Racing New South Wales operates. The proposals are also based on the recommendations made in the Malcolm Scott Review and the statutory five-year review of the greyhound and harness racing legislation. All of these have involved substantial consultation and consideration of what is the best way forward...The Government acknowledges that all three codes of racing consider self-management of their respective industries, free of Government intervention, as a fundamental aspect of their governance arrangements. The racing industry is traditionally self-funding and provides a significant contribution to the economy of this State. A billion dollars annually and up to 50,000 full time and part time jobs represents a place in the top three industries. The governance arrangements to be implemented are based on the Racing New South Wales model introduced last year. This features a single board for each of the three codes that are responsible for all aspects of the control and regulation of the relevant sector; that is, both regulatory and commercial responsibilities. The model for the controlling bodies is that they are a body corporate created by statute, which does not represent the Crown and which is not subject to Government direction.

15. Further, the Agreement in Principle speech explained that:

The disbandment of the authority and the transfer of its regulatory functions to Greyhound Racing New South Wales and to Harness Racing New South Wales have been in the public domain since the tabling in Parliament on 26 June 2008 of the Malcolm Scott Review and the five-year review of the greyhound and harness racing legislation. A return to a single industry board for each of the greyhound and harness racing codes reflects the Racing New South Wales model, and is the norm nationally.

16. The transfer process is being oversighted by a transition working party chaired by Michael Foggo, the Commissioner of the Office of Liquor, Gaming and Racing.
17. The Bills will provide for an industry consultation group in each of the greyhound and harness codes and other requirements aimed at facilitating formal consultation between Racing New South Wales and stakeholders. The five members of the industry consultation group will consist of: one person nominated by either the New South Wales Harness Racing Club, or the New South Wales Greyhound Breeders, Owners and Trainers Association; one person nominated by TAB clubs; one person

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nominated by country clubs, or non-TAB clubs in the case of the harness racing industry; and no more than three persons, each to be nominated by an eligible industry body.

18. The Agreement in Principle speech also stated that:

...the transfer arrangements are essentially the equivalent of the 2002 restructure arrangements. Greyhound Racing New South Wales and Harness Racing New South Wales have undertaken detailed consideration of their future needs. I am advised by the working party that there are a significant number of comparable positions in either Greyhound Racing New South Wales or Harness Racing New South Wales. A comparable position in a receiving body is one that has substantially the same duties as a former position in the authority. Staff in that situation have the right to apply to transfer to the new body. If they elect to do so they enjoy the following arrangements: their application will receive preference; they will have a guarantee of 12 months employment; they will receive a compensation payment for relinquishing public sector conditions on a scale which includes up to a maximum of 20 weeks pay for those over 45 years of age with six or more years of service; they will receive a starting salary with the new body which matches their existing base salary; and there will be payment or transfer of their accrued recreation and long service leave entitlements...Staff who do not fall into that category, and staff in that category who do not elect to transfer, will be subject to the public sector arrangements for excess staff—that is, a voluntary redundancy or redeployment.

The Bill

19. This Bill is cognate with the *Greyhound Racing Bill 2009*. The objects of this Bill are:

- (a) to repeal the *Greyhound and Harness Racing Administration Act 2004*, the *Greyhound Racing Act 2002* and the *Harness Racing Act 2002* and to make consequential amendments to various other Acts and instruments, and
- (b) to amend the *Racing Appeals Tribunal Act 1983* to provide for greyhound racing appeals and harness racing appeals to be dealt with under that Act, and
- (c) to amend the *Sporting Venues (Pitch Invasions) Act 2003* to extend the operation of that Act to specified restricted areas on licensed racecourses during race meetings and trial meetings, and
- (d) to amend the *Thoroughbred Racing Act 1996* to enable Racing NSW to make arrangements for the sharing of staff and facilities with Greyhound Racing NSW and Harness Racing NSW and to expand the functions of the Integrity Assurance Committee under that Act to include dealing with complaints against horse racing officials.

20. Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 repeals the *Greyhound and Harness Racing Administration Act 2004*, the *Greyhound Racing Act 2002* and the *Harness Racing Act 2002*

Schedule 1 amends *Racing Appeals Tribunal Act 1983 No 199*

Schedule 2 amends *Sporting Venues (Pitch Invasions) Act 2003 No 44*

Schedule 3 amends other Acts and Regulations: amend various Acts and Regulations as a consequence of the repeal of the *Greyhound and Harness Racing Administration Act*

2004, the *Greyhound Racing Act 2002* and the *Harness Racing Act 2002* and the *Thoroughbred Racing Act 1996*.

Issues Considered by the Committee

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

21. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

22. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

8. SUCCESSION AMENDMENT (INTESTACY) BILL 2009

Date Introduced:	2 April 2009
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. The New South Wales Law Reform Commission Report 116 *Uniform succession laws: intestacy* was endorsed by the National Committee for Uniform Succession Laws (**the National Committee**) and submitted to the Standing Committee of Attorneys-General in April 2007. The report sets out draft model laws to implement the recommendations of the National Committee. The model laws provide for the distribution of the property of deceased persons who have not executed a will or who have failed to execute a will that disposes of some or all of their property effectively.
2. The objects of this Bill are:
 - (a) to amend the *Succession Act 2006* (**the 2006 Act**) to enact, with some modifications, the model provisions as a new Chapter 4 of that Act, and
 - (b) to repeal those provisions of the *Probate and Administration Act 1898* which currently provide for intestate succession (**the 1898 Act intestacy provisions**), and
 - (c) to make various provisions of a savings, transitional or consequential nature.

Background

3. According to the Agreement in Principle Speech, this bill marks the next step for New South Wales in implementing the recommendations of the National Committee on Uniform Succession Laws. The Committee was established by the Standing Committee of Attorneys General [SCAG] to develop model laws to be used as the basis for the reform of succession laws across Australian States and Territories. The National Committee on Uniform Succession Laws was charged with examining four separate areas of succession law: the law of wills, family provision, intestacy and the administration of estates. Reports have been released on wills, intestacy and family provision. The administration of estates report will be released shortly. Each report contains a model bill for implementation by States and Territories.
4. The National Committee's first two reports have been implemented in New South Wales. The *Succession Act 2006* implemented the model wills bill. The *Succession Amendment (Family Provision) Act 2008* added a new Chapter 3 to the Succession Act, implementing the model Family Provision Bill, and repealed the *Family Provision Act 1982*. This Bill implements the National Committee's report on intestacy. It will become Chapter 4 of the *Succession Act 2006*.

5. The National Committee's recommendations were informed by the New South Wales Law Reform Commission's research about the characteristics of both testate and intestate estates. This research was useful in determining how people who do not write wills might have intended to distribute their property upon death. The Law Reform Commission research involved a survey of 650 matters filed in the Probate Registry of the Supreme Court of New South Wales in September 2004.

The Bill

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 repeals the *Inheritance Act of 1901*. The provisions of that Act identify the heir at common law for the purposes of succession to land and are unnecessary (see section 33 of the *Conveyancing Act 1919*).

Schedule 1 Amendment of Succession Act 2006

No 80

Proposed new Chapter 4 contains the following provisions:

Part 4.1 Preliminary

New section 101 inserts definitions for the purposes of the new Chapter 4.

Definitions inserted include a definition of **personal effects**. The surviving spouse of an intestate is entitled to these items. Section 61A (2) of the 1898 Act intestacy provisions currently define these as **household chattels**. They are essentially articles of household or personal use.

New section 102 defines **intestate** as a person who dies and either does not leave a will or leaves a will but does not dispose effectively by will of all or part of his or her property. The 1898 Act intestacy provisions do not define intestate.

New section 103 makes it clear that references in the new Chapter 4 to an entitlement to the whole of an intestate's estate are references to so much of the estate as remains after payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of the estate. The provision is based on section 61B of the 1898 Act intestacy provisions.

New sections 104 and 105 define the meaning of **spouse** and **domestic partnership**, respectively, in the new Chapter 4. A spouse is a person who was married to the intestate, or was a party to a domestic relationship with the intestate, immediately before the intestate's death. A domestic relationship is a de facto relationship that has been in existence for a continuous period of at least 2 years or has resulted in the birth of a child. Unlike section 61B (9) of the 1898 Act intestacy provisions, the new Chapter does not state that spouses should be treated as separate persons. The National Committee recommended that there is no need to make such a statement.

New section 106 sets out the method for determining and adjusting the spouse's statutory legacy. This is the amount that a spouse (as defined) is entitled to in addition to the household or personal effects.

New sections 107 and 108 set out the rules relating to survivorship for intestate succession. A person is not entitled to participate in the distribution of an intestate estate unless the person survives the intestate.

New section 109 describes the effect of adoption for the purposes of distribution on intestacy.

Part 4.2 Spouse's entitlements

Part 4.2 sets out the entitlements of the intestate's surviving spouse (as defined).

Division 1 Entitlement of surviving spouse

New section 110 states that the Division applies where the intestate leaves a spouse (but not more than one spouse).

New section 111 provides that a surviving spouse should be entitled to the whole of the intestate estate where there are no surviving issue of the intestate.

New sections 112 and 113 provide that where the intestate is survived by a spouse and issue, the spouse is entitled to the whole intestate estate except in cases where some of the issues are of the intestate from another relationship. In the latter case the intestate estate is to be shared between the surviving spouse and the issue

Division 2 Spouse's preferential right to acquire property from the estate

New section 114 states that the Division applies where the intestate leaves a spouse (but not more than one spouse).

New section 115 gives the spouse (as defined) an entitlement to elect to obtain any property (subject to some restrictions) in the intestate's estate. The election will require Supreme Court authorisation if the acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate substantially more difficult. This replaces sections 61A (2), 61B (13), 61D and 61E of, and the Fourth Schedule to, the 1898 Act intestacy provisions. Under these provisions surviving spouses are currently given a conditional right to obtain the intestate's interest in the home they shared with the intestate before the intestate's death.

New sections 116 – 121 outline the procedures to be followed in relation to such an election being exercised.

Division 3 Multiple spouses

New Division 3 provides for the division of entitlement to shares in an intestate estate when an intestate is survived by more than one spouse. For example, where the intestate is married and also has a de facto partner. This differs from section 61B (3A) of the 1898 Act intestacy provisions under which a de facto partner of at least 2 years will take the spouse's entitlement exclusively (subject to certain conditions).

New section 122 provides that if an intestate leaves more than one spouse, but no issue, the spouses are entitled to the whole of the intestate estate in shares determined in accordance with the new Division.

New section 123 provides that if an intestate leaves more than one spouse and issue who are all issue of one or more of the surviving spouses, the spouses are entitled to the whole of the intestate estate in shares determined in accordance with the new Division.

New section 124 provides that if an intestate leaves more than one spouse and any issue who are not issue of a surviving spouse, the spouses are entitled to share the personal effects, the statutory legacy and half of the residue in accordance with the new Division and the issue of the intestate are entitled to an equal share of the remaining residue.

New section 125 sets out the ways in which property may be shared between spouses under the new Division. The property may be shared equally or in accordance with a distribution agreement between the spouses or a distribution order made by the Supreme Court.

Part 4.3 Distribution among relatives

New section 127 sets out the entitlements of children to an intestate estate.

New section 128 sets out the entitlements of parents to an intestate estate.

New section 129 sets out the entitlements of brothers and sisters to an intestate estate.

New section 130 sets out the entitlements of grandparents to an intestate estate.

New section 131 sets out the entitlements of aunts and uncles to an intestate estate.

New section 132 provides for a person entitled to take in more than one capacity to take in each capacity.

Part 4.4 Indigenous persons' estates

New sections 133–135 make special provision for the distribution of the estates of intestate persons of Aboriginal or Torres Strait Islander descent. This recognises the broader concepts of family relationships that apply in some Aboriginal and Torres Strait Islander communities.

Part 4.5 Absence of persons entitled

New sections 136 and 137 provide for the situation where an intestate dies leaving no person entitled to the intestate estate. They provide for a bona vacantia estate to vest in the State but enable the Minister to waive the rights of the State in favour of dependants of the intestate and certain other specified persons and organisations for whom the intestate might reasonably have been expected to make provision. This discretion is similar to that currently contained in section 61B (8) of the 1898 Act intestacy provisions.

Part 4.6 Miscellaneous

New section 138 provides for the immediate vesting of the entitlement of a minor in an intestate's estate.

New section 139 provides for the disclaimer of an interest in an intestate estate. It treats the person who disclaims an interest as being deceased. This means his or her issue will be able to take their share in the interest by representation.

New section 140 reflects the current position in New South Wales that there is no account to be taken of benefits given by the intestate before his or her death. (This rule, known as the Hotchpot rule, was abolished in New South Wales in 1977).

Schedule 1 [1] makes a consequential amendment to the long title of the 2006 Act and **Schedule 1 [3]** amends section 3 (2) for consistency with proposed new section 107. The definition encompasses persons who are born as a result of in vitro fertilisation after a period of gestation in the uterus that commenced before a person's death and who survive the person for at least 30 days after birth.

Schedule 1 [5] amends the power to make rules of court in the 2006 Act.

Schedule 1 [6] and [10] amend Schedule 1 to the 2006 Act to enable the making of savings and transitional regulations and to insert a savings provisions consequent on the repeal of the 1898 Act intestacy provisions.

Schedule 1 [7], [8] and [9] amend Schedule 1 to the 2006 Act to clarify the effect of savings provisions in the light of the repeal of Schedule 2.

Schedule 2 Amendment of other Acts

Schedule 2 makes consequential amendments to various Acts and the amendments described below.

Schedule 2.5 contains the repeals of the 1898 Act intestacy provisions described in the Overview. **Schedule 2.5 [9]** amends section 84A of the *Probate and Administration Act 1898* to make the rates of interest payable on legacies and annuities prescribed by that section consistent with the rates contained in proposed new section 106 (5) of the 2006 Act.

Issues Considered by the Committee

Issue: Proposed Section 112 – Right to Property, Rights of Children

6. The Bill provides that where an intestate dies leaving a spouse or partner and children of that relationship, the entire estate goes to the spouse or partner. This

Succession Amendment (Intestacy) Bill 2009

recommendation was based on the Law Reform Commission's research. Currently under 61B (3) of the *Probate and Administration Act 1898*, if an intestate estate exceeds a prescribed amount (\$200,000) the spouse will only inherit half the estate and the children the remainder.

7. However, the Law Reform Commission study found that in 75 per cent of testate estates surveyed where a testator had a spouse and children of the relationship, the testator left the whole estate to the spouse. Spouses and children shared in the estate in only 2.3 per cent of estates surveyed. There were also considerations such as whether the family home will need to be sold to satisfy the entitlements of the surviving adult children, the fact that given longer life expectancies an elderly surviving spouse may have greater needs than younger independent children, and the fact that the current system may not take into account the substantial personal contribution that the surviving spouse may have made to the shared estate.
8. Further, the National Committee drew the conclusion that it could be assumed that the intestate's children will inherit from the spouse or partner in due course.
9. The Family Provision rights given to children of a relationship under Chapter 3 of the *Succession Act 2006* still protect inheritance rights should the surviving spouse or partner not make any children of a relationship beneficiaries of their will. As such, the Committee does not consider that this Section of the Bill trespasses unduly on any rights.

10. The Committee does not consider that proposed Section 112, which now leaves the entire estate to the spouse or partner, will unduly trespass upon the inheritance rights of the children of the relationship given the rights conveyed to children of a relationship under Chapter 3 of the Succession Act 2006 should that spouse or partner not subsequently name those children beneficiaries.

Issue: Clause 2 – Commencement by Proclamation – Provide the Executive with unfettered control over the commencement of an Act

11. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

12. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

Part Two – Regulations

SECTION A: NOTIFICATION OF POSTPONEMENT OF REPEAL OF REGULATIONS UNDER S 11 OF THE *SUBORDINATE LEGISLATION ACT 1989*

S. 11 Subordinate Legislation Act 1989 Paper No: 5150

Notification of the proposed postponements of the repeal of the
Electricity Supply (General) Regulation 2001 (4); Gas Supply (natural
Gas Retail Competition) Regulation 2001 (3)

...

File Ref: LRC 2676

Minister for Energy

Issues

13. By letter received 2 April 2009, the Minister for Energy advised the Committee that he is proposing to postpone the repeal of the above regulations.

Recommendation

14. That the Committee write to the Minister to advise that it has considered the reasons advanced for the postponements of the repeal of the regulations and does not have any concerns with this proposal.

Comment

Electricity Supply (General) Regulation 2001; Gas Supply (Natural Gas Retail Competition) Regulation 2001

15. The Minister in his letter has advised that he is requesting the postponements of the staged repeal of the *Electricity Supply (General) Regulation 2001* for the fourth time and the *Gas Supply (Natural Gas Retail Competition) Regulation 2001* for the third time.
16. The Minister advises that:

The reason for this request is to take account of the Ministerial Council on Energy's national energy market reform program, which is expected to result in the transfer of many of the distribution and retail functions currently contained in the Regulations to a proposed National Energy Customer Framework (the Framework). Under this process, the regulatory frameworks for the two segments (gas and electricity) of the energy industry are being

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harmonised where appropriate. This recognises that businesses in the energy industry are becoming integrated energy businesses rather than standalone gas or electricity businesses.

The timeframe for completing the Framework has been extended due to the complex nature of the reforms and considerable consultation process required for such significant reforms. Substantial revisions to the current Regulations will be required in the future as a result of New South Wales' commitment to implement the proposed Framework.

A further postponement of the Regulations will allow members of the public and stakeholders to focus on one regulatory process only at a time.

Appendix 1: Index of Bills Reported on in 2009

	Digest Number
Appropriation (Budget Variations) Bill 2009	4
Associations Incorporation Bill 2009	2
Barangaroo Delivery Authority Bill 2009	2
Biofuel (Ethanol Content) Amendment Bill 2009	3
Children and Young Persons (Care and Protection) Amendment (Children's Employment) Bill 2009	2
Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009	2
Crimes (Administration of Sentences) Amendment (Private Contractors) Bill 2009	2
Crimes (Appeal and Review) Amendment Bill 2009	2
Crimes (Criminal Organisations Control) Bill 2009	5
Crimes (Sentencing Procedure) Amendment (Council Law Enforcement Officers) Bill 2009	5
Education Amendment Bill 2009	3
Education Amendment (Educational Support For Children With Significant Learning Difficulties) Bill 2008*	1
Food Amendment (Meat Grading) Bill 2008*	1
Garling Inquiry (Clinician and Community Council) Bill 2009*	5
Gas Supply Amendment (Ombudsman Scheme) Bill 2009	5
GreyHound Racing Bill 2009	5
Harness Racing Bill 2009	5
Hawkesbury-Nepean River Bill 2009	4
Health Legislation Amendment Bill 2009	4
Hurlstone Agricultural High School Site Bill 2009	3
Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Bill 2009	4
Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009	2

	Digest Number
Liquor Amendment (Special License) Conditions Bill 2008	1
Nation Building and Jobs Plan (State Infrastructure Delivery) Bill 2009	2
Parking Space Levy Bill 2009	3
Racing Legislation Amendment Bill 2009	5
Real Property and Conveyancing Legislation Amendment Bill 2009	4
Surveillance Devices Amendment (Validation) Bill 2009	4
Succession Amendment (Intestacy) Bill 2009	5
Telecommunications (Interception and Access) (New South Wales) Amendment Bill 2008	1
Transport Administration Amendment (CountryLink Pensioner Booking Fee Abolition) Bill 2009	3
Western Lands Amendment Bill 2008	1

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1		
Civil Liability Legislation Amendment Bill 2008	Attorney General	28/10/08			12	
Contaminated Land Management Amendment Bill 2008	Minister for Climate Change and the Environment	22/09/08	03/12/08		10	1
Crimes (Administration of Sentences) Amendment Bill 2008	Attorney General and Minister for Justice	2/12/07			15	
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08	6/02/09		9	
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07	13/2/09	1		2
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1	
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning		12/06/08		8	
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7		
Home Building Amendment	Minister for Fair Trading		30/10/08		10, 13	
Liquor Legislation Amendment Bill 2008	Minister for Gaming and Racing	24/11/08	5/01/09		14	2
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07	22/01/09	1		2
Parking Space Levy Bill 2009	Minister for Transport	23/03/09				3
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1, 2		
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1		
Water Management Amendment Bill 2008	Minister for Water	28/10/08	15/12/08		12	2

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2009

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Associations Incorporation Bill 2009		N, R			N, R
Barangaroo Delivery Authority Bill 2009	N				
Biofuel (Ethanol Content) Amendment Bill 2009	N			N	N, R
Crimes (Criminal Organisations Control) Bill 2009	R, N		R		
Gas Supply Amendment (Ombudsman Scheme) Bill 2009				N	
Greyhound Racing Bill 2009				N	
Harness Racing Bill 2009				N	
Hawkesbury-Nepean River Bill 2009				N	
Health Legislation Amendment Bill 2009	N				
Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Bill 2009				N	
Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009	N, R, C	R			
Liquor Amendment (Special Licence) Conditions Bill 2008				N, R	
Nation Building and Jobs Plan (State Infrastructure Delivery) Bill 2009	N,		N	N	
Parking Space Levy Bill 2009				N	N, C
Racing Legislation Amendment Bill 2009				N	
Real Property and Conveyancing Legislation Amendment Bill 2009	N, R				
Succession Amendment (Intestacy) Bill 2009	N			N	
Surveillance Devices Amendment (Validation) Bill 2009	N, R				
Western Lands Amendment Bill 2008				R	

Key

- R Issue referred to Parliament
- C Correspondence with Minister/Member
- N Issue Note

Appendix 4: Index of correspondence on regulations

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2008	Digest 2009
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12	
Liquor Regulation 2008	Minister for Gaming and Racing and Minister for Sport and Recreation	22/09/08	5/01/09	10	2
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10	