



Legislation Review Committee

LEGISLATION REVIEW DIGEST

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

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Membership and Staff

CHAIR	Mr Stephen Bromhead MP, Member for Myall Lakes
DEPUTY CHAIR	Dr Geoff Lee MP, Member for Parramatta
MEMBERS	Mr Garry Edwards MP, Member for Swansea Mr John Flowers MP, Member for Rockdale Ms Tania Mihailuk MP, Member for Bankstown The Hon. Shaoquett Moselmane MLC The Hon. Dr Peter Phelps MLC Mr David Shoebridge MLC
CONTACT DETAILS	Legislation Review Committee Parliament of New South Wales Macquarie Street Sydney NSW 2000
TELEPHONE	02 9230 3050
FACSIMILE	02 9230 3052
E-MAIL	legislation.review@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au/legislationreview

Functions of the Committee

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

8A Functions with respect to Bills

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

9 Functions with respect to Regulations

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

- v that the objective of the regulation could have been achieved by alternative and more effective means,
 - vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - vii that the form or intention of the regulation calls for elucidation, or
 - viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- 2 Further functions of the Committee are:
- (d) 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
 - (e) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

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

Guide to the Digest

COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

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.

COMMENT ON REGULATIONS

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the Digest. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the Digest drawing the regulation to the Parliament's "special attention". The criteria for the Committee's consideration of regulations are set out in s 9 of the *Legislation Review Act 1987*.

Regulations for the special attention of Parliament

When required, this section contains any reports on regulations subject to disallowance to which the Committee wishes to draw the special attention of Parliament.

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 MINISTERIAL CORRESPONDENCE ON BILLS

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 2: INDEX OF CORRESPONDENCE ON REGULATIONS REPORTED ON

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.

Conclusions

PART ONE - BILLS

1. AGRICULTURAL TENANCIES AMENDMENT BILL 2011

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

Commencement by proclamation

The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature. However, the Committee notes that this Bill proposes to confer jurisdiction over agricultural tenancy disputes to the Consumer, Trader and Tenancy Tribunal.

The Committee acknowledges that Tribunal members may require time to familiarise themselves with the new jurisdiction and stakeholders will need to be informed of the new provisions. Accordingly, in these circumstances the Committee does not consider there to be an inappropriate delegation of legislative powers.

2. COAL SEAM GAS MORATORIUM BILL 2011*

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

Property rights; Denial of Compensation

The Committee notes that provisions in this Bill may trespass on personal property rights. The Committee refers to Parliaments the question as to whether the Bill trespasses on personal and property rights.

3. CONSTITUTION AMENDMENT (RESTORATION OF OATHS OF ALLEGIANCE) BILL 2011*

The Committee does not make any comment on the Bill in respect of the issues set out under s8A(1) of the *Legislation Review Act 1987*.

4. POLICE AMENDMENT (DEATH AND DISABILITY) BILL 2011

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

Matters in regulation which should be included in legislation

The Committee reiterates the view of its predecessor Committee that the inclusion of the content of the death and disability insurance policy in the regulations does not require comment under section 8A(1)(b)(v) of *Legislation Review Act*.

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

Prescribing the obligations of police officers whilst ousting the jurisdiction of the Industrial Relations Commission

The Committee refers to Parliament whether the provision of obligations in the regulations with respect to rehabilitation, retraining, redeployment and contributions to the policy, constitutes the making of obligations unduly dependent upon non-reviewable decisions.

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

Commencement by proclamation

The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature.

The Committee acknowledges that this Bill seeks to replace the current death and disability scheme with a death and disability policy. The Committee is of the opinion that it is appropriate for the Act to commence at a time when that policy is in place. Accordingly, in these circumstances the Committee does not consider there to be an inappropriate delegation of legislative powers.

5. STRATA LEGISLATION AMENDMENT BILL 2011

The Committee does not make any comment on the Bill in respect of the issues set out under s8A(1) of the *Legislation Review Act 1987*.

PART TWO - REGULATIONS

1. ROAD TRANSPORT (DRIVER LICENSING) AMENDMENT (RELEASE OF PHOTOGRAPHS TO IDENTITY SECURITY STRIKE TEAM) REGULATION 2011

Trespasses unduly on personal rights and liberties: s 9(1)(b) of the LRA

Right to privacy

The function of the Committee is to consider whether the attention of Parliament should be drawn to any regulation on any ground, including when a regulation trespasses unduly on personal rights and liberties. This amendment has an effect on an individual's right to privacy by enabling the sharing of an individual's photograph with various law enforcement agencies. The Committee notes that the power to release photographs to a number of law enforcement agencies already exists, and that this amendment has the effect of adding additional law enforcement agencies.

The Committee recognises the significant safeguards that exist within the regulation and as such does not make a comment in relation to this amendment.

2. TERRORISM (POLICE POWERS) AMENDMENT REGULATION 2011

Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

Oppressive official powers – exclusion of access to Official Visitors

The Committee has commented in the past that Official Visitors have a legislated responsibility to ensure the health, safety and welfare of inmates and restricting access by Official Visitors may unduly trespass on personal rights and liberties. The Committee acknowledges the advice received in relation to the circumstances in which access would be excluded. The Committee restates that such clauses may trespass on personal rights and liberties.

Confidential communication and access to legal representation

The Committee acknowledges the advice received in relation to the exclusion of clauses 107, 109 and 78 of the *Crimes (Administration of Sentences) Regulation 2008* and the effect on confidential communication and legal representation. The Committee notes that the exclusion of these clauses may have the effect of trespassing on personal rights and liberties.

Part One - Bills

1. Agricultural Tenancies Amendment Bill 2011

Date introduced	9 November 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Fair Trading

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Agricultural Tenancies Act 1990* (the Principal Act) and the *Consumer, Trader and Tenancy Tribunal Act 2001* to replace the current arbitration system for determining disputes relating to agricultural tenancies with dispute resolution and determination by the Consumer, Trader and Tenancy Tribunal (the Tribunal).

BACKGROUND

2. As stated above, the purpose of the *Agricultural Tenancies Amendment Bill 2011* is to establish a new process for resolving disputes between tenants and landowners in respect of agricultural tenancies.
3. During 2011, responsibility for the *Agricultural Tenancies Act 1990* was transferred from the Primary Industries portfolio to the Fair Trading portfolio. The Minister commented in the Agreement in Principle speech:

Under the current Act, the Director General of the Department of Primary Industries is responsible for the arbitration of disputes however it would be neither logical nor practical to transfer administrative responsibility for the Act to Fair Trading without also transferring responsibility for the dispute resolution role. As the Consumer, Trader and Tenancy Tribunal already provides dispute resolution services and has extensive experience in tenancy-related matters, it is ideally placed to take on this role.¹

4. The provisions in Part 4 of the current Act will be replaced by new provisions and similar procedural and administrative provisions will apply to all matters within its jurisdiction.
5. According to the Agreement in Principle speech, a memorandum of understanding will be entered into so that the tribunal can seek expert advice from the Department of Primary Industries when required.

¹ The Hon. Anthony Roberts MP, New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 9 November 2011

6. The Minister also highlighted that the key stakeholder for agricultural tenancies, the NSW Farmers Association, was consulted before and during the drafting of the Bill and it supports the introduction of the new dispute resolution process.

OUTLINE OF PROVISIONS

7. Clause 1 sets out the name (also called the short title) of the proposed Act.
8. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
9. Clause 3 repeals the *Agricultural Tenancies Regulation 2006*, as a consequence of the change to the dispute resolution system.

Schedule 1 Amendment of *Agricultural Tenancies Act 1990*

10. Schedule 1 [1] amends the long title to omit a reference to arbitration and mediation.
11. Schedule 1 [2] inserts an object for the Principal Act relating to the provision of a mechanism for settling disputes by applications to the Tribunal.
12. Schedule 1 [3] omits an unnecessary definition.
13. Schedule 1 [4] inserts a definition of Tribunal.
14. Schedule 1 [5]–[9] and [11] replace the use of arbitration to resolve certain matters with determination by the Tribunal. The matters relate to the terms of an agricultural tenancy and improvements carried out by owners or tenants and compensation for improvements.
15. Schedule 1 [10] removes the requirement for the cost of condition reports to be shared and also makes a consequential amendment.
16. Schedule 1 [12] replaces Part 4 of the Principal Act to confer jurisdiction on the Tribunal to resolve disputes and other matters relating to agricultural tenancies. Proposed section 20 enables an owner or tenant (or former owner or former tenant) to apply to the Tribunal for determination of matters under the Principal Act, including disputes relating to or arising out of agricultural tenancies. Proposed section 21 sets out the orders that may be made by the Tribunal and limits the amount that may be ordered to be paid to \$500,000. Proposed section 22 requires all applications for determinations to be dealt with by the Tribunal under the alternative dispute resolution provisions of the *Consumer, Trader and Tenancy Tribunal Act 2001* and prevents the Tribunal from determining a matter unless it is satisfied there is no prospect of settlement or successful mediation. Proposed section 23 re-enacts a provision relating to amounts payable by trustee owners of farms. Schedule 1 [16] makes a consequential amendment.
17. Schedule 1 [13] omits an unnecessary provision relating to the delegation of functions by the Director-General of the Department of Primary Industries. The current functions of the Director-General are being omitted by the proposed Act.
18. Schedule 1 [14] enables the service of documents by facsimile.

19. Schedule 1 [15] makes it clear that documents may be served in the manner permitted by the *Consumer, Trader and Tenancy Tribunal Act 2001*.
20. Schedule 1 [17] enables savings and transitional provisions to be made consequent on the enactment of the proposed Act.
21. Schedule 1 [18] continues the application of the current law to matters the subject of an application for arbitration before the commencement of proposed Part 4.Text

Schedule 2 Amendment of *Consumer, Trader and Tenancy Tribunal Act 2001*

22. Schedule 2 [1] makes an amendment consequential on the conferral of jurisdiction on the Tribunal under the *Agricultural Tenancies Act 1990*.
23. Schedule 2 [2] assigns to the Commercial Division of the Tribunal the exercise of the Tribunal's jurisdiction under the *Agricultural Tenancies Act 1990*.

ISSUES CONSIDERED BY COMMITTEE

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

Commencement by proclamation

24. The Committee notes that the Act is to commence operation on a day or days to be appointed by proclamation. This provides the Government with the power to commence the Act on whatever day it chooses or not at all. The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature.
25. The Committee also notes that this Bill proposes to confer jurisdiction over agricultural tenancy disputes to the Consumer, Trader and Tenancy Tribunal. The Minister's office has advised the Committee that the Bill is to commence on proclamation to allow time for members of the Consumer, Trader and Tenancy Tribunal to familiarise themselves with the new jurisdiction and for the Department to liaise with the sector to inform them of the new provisions.

The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature. However, the Committee notes that this Bill proposes to confer jurisdiction over agricultural tenancy disputes to the Consumer, Trader and Tenancy Tribunal.

The Committee acknowledges that Tribunal members may require time to familiarise themselves with the new jurisdiction and stakeholders will need to be informed of the new provisions. Accordingly, in these circumstances the Committee does not consider there to be an inappropriate delegation of legislative powers.

2. Coal Seam Gas Moratorium Bill 2011*

Date introduced	11 November 2011
House introduced	Legislative Council
Member responsible	The Hon. Jeremy Buckingham MLC
	*Private member

PURPOSE AND DESCRIPTION

1. The object of this Bill is to regulate the exploration for, and mining of, coal seam gas (which is also known as coal seam methane or coal bed methane) by:
 - (a) prohibiting prospecting for petroleum, and petroleum mining operations relating to coal seam gas in the Sydney Catchment Authority's special area and the Sydney metropolitan region, and
 - (b) cancelling or suspending certain petroleum titles relating to coal seam gas, and prohibiting the grant or renewal of such titles in relation to the Sydney Catchment Authority's special area and the Sydney metropolitan region, and
 - (c) prohibiting petroleum prospecting, and petroleum mining operations, relating to coal seam gas in other parts of the State during a 12-month moratorium period, and
 - (d) during that moratorium period, suspending certain petroleum titles relating to coal seam gas (other than production leases) relating to land in those other parts of the State and prohibiting the grant or renewal of certain petroleum titles relating to that land.

BACKGROUND

2. The Bill seeks to create a 12 month moratorium on any new coal seam gas prospecting and mining, and create a prohibition on any coal seam gas prospecting or mining within the Sydney Metropolitan area or within special catchment areas declared under the *Sydney Water Catchment Management Act 1998*.
3. The Committee notes that there is presently an ongoing Legislative Council Inquiry into Coal Seam Gas. Hearings have been conducted in regional centres and now in Sydney. Evidence has been gathered and the Committee believes the Inquiry should be finalised and its Report published before legislation is introduced.

OUTLINE OF PROVISIONS

Part 1 Preliminary

4. Clause 1 sets out the name (also called the short title) of the proposed Act.
5. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

6. Clause 3 defines expressions used in the proposed Act. Moratorium period is defined as the 12-month period beginning on the date of assent to the proposed Act, petroleum title relating to coal seam gas means an exploration licence, assessment lease, production lease or special prospecting authority under the *Petroleum (Onshore) Act 1991* in relation to coal seam gas and protected area means both the Sydney Catchment Authority's special area (an area of land declared to be a special area under section 44 of the *Sydney Water Catchment Management Act 1998*) and the Sydney metropolitan region, which is defined by reference to the local government areas that make it up.

Part 2 Prohibition on petroleum prospecting and mining operations relating to coal seam gas in protected area

7. Clause 4 prohibits petroleum prospecting and mining operations relating to coal seam gas in the protected area. The maximum penalty is 200 penalty units (currently \$22,000) or imprisonment for 2 years, or both. The proposed section applies whether or not the relevant person holds any petroleum title relating to coal seam gas.
8. Clause 5 cancels any petroleum title relating to coal seam gas that authorises activities in the protected area.
9. Clause 6 prohibits the granting of any petroleum title relating to coal seam gas that authorises activities in the protected area.
10. Clause 7 prohibits the renewal of any petroleum title relating to coal seam gas that authorises activities in the protected area.

Part 3 Moratorium on petroleum prospecting and mining operations relating to coal seam gas outside protected area

11. Clause 8 prohibits petroleum prospecting and mining operations relating to coal seam gas outside the protected area during a 12-month moratorium period. The maximum penalty is 200 penalty units or imprisonment for 2 years, or both. The proposed section applies whether or not the relevant person holds any petroleum title relating to coal seam gas, except that it does not prohibit a person from conducting such operations as are authorised by a production lease in force immediately before the commencement of the proposed Act.
12. Clause 9 suspends any petroleum title (other than a production lease) relating to coal seam gas that authorises activities on land outside the protected area for the duration of the moratorium period.
13. Clause 10 imposes a 12-month moratorium on the grant or renewal of any petroleum title relating to coal seam gas that authorises activities on land outside the protected area.

Part 4 Miscellaneous

14. Clause 11 provides that the proposed Act operates despite any authorisation or approval under the *Petroleum (Onshore) Act 1991*.
15. Clause 12 provides for proceedings for offences against the proposed Act to be dealt with summarily by the Local Court.

ISSUES CONSIDERED BY COMMITTEE

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

Property rights; Denial of Compensation

16. Provisions within this Bill have the effect of limiting and restricting activities permitted to owners of a petroleum title relating to coal seam gas granted under the *Petroleum (Onshore) Act 1991* (the Act) and may unduly trespass on personal rights and liberties.
17. The Committee notes that section 26 of the Act provides that every petroleum title, and any interest in any such title, is to be taken in law to be personal property, and therefore any encroachment on the use of that property could be considered a trespass on personal property rights.
18. In addition, section 22 of the Act contains a number of due process provisions concerning the cancellation or operational suspension of petroleum titles. Provisions within this Bill make ineffective many of those provisions. The Committee also notes that section 22(5) of the Act provides that where a petroleum title is cancelled or suspended, no compensation is payable by the Crown for or in respect of the cancellation of, or a suspension of operations under, a petroleum title.

The Committee notes that provisions in this Bill may trespass on personal property rights. The Committee refers to Parliaments the question as to whether the Bill trespasses on personal and property rights.

3. Constitution Amendment (Restoration of Oaths of Allegiance) Bill 2011*

Date introduced	11 November 2011
House introduced	Legislative Council
Member responsible	Revd the Hon Fred Nile MLC
	*Private Member

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Constitution Act 1902* to give a Member of the Legislative Council, Legislative Assembly or the Executive Council the option of taking or making an oath or affirmation of allegiance to Her Majesty Queen Elizabeth II, Her heirs and successors as an alternative to the pledge of loyalty to Australia and the People of New South Wales.
2. Taking the pledge of loyalty is currently required before a Member of Parliament can sit or vote and before a Member of the Executive Council can assume office. At present, taking an oath of allegiance is neither required nor offered.
3. It is proposed that the taking of the oath of allegiance will be offered as an optional alternative to the pledge of loyalty, and not as a substitute.

BACKGROUND

4. In 2006, the *Constitution Act 1902* was amended to require Members of Parliament and Ministers to take a pledge of loyalty to Australia and to the people of New South Wales instead of swearing allegiance to the Queen, which had been the previous requirement.
5. This Bill seeks to restore the oath of allegiance as an alternative to the pledge of loyalty. In advising the House of his reasons why this Bill has been introduced, the Member responsible, Revd the Hon Fred Nile explained:

The oath of allegiance to the Queen unites the peoples of a nation in times of war and peace. Once the oath has lost its significant, then lost also is our national discipline and patriotism. As we know, our service men and women take a similar oath. The oath is not simply to the Queen as an individual but to the Crown, which embodies far more than just the physical characteristics of our country. It is the basis on which our Constitution is founded, the font of our laws and the single entity which unites all Australians into one nation. It is thus the endowment of the hopes and aspirations and indeed the whole wellbeing of the people it safeguards.

OUTLINE OF PROVISIONS

6. Clause 1 sets out the name (also called the short title) of the proposed Act.
7. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

8. Schedule 1 amends the *Constitution Act 1902* to give effect to the matters set out in the Overview.

ISSUES CONSIDERED BY COMMITTEE

The Committee does not make any comment on the Bill in respect of the issues set out under s8A(1) of the *Legislation Review Act 1987*.

4. Police Amendment (Death and Disability) Bill 2011

Date introduced	9 November 2011
House introduced	Legislative Council
Minister responsible	The Hon. Michael Gallacher MLC
Portfolio	Minister for Police and Emergency Services

PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
 - (a) to terminate the existing industrial award-based scheme for death and disability payments to police officers injured at work or off-duty;
 - (b) to replace that scheme with entitlements to death and disability payments in accordance with an approved insurance policy;
 - (c) to amend the *Industrial Relations Act 1996* to remove the jurisdiction of the Industrial Relations Commission to make or vary industrial instruments that provide for death and disability payments in respect of police officers; and
 - (d) to make other consequential or ancillary amendments.

BACKGROUND

2. The Minister has put before the House a Bill that seeks to replace the current death and disability scheme for NSW Police with a commercial income protection insurance arrangement. The Bill also restricts officer's entitlements to workers' compensation top-up payments.
3. The Minister has identified that in 2010-2011 the death and disability scheme cost \$288 million, which the Minister noted was more than 10 times its anticipated cost in 2005. Workers' compensation costs for the NSW Police Force have increased by 742 per cent since 2005-2006. Furthermore, the Minister noted that when the cost of the scheme is added to the \$463 million in workers' compensation costs, the total cost is \$762 million this year, which is approaching 50 per cent of the NSW Police salaries of \$1.574 billion.²
4. The Minister has noted that the current scheme discourages officers from returning to work by topping up salaries and making death and disability benefits payable on medical discharge.³

² The Hon. Michael Gallacher, *Hansard*, Legislative Council, 9 November 2011.

³ The Hon. Michael Gallacher, *Hansard*, Legislative Council, 9 November 2011.

OUTLINE OF PROVISIONS

5. Clause 1 sets out the name (also called the short title) of the proposed Act.
6. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation issues considered by committee.

SCHEDULE 1 AMENDMENT OF POLICE ACT 1990 NO 47

7. Schedule 1 [1] inserts a new Part 9B into the Police Act 1990 which provides for death and disability payments to police officers in accordance with an approved insurance policy. The new Part 9B contains the following provisions:
8. Proposed section 199A sets out the definitions for the purposes of the proposed Part. *Death and disability payments* is defined to include lump sum payments or income support in relation to death or incapacity for work arising from a work-related injury or an off-duty injury (and includes workers compensation top-up weekly payments).
9. Proposed section 199B excludes from the operation of the proposed Part police officers who are contributors to the Police Superannuation Fund or the State Superannuation Fund and (with an exception) police officers who are contributors to the State Authorities Superannuation Fund and are covered by the additional benefit for incapacity under the *State Authorities Superannuation Act 1987*.
10. Proposed section 199C requires the NSW Police Force or FSS Trustee Corporation to take out an approved death and disability insurance policy on behalf of police officers.
11. Proposed section 199D provides that an *approved death and disability insurance policy* is an insurance policy approved by the Minister, with the concurrence of the Treasurer, that provides death and disability payments for police officers. An approved death and disability insurance policy must provide for payments for police officers who die, or who are incapacitated for work as police officers, as a result of being injured at work. An approved death and disability insurance policy may also include provision for payments in respect of injuries that did not occur at work. It may also provide for payments in the form of income protection to a police officer who is a contributor to the State Authorities Superannuation Fund and is covered by the additional benefit for incapacity under the *State Authorities Superannuation Act 1987*.
12. Proposed section 199E requires the Minister, in approving an insurance policy under the proposed Part, to be satisfied that the cost to the State of the policy (after deducting the contribution made by police officers under proposed section 199F) will be approximately 4.6% of the remuneration of police officers covered by the policy. The regulations may vary that cost to the State.
13. Proposed section 199F requires police officers to make the contribution prescribed by the regulations to the costs of the approved death and disability insurance policy. Until a contribution rate is prescribed, the rate will be the same as the contribution required to be made by police officers under the *Crown Employees (Police Officers Death and Disability) Award 2005* before its rescission by the proposed Act (namely 1.8% of their remuneration).

14. Proposed section 199G sets out the matters that may be dealt with by the regulations, including the provisions that must or may be included in an approved death and disability insurance policy, savings and transitional provisions and injury management.
15. Proposed section 199H provides that the proposed Part does not affect workers compensation or superannuation entitlements.
16. Proposed section 199I rescinds the *Crown Employees (Police Officers Death and Disability) Award 2005*.
17. Proposed section 199J rescinds clause 9 of the *Crown Employees (Police Officers - 2009) Award* (relating to top-up of weekly workers compensation).
18. Proposed section 199K provides for savings and transitional arrangements in respect of death and disability payments to police officers. Under the proposed section, the provisions of the *Crown Employees (Police Officers Death and Disability) Award 2005* (the former award) relating to temporary or partial incapacity will continue to apply to a police officer who has been assessed by an independent medical practitioner as suffering a disability resulting in the police officer being incapacitated for work as a police officer, but who has not yet been discharged from the NSW Police Force. A police officer who is injured before being covered by an approved death and disability insurance policy (but who would have been entitled to a payment under the former award in respect of death or incapacity arising from that injury) is entitled to payments equivalent to those that the police officer would have been paid under the approved policy if it had covered the police officer. The proposed section preserves entitlements under an insurance policy taken out on behalf of police officers before the commencement of the proposed Part in relation to death or total and permanent incapacity. Police officers will also continue to be entitled to workers compensation top-up payments under clause 9 of the *Crown Employees (Police Officers - 2009) Award* for a period of 6 months after the commencement of the proposed Part, despite the rescission of that provision.
19. Proposed section 199L provides for the cost of death and disability payments for police officers to be kept under review and for the Minister and Treasurer to be advised of that cost.
20. Proposed section 199M provides for a review by the Auditor-General after the enactment of the proposed Act of whether the proposed Part and the injury management practices for police officers have improved the performance of the NSW Police Force in securing the return of injured police officers to duty.
21. Schedule 1 [2] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.
22. Schedule 1 [3] makes a consequential amendment to the savings and transitional provisions relating to the former special risk benefits to ensure that those provisions are not affected by the replacement of the existing death and disability scheme under the proposed Act.

SCHEDULE 2 AMENDMENT OF POLICE REGULATION 2008

23. Schedule 2 [2] provides for a top-up of weekly workers compensation payments to injured police officers to ensure that, during the first 6 months of incapacity, the officers are paid their full ordinary rate of pay (that will include loadings and allowances in the nature of salary).
24. Schedule 2 [1] and [3] make consequential amendments.

SCHEDULE 3 AMENDMENT OF STATE AUTHORITIES

Superannuation Act 1987 No 211

25. The Schedule inserts a new Part 5D into the *State Authorities Superannuation Act 1987* which provides for the making of regulations to enable police officers to elect to be covered for lump sum payments by an approved death and disability insurance policy under the *Police Act 1990* instead of the additional superannuation benefit.

SCHEDULE 4 AMENDMENT OF INDUSTRIAL RELATIONS ACT 1996

26. Schedule 4 [2] removes the jurisdiction of the Industrial Relations Commission to make or vary industrial instruments that provide for death and disability payments in respect of police officers. It also provides that the Commission cannot treat any savings attributable to the operation of the proposed Act as employee-related cost savings that may offset increased employee-related costs arising from proposed salary increases.
27. Schedule 4 [1] makes an ancillary amendment to the jurisdiction of the Industrial Relations Commission in relation to unfair contracts.

ISSUES CONSIDERED BY THE COMMITTEE

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

Matters in regulation which should be included in legislation

28. The Committee notes that the effect of proposed sections 199D - 199G is to include in the regulations the content of the death and disability insurance policy. The Committee also notes that the current death and disability scheme is contained in the *Crown Employees (Police Officers Death and Disability Award) 2005*, and the content was not outlined in the governing Act. The Legislation Review Committee of the 53rd Parliament reviewed the governing legislation in Digest 1 of 2006 and did not provide a comment in relation to the appropriateness of including the content of the death and disability insurance scheme in the regulations. The Committee reiterates the view of its predecessor Committee that the inclusion of the content of the death and disability insurance policy in the regulations does not require comment under section 8A(1)(b)(v) of *Legislation Review Act*.

The Committee reiterates the view of its predecessor Committee that the inclusion of the content of the death and disability insurance policy in the regulations does not require comment under section 8A(1)(b)(v) of *Legislation Review Act*.

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

Prescribing the obligations of police officers whilst ousting the jurisdiction of the Industrial Relations Commission

29. Proposed subsection 199G(c) outlines that the regulation may make provision for or with respect to "the obligations of the NSW Police Force and police officers or former police officers with respect to rehabilitation, retraining and redeployment of incapacitated police officers or former police officers".

The Committee refers to Parliament whether the provision of obligations in the regulations with respect to rehabilitation, retraining, redeployment and contributions to the policy, constitutes the making of obligations unduly dependent upon non-reviewable decisions.

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

Commencement by proclamation

30. The Committee notes that the Act is to commence operation on a day or days to be appointed by proclamation. This provides the Government with the power to commence the Act on whatever day it chooses or not at all. The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature.
31. In the second reading speech, the Minister noted that – if passed – the Act will commence on proclamation, which will be timed to occur concurrently with the approval of an insurance policy.

The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature.

The Committee acknowledges that this Bill seeks to replace the current death and disability scheme with a death and disability policy. The Committee is of the opinion that it is appropriate for the Act to commence at a time when that policy is in place. Accordingly, in these circumstances the Committee does not consider there to be an inappropriate delegation of legislative powers.

5. Strata Legislation Amendment Bill 2011

Date introduced	11 November 2011
House introduced	Legislative Assembly
Member responsible	Clover Moore MP
	*Private Member

PURPOSE AND DESCRIPTION

1. This Bill seeks to make a series of amendments to *Strata Schemes Management Act 1996* with respect to the following matters:
 - To prevent certain persons from being appointed as strata managing agents or the caretakers of strata schemes;
 - To require the disclosure by strata managing agents, caretakers and legal practitioners involved with strata management of any connections they have with certain individuals, and to require individuals standing for election or appointment to an executive committee of any connections with certain individuals.
 - To provide that an owner of a lot in a strata scheme is jointly and severally liable with the occupier of that lot for damage done to common property;
 - To provide limits on the number of persons that can reside on a lot in a strata scheme, namely two times the number of designated bedrooms;
 - To enable the Consumer, Trader and Tenancy Tribunal (CTTT) to make certain orders for the settlement of disputes in respect of strata development contracts and strata management statements;
 - To make it an offence to contravene an order made under the Principal Act by an Adjudicator or the Tribunal;
 - To change the requirements for serving summons or other legal process on an owners corporation, including to allow service by e-mail; and
 - To make other miscellaneous amendments of a technical nature with respect to the administration of strata schemes.

BACKGROUND

2. The Bill has been introduced by the Member for Sydney, Ms Clover Moore, and was prompted by concerns about certain current practices in strata management schemes.
3. The Member commenced a review of this issue following the 2009 release of her discussion paper on the matter – [Proposals for Strata Legislation Reform](#).

4. Subsequent to this, the Member engaged in consultation with occupants, owners, and industry stakeholders, including the Institute of Strata Management Title and the Real Estate Institute of NSW.
5. The Bill seeks to make a suite of miscellaneous amendments to the *Strata Schemes Management Act 1996* to further the transparency of strata management, provide for further avenues of dispute resolution, strengthen compliance functions, and to provide for other best practice procedures.
6. The Member advised the House her reasons for introducing the Bill:

 'Apartments create micro-communities that need to be run democratically and transparently, with accountability for those in positions of power. While legislative amendments in the past 10 years have provided some improvement, many problems remain unresolved.'

OUTLINE OF PROVISIONS

7. Clause 1 sets out the name (also called the short title) of the proposed Act.
8. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
9. Schedule 1 [1] inserts proposed section 25A into the Principal Act to require members of an executive committee to comply with the code of conduct in proposed Schedule 1A. Schedule 1 [29] inserts proposed Schedule 1A into the Principal Act.
10. Schedule 1 [2] inserts proposed sections 27A and 27B into the Principal Act. Proposed section 27A prevents the original owner, and certain other specified persons connected with the original owner or involved in building works for the strata scheme concerned, from being appointed as a strata managing agent and requires an owners corporation or executive committee to terminate an appointment that has been made if it becomes aware that the strata managing agent is such a person.
11. Proposed section 27B makes it an offence for a person to fail to disclose certain connections that the person has to other specified persons before accepting an appointment as a strata managing agent. If the connection forms after the appointment, it is an offence for the strata managing agent to fail to make the disclosure as soon as the agent becomes aware, or ought reasonably to have become aware, that the connection exists. The proposed section enables an owners corporation or executive committee to terminate the appointment of a strata managing agent if it becomes aware that such a connection exists.
12. Schedule 1 [3] inserts proposed section 40D into the Principal Act which prevents the original owner of a strata scheme, and certain other specified persons connected with the original owner, from being appointed as a caretaker for the strata scheme and requires an owners corporation to terminate an appointment that has been made if it becomes aware that the caretaker is such a person.
13. Schedule 1 [23] inserts proposed section 230B into the Principal Act which makes it an offence for a legal practitioner to fail to disclose if the practitioner is connected with the original owner before undertaking to provide legal services to an owners corporation. If

the connection forms after the legal practitioner is engaged to undertake those services, it is an offence for the practitioner to fail to make the disclosure as soon as the practitioner becomes aware, or ought reasonably to have become aware, that the connection exists. The proposed section enables an owners corporation or executive committee to terminate the engagement of a legal practitioner if it becomes aware that such a connection exists. Schedule 1 [22] makes a consequential amendment.

14. Schedule 1 [27] amends section 246 of the Principal Act to enable regulations to be made with respect to the procedures to be observed by the chairperson and secretary in relation to meetings of an owners corporation and by persons presiding at those meetings and with respect to a code of conduct for chairpersons, secretaries and treasurers of owners corporations and members of executive committees. Schedule 1 [28] makes a consequential amendment.
15. Schedule 1 [36] amends clause 3A of Schedule 3 to the Principal Act which currently prevents a person connected with the original owner or caretaker from being eligible to be elected to the executive committee of a strata scheme unless the person first discloses the connection. The amendment extends that provision to persons connected with the strata managing agent.
16. Schedule 1 [37] and [38] amend clause 3A of Schedule 3 to the Principal Act to make it an offence for a person to be elected, or appointed to act, as a member of an executive committee without making the disclosures required by that clause. The person also commits an offence each time the person votes on a matter as a member of the executive committee after failing to make such a disclosure.
17. Schedule 1 [39] amends clause 3A of Schedule 3 to the Principal Act to make it an offence for a person who becomes connected with the original owner, caretaker or strata managing agent after having being elected, or appointed to act, as a member of an executive committee to fail to disclose the connection.
18. Schedule 1 [9] amends section 98 of the Principal Act to require certain additional matters to be recorded on the strata roll for a strata scheme. Those matters are licences granted by the owners corporation for use of the common property, plans and approvals for building work to the common property, plans and approvals for building work carried out on other property in the strata scheme (if lawfully available to the owners corporation), details of loans to the owners corporation and copies of special resolutions passed to allow additions and alterations to the common property or the erection of new structures on the common property. Schedule 1 [8] makes a consequential amendment.
19. Schedule 1 [10] amends section 98 of the Principal Act to require the strata roll to contain an index of documents included in the roll.
20. Schedule 1 [5] amends section 76 of the Principal Act to enable an owners corporation to levy additional payments for the sinking fund if faced with unexpected expenses to be paid from that fund. Currently, the owners corporation can only levy additional payments to the administrative fund. Schedule 1 [4] makes a consequential amendment.
21. Schedule 1 [6] amends section 76 of the Principal Act to provide that, if a quorum cannot be achieved for an annual general meeting in accordance with that Act, the

payments required to be levied to the administrative fund and the sinking fund are taken to be the same amounts as levied in the previous year increased by the Consumer Price Index.

22. Schedule 1 [7] amends section 87 of the Principal Act to increase the insurance required to be taken out under that section in relation to a strata scheme (for example, to cover occupier's liability and workers compensation) from \$10,000,000 to \$20,000,000.
23. Schedule 1 [30] amends clause 10 of Schedule 2 to the Principal Act to provide that, if a person pays strata contributions levied on the person by cheque, those contributions are not taken to have been paid for the purpose of the person exercising voting rights at a general meeting of an owners corporation unless, when the meeting is held, at least 5 clear working days have passed since the cheque was received and no notice of the cheque being dishonoured has been received.
24. Schedule 1 [35] amends clause 34 of Schedule 2 to the Principal Act to require notice of a general meeting to include proposed estimates of amounts needed to be credited to the administrative and sinking funds and proposed amounts of strata contributions based on those estimates.
25. Schedule 1 [15] and [16] amend section 162 of the Principal Act to enable the Tribunal to make an order terminating the appointment of a strata managing agent if the agent is a person referred to in proposed section 27A (1).
26. Schedule 1 [19] inserts proposed sections 183C and 183D into the Principal Act to enable the Tribunal in certain circumstances to make orders to settle disputes in relation to strata development contracts and strata management statements.
27. Schedule 1 [20] amends section 198 of the Principal Act to increase the monetary penalties for contempt of the Tribunal from 5 penalty units to 50 penalty units (currently \$5,500).
28. Schedule 1 [21] inserts proposed section 201A into the Principal Act to make it an offence for a person to contravene an order made by the Tribunal or an Adjudicator under Chapter 5 of the Principal Act (which deals with the resolution of disputes in relation to strata schemes).
29. Schedule 1 [12]–[14], [17] and [18] make consequential amendments.
30. Schedule 1 [11] inserts proposed sections 117A and 117B into the Principal Act. Proposed section 117A provides that the owner of a lot is jointly and severally liable with the occupier of the lot for damage caused by the occupier to the common property. However, the owner is entitled to be indemnified by the occupier for any such damage.
31. Proposed section 117B prevents the owner or occupier of a lot from allowing more persons over the age of 18 years to reside on the lot than the number obtained by multiplying each bedroom or other intended sleeping area in the lot by 2.
32. Schedule 1 [24] amends section 235 of the Principal Act to require service of a summons or other legal process on an owners corporation to be effected by posting it to the address recorded on the Register for service of notices on the owners corporation and

also posting it to the address of the strata scheme (if that address is different) or leaving it in the letterbox of the owners corporation.

33. Schedule 1 [25] amends section 236 of the Principal Act to enable an owners corporation or an executive committee to serve a notice or other document on a person by e-mailing it to the e-mail address provided by the person for service of notices.
34. Schedule 1 [26] makes a consequential amendment.
35. Schedule 1 [31] amends clause 19 of Schedule 2 to the Principal Act to limit the time at which a poll may be demanded after a vote has been taken at a general meeting of an owners corporation.
36. Schedule 1 [32] and [33] amend clause 31 of Schedule 2 to the Principal Act to enable the owners corporation by resolution at a general meeting to vary the time at which the annual general meeting is held, subject to certain limitations.
37. Schedule 1 [34] inserts proposed clauses 33A and 33B into Schedule 2 to the Principal Act.
38. Proposed clause 33A requires notice of a general meeting that includes a motion to amend, repeal or substitute a by-law to also include a report prepared by the proponent explaining the intent of the proposed amendment, repeal or substitution.
39. Proposed clause 33B requires notice of a general meeting to include any disclosures made under proposed section 27B or 230B since the last meeting.
40. Schedule 1 [40] inserts proposed clause 6A into Schedule 3 to the Principal Act to require notice of an executive committee meeting to include any disclosures made under proposed section 27B or 230B since the last meeting.
41. Schedule 1 [41] inserts proposed clause 17A into Schedule 3 to the Principal Act to enable the executive committee to transact business by telephone, closed-circuit television or other electronic means.
42. Schedule 1 [42] and [43] amend Schedule 4 to the Principal Act to make provision for savings and transitional matters as a consequence of the enactment of the proposed Act.
43. Schedule 2 amends Form 1 in Schedule 8 to the *Strata Schemes Management Regulation 2010* which is the form of a certificate under section 109 of the Principal Act given by an owners corporation as to the financial and other matters relating to a lot in a strata scheme. The amendment changes the requirement to disclose payments to be made by the owners corporation that do not relate to the maintenance or insurance of the strata scheme with a requirement to disclose payments to be made that relate to a matter that was not included in the estimates of actual and expected expenditure required to be prepared in relation to the strata scheme.

ISSUES CONSIDERED BY COMMITTEE

The Committee does not make any comment on the Bill in respect of the issues set out under s8A(1) of the *Legislation Review Act 1987*.

Part Two - Regulations

1. Road Transport (Driver Licensing) Amendment (Release of Photographs to Identity Security Strike Team) Regulation 2011

BACKGROUND

1. The object of this Regulation is to provide that the Roads and Traffic Authority may release certain photographs or photographic images that it stores to the Identity Security Strike Team (Sydney) (an inter-agency team charged with investigating serious identity-related crime and currently made up of members of the NSW Police Force, the New South Wales Crime Commission, the Australian Crime Commission, the Australian Federal Police and the Commonwealth Department of Immigration and Citizenship). The relevant photographs relate to driver licences, "proof of age" cards and licences and permits under the *Firearms Act 1996*, the *Security Industry Act 1997*, the *Weapons Prohibition Act 1998* and (from 7 January 2011) the *Commercial Agents and Private Inquiry Agents Act 2004*.
2. This Regulation is made under the *Road Transport (Driver Licensing) Act 1998*, including section 19 (the general regulation-making power) and section 41 (1) (g) (which permits the release of photographs and photographic images in accordance with the regulations).

COMMENT

Trespasses unduly on personal rights and liberties: s 9(1)(b) of the LRA

Right to privacy

3. This regulation amends clause 107 of the *Road Transport (Driver Licensing) Regulation 2008*, to authorise the Roads and Traffic Authority to release certain photographs to the inter-agency team known as the Identity Security Strike team (Sydney), being a team hosted by the Australian Federal Police and charged with investigating serious identity-related crime. The Committee notes that the release of personal information such as photographs, without the direct consent or knowledge of the individual, impacts upon an individual's right to privacy.
4. Prior to the amendments, clause 107 permitted the release of photographs to the NSW Crime Commission and the Australian Security Intelligence Organisation for the purposes of the investigation and prosecution of specified criminal activity. In addition, section 41 of the *Road Transport (Driver Licensing) Act 1989* permits photographs to be released to the NSW Police Force.
5. The Committee acknowledges that the authority to release certain photographs is not provided without safeguards. Clause 107 provides that any release of photographs must be in accordance with any protocol approved by the Privacy Commissioner.

CONCLUSION

The function of the Committee is to consider whether the attention of Parliament should be drawn to any regulation on any ground, including when a regulation trespasses unduly on personal rights and liberties. This amendment has an effect on an individual's right to privacy by enabling the sharing of an individual's photograph with various law enforcement agencies. The Committee notes that the power to release photographs to a number of law enforcement agencies already exists, and that this amendment has the effect of adding additional law enforcement agencies.

The Committee recognises the significant safeguards that exist within the regulation and as such does not make a comment in relation to this amendment.

2. Terrorism (Police Powers) Amendment Regulation 2011

PURPOSE AND DESCRIPTION

1. This regulation remade, with minor amendments, the provisions of the *Terrorism (Police Powers) Regulation 2005*, which was repealed on 1 September 2011 by section 10 (2) of the *Subordinate Legislation Act 1989*.
2. This regulation is no longer subject to disallowance. **Due to the prorogation of Parliament, the Committee was unable to comment on amendments made to the Terrorism (Police Powers) Regulation 2005 in 2010.** The *Terrorism (Police Powers) Amendment Regulation 2010* inserted clause 8 into the regulation. Clause 8 excludes certain provisions of *Crimes (Administration of Sentences) Act 1999*.
3. This regulation provides for the following:
 - (a) the delegation of functions by the Commissioner of Police and the Crime Commissioner;
 - (b) the keeping and inspection of documents relating to covert search warrants;
 - (c) the certification of documents or parts of documents that are not to be made available for inspection;
 - (d) the approval of forms by the Attorney General;
 - (e) the provisions of, or made under, the *Crimes (Administration of Sentences) Act 1999* that do not apply in respect of a person detained in a correctional centre when the person is detained under a preventative detention order; and
 - (f) savings and formal matters.
4. This regulation is made under the *Terrorism (Police Powers) Act 2002*, including sections 26X (3), 27E (2), 27F (2), 27L (2) and 32 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

5. Clause 8 of the Regulation is made under section 26X(3) of the *Terrorism (Police Powers) Act 2002* (the Act) which allows the Regulations to exclude provisions of the *Crimes (Administration of Sentences) Act 1999* and the *Crimes (Administration of Sentences) Regulation 2008* from applying to persons detained at a correctional centre under a preventative detention order.
6. The Act allows a preventative detention order to be made against a person in relation to a terrorist act. Section 26X of the Act provides that arrangements can be made for the person subject to the preventative detention order to be detained in a correctional centre.

7. For the purposes of section 26X(3) of the Act, the following provisions are excluded:
- (a) sections 19–22, 25–38, 41C, 41D, 47–50, 66–71 and 228 of the *Crimes (Administration of Sentences) Act 1999*;
 - (b) clauses 6 (f), 12–21, 60, 62, 70–82, 104–109, 155–157 and 159 (to the extent that it would enable an inmate to speak to the Official Visitor) of, and items 6 and 7 of Schedule 1 to, the *Crimes (Administration of Sentences) Regulation 2008*; and
 - (c) any regulation made under section 79 (i)–(l) of the *Crimes (Administration of Sentences) Act 1999*.
8. The Committee has been advised that the changes made to the regulation by clause 8 are a consequence of the statutory review of the *Terrorism (Police Powers) Act 2002* conducted by the Attorney General's Department in 2009/10.

Oppressive official powers – exclusion of access to Official Visitors

9. Section 228 of the *Crimes (Administration of Sentences) Act 1999* provides for the Minister to appoint Official Visitors and details the role of Official Visitors. This section is excluded by clause 8 of the Regulation and thus does not apply to persons detained at a correctional centre under a preventative detention order.
10. Clauses 155, 156, 157 and 159 of the *Crimes (Administration of Sentences) Regulation 2008* are also excluded by clause 8 of the Regulation. Clauses 155, 156 and 157 provide for notice of availability of Official Visitors, complaints and inquiries received by an Official Visitor and reports by Official Visitors. Clause 159 deals with requests from an inmate to the Minister, the Commissioner or an Official Visitor.
11. Official Visitors have a legislated responsibility to ensure the health, safety and welfare of inmates. Excluding the access of Official Visitors to those detained in a correctional centre may trespass on personal rights and liberties.
12. The Committee has been advised that a person subject to a preventative detention order is already prohibited from contacting an Official Visitor by virtue of s 26ZD of the *Terrorism (Police Powers) Act 2002* and the amendment to the regulation is simply designed to restate this position. The Committee has been advised that such provisions are based on the premise that, other than a few very limited exceptions, a person subject to a preventative detention order is not entitled to contact anyone.

The Committee has commented in the past that Official Visitors have a legislated responsibility to ensure the health, safety and welfare of inmates and restricting access by Official Visitors may unduly trespass on personal rights and liberties. The Committee acknowledges the advice received in relation to the circumstances in which access would be excluded. The Committee restates that such clauses may trespass on personal rights and liberties.

Confidential communication and access to legal representation

13. Clauses 107 and 109 of the *Crimes (Administration of Sentences) Regulation 2008* are excluded by the Regulation. Clause 107 deals with certain privileged correspondence from an exempt body or an exempt person.⁴
14. Clause 107 provides that:
- (1) As soon as practicable after receiving from an inmate any letter or parcel addressed to an exempt body or exempt person, a nominated officer must post the letter or parcel to the addressee, without opening, inspecting or reading it.
 - (2)-(4) (Repealed)
 - (5) As soon as practicable after receiving from an exempt body or exempt person any letter or parcel addressed to an inmate, a nominated officer must deliver the letter or parcel to the inmate, without opening, inspecting or reading it.
 - (6) Subclause (5) applies only to a letter or parcel that is contained in an envelope or package that is addressed to the general manager together with a note to the effect that the letter or parcel is to be delivered to the inmate without being opened, inspected or read by any person other than the inmate.
 - (7) In the case of a letter or parcel from an exempt person, a nominated officer may require the letter or parcel to be opened by the inmate in his or her presence if of the opinion that it may contain prohibited goods and, if it does so, may confiscate the letter or parcel and its contents and deal with them in accordance with the directions of the Commissioner.
 - (8) This clause does not apply to any letter or parcel to which clause 108 applies.
15. Clause 109 is also excluded by this regulation. Clause 109 states that:
- Subject to clauses 108 and 108A, this Regulation is not to be construed so as to limit correspondence between an inmate's legal practitioner in respect of any matters affecting the inmate's trial, conviction or imprisonment.
16. Clause 78 of the *Crimes (Administration of Sentences) Regulation 2008* is also excluded by this regulation. Clause 78 provides:
- In addition to any other visit authorised by this Regulation, an inmate is entitled to be visited by the inmate's legal practitioner.
17. The Committee is of the view that the extent to which monitoring of otherwise confidential communications and the limitations placed on access to legal representation is authorised by this regulation may trespass on personal rights and liberties.

⁴ An exempt body or person includes: the Ombudsman; the Judicial Commission; the New South Wales Crime Commission; the Police Integrity Commission; the Anti-Discrimination Board; the Administrative Decisions Tribunal; the Independent Commission Against Corruption; the Privacy Commissioner; the Legal Aid Commission; the Legal Services Commissioner; the Legal Services Tribunal; the Commonwealth Ombudsman; the Commonwealth Human Rights and Equal Opportunity Commission; the Australian Crime Commission; a Member of Parliament, a legal practitioner or a police officer.

18. The Committee has been advised that the *Terrorism (Police Powers) Act 2002* provides very specific restrictions on the contact that a person subject to a preventative detention order may have. As such the normal rules are inappropriate.

The Committee acknowledges the advice received in relation to the exclusion of clauses 107, 109 and 78 of the *Crimes (Administration of Sentences) Regulation 2008* and the effect on confidential communication and legal representation. The Committee notes that the exclusion of these clauses may have the effect of trespassing on personal rights and liberties.

PROPOSED COURSE OF ACTION:

That the Committee write to the Attorney General, noting that whilst the regulation is past its disallowance period, the Committee has concerns with the regulation as outlined in the conclusions above.

Appendix One – Index of Ministerial Correspondence on Bills

The Committee currently has no Ministerial correspondence in respect of Regulations.

Appendix Two – Index of Correspondence on Regulations on which the Committee has reported on

The Committee currently has no correspondence in respect of Regulations on which it has reported.