

PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

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No 11 of 2005

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* Denotes Private Member's Bill

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Vice Chairman

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Staff

Russell Keith, Committee Manager

Indira Rosenthal, Senior Committee Officer

Mel Keenan, Senior Committee Officer

Rachel White, Committee Officer

Melanie Carmeci, Assistant Committee Officer

Panel of Legal Advisers

The Committee retains a panel of legal advisers to provide advice on Bills as required.

Professor Phillip Bates

Professor Simon Bronitt

Dr Steven Churches

Dr Anne Cossins

Professor David Farrier

Mr John Garnsey QC

Associate Professor Luke McNamara

Ms Rachel Pepper

Mr Rohan Price

Ms Diane Skapinker

Ms Jennifer Stuckey-Clarke

Professor George Williams

Contact Details

Legislation Review Committee

Legislative Assembly

Parliament House

Macquarie Street

Sydney NSW 2000

Telephone

02 9230 3418

Facsimile

02 9230 3052

Email

legislation.review@parliament.nsw.gov.au

URL

www.parliament.nsw.gov.au/lrc/digests

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 iii).

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 iii).

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 2005

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 2005

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 2005

This table specifies the action the Committee has taken with respect to Bills that received comment in 2005 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 2005

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. Confiscation of Proceeds of Crime Amendment Bill 2005

Strict Liability: Clause 59

- | | |
|-----|--|
| 29. | The Committee is of the view that, except in extraordinary circumstances, it is inappropriate for an offence of strict liability to be punishable by a term of imprisonment. While it is important to ensure that the Public Trustee and the Commissioner can fulfil their obligations in relation to a freezing notice, it is not apparent to the Committee that this is an extraordinary circumstance justifying a prison term for a person not intending to commit the offence. |
| 30. | The Committee has written to the Attorney General for clarification as to the need to prescribe a term of imprisonment for this strict liability offence. |
| 31. | The Committee refers to Parliament the question as to whether providing for imprisonment for this offence trespasses unduly on personal rights and liberties. |

Self-incrimination/Right to Silence: proposed s 51A

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| 39. | The Committee notes that the right against self-incrimination (or “right to silence”) is a fundamental right, which should only be eroded when overwhelmingly in the public interest. |
| 40. | The Committee is of the view that requiring a person to give certain information about property that is the subject of a freezing order is in the public interest and that abrogating the right to silence is not unwarranted. |
| 41. | The Committee also notes that abrogation of the right should only be to an extent necessary to achieve the public interest aim and should be proportionate to that aim. For this reason, the Committee is of the view that information given under compulsion should not normally be able to be used against the person in criminal or civil proceedings, directly or derivatively. |
| 42. | The Committee notes that proposed s 51A provides that the statement cannot be used in criminal proceedings against the person but provides no limit on its use in civil proceedings or derivatively in criminal proceedings. |
| 43. | The Committee has written to the Attorney General to seek his advice as to why there is no restriction on the use of self-incriminating information in civil proceedings or its derivative use in criminal proceedings. |
| 44. | The Committee refers to Parliament the question of whether proposed s 51A constitutes an undue trespass on the personal right against self-incrimination. |

Discrimination & Appeal Rights: Clause 2, proposed Division 2 of Part 7

- 57. The Committee is of the view that it is a trespass on a person's fundamental rights:**
- to authorise the state to take over management of a person's property and affairs without compelling justification and adequate safeguards of the person's rights;
 - to discriminate against a person on the ground of mental illness, and
 - to fail to provide the right to appeal against the making of a damages supervision order (DSO).
- 58. The Committee is also of the view that these rights, while not absolute, should only be displaced by compelling public interest justifications and only to the extent necessary to achieve the competing public interest objective.**
- 59. The Committee notes the public interest in ensuring that an award of damages for non-economic loss is used for the purpose for which it was awarded, namely medical and related costs arising out of the injury.**
- 60. The Committee also notes that a court can only make a DSO if satisfied that it is in the best interests of the person concerned.**
- 61. The Committee has written to the Attorney General for advice as to the public interest justifications for enabling a court to order a DSO in respect of a person who is able to manage their own affairs and property and failing to provide for a right of appeal against a DSO.**
- 62. The Committee refers to Parliament the question of whether proposed Division 2 of Part 7 and proposed section 54D unduly trespass on personal rights and liberties.**

Strict Liability: proposed section 54G

- 66. The Committee is of the view that, except in extraordinary circumstances, it is inappropriate for an offence of strict liability to be punishable by a term of imprisonment.**
- 67. The Committee has written to the Attorney General for clarification as to the need to prescribe a term of imprisonment for this strict liability offence.**
- 68. The Committee refers to Parliament the question as to whether providing for imprisonment for this offence trespasses unduly on personal rights and liberties.**

Reversal of onus of proof: proposed sections 193B, 193C & 193D

- 76. The Committee notes that the reversal of the onus of proof may be inconsistent with the presumption of innocence, which is recognised as a fundamental human right.**
- 77. The Committee also notes that this right is not absolute and that provisions which shift the burden of proof, subject to reasonable limits, have been held not to be incompatible with the presumption of innocence.**

- 78. The Committee has written to the Minister for advice on the need to place a legal burden of proof on a defendant in relation to these matters rather than leaving the burden of proof with the prosecution or placing an evidential burden on the defendant.**
- 79. The Committee refers to Parliament the question of whether reversing the onus of proof and requiring a defendant to bear a legal burden of proof unduly trespass on the person's right to be presumed innocent.**

Strict Liability: proposed section 193C

- 83. The Committee is of the view that, except in extraordinary circumstances, it is inappropriate for an offence of strict liability to be punishable by a term of imprisonment.**
- 84. The Committee has written to the Attorney General for clarification as to the need to prescribe a term of imprisonment for this strict liability offence.**
- 85. The Committee refers to Parliament the question as to whether providing for imprisonment for this offence trespasses unduly on personal rights and liberties.**

Discrimination; Right to property: Clause 5, proposed Part 3

- 93. The Committee is of the view that treating a person who has been found not guilty of a crime as if they had been convicted of that crime is a trespass of that person's fundamental rights.**
- 94. The Committee notes that there is a public interest in ensuring that people cannot benefit from murder. The Committee also notes that the person who is the subject of a forfeiture application order under proposed section 11 has been found not guilty of murder.**
- 95. The Committee further notes that the forfeiture rule can only be applied to a person found not guilty of murder because of mental illness if the Supreme Court is satisfied that it is in the interests of justice.**
- 96. The Committee has written to the Attorney General for advice as to the public interest justification for extending the forfeiture rule to a person who has been found not guilty of murder because of mental illness.**
- 97. The Committee has also written to the Minister for advice as to why the Bill gives no guidance to the Court on the circumstances in which justice might require the Supreme Court to apply the forfeiture rule to a person who has been found not guilty of murder because of mental illness.**
- 98. The Committee refers to Parliament the question as to whether the application of the forfeiture rule to a person who has been found not guilty of murder because of mental illness under the Bill unduly trespasses on that person's rights.**

2. Crime Amendment (Road Accidents) Bill 2005

Objective mens rea standard: proposed s 52AB and s 70:

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| 14. | The Committee considers that, as a general rule, objective mens rea standards should only be imposed when clearly in the public interest, and the severity of punishment should reflect the lack of criminal intent. |
| 15. | The Committee notes the benefit of preventing drivers escaping criminal liability for failing to stop by claiming they were not aware of an injury or death arising from their driving in circumstances where a reasonable person ought to have known of that injury or death. |
| 16. | The Committee has written to the Attorney General to seek clarification on the liability of a driver, whose vehicle causes injury or death, leaving the scene of an accident under some mental incapacity. |
| 17. | The Committee refers to Parliament the question of whether the adoption of an objective standard in the proposed amendments constitutes an undue trespass on personal rights and liberties. |

Aggravated offences

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| 23. | The Committee notes that the maximum penalties for failing to stop and assist under s 52AB(1) and (2) are the same as the penalties for dangerous driving occasioning death or grievous bodily harm under s 52A (1) and (3) respectively with a view to removing an incentive to flee the scene of an accident to avoid a more severe penalty. |
| 24. | The Committee notes that s 52AB makes no distinction between a driver whose dangerous driving caused the accident and a driver who was not responsible for the accident where both leave the scene. Both would face maximum penalties of 10 or 7 years imprisonment. |
| 25. | The Committee has written to the Attorney General to seek his advice as to why the more severe penalties in s 52AB may apply to drivers who did not drive in a dangerous manner rather than being limited to some circumstance of aggravation, such as dangerous driving. |
| 26. | The Committee refers to Parliament the question of whether the severe penalties in s 52AB, which does not require that a driver be responsible for the impact occasioning death or grievous bodily harm, unduly trespasses on personal rights and liberties. |

Duty of care

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| 31. | The Committee notes that the Bill places an obligation on the driver of a vehicle involved in an impact occasioning death or injury to provide any assistance that may be necessary, and that is in his or her power to give, regardless of whether the driver was responsible for that impact. |
| 32. | The Committee notes that no such obligation is placed upon other witnesses to the accident or, for example, any pedestrian who may have caused the accident. |

- 33. The Committee also notes that, while the second reading speech stated that common sense judgement will be required in the application of the offences, the actual terms of the Bill appear to place a fairly onerous requirement of assistance that goes beyond that which is merely reasonable.**
- 34. The Committee has written to the Attorney General to seek his advice as to why drivers who are not responsible for their vehicle's impact occasioning death or injury are under a duty to assist while other persons at the scene, who may or may not have had some responsibility for the accident, have no such duty.**
- 35. The Committee has also written to the Attorney General to seek his advice as to why the duty to assist is not put in terms of what is reasonable, and within a person's power, if that is the level of duty intended.**
- 36. The Committee refers to Parliament the question of whether the duty placed upon drivers to provide any assistance that may be necessary and within their power unduly trespasses on personal rights and liberties.**

3. Criminal Procedure Amendment (Prosecutions) Bill 2005

Clause 2: Retrospectivity

- 10. As the retrospective validation of proceedings in the circumstances does not operate unfairly against any person, the Committee does not consider that Schedule 1 [3] trespasses unduly on personal rights and liberties.**
- 13. The Committee notes that the retrospective commencement of the Bill may affect any proceedings already in progress and presumes that courts will have regard to the Bill before Parliament before it becomes law.**
- 14. However, given that the Bill only remedies a technical deficiency in indictments and does not result in any substantive unfairness against an accused or convicted person, the Committee does not consider that the retrospective commencement unduly trespasses on personal rights and liberties.**

4. National Parks and Wildlife Amendment (Jenolan Caves Reserves) Bill 2005

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

5. Public Sector Employment And Management Amendment (Ethanol Blended Fuel) Bill 2005*

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

6. State Emergency and Rescue Management Amendment Bill 2005

Reversal of onus of proof: proposed s 63B(3)

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| 11. | Proposed s 63B(3) of the Bill imposes a legal burden of proof on a defendant regarding whether their conduct was for public entertainment or was done with a reasonable excuse. |
| 12. | The Committee notes that the reversal of the onus of proof may be inconsistent with the presumption of innocence, which is recognised as a fundamental human right. |
| 13. | The Committee also notes that this right is not absolute and that provisions which shift the burden of proof, subject to reasonable limits, have been held not to be incompatible with the presumption of innocence. |
| 14. | The Committee has written to the Minister for advice on the need to place a legal burden of proof on a defendant in relation to these matters rather than leaving the burden of proof with the prosecution or placing an evidential burden on the defendant. |

SECTION B: Ministerial Correspondence — Bills Previously Considered

7. Gaming Machines Amendment Bill 2005

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| 4. | The Committee thanks the Minister for his response. |
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8. Road Transport (General) Bill 2004

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|----|---|
| 8. | The Committee thanks the Minister for his response. |
|----|---|

Part One – Bills

SECTION A: COMMENT ON BILLS

1. CONFISCATION OF PROCEEDS OF CRIME AMENDMENT BILL 2005

Date Introduced:	21 September 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon R J Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The Bill amends the *Confiscation of Proceeds of Crime Act 1989*, the *Civil Liability Act 2002*, the *Crimes Act 1900* and the *Forfeiture Act 1995* with respect to the seizure and restraint of property connected with criminal activity, the supervision of damages paid to offenders suffering from mental illness, money laundering offences and the application of the forfeiture rule to persons found not guilty of murder by reason of mental illness.

Background

2. In the second reading speech, Mr West stated:

The amendments to the *Confiscation of Proceeds of Crime Act* implement recommendations arising from a comprehensive review of criminal asset confiscation laws in New South Wales. This review was jointly conducted by the Attorney General's Department and the Ministry of Police.

The review was informed by a group of experts drawn from NSW Police, the Office of the Director of Public Prosecutions, the New South Wales Crime Commission, the Legal Aid Commission, the Public Trust Office, the New South Wales Law Society, the New South Wales Bar Association, and the Australian Crime Commission.

Amendments to the money laundering provisions will implement an agreement reached by the Council of Australian Governments at its Summit on Terrorism and Multi-Jurisdictional Crime to reform money laundering laws...

All of the proceeds of crime derived under the *Confiscation of Proceeds of Crime Act* are channelled into the Victim's Compensation Fund, which is used to compensate victims of crime for the harm they have suffered.¹

¹ Mr Graham West MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 21 September 2005.

The Bill

Schedule 1 – *Amendment of Confiscation of Proceeds of Crime Act 1989*

*Drug Proceeds Orders*²

3. The Bill makes procedures relating to applications for penalty orders based on drug offences (*drug proceeds orders*) consistent with those for orders based on other offences (*pecuniary penalty orders*).
4. A ***drug proceeds order*** requires a person convicted of a drug trafficking offence to pay to the State an amount equal to the amount they received as payment or reward for that trafficking. The Bill amends the way in which a court is to assess the amount of that payment or reward. A drug proceeds order must require the person to pay a pecuniary penalty equal to the benefits the person derived in connection with drug trafficking *at any time*.³ As currently enacted, section 29 limits the amount to that which may be recovered from the defendant at the time the order is made.⁴
5. Notice must be given to anyone who has an interest in the property to be forfeited under a drug proceeds order. Any such person has a right to appear and give evidence at the proceedings for the drug proceeds order.⁵

Freezing notices

6. The amendments provide for a new two-stage procedure for freezing and dealing with:
 - property that is or may be tainted property⁶ in relation to a serious offence;
 - benefits derived from a serious offence; or
 - proceeds from drug offences.
7. Under this procedure, the Bill enables an authorised officer to apply for a “freezing notice” in respect of specified property of a defendant or another person from an authorised justice⁷ [cl 42B]. Freezing notices are interim orders and an authorised officer can apply for one if the officer has reasonable grounds to believe that:
 - the person has committed a serious offence (if they have not yet been convicted) and the property is tainted property in respect of the offence; or

² See Division 4 of the *Confiscation of the Proceeds of Crime Act 1989*.

³ Proposed s 30 lists the matters to which the court is to have regard in assessing benefits derived in connection with drug trafficking.

⁴ Section 29 of the *Confiscation of the Proceeds of Crime Act 1989* has not yet commenced.

⁵ Note also that proposed section 32 [cl 29] contains provisions, similar to those relating to pecuniary penalty orders, setting out the circumstances when a court may treat property subject to the effective control of the defendant as property of the defendant.

⁶ Under s 35 of the *Confiscation of the Proceeds of Crime Act 1989*, ***tainted property*** includes property that was used in, derived or realised from or as the result of, the commission of an interstate serious offence. Clause 31 of the Bill amends this definition, adding para (d), which provides that property is also ***tainted property*** if it “was substantially derived or realised, directly or indirectly, by any person for the depiction of a serious offence, or the expression of the offender’s thoughts, opinions or emotions regarding the offence, in any public promotion”.

⁷ ***Authorised officer*** and ***authorised justice*** are defined terms under section 4 of the *Confiscation of the Proceeds of Crime Act 1989* and Schedule 1[3] of the Bill, and Schedule 1[33] respectively.

- the person has derived benefits from committing the offence.
8. Once a freezing notice has been issued, the applicant must notify the defendant, the owner of affected property and any other person subject to the freezing notice [proposed s42F]. These people can apply to an appropriate court to have the notice set aside or varied.
 9. The second step requires the authorised officer to apply to an appropriate court for confirmation of the freezing notice [proposed s 42K]. The court can confirm the notice, vary the notice or set it aside [proposed s 42L]. If the court confirms the notice, it must make property orders such as directing the Commissioner or Police to take control of the property and to dispose of it in a specified manner and to retain any proceeds [proposed s 42M].⁸
 10. The Court can also refuse to confirm a freezing notice unless the State gives undertakings with respect to the payment of damages or costs in relation to the notice [proposed s 42N].
 11. Other provisions in the Bill relating to freezing notices:
 - (a) create the offences of:
 - (i) knowingly giving false or misleading information in an application for a freezing notice [proposed s 42G];
 - (ii) knowingly contravening a freezing notice [proposed s 42O]; and
 - (iii) hindering or obstructing the Public Trustee or the Commissioner in the performance of obligations under a freezing notice [Schedule 1[59]];
 - (b) enable the setting aside of a dealing with property if it is done in contravention of a freezing notice [proposed s 42O];
 - (c) provide for the circumstances in which a freezing notice ceases to have effect, including if the defendant is not charged with a serious offence at the end of the period of 48 hours after the issuing of the notice [proposed s 42P];
 - (d) enable a freezing notice to be discharged by the payment to the State of an amount equal to the value of the property subject to the notice [proposed s 42R];
 - (e) provide for the return of property, or payment of the proceeds of property, on a freezing notice ceasing to be in force [proposed s 42S];
 - (f) enable the Attorney General, the DPP or the Commissioner or Police to appeal against a refusal to confirm a freezing notice [proposed s 42U];
 - (g) remove the right of a person to rely on the privilege against self-incrimination if the person is required to furnish a statement to the Public Trustee or the Commissioner giving particulars of property but prevents any such statement from being used in criminal proceedings [proposed s 51A]; and

⁸ The Court can make alternative orders. These are also set out in proposed s 42M of the Bill.

Confiscation of Proceeds of Crime Amendment Bill 2005

- (h) extend the limitation under s 62 on non-disclosure of documents on grounds of self-incrimination under the Act to proceedings relating to freezing notices provisions [Schedule 1 [71]].

Restraining orders

12. The Bill also amends the provisions governing restraining orders⁹ as follows:
- to enable an application to be made for a restraining order after a person has been convicted of a serious offence, in addition to before or after a person has been charged [Schedule 1[34]; and
 - to prohibit a restraining order from being made in respect of property affected by a freezing notice or an application for a freezing notice [Schedule 1 [36]].

Other amendments

13. Other amendments include:
- recognition and enforcement of additional interstate instruments relating to confiscation of property; and
 - requiring a court considering any hardship likely to arise from a forfeiture order to take into account responsibilities arising from an Aboriginal person or Torres Strait Islander's ties to extended family and kinship.

Schedule 2 – *Amendment of Civil Liability Act 2002*

Damages arising out of criminal conduct by persons suffering from mental illness

14. The amendments insert proposed Division 2 of Part 7 [proposed sections 54B–54H] into the *Civil Liability Act 2002* (the Act) to provide that a court may make a ***damages supervision order*** requiring any damages awarded to a person who suffered injury or damage arising from their criminal conduct and who was suffering a mental illness at that time, to be subject to control by the Public Trustee.¹⁰
15. In making such an order, the court must be satisfied that it is an award of damages to which the proposed Division applies and that it is in the best interests of the person to make the order. Under such an order, the Public Trustee must ensure that the amount of damages is used to cover past, present and future costs of treatment, rehabilitation and care.
16. The Bill makes it an offence to hinder or obstruct the Public Trustee in the exercise of the Public Trustee's obligations under a damages supervision order. The maximum penalty is 20 penalty units (\$2,200), 6 months imprisonment or both [proposed s 54G].

⁹ Restraining orders are dealt with in Division 2 of Part 3 of the *Confiscation of the Proceeds of Crime Act 1989*.

¹⁰ The Division will not apply to damages awarded against certain public sector defendants ("protected defendants") required to be paid into a victim trust fund. See *Civil Liability Amendment (Offender Damages) Bill 2005*.

Schedule 3 – Amendment of Crimes Act 1900

17. The amendments made to this Act create offences relating to proceeds derived from crime [proposed Division 1A [proposed ss 193A-193G]. For example, the Bill replaces the money laundering offence formerly contained in the *Confiscation of Proceeds of Crime Act 1989*. Proposed section 193B makes it an offence:
- to deal with proceeds of crime (ie, proceeds of a serious offence) knowing that it is proceeds of crime and intending to conceal that it is proceeds of crime (max. penalty 20 years imprisonment);
 - to deal with proceeds of crime knowing that it is proceeds of crime (max. penalty 15 years of imprisonment); and
 - to deal with proceeds of crime being reckless as to whether it is proceeds of crime (max. penalty 10 years imprisonment).
18. The Bill defines the term to “*deal with*” property to include receiving, possessing, concealing or disposing of property, bringing property into New South Wales and engaging directly or indirectly in a transaction [proposed s 193A].
19. Other new offences include:
- a summary offence of dealing with property that is property there are reasonable grounds to suspect is proceeds of an unlawful activity, (max. penalty 50 penalty units (\$5,500) or imprisonment for 2 years, or both) [proposed s 193C];
 - dealing with property (being money or other valuables) intending that the property will become an instrument of crime if the property subsequently becomes such an instrument (max. penalty 15 years imprisonment [proposed s 193D]; and
 - dealing with property being reckless as to whether or not the property subsequently will become an instrument of crime if the property subsequently becomes such an instrument (max. penalty 10 years imprisonment) [proposed s 193D].¹¹

Schedule 4 – Amendment of Forfeiture Act 1995

20. The forfeiture rule is a rule at common law that prevents a person who has unlawfully killed another person from acquiring a benefit as a result of the killing. The *Forfeiture Act 1995* modified this rule and allows a person to apply to the Supreme Court for a modification of the rule on the ground that justice requires it to be modified, provided the unlawful killing did not constitute murder.
21. In addition, at common law there is an exception to the forfeiture rule in respect of a person who:
- unlawfully killed another person;

¹¹ Proceedings for offences under proposed section 193D require the consent of the Director of Public Prosecutions.

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- was suffering from mental illness at the time; and
 - was found not guilty because of that illness.
22. The Bill amends the *Forfeiture Act 1995* to modify this exception to enable the Supreme Court to apply the forfeiture rule in a case where a person has been found not guilty of ***murder*** by reason of mental illness [proposed s 11]. The Court may make an order if satisfied that justice requires the rule to be applied as if the offender had been found guilty of murder.
23. These amendments apply to a killing occurring before or after their commencement [proposed s 14].

Issues Considered by the Committee

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

SCHEDULE 1 – AMENDMENT OF *CONFISCATION OF PROCEEDS OF CRIME ACT 1989*

Strict Liability: Clause 59

24. This clause amends section 51 of the *Confiscation of the Proceeds of Crime Act 1989* to make it an offence to hinder or obstruct the Public Trustee or the Commissioner in the performance of their obligations under a freezing notice.
25. As this offence does not require the prosecutor to prove a fault element, it may be considered a “strict liability” offence. In other words, a person can commit such an offence without having meant to do so and whether or not they had any criminal intent.¹² Strict liability is often imposed for regulatory offences (eg, driving a car without a current registration) where there is a need to ensure persons take all reasonable steps to avoid the offence.
26. The Committee is of the view that providing for strict liability is a very serious matter as such offences remove the need for the prosecutor to prove that a person had the “mens rea” or “criminal mind” when they committed the offence. This is a key element in the protection of the rights of defendants. Therefore, strict liability offences should be:
- imposed only after careful consideration of all available options;
 - subject to defences wherever possible where contravention appears reasonable; and
 - have only limited monetary penalties and no terms of imprisonment.
27. The Committee notes that the Bill does not provide a defence to this offence, although the common law defence of reasonable and honest mistake of fact remains available. The Committee also notes that the maximum penalty prescribed for this offence includes a term of imprisonment.
28. The Committee notes the public interest in ensuring that property used in, or obtained as a benefit from, the commission of a serious offence can be seized and forfeited.

¹² See section 6.1 of the Commonwealth Criminal Code for a definition of strict liability offences.

The Committee notes that the new mechanism of freezing notices proposed in the Bill is aimed at assisting in the confiscation of such property. To meet this objective, it is important that the Public Trustee and the Commissioner are able to carry out their obligations in relation to freezing notices without obstruction or hindrance.

- 29. The Committee is of the view that, except in extraordinary circumstances, it is inappropriate for an offence of strict liability to be punishable by a term of imprisonment. While it is important to ensure that the Public Trustee and the Commissioner can fulfil their obligations in relation to a freezing notice, it is not apparent to the Committee that this is an extraordinary circumstance justifying a prison term for a person not intending to commit the offence.**
- 30. The Committee has written to the Attorney General for clarification as to the need to prescribe a term of imprisonment for this strict liability offence.**
- 31. The Committee refers to Parliament the question as to whether providing for imprisonment for this offence trespasses unduly on personal rights and liberties.**

Self-incrimination/Right to Silence: proposed s 51A

32. Proposed section 51A provides that a person who is directed to furnish a statement giving particulars of property to the Public Trustee or the Commissioner cannot refuse to comply with the direction on the ground that to do so might tend to incriminate the person or make the person liable to a forfeiture or penalty.
33. The provision also provides that the statement *cannot* be used in criminal proceedings against the person, except a proceeding in respect of the falsity of the statement. However, it is silent on the use of the statement against the person in civil proceedings or its derivative use in criminal proceedings.
34. The Committee will always be concerned to identify legislation that removes or restricts a person's right against self-incrimination (or "right to silence"). The Committee considers that this right is a fundamental human right protecting personal freedom and human dignity. The Committee notes that Article 14(3)(g) of the *International Covenant on Civil and Political Rights* states that a person has the right "[n]ot to be compelled to testify against himself or to confess guilt".
35. The Committee notes that the right has been held by the High Court to apply to civil proceedings and to the production of documents in criminal proceedings.¹³
36. It has become relatively common for laws in New South Wales to compel persons to provide information the Government requires when that information is peculiarly within the knowledge of the person, even though to do so may incriminate him or her. Such laws are usually made in the context of issues of great public concern, such as crime prevention or public safety. The Committee is of the view that such legislation should only be made with clear and proper justification on significant public interest grounds.

¹³ *EPA v Caltex* (1993) 178 CLR 447, per Mason CJ and Toohey J.

37. The Committee notes the important public interest of ensuring that property gained through criminal activity can be seized and forfeited and the importance of accurately identifying any proceeds of crime. Requiring a person to give information about the particulars of a property to the Public Trustee or Commissioner so they may fulfil their obligations under a freezing order is consistent with this public interest.
38. However, the Committee also notes that any derogation of the right not to incriminate oneself should be the minimum necessary to achieve the public interest aim and be proportionate to that aim. In line with this view, the Committee considers that the use of information obtained in breach of the privilege should be constrained as much as is practicable. This would normally include limiting its derivative use and use in civil proceedings.
39. **The Committee notes that the right against self-incrimination (or “right to silence”) is a fundamental right, which should only be eroded when overwhelmingly in the public interest.**
40. **The Committee is of the view that requiring a person to give certain information about property that is the subject of a freezing order is in the public interest and that abrogating the right to silence is not unwarranted.**
41. **The Committee also notes that abrogation of the right should only be to an extent necessary to achieve the public interest aim and should be proportionate to that aim. For this reason, the Committee is of the view that information given under compulsion should not normally be able to be used against the person in criminal or civil proceedings, directly or derivatively.**
42. **The Committee notes that proposed s 51A provides that the statement cannot be used in criminal proceedings against the person but provides no limit on its use in civil proceedings or derivatively in criminal proceedings.**
43. **The Committee has written to the Attorney General to seek his advice as to why there is no restriction on the use of self-incriminating information in civil proceedings or its derivative use in criminal proceedings.**
44. **The Committee refers to Parliament the question of whether proposed s 51A constitutes an undue trespass on the personal right against self-incrimination.**

SCHEDULE 2 – AMENDMENT OF *CIVIL LIABILITY ACT 2002*

Discrimination & Appeal Rights: Clause 2, proposed Division 2 of Part 7

45. Proposed section 54D provides that a court may make a *damages supervision order* (DSO) requiring any damages awarded to a person who suffered injury or damage arising from their criminal conduct and who was suffering a mental illness at that time, to be subject to control by the Public Trustee.¹⁴

¹⁴ Damages payable by a protected defendant to the victim trust fund, as proposed in the *Civil Liability Amendment (Offender Damages Trust Fund) Bill 2005* are excluded.

46. In making such an order, the court must be satisfied that it is in the best interests of the person to make the order. The Public Trustee holds the amount of damages in trust for the person awarded the damages.
47. Section 54D also provides that a DSO may be made even if the person awarded the damages is not mentally ill or mentally incapacitated at the time the order is made. There is no provision for appealing a decision to impose a DSO, although it can be revoked by a court [s 54E(2)(a)].

Discrimination

48. The DSO regime treats a person who was found not guilty of unlawful killing because of their mental illness less favourably than another person found not guilty of unlawful killing on the ground of a different exculpatory defence (eg, self defence). In the latter case, a court cannot make an order giving the state control of an award of damages payable to that person if they were capable of managing their own affairs. The distinction is based on the reason for the acquittal, although in both examples the person who was found not guilty did commit the unlawful killing.
49. The Committee notes that there are circumstances in which it is appropriate for the state to take over control of a person's affairs. These include situations in which a person, due to incapacity, is unable to manage their affairs by themselves. It is to deal with these situations that the office of the Protective Commissioner, with powers to take over management of a person's estate by order of the Supreme Court, has been established under the *Protected Estates Act*. However, under that Act, a person who becomes able to look after themselves and their interests can take over management of their affairs.
50. By contrast, a DSO is not based on whether the person is capable of managing their own affairs, although the court making the DSO must consider whether it is in the best interests of the person before making the order and can revoke it, on application, if satisfied that the order is no longer in the person's best interests.

Appeal Rights

51. The Committee is of the view that the discriminatory effect of the proposed Division is compounded by the failure of the Bill to provide for a right of appeal against the ordering of a DSO, although a person can seek revocation of the order.
52. Again, this can be contrasted with the regime provided for under the *Protected Estates Act*. Under that Act, the Supreme Court can order the Protective Commissioner to take control of a person's estate if satisfied that the person is unable to manage their affairs. However, a person who is subject to such an order can appeal the order in the Supreme Court or in the Administrative Decisions Tribunal [ss 21 & 21A, respectively].
53. The Committee is of the view that taking over control of a person's assets by the state is a serious infringement of that person's rights. The Committee is also of the view that there are circumstances in which it is appropriate for the state to take control of a person's property and affairs and manage those affairs on behalf of that person.

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However, these circumstances are limited and must be compelling. Incapacity of a person to manage his or her own affairs is one such circumstance.

54. In addition, the extent of the infringement should be proportional to the objective sought. Safeguards should be provided to minimise the adverse effect of any infringement. Providing for review of a decision to impose a DSO would be such a safeguard.
55. The Committee notes that an award of damages to be managed under a DSO comprises damages only for non-economic loss awarded to cover medical and related costs. The Committee also notes that the Public Trustee is obliged to pay out money held in trust under a DSO for such purposes only. In this way, the DSO regime is aimed at ensuring that the award of damages is used for the purposes for which it was awarded.
56. Despite these factors, and the fact that a court may only make a DSO if satisfied that it is in the best interests of the person concerned, the Committee is of the view that allowing the state, by order of the Supreme Court, to take over management of a person's assets, regardless of whether that person can manage their affairs, is a trespass on that person's rights. Further, this trespass is compounded by the fact that the person has been found not guilty and by the lack of appeal rights under the Bill, other than an application to a court for revocation.

- 57. The Committee is of the view that it is a trespass on a person's fundamental rights:**
- to authorise the state to take over management of a person's property and affairs without compelling justification and adequate safeguards of the person's rights;
 - to discriminate against a person on the ground of mental illness, and
 - to fail to provide the right to appeal against the making of a damages supervision order (DSO).
- 58. The Committee is also of the view that these rights, while not absolute, should only be displaced by compelling public interest justifications and only to the extent necessary to achieve the competing public interest objective.**
- 59. The Committee notes the public interest in ensuring that an award of damages for non-economic loss is used for the purpose for which it was awarded, namely medical and related costs arising out of the injury.**
- 60. The Committee also notes that a court can only make a DSO if satisfied that it is in the best interests of the person concerned.**
- 61. The Committee has written to the Attorney General for advice as to the public interest justifications for enabling a court to order a DSO in respect of a person who is able to manage their own affairs and property and failing to provide for a right of appeal against a DSO.**
- 62. The Committee refers to Parliament the question of whether proposed Division 2 of Part 7 and proposed section 54D unduly trespass on personal rights and liberties.**

Strict Liability: proposed section 54G

63. This section provides that a person must not hinder or obstruct the Public Trustee in the performance of his or her duties under a damages supervision order. The maximum penalty is 20 penalty units (\$2,200) or 6 months imprisonment or both.
64. As this offence does not require the prosecutor to prove a fault element, it may be considered a “strict liability” offence. In other words, a person can commit such an offence without having meant to do so and whether or not they had any criminal intent.
65. This section is similar to the proposed s 51(1) in Schedule 1[59]. The Committee’s comments on that amendment apply equally in respect of proposed section 54G. Members are referred to the Committee’s comments on strict liability offences and the inappropriateness of terms of imprisonment for such offences set out above.

- 66. The Committee is of the view that, except in extraordinary circumstances, it is inappropriate for an offence of strict liability to be punishable by a term of imprisonment.**
- 67. The Committee has written to the Attorney General for clarification as to the need to prescribe a term of imprisonment for this strict liability offence.**
- 68. The Committee refers to Parliament the question as to whether providing for imprisonment for this offence trespasses unduly on personal rights and liberties.**

SCHEDULE 3 – AMENDMENT OF *CRIMES ACT 1900***Reversal of onus of proof: proposed sections 193B, 193C & 193D**

69. These proposed sections create new offences relating to money laundering or dealing with proceeds of crime property. It is a defence to these offences if the defendant *satisfies the court* that, in the case of:
- money laundering (s 193B) – they dealt with the proceeds of crime to assist the enforcement of a law of the Commonwealth, a State or a Territory;
 - dealing with property suspected of being proceeds of crime (s 193C) – they had no reasonable grounds for suspecting that the property was substantially derived or realised, directly or indirectly, from an act or omission constituting an offence against a law in force in the Commonwealth, a State or a Territory or another country;
 - dealing with property that subsequently becomes an instrument of crime (s 193D) – they dealt with the proceeds of crime to assist the enforcement of a law of the Commonwealth, a State or a Territory.
70. These defences reverse the onus of proof by requiring that the defendant prove to his or her innocence. Requiring a defendant to prove any matter in relation to an offence is *prima facie* contrary to the presumption of innocence, which is recognised as a fundamental human right protected under common law¹⁵ and under international

¹⁵ The so-called “golden thread” per Sankey L in *Woolmington v DPP* (1935) AC 462 (HL).

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law.¹⁶ However, the presumption of innocence is not absolute¹⁷ and is widely accepted in Australia and in comparable jurisdictions that the presumption of innocence can be qualified in pursuit of legitimate objectives.

71. A provision reversing the onus of proof may not necessarily be contrary to the presumption of innocence, but only if the provision is within reasonable limits, namely, balancing the need to protect the rights of a defendant with the need to meet other public interests.
72. The Committee generally considers that a reasonable limit for a reversal of the onus of proof is to place no more than an **evidential burden** of proof on a defendant (the defendant points to evidence that suggests a reasonable possibility that the matter exists or does not exist).
73. However, by requiring a person to “satisfy the court” that his or her conduct was done to assist law enforcement or was done with a “reasonable excuse”, such as having no reasonable grounds for suspecting that they were dealing with proceeds of crime,¹⁸ proposed sections 193B, 193C and 193D place a **legal burden** of proof on the defendant, whereby they must prove or disprove some matter to establish his or her innocence.
74. In this regard, the Minister for Justice and Customs in his 2004 report, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, stated:

A matter should be included in a defence, thereby placing the onus on the defendant, only where the matter is peculiarly within the knowledge of the defendant; and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish...

The mere fact that it is difficult for the prosecution to prove an element of an offence has not traditionally been considered in itself, a sound justification for reversing the onus of proof...

However, where a matter is peculiarly within the defendant’s knowledge and not available to the prosecution, it is legitimate to cast the matter as a defence. Placing of an evidential burden on the defendant (or the further step of casting a matter as a legal burden) is more readily justified if:

- the matter in question is not ‘central’ to the question of culpability for the offence,
- the offence carries a relatively low penalty, or
- the conduct proscribed by the offence poses a grave danger to public health or safety.¹⁹

¹⁶ Article 14(2) of the International Covenant on Civil and Political Rights.

¹⁷ In *Woolmington v DPP* (1935) AC 462 (HL), Lord Sankey qualified his now famous “golden thread” statement by adding that it was “subject... to any statutory exception”.

¹⁸ Other “reasonable excuse” defences include duress, mistake or ignorance of fact, intervening conduct or event, and lawful authority: *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs, February 2004, p 27.

¹⁹ *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs, February 2004, p 28.

75. With respect to proposed s 193C, there may be some matters relevant to establishing that there were no reasonable grounds for suspecting that the property with which he or she was dealing was a proceed of crime. However, in relation to sections 193B and 193D it is not apparent to the Committee that whether a person's conduct was for the purpose of assisting law enforcement is a matter peculiarly within the defendant's knowledge and not otherwise available to the prosecution.

- 76. The Committee notes that the reversal of the onus of proof may be inconsistent with the presumption of innocence, which is recognised as a fundamental human right.**
- 77. The Committee also notes that this right is not absolute and that provisions which shift the burden of proof, subject to reasonable limits, have been held not to be incompatible with the presumption of innocence.**
- 78. The Committee has written to the Minister for advice on the need to place a legal burden of proof on a defendant in relation to these matters rather than leaving the burden of proof with the prosecution or placing an evidential burden on the defendant.**
- 79. The Committee refers to Parliament the question of whether reversing the onus of proof and requiring a defendant to bear a legal burden of proof unduly trespass on the person's right to be presumed innocent.**

Strict Liability: proposed section 193C

80. Proposed section 193C provides that a person is guilty of a summary offence if they deal with property and there are reasonable grounds to suspect that the property is proceeds of crime property. This offence is punishable by a monetary penalty (50 penalty units) or a term of imprisonment (2 years) or both.
81. As this offence does not require the prosecutor to prove fault in relation to all elements, it may be considered a "strict liability" offence. In other words, a person can commit such an offence without having meant to do so and whether or not they had any criminal intent.
82. This section is similar to the proposed s 51(1) in Schedule 1[59]. The Committee's comments on that amendment apply equally in respect of this proposed section. Members are referred to the Committee's comments on strict liability offences and the inappropriateness of terms of imprisonment for such offences set out above.

- 83. The Committee is of the view that, except in extraordinary circumstances, it is inappropriate for an offence of strict liability to be punishable by a term of imprisonment.**
- 84. The Committee has written to the Attorney General for clarification as to the need to prescribe a term of imprisonment for this strict liability offence.**
- 85. The Committee refers to Parliament the question as to whether providing for imprisonment for this offence trespasses unduly on personal rights and liberties.**

SCHEDULE 4 – AMENDMENT OF *FORFEITURE ACT 1995*

Discrimination; Right to property: Clause 5, proposed Part 3

86. Proposed section 11 of the *Forfeiture Act 1995* allows any “*interested person*”²⁰ to apply to the Supreme Court for an order that the forfeiture rule should apply to a person who has been found not guilty of murder by reason of mental illness. The interested person must apply within 6 months of the person being found not guilty²¹ [proposed s 12].
87. The Court may make such an order if it is *satisfied that justice requires the rule to be applied*. In deciding this, proposed subsection 11(3) states that the Court is to have regard to the following:
- (a) the conduct of the offender;
 - (b) the conduct of the deceased person;
 - (c) the effect of the application of the rule on the offender or any other person; and
 - (d) such other matters as to the Court appear material.
88. The Bill also allows an interested person to apply to the Supreme Court for a revocation of the order applying the forfeiture rule under proposed section 11.
89. The effect of a forfeiture application order is, for the purposes of forfeiture, to treat a person who has been found not guilty of murder as if they had been convicted of that murder. Under NSW law, the onus is on a defendant to show, on the balance of probabilities, that they were suffering a mental illness at the time of the murder and, as a result, they did not know the nature and quality of the act they committed or they did not know that what they were doing was wrong.²²
90. The Committee is of the view that treating a person who has been found not guilty of a crime as if they had been convicted of that crime is a trespass on their fundamental rights.
91. The Committee notes that the amendment to the forfeiture rule under the Bill does not apply automatically, but must be ordered by the Supreme Court. The Committee also notes that the Court cannot order the application of the forfeiture rule unless it is satisfied that justice requires the rule to be applied in a particular case. Clearly this requirement is aimed at balancing the rights of the person and public interests that may conflict with those rights. The Committee notes, however, that the Bill gives no guidance to the Court on what the interests of justice might require, leaving the matter entirely up to the discretion of the Court.

²⁰ An “*interested person*” is defined in proposed s 10 of the *Forfeiture Act 1995* to *exclude* an offender or a person claiming through an offender.

²¹ The Supreme Court may grant leave for an interested person to make an application outside the 6 months time limit if the Court “considers it just in all the circumstances” [proposed subsection 12(2)].

²² See *Mental Health (Criminal Procedure) Act 1990*.

92. The Committee also notes that an application to the Court for a forfeiture application order must be made within 6 months after the day on which the person was found not guilty of murder and that any interested person may, with the Court's leave, apply for the revocation of the order.

93. **The Committee is of the view that treating a person who has been found not guilty of a crime as if they had been convicted of that crime is a trespass of that person's fundamental rights.**
94. **The Committee notes that there is a public interest in ensuring that people cannot benefit from murder. The Committee also notes that the person who is the subject of a forfeiture application order under proposed section 11 has been found not guilty of murder.**
95. **The Committee further notes that the forfeiture rule can only be applied to a person found not guilty of murder because of mental illness if the Supreme Court is satisfied that it is in the interests of justice.**
96. **The Committee has written to the Attorney General for advice as to the public interest justification for extending the forfeiture rule to a person who has been found not guilty of murder because of mental illness.**
97. **The Committee has also written to the Minister for advice as to why the Bill gives no guidance to the Court on the circumstances in which justice might require the Supreme Court to apply the forfeiture rule to a person who has been found not guilty of murder because of mental illness.**
98. **The Committee refers to Parliament the question as to whether the application of the forfeiture rule to a person who has been found not guilty of murder because of mental illness under the Bill unduly trespasses on that person's rights.**

The Committee makes no further comment on this Bill.

2. CRIME AMENDMENT (ROAD ACCIDENTS) BILL 2005

Date Introduced: 21 September 2005
House Introduced: Legislative Assembly
Minister Responsible: The Hon R J Debus MP
Portfolio: Attorney General

Purpose and Description

1. The Bill amends the *Crimes Act 1900* (Crimes Act) and various other Acts with respect to the obligations of drivers to stop and provide assistance where their vehicles are involved in accidents that cause death or injury.

Background

2. The Attorney General noted the following background to the Bill:

Under our current laws, failure to stop at the scene of an accident is covered under the Road Transport (Safety and Traffic Management) Act. It provides for a maximum penalty of 18 months for a first offence and two years for a second or subsequent offence. When such a relatively low penalty for failure to stop is balanced against higher penalties for crimes such as dangerous driving, there is no apparent incentive in the law for drivers to stay and render assistance...When a driver on our roads leaves the scene of an accident, leaving in his or her wake a dead or badly injured person without attempting to render assistance, the fundamental code of civilised society is breached.²³

The Bill

3. The Bill replaces existing s 70 of the *Road Transport (Safety and Traffic Management) Act 1999* (the 1999 Act).²⁴ That section currently provides:

The driver or rider of a vehicle or horse concerned in an accident that occurs because of the presence of the vehicle or horse on a road or road related area and that causes the death of or injury to any person must not knowingly fail to stop and give any assistance that may be necessary and that it is in his or her power to give.
4. The Bill effectively replaces this offence of failing to stop after an accident with three new offences. The proposed offences are:
 - failing to stop and assist where a vehicle driven by that person is involved in an impact causing the death of another person: maximum penalty 10 years' imprisonment [proposed s 52AB(1) of the Crimes Act];

²³ The Hon R J Debus MP, Attorney General, Answer to Question Without Notice, Legislative Assembly *Hansard*, 21 September 2005.

²⁴ The Bill also amends the *Criminal Procedure Act 1986* to provide that an offence against proposed s 52AB will be dealt with summarily, unless the prosecution or person charged elects for it to be dealt with on indictment; and the *Road Transport (General) Act 1999* and the (uncommenced) *Road Transport (General) Act 2005*, to provide for driver licence disqualification when a person is convicted of an offence under proposed s 52AB of the Crimes Act.

- failing to stop and assist where a vehicle driven by that person is involved in an impact causing grievous bodily harm to another person: maximum penalty 7 years imprisonment [proposed s 52AB(2)]; and
- failing to stop and assist where a vehicle or horse driven/ridden by that person on a road or road related area is involved in an impact causing the death of, or injury to another person: maximum penalty 30 penalty units and/or imprisonment for 18 months for a first offence, or 50 penalty units and/or imprisonment for 2 years for a subsequent offence [proposed s 70 of the 1999 Act].

Issues Considered by the Committee

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

Objective *mens rea* standard: proposed s 52AB and s 70:

- Proposed s 52AB(1) provides that a person is guilty of an offence if:
 - a vehicle being driven by the person is involved in an impact occasioning the death of another person;
 - the person knows, or ***ought reasonably to know***, that the vehicle has been involved in an impact occasioning the death of, or grievous bodily harm to, another person; and
 - the person fails to stop and give any assistance that may be necessary and that it is in his or her power to give.
- Proposed s 52AB(2) provides in similar terms where grievous bodily harm is occasioned.
- These proposed offences cover a range of scenarios. At one extreme, the person accused of failing to stop and assist may have been exclusively responsible for the initial accident; at the other, that person may have in fact been the victim of an accident caused by the very person whom they are now accused of not assisting.
- In her second reading speech, the Minister stated:

The extension of the mental element to incorporate an objective element of “ought reasonably to have known” is warranted in the special circumstances of this offence. There should be no arguments about “actual knowledge” when objectively a person ought reasonably to have known that death or grievous bodily harm would result from a collision.²⁵

²⁵ The Hon D Beamer MP, Minister for Western Sydney, Minister for Fair Trading, and Minister Assisting the Minister for Commerce, Legislative Assembly *Hansard*, 21 September 2005. See also s 54(4) of the *Road Traffic Act 1974* (WA), which allows the driver an excuse where he or she was not aware of the occurrence of the accident, but placing the burden of proof on the accused:

In any proceedings in respect of any offence against subsection (1) of which the failing to stop immediately after the occurrence of any accident is an element, it is a defence for the person charged to prove that he was not aware of the occurrence of the accident to which the alleged offence relates.

Crime Amendment (Road Accidents) Bill 2005

9. Traditionally under criminal law, a person will only be held responsible – and punished – for conduct the nature and context of which he or she is *actually aware*, ie, a subjective standard. The Bill provides an alternative objective test (“ought reasonably to know”) to the subjective test (“knows”) to determine the culpability of a driver whose vehicle was involved in an impact occasioning death or injury. The objective test exposes the driver to a severe penalty if they did not *know* this fact but it can be shown that a reasonable person would have known it.²⁶ In this regard the offence is akin to one of strict liability. The Committee has previously expressed the view that imprisonment should not be available for strict liability offences.²⁷
10. However, the use of a subjective standard in criminal law has already been significantly modified, even in relation to well-established criminal offences.²⁸ Such change is being made not only legislatively, but also by the courts when interpreting legislation and elucidating the common law.²⁹
11. Moreover, it is arguable that the steps a driver must take to avoid liability under proposed s 52AB are not unduly onerous. Any impact involving an occupied motor vehicle carries a substantial risk of injury (eg, reversing into an occupied parked car carries a risk of whiplash to the occupant). It could reasonably be argued that an accused who has failed to stop should not be allowed to escape conviction by arguing that he or she did not realise that injury has been caused, when a reasonable person would have reached a different conclusion. It is not unreasonable to demand that any person involved in an accident stop and inquire as to the health of anybody else involved.
12. It is important to note, however, that the concept of “impact” is defined very broadly, including a vehicle causing an impact between other vehicles or another vehicle and a person. Such an indirect impact may not be obvious to a driver.³⁰

²⁶ The same approach is taken in the s 61 of the Victorian *Road Safety Act 1986*.

²⁷ See, eg, *Legislation Review Digest* No. 3 of 2005 in the context of the *Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+) Bill 2005*. Note that the Commonwealth Attorney General’s Department follows a guideline providing that if strict liability is applied the maximum penalty should in general be no more than 60 penalty units (\$6,600 for an individual) see Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 26 June 2002.

²⁸ For example, the common law offence of manslaughter relies on an objective standard. It is committed where:

- (a) the accused fell considerably short of the standard of care that a reasonable person would have exercised, in circumstances where the reasonable person would have appreciated a *high* risk that serious bodily harm would result: *Nydam v R* [1977] VR 430; *Queen v Lavender* [2005] HCA 37); or
- (b) an unlawful act committed by the accused was of such a nature that a reasonable person in the accused’s position would have realised that they were exposing someone to an appreciable risk of serious injury: *Wilson v the Queen* (1992) 174 CLR 313.

²⁹ Road traffic offences, such as negligent driving, driving at a speed or in a manner dangerous to the public [s 42 of the *Road Transport (Safety and Traffic Management) Act 1999*] and dangerous driving causing death or grievous bodily harm [s 52A of the *Crimes Act*] turn on varying degrees of departure from the standard of care expected of a reasonable driver, i.e. degrees of negligence: *Buttsworth* [1983] 1 NSWLR 658.

³⁰ Proposed s 52AB applies the following definition in s 52A (which is similar to that in proposed s 70(3)):

(5) **When vehicle is involved in impact—generally**

For the purposes of this section, the circumstances in which a vehicle is involved in an impact occasioning the death of, or grievous bodily harm to, a person include if the death or harm is occasioned through any of the following:

13. The Bill also does not explicitly address the liability of a driver suffering from mental or psychological incapacity who leaves the scene of an accident. For example, it is not clear to the Committee how the objective test would be applied to a driver who was very confused or in a state of automatism as a result of the physical or psychological impact of an accident.

14. **The Committee considers that, as a general rule, objective *mens rea* standards should only be imposed when clearly in the public interest, and the severity of punishment should reflect the lack of criminal intent.**
15. **The Committee notes the benefit of preventing drivers escaping criminal liability for failing to stop by claiming they were not aware of an injury or death arising from their driving in circumstances where a reasonable person ought to have known of that injury or death.**
16. **The Committee has written to the Attorney General to seek clarification on the liability of a driver, whose vehicle causes injury or death, leaving the scene of an accident under some mental incapacity.**
17. **The Committee refers to Parliament the question of whether the adoption of an objective standard in the proposed amendments constitutes an undue trespass on personal rights and liberties.**

Aggravated offences

18. The primary aim of the offence under proposed new s 70 is to ensure that immediate assistance is obtained for people injured in accidents, however serious the injury.
19. According to the second reading speech, the Bill's other aim is to increase maximum penalties in order to deter those who may have committed other serious offences from seeking to evade liability by leaving the scene, thereby making it more difficult for the

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- (a) the vehicle overturning or leaving a road while the person is being conveyed in or on that vehicle (whether as a passenger or otherwise),
 - (b) an impact between any object and the vehicle while the person is being conveyed in or on that vehicle (whether as a passenger or otherwise),
 - (c) an impact between the person and the vehicle,
 - (d) the impact of the vehicle with another vehicle or an object in, on or near which the person is at the time of the impact,
 - (e) an impact with anything on, or attached to, the vehicle,
 - (f) an impact with anything that is in motion through falling from the vehicle,
 - (g) the person falling from the vehicle, or being thrown or ejected from the vehicle, while being conveyed in or on the vehicle (whether as a passenger or otherwise),
 - (h) an impact between any object (including the ground) and the person, as a consequence of the person (or any part of the person) being or protruding outside the vehicle, while the person is being conveyed in or on the vehicle (whether as a passenger or otherwise).

(6) When vehicle is involved in causing other impacts

For the purposes of this section, a vehicle is also involved in an impact occasioning the death of, or grievous bodily harm to, a person if:

- (a) the death or harm is occasioned through the vehicle causing an impact between other vehicles or between another vehicle and any object or person or causing another vehicle to overturn or leave a road, and
 - (b) the prosecution proves that the vehicle caused the impact.
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police to gather evidence to prove those offences (for example, evidence that the accused was over the prescribed alcohol limit).

20. It is justifiable that any driver - regardless of whether he or she caused an accident, or was entirely blameless in this regard - should be required to offer assistance to an injured person and the penalties in s 70 are arguably reasonable for those who are innocently involved in an accident but then fail to stop. It also seems reasonable to impose heavier penalties for the offences under s 52AB (1) and (2) when a person criminally responsible for the death or injury of a person flees the scene.
21. However, it is not apparent why a person who was not responsible for an accident involving the vehicle he or she was driving should be liable to the heavy penalties under s 52AB(1) and (2). Such heavier penalties would seem appropriate for circumstances of aggravation, such as dangerous driving.
22. In theory, a driver who was not responsible for the initial accident could be convicted under s 52AB(1) or (2) because he or she failed to stop and lend assistance to the person whose serious criminal behaviour was entirely responsible for the accident.

23. **The Committee notes that the maximum penalties for failing to stop and assist under s 52AB(1) and (2) are the same as the penalties for dangerous driving occasioning death or grievous bodily harm under s 52A (1) and (3) respectively with a view to removing an incentive to flee the scene of an accident to avoid a more severe penalty.**
24. **The Committee notes that s 52AB makes no distinction between a driver whose dangerous driving caused the accident and a driver who was not responsible for the accident where both leave the scene. Both would face maximum penalties of 10 or 7 years imprisonment.**
25. **The Committee has written to the Attorney General to seek his advice as to why the more severe penalties in s 52AB may apply to drivers who did not drive in a dangerous manner rather than being limited to some circumstance of aggravation, such as dangerous driving.**
26. **The Committee refers to Parliament the question of whether the severe penalties in s 52AB, which does not require that a driver be responsible for the impact occasioning death or grievous bodily harm, unduly trespasses on personal rights and liberties.**

Duty of care

27. There is no general duty at common law for a person to rescue someone else, even if he or she could have saved that other person without personal risk: not every moral obligation involves a duty to act.³¹
28. There are many instances in which legislation has in fact made an omission into a criminal offence, creating a duty to act.³² There are, however, particular features of the

³¹ See, eg, *Instan* [1893] 1 QB 450. The general position under the common law is that a person only has a duty to act in special circumstances, namely:

- where there is a special relationship (for example, parent and child, ship's master and seaman); and
- where someone has voluntarily assumed an obligation to take care of another, and in the course of doing so has effectively prevented others from providing assistance, as by secluding the person: *Taktak* (1988) 14 NSWLR 226, and *Stone and Dobinson* [1977] 1 QB 354.

duty to act under proposed s 52AB which may be regarded as being too expansive, and creating thereby an undue trespass upon personal rights and liberties:

- the duty to lend assistance under s 52AB is imposed not only on drivers who have caused the accident by their criminal behaviour, but also on drivers who may in fact be the victims of offences committed by the very people whom they are now required to assist. Moreover, others at the scene of an accident are not placed under a similar duty of care; and
- on the face of the proposed section, the duty is not simply to inform emergency services as soon as possible, but “to give any assistance that may be necessary”. This appears not only to require that drivers involved in accidents go further than their “incompetent best” and act without being negligent, but to go beyond even this and do what is necessary. In contrast, the common law duty of care is only breached where there has been a very high degree of negligence, frequently referred to as criminal negligence.

29. The intention of this obligation to assist was clarified as follows in the second reading speech:

The requirement is to stop and give any assistance necessary that is in the driver's power to give. That is not to say that people must stop to perform first aid when they are not qualified to do so, or rescue someone from a burning car in dangerous circumstances. Obviously commonsense judgment will be required.

What is required is for the person to stop and take steps to assist directly or obtain expert help by contacting police or emergency services to ensure that professional expert assistance is obtained at the earliest opportunity.³²

30. However, the only qualification in the Bill is that the assistance must be “in his or her power to give”. This does not seem to allow any argument that the assistance that is necessary might expose the driver to unreasonable risks.

31. The Committee notes that the Bill places an obligation on the driver of a vehicle involved in an impact occasioning death or injury to provide any assistance that may be necessary, and that is in his or her power to give, regardless of whether the driver was responsible for that impact.

32. The Committee notes that no such obligation is placed upon other witnesses to the accident or, for example, any pedestrian who may have caused the accident.

³² Indeed, a version of the proposed offences already exists under current s 70 of the *Road Transport (Safety and Traffic Management) Act 1999*. Further, eg, s 289 of the Queensland *Criminal Code* provides as follows:

It is the duty of every person who has in the person's charge or under the person's control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

The same provision is found in s 266 of the WA *Criminal Code*.

³³ The Hon D Beamer MP, Minister for Western Sydney, Minister for Fair Trading, and Minister Assisting the Minister for Commerce, Legislative Assembly *Hansard*, 21 September 2005.

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| <p>33. The Committee also notes that, while the second reading speech stated that common sense judgement will be required in the application of the offences, the actual terms of the Bill appear to place a fairly onerous requirement of assistance that goes beyond that which is merely reasonable.</p> <p>34. The Committee has written to the Attorney General to seek his advice as to why drivers who are not responsible for their vehicle's impact occasioning death or injury are under a duty to assist while other persons at the scene, who may or may not have had some responsibility for the accident, have no such duty.</p> <p>35. The Committee has also written to the Attorney General to seek his advice as to why the duty to assist is not put in terms of what is reasonable, and within a person's power, if that is the level of duty intended.</p> <p>36. The Committee refers to Parliament the question of whether the duty placed upon drivers to provide any assistance that may be necessary and within their power unduly trespasses on personal rights and liberties.</p> |
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The Committee makes no further comment on this Bill.

3. CRIMINAL PROCEDURE AMENDMENT (PROSECUTIONS) BILL 2005

Date Introduced: 21 September 2005
House Introduced: Legislative Assembly
Minister Responsible: The Hon R J Debus MP
Portfolio: Attorney General

Purpose and Description

1. The Bill amends the *Criminal Procedure Act 1986* (the Act) to:
 - validate certain indictments that have been held to be invalid; and
 - provide that a failure by the Director of Public Prosecutions (DPP) to authorise a private legal practitioner prosecuting a matter on the DPP's behalf to sign indictments does not make an indictment signed by the practitioner bad, insufficient, void, erroneous or defective.

Background

2. Under s 126 of the Act, an indictment must be signed:
 - (a) by the Attorney General, the Solicitor General or the DPP; or
 - (b) for and on behalf of the Attorney General or the DPP by:
 - (i) a Crown Prosecutor;
 - (ii) a Deputy Director of Public Prosecutions; or
 - (iii) a person authorised by order in writing by the DPP to sign indictments for and on behalf of the DPP.
3. In the recent decisions of *R v Halmi*³⁴ and *R v Janceski*³⁵, the Court of Criminal Appeal held that indictments signed by barristers at the private bar instructed to prosecute offences on behalf of the DPP were invalid, unless the DPP had also expressly authorised the barristers by order in writing under s 126 to sign the indictments.
4. It was noted in the second reading speech that:

[t]his technical invalidity arose even though the defendants and their legal representatives were well aware that the DPP had retained a private barrister to prosecute on his behalf, and they were well aware of the actual case against the defendants.

... Put simply, the decisions of the Court of Criminal Appeal in *Halmi* and *Janceski* stand, but the gate will be closed. No more appeals will be able to be brought forward on the technical grounds argued in those cases. The bill will preclude, once and for all, any appeal against conviction following successful prosecution by the DPP based

³⁴ [2005] NSWCCA 2.

³⁵ [2005] NSWCCA 281.

on the purely technical ground that the indictment was not signed by a person with the proper authority to sign indictments.³⁶

The Bill

5. The Bill validates the following:
 - indictments that would otherwise be invalid only because they were signed during the *relevant period* by a prosecutor instructed to prosecute an offence on the DPP's behalf who was not authorised by order in writing to do so by the DPP under s 126 or any corresponding provision of the Act previously in force; and
 - criminal proceedings (including the acquittal or conviction of the defendant or a sentence imposed on the defendant) based on such indictments.
6. The relevant period commences on 13 July 1987 (which is the day on which the Act commenced) and ends immediately before 21 September 2005, the day on which the Bill was introduced into Parliament.

Issues Considered by the Committee

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

Clause 2: Retrospectivity

7. The Bill has retrospective application in that:
 - it provides that the amendments to the Act are taken to have commenced on the date the Bill was introduced into Parliament [proposed s 2]; and
 - it validates indictments and criminal proceedings previously invalid apart from those that were held to be invalid or a nullity in a judgment, order of other decision of a court before the Bill's deemed commencement [Sch 1 [3]].
8. The Committee will always be concerned to identify any retrospective provision that may adversely impact upon any person.
9. In relation to the retrospective validation of indictments, the Committee notes that the ground of invalidity is purely technical and the retrospective removal of this ground does not give rise to any unfairness against an accused person.

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| <p>10. As the retrospective validation of proceedings in the circumstances does not operate unfairly against any person, the Committee does not consider that Schedule 1 [3] trespasses unduly on personal rights and liberties.</p> |
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11. In relation to the retrospective commencement of the Bill, the Minister stated that:

This provision is consistent with the intention of the bill that all indictments signed by a legal practitioner on behalf of the DPP should be validated, but that existing court

³⁶ The Hon D Beamer MP, Minister for Western Sydney, Minister for Fair Trading, and Minister Assisting the Minister for Commerce, Legislative Assembly *Hansard*, 21 September 2005.

Criminal Procedure Amendment (Prosecutions) Bill 2005

decisions should not be interfered with. Section 2 prevents any further decisions from being made from this day forward that would invalidate any indictment presented on behalf of the DPP merely because of the signature that appears on the indictment.

12. The Committee considers that, in the circumstances, it is appropriate to retrospectively prevent any new actions being brought. The Committee notes, however, that the retrospective commencement requires that courts have regard to the Bill before Parliament, even though it has not become law, to avoid any decisions after the introduction of the Bill being interfered with.

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| <p>13. The Committee notes that the retrospective commencement of the Bill may affect any proceedings already in progress and presumes that courts will have regard to the Bill before Parliament before it becomes law.</p> <p>14. However, given that the Bill only remedies a technical deficiency in indictments and does not result in any substantive unfairness against an accused or convicted person, the Committee does not consider that the retrospective commencement unduly trespasses on personal rights and liberties.</p> |
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The Committee makes no further comment on this Bill.

4. NATIONAL PARKS AND WILDLIFE AMENDMENT (JENOLAN CAVES RESERVES) BILL 2005

Date Introduced: 21 September 2005
House Introduced: Legislative Assembly
Minister Responsible: The Hon R J Debus MP
Portfolio: Environment

Purpose and Description

1. This Bill amends the *National Parks and Wildlife Act 1974* and makes consequential amendments to other legislation to abolish the Jenolan Caves Reserve Trust and transfer care, control and management of four Karst Conversation reserves to the Department of Environment and Conservation.³⁷ The Bill preserves the karst conservation reserve status of those lands.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

³⁷ These are the Jenolan, Wombeyan, Borenore and Abercrombie Karst Conservation Reserves.

5. PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT AMENDMENT (ETHANOL BLENDED FUEL) BILL 2005*

Date Introduced: 15 September 2005

House Introduced: Legislative Assembly

Minister Responsible: Premier

Portfolio:

Purpose and Description

1. This Bill amends the *Public Sector Employment and Management Act 2002* to require the use of ethanol blended fuel in cars owned, leased or operated by the NSW Government or that are part of a public sector remuneration package.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

6. STATE EMERGENCY AND RESCUE MANAGEMENT AMENDMENT BILL 2005

Date Introduced: 22 September 2005
House Introduced: Legislative Assembly
Minister Responsible: The Hon Tony Kelly MLC
Portfolio: Emergency Services

Purpose and Description

1. The object of the Bill is to amend the *State Emergency and Rescue Management Act 1989* (the Act) to create new offences related to the impersonation³⁸ of an officer of an emergency services organisation and for other purposes.

Background

2. It was stated in the second reading speech that:

[T]he bill creates two new offences relating to the unauthorised manufacture, sale or hire of the insignia or uniform of an emergency services organisation; and the use or display of an emergency services uniform or insignia with the intention to deceive – that is, to impersonate an officer of an emergency service organisation...

Removing the “unofficial market” in the insignia and uniforms of those organisations will help minimise the opportunity for them to be used by those with the wrong intent...

The bill [also] answers proposals put forward by the State Emergency Management Committee and NSW Police to improve emergency and management arrangements by amending section 24 of the Act to provide for the appointment of deputy district emergency operation controllers and amending section 30 of the Act to introduce more flexible arrangements for the appointment of local emergency operation controllers.³⁹

The Bill

3. The two new offences in proposed s 63B(1) and (2) cover the impersonation of an **officer** of any **emergency service organisation**,⁴⁰ excluding the NSW Police.⁴¹ Each offence attracts a maximum penalty of 50 penalty units (\$5,500).

³⁸ **False impersonation** is defined as passing oneself off as another person: *Encyclopaedic Australian Legal Dictionary*, LexisNexis online, 9 September 2004. For the purposes of the criminal law, false impersonation requires an element of dishonesty: *Cameron v Holt* (1980) 142 CLR 342.

³⁹ Mr Neville Newell, Parliamentary Secretary, Legislative Assembly *Hansard*, 22 September 2005.

⁴⁰ These organisations are the NSW Ambulance, the NSW Fire Brigades, the NSW Rural Fire Service, the State Emergency Service and other agencies that manage or control an accredited rescue unit, such as the Volunteer Rescue Association, the Royal Volunteer Coastal Patrol and the Australian Volunteer Coast Guard: *State Emergency and Rescue Management Act 1989*, s 3. An **emergency services organisation officer** is defined to include “an employee, member, volunteer or any other person who exercises functions on behalf of an emergency services organisation (other than the NSW Police)”: proposed s 63B(4).

4. Proposed s 63B(3) provides for these new offences to be subject to a defence if:
- the person's conduct is authorised by the relevant organisation;
 - the person *can establish* that the conduct is for the purposes of a public entertainment; or
 - the person *can establish* that he or she has a reasonable excuse.

Issues Considered by the Committee

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

Reversal of onus of proof: proposed s 63B(3)

5. Proposed s 63B(3) requires a person to establish that their conduct was for the purposes of a public entertainment, or was done with a reasonable excuse, to avail themselves of a defence to a proposed s 63B offence. This places the burden of proving that the offence was not committed on the defendant when the conduct of impersonation was done for the purposes of public entertainment or with a reasonable excuse.
6. When particular conduct is not criminal in certain circumstances, an offence provision can be drafted to:
- (a) require that the prosecution prove, beyond reasonable doubt, that there were no such mitigating circumstances for the conduct (thereby keeping the onus of proving all the elements of the offence on the prosecution); or
 - (b) provide that, if the defendant can adduce evidence that the mitigating circumstances existed, the prosecution must prove beyond reasonable doubt that the circumstances did not exist (thereby placing an *evidential burden*⁴² on the defendant); or
 - (c) require that, if the prosecution proves the other elements of the offence, the defendant must prove the mitigating circumstances on the balance of probabilities to avoid liability (thereby placing a *legal burden* on the defendant).
7. Requiring a defendant to prove any matter in relation to an offence is *prima facie* contrary to the presumption of innocence, which is recognised as a fundamental human right protected under common law⁴³ and under international law.⁴⁴ However, the presumption of innocence is not absolute.⁴⁵ It is widely accepted in Australia and

⁴¹ The NSW Police are not covered because the offences of wearing or possessing a police uniform or insignia or impersonating a police officer already exist in ss 203 and 204 of the *Police Act* 1990: Mr Neville Newell, Parliamentary Secretary, Second Reading Speech, Legislative Assembly *Hansard*, 22 September 2005.

⁴² Under section 13.3 of the Commonwealth *Criminal Code*, an *evidential burden* means the burden of adducing or pointing to evidence that *suggests a reasonable possibility* that the matter exists or does not exist.

⁴³ The so-called "golden thread" per Sankey L in *Woolmington v DPP* (1935) AC 462 (HL).

⁴⁴ See Article 14(2) of the International Covenant on Civil and Political Rights, which states that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

⁴⁵ In *Woolmington v DPP* (1935) AC 462 (HL), Lord Sankey qualified his now favour "golden thread" statement by adding that it was "subject... to any statutory exception".

in comparable jurisdictions that the presumption of innocence can be qualified in pursuit of legitimate objectives.⁴⁶ A provision reversing the onus of proof may not necessarily be contrary to the presumption of innocence, but only if the provision is within reasonable limits, namely, it balances the need to protect the rights of a defendant with the need to meet other public interests.

8. The Committee generally considers that a reasonable limit for a reversal of the onus of proof is to place no more than an **evidential burden** of proof on a defendant. However, by requiring a person to “establish” that his or her conduct was for the purposes of public entertainment or was done with a “reasonable excuse”⁴⁷, proposed 63B(3) places a **legal burden** of proof on the defendant.

9. In this regard, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* states:

A matter should be included in a defence, thereby placing the onus on the defendant, only where the matter is peculiarly within the knowledge of the defendant; and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish...

The mere fact that it is difficult for the prosecution to prove an element of an offence has not traditionally been considered in itself, a sound justification for reversing the onus of proof...

However, where a matter is peculiarly within the defendant’s knowledge and not available to the prosecution, it is legitimate to cast the matter as a defence. Placing of an evidential burden on the defendant (or the further step of casting a matter as a legal burden) is more readily justified if:

- the matter in question is not ‘central’ to the question of culpability for the offence,
- the offence carries a relatively low penalty, or
- the conduct proscribed by the offence poses a grave danger to public health or safety.⁴⁸

10. With respect to proposed s 63B(3), there may be some matters relevant to establishing a “reasonable excuse” that may relate to a person’s state of mind, such as whether their conduct was based on a reasonable mistake of fact. However, it is not apparent to the Committee that whether a person’s conduct was for the purpose of public entertainment is a matter peculiarly within the defendant’s knowledge and not available to the prosecution.

⁴⁶ This is so even in jurisdictions such as Canada where the right to be presumed innocent is constitutionally entrenched in Article 11 of the *Charter of Rights and Freedoms*. The European Court of Human Rights has also ruled that reverse onus offences can, depending on their terms and the seriousness of the penalty associated with the crime in question, be regarded as compatible with the right to be presumed innocent which is protected by Article 6(2) of the European Convention on Human Rights: *Salabiaku v France* (1988) 13 EHRR 379.

⁴⁷ The “reasonable excuse” defence is considered to cover many of the exceptions to criminal responsibility, including duress, mistake or ignorance of fact, intervening conduct or event, and lawful authority: *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs, February 2004, p 27.

⁴⁸ *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs, February 2004, p 28.

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| 11. | Proposed s 63B(3) of the Bill imposes a legal burden of proof on a defendant regarding whether their conduct was for public entertainment or was done with a reasonable excuse. |
| 12. | The Committee notes that the reversal of the onus of proof may be inconsistent with the presumption of innocence, which is recognised as a fundamental human right. |
| 13. | The Committee also notes that this right is not absolute and that provisions which shift the burden of proof, subject to reasonable limits, have been held not to be incompatible with the presumption of innocence. |
| 14. | The Committee has written to the Minister for advice on the need to place a legal burden of proof on a defendant in relation to these matters rather than leaving the burden of proof with the prosecution or placing an evidential burden on the defendant. |

The Committee makes no further comment on this Bill.

SECTION B: MINISTERIAL CORRESPONDENCE — BILLS PREVIOUSLY CONSIDERED

7. GAMING MACHINES AMENDMENT BILL 2005

Date Introduced:	8 December 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Background

1. The Committee reported on this Bill in *Legislation Review Digest* No. 8 of 2005 on 20 June 2005 and wrote to the Minister on the same day expressing its concern that a number of provisions create strict liability offences with maximum penalty of 100 penalty units.

The Minister's Reply

2. In his reply of 20 September 2005, the Minister wrote that the penalties for the strict liability offences identified by the Committee are similar to penalties for other offences under the Act. He also stated that the penalties are necessary to enforce compliance with certain requirements under the Act.
3. The Minister also explained that the penalties for the offences to which the Committee referred in its letter
will be listed in Schedule 3 of the Regulation, and will be dealt with most frequently by way of penalty notice. Therefore, venues will receive a penalty notice valued at \$1,100, rather than face prosecution. The ability to prosecute and have venues face fines of up to \$11,000 will, as is currently the practice of the Department, be reserved for the most serious breaches of the Act.

The Committee's Conclusion

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| 4. The Committee thanks the Minister for his response. |
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PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

20 June 2005

Our Ref: LRC 1286

Your Ref:

The Hon Grant McBride MP
Minister for Gaming and Racing
Level 13, 55 Hunter Street
Sydney NSW 2000

Dear Minister

GAMING MACHINES AMENDMENT BILL 2005

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 8 of 2005*.

The Committee resolved to write to you in relation to Schedule 1, clauses 7, 8, 12, 18 & 24 & Schedule 2, clause 1. In particular, the Committee is concerned that these provisions create strict liability offences with a maximum penalty of 100 penalty units.

The Committee is of the view that strict liability offences should only be imposed when clearly in the public interest, and that the severity of punishment should reflect the lack of criminal intent.

In regard to penalties, the Committee notes the Commonwealth Attorney General's Department's guideline that if strict liability is applied the maximum penalty should in general be no more than 60 penalty units (which under Commonwealth law means \$6,600 for an individual and \$33,000 for a body corporate).

The Committee notes the important purpose of these regulatory offences, but is, nonetheless, of the view that 100 penalty units is rather high for a strict liability offence for an offence that does not include a statutory fault element where that penalty may be applied to individuals.

The Committee seeks your advice as to the need for a penalty of 100 penalty units in this case.

Yours sincerely

A handwritten signature in black ink, appearing to read "Peter Primrose".

Peter Primrose MLC
Chairman



Minister for Gaming and Racing

RML: 05/0927
Dept ref: 05/00729



20 SEP 2005

Mr Peter Primrose MLC
Chairperson
Legislation Review Committee
Legislative Assembly
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Primrose *Peter*

I refer to your letter, dated 20 June 2005, concerning consideration by the Legislation Review Committee of the Gaming Machines Amendment Bill 2005.

I note the Legislation Review Committee has expressed concern that some of the provisions in the Bill create strict liability offences and that the proposed penalties for these offences are too high at a maximum penalty of 100 penalty units.

These provisions include Schedule 1, clauses 7 and 8, which introduce offences if a club or hotel with gaming machines does not enter into arrangements to provide problem gambling counselling to members or patrons and does not take action to establish a self-exclusion scheme. The maximum penalty for each of these offences is 100 penalty units.

In answer to the Committee's concerns about these provisions, I note that the provision of problem gambling counselling and self-exclusion schemes in clubs and hotels are important responsible gambling measures that were introduced over 3 years ago with no penalty. Clubs and hotels have had over 3 years to implement these important measures and it is now appropriate that the enforcement of these measures is strengthened by providing a penalty if venues fail to implement them.

The amount of the penalty at 100 penalty units is the same as that applying to other offences arising from a failure to implement responsible gambling measures, like the shutting-down of gaming machines as prescribed, publishing gaming machine advertising, displaying gambling-related signs and accepting the transfer of a prize-winning cheque.

Another provision the Committee is concerned about is clause 12 of Schedule 1, which creates an offence for licensed dealers, sellers, advisers and technicians to supply or fit unapproved software components into gaming machines. This amendment seeks to ensure that the Board approves any modification to a gaming machine, and that the gaming machine operates in accordance with that approval.

It is important to note that the process in place for the approval of gaming machines and gaming machine components means that to commit this offence, a licensed dealer, seller, adviser or technician would have to knowingly fit unapproved software to a machine.

Level 13, 55 Hunter Street, Sydney 2000, NSW Australia
Telephone: (02) 9237 2555 • Facsimile: (02) 9237 2500 • Email: mindgr@dgr.nsw.gov.au

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Again, the penalty for this offence is similar to other offences in the Act, for example possessing gaming machines that are not approved.

The Committee has also mentioned clause 18 of Schedule 1, which proposes to insert new sections 133 and 133A of the Act. New section 133 provides an offence for hotels and clubs not to take reasonable action to ensure that their gaming machines are connected to an authorised Central Monitoring System (CMS). New section 133A provides a similar offence for a technician who carries out work on a gaming machine – he must ensure that it is connected to the CMS when he has finished his work. New section 133A(2) provides a defence for a technician if it is not practicable in the circumstances for him to connect a machine to a CMS, provided he records certain details in the CMS connectivity certificate. The maximum penalty for these offences is 100 penalty units, again this is similar to other offences in Part 9 of the Act, which regulates the authorised CMS, for example failure to pay the CMS monitoring fee.

Ensuring that machines are attached to the CMS is necessary to ensure gaming machine tax is paid by hotels and clubs. Therefore, it is appropriate that failure to take reasonable action to connect machines to the CMS should result in a penalty.

The Committee has also mentioned clause 24 of Schedule 1, which includes an offence for failing to comply with a notice of a special inspector to produce information and documents. Clause 24 has been included in the Bill to allow inspectors to obtain the same information and records as if the inspection was conducted on site. This will improve the efficiency of investigations. Without the proposed offence applying, it would be impossible to enforce production of information relevant to the investigation.

The offence in Schedule 2, clause 1, applies to the casino operator if it does not make available arrangements for problem gambling counselling services to its patrons. The same arguments that I have made in support of Schedule 1, clauses 7 and 8, apply equally to this provision.

Finally, I note that it is intended that the penalties for all these offences will be listed in Schedule 3 of the Regulation, and will be dealt with most frequently by way of penalty notice. Therefore, venues will receive a penalty notice valued at \$1,100, rather than face prosecution. The ability to prosecute and have venues face fines of up to \$11,000 will, as is currently the practice of the Department, be reserved for the most serious breaches of the Act.

I trust this addresses the concerns raised by the Committee.

Yours sincerely



Grant McBride, MP
Minister for Gaming and Racing

8. ROAD TRANSPORT (GENERAL) BILL 2004

Date Introduced:	8 December 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Joseph Tripodi MP
Portfolio:	Roads

Background

1. The Committee reported on this Bill in its *Legislation Review Digest* No. 1 of 2005. On 17 February 2005, the Committee wrote to the then Minister to seek advice in relation to the following two matters.
 - why an authorised officer, who is given significant powers under the Bill, need not be a member of staff of a public authority and why the Bill does not specify other requirements regarding the qualifications or attributes of persons who may be appointed as authorised officers under the Bill; and
 - why there is a need for a power under the Bill to make regulations that can impose fees that may also comprise a tax.
2. The then Minister replied to the Committee on 14 March 2005 noting that “the definition of ‘authorised officer’ in the above Bill is not limited to those employed by the [RTA], as other road managers, for example, local councils and Police also undertake a road transport enforcement task”.
3. The Committee replied on 1 April 2005 noting that the “other road managers” the then Minister referred to were all members of staff of public authorities and again seeking advice as to why an authorised officer need not be a member of staff of a public authority (*Legislation Review Digest* No. 4 of 2005).
4. The then Minister responded to this letter on 19 July 2005, advising that the Bill is based on national model legislation developed by the National Transport Commission and approved unanimously by all Australian Transport Ministers in November 2003 and that the provision relating to authorised officers are also consistent with the *Road Transport (General) Act 1999*.
5. The then Minister also repeated his earlier advice that “authorised officers” may include other road managers such as local councils and NSW police and that enforcement powers would only be delegated to those authorised officers who have received appropriate training.
6. The Committee published this correspondence in its *Legislation Review Digest* No. 10 of 2005, together with its report on the correspondence thanking the then Minister for his reply and expressing the Committee’s disappointment that he had once again not answered its question as to why an authorised officer need not be a member of staff of a public authority.

The Minister's Reply

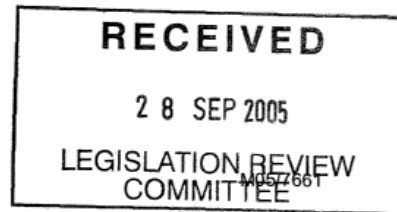
7. On 28 September 2005, the Committee received further correspondence from the Minister. The Minister advised the Committee that:

[t]he 'chain of responsibility' provisions contained in the [Bill] recognise that parties other than the traditional on-road parties influence compliance with road transport laws. In order to effectively carry out a complex 'chain of responsibility' investigation and gather evidence of systemic and habitual offenders the RTA may be required to examine systems and documentation beyond what is currently collected. For example, the RTA may need to call upon the skills of information technology and other specialists to investigate the payroll and other records of a company to substantiate driving hours offences.

Therefore, the definition of an 'authorised officer' cannot be limited to a staff member of a public authority in order to provide the RTA with the flexibility to authorise specialist persons to assist with future investigations...

The Committee's Conclusion

- | |
|--|
| 8. The Committee thanks the Minister for his response. |
|--|



Mr Peter Primrose MLC
Chairman, Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

23 SEP 2005

Dear Mr Primrose

I refer to the Legislation Review Committee's further enquiry to the Roads and Traffic Authority (RTA) regarding the *Road Transport (General) Act 2005*.

The 'chain of responsibility' provisions contained in the above legislation recognise that parties other than the traditional on-road parties influence compliance with road transport laws. In order to effectively carry out a complex 'chain of responsibility' investigation and gather evidence of systematic and habitual offenders the RTA may be required to examine systems and documentation beyond what is currently collected. For example, the RTA may need to call upon the skills of information technology and other specialists to investigate the payroll and other records of a company to substantiate driving hours offences.

Therefore, the definition of an 'authorised officer' cannot be limited to a staff member of a public authority in order to provide the RTA with the flexibility to authorise specialist persons to assist with future investigations. There appears to be precedent for such flexibility in other legislation, for example, section 47 of the *Occupational Health and Safety Act 2000* allows, under Regulation, for other persons to be authorised as Workcover inspectors.

The RTA takes seriously the responsibility of these delegated powers. I can again assure the Committee that it is the intent of the RTA and the Government that the provisions relating to the enforcement powers in the Act will only be delegated to those authorised officers who have received the appropriate training.

If you require further information please contact Mr Philip Halton, General Manager Compliance and Freight Strategy, RTA on 9218 6662.

Yours sincerely

Joe Tripodi
Minister for Roads

Part Two – Regulations

SECTION A: REGULATIONS ABOUT WHICH THE COMMITTEE IS SEEKING FURTHER INFORMATION

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Adoption Amendment (Adoption Service Providers) Regulation 2005	01/07/05	3312	12/09/05	26/09/05
Centennial Park and Moore Park Trust Regulation 2004	27/08/04	6699	05/11/04 29/04/05	21/04/05
Companion Animals Amendment (Penalty Notices) Regulation 2005	19/08/05	4579	12/09/05	
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005	29/07/05	4033	12/09/05	
Legal Profession Amendment (Advertising) Regulation 2005	15/06/05	2279	12/09/05	
Stock Diseases General (Amendment) Regulation 2005	30/06/05	3277	12/09/05	
Workers Compensation Amendment (Advertising) Regulation 2005	15/06/05	2288	12/09/05	

Appendix 1: Index of Bills Reported on in 2005

	Digest Number
Anti-Discrimination Amendment (Religious Tolerance) Bill 2005*	10
Appropriation Bill 2005	7
Appropriation (Budget Variations) Bill 2005	6
Appropriation (Parliament) Bill 2005	7
Appropriation (Special Offices) Bill 2005	7
Brigalow and Nandewar Community Conservation Area Bill 2005	7
Building Legislation Amendment (Smoke Alarms) Bill 2005	9
Building Professionals Bill 2005	7
Civil Liability Amendment (Food Donations) Bill 2004	1
Civil Liability Amendment (Offender Damages) Bill 2005	2, 3
Civil Liability Amendment (Offender Damages Trust Fund) Bill 2005	10
Civil Procedure Bill 2005	5
Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+ Films) Bill 2005*	3
Coal Acquisition Amendment (Fair Compensation) Bill 2005	5
Confiscation of Proceeds of Crime Amendment Bill 2005	11
Courts Legislation Amendment Bill 2005	7
Court Security Bill 2005	2
Crimes Amendment (Grievous Bodily Harm) Bill 2005	3
Crimes Amendment (Protection of Innocent Accused) Bill 2005*	10
Crimes Amendment (Road Accidents) Bill 2005	11
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	6
Criminal Appeal Amendment (Jury Verdicts) Bill 2004*	3
Criminal Assets Recovery Amendment Bill 2005	7
Criminal Procedure Amendment (Evidence) Bill 2005	3
Criminal Procedure Further Amendment (Evidence) Bill 2005	4
Criminal Procedure (Prosecutions) Bill 2005	11
Crown Lands Amendment (Access to Property) Bill 2005*	4
Crown Lands Legislation Amendment Bill 2005	7
Defamation Bill 2005	10
Drug Misuse and Trafficking Amendment Bill 2005	8
Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005	6

	Digest Number
Duties Amendment (Abolition of Bob Carr's Vendor Duty) Bill 2005*	9
Duties Amendment (Abolition of Vendor Duty) Bill 2005	10
Electricity Supply Amendment Bill 2005	2, 5
Energy Administration Amendment (Water and Energy Savings) Bill 2005	5
Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004	1
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005	7
Fair Trading Amendment (Responsible Credit) Bill 2005*	6
Fire Brigades Amendment (Community Fire Units) Bill 2005	7
Fiscal Responsibility Bill 2005	7
Fisheries Management Amendment (Catch History) Bill 2005*	6
Gambling (Two-up) Amendment Bill 2005	7
Game and Feral Animal Control Amendment Bill 2005	5
Gaming Machines Amendment Bill 2005	8
Independent Commission Against Corruption Amendment Bill 2005	2, 3
James Hardie Former Subsidiaries (Special Provisions) Bill 2005	9
Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004	1
Legal Profession Amendment Bill 2005	8
Legal Profession Bill 2004	1, 5
Legislation Review Amendment (Family Impact) Bill 2005*	9
Local Government Amendment Bill 2005	8
Local Government Amendment (Stormwater) Bill 2005	10
Local Government and Valuation of Land Amendment (Water Rights) Bill 2005	9
Marine Safety Amendment (Random Breath Testing) Bill 2004	1
National Park Estate (Reservations) Bill 2005	7
National Parks and Wildlife (Adjustment of Areas) Bill 2005	3
National Parks and Wildlife Amendment (Jenolan Caves Reserves) Bill 2005	11
National Parks and Wildlife (Further Adjustment of Areas) Bill 2005	9
Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005	7
Parliamentary Electorates and Elections Amendment (Voting Age) Bill 2005*	9
Passenger Transport Amendment (Maintenance of Bus Services) Bill 2005	8
Pawnbrokers and Second-hand Dealers Amendment Bill 2005	8
Petroleum (Submerged Lands) Amendment (Permits and Leases) Bill 2005	7
Photo Card Bill 2004	1

	Digest Number
Police Integrity Commission Amendment (Shaw Investigation) Bill 2005*	2
Poultry Meat Industry Amendment (Prevention of National Competition Policy Penalties) Bill 2005	7
Prisoners (Interstate Transfer) Amendment Bill 2005	4, 5
Property Legislation Amendment Bill 2005	10
Protection of Agricultural Production (Right to Farm) Bill 2005*	4
Protection of the Environment Operations Amendment Bill 2005	10
Public Sector Employment and Management Amendment (Ethanol Blended Fuel) Bill 2005*	11
Road Transport (General) Bill 2004	1, 4
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	1, 4, 7
Rural Workers Accommodation Amendment Bill 2005	7
Security Industry Amendment Bill 2005	9
Security Interests in Goods Bill 2005	10
Sheriff Bill 2005	2
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2005*	9
Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004	1
Sporting Venues (Offenders Banning Orders) Bill 2005	10
Standard Time Amendment (Co-ordinated Universal Time) Bill 2005	2
Standard Time Amendment (Daylight Saving) Bill 2005	10
State Emergency and Rescue Management Amendment Bill 2005	11
State Revenue Legislation Amendment Bill 2005	8
State Revenue Legislation Amendment (Budget Measures) Bill 2005	7
Statute Law Miscellaneous Provisions Bill 2005	8
Surveying Amendment Bill 2005	7
Sydney 2009 World Masters Games Organising Committee Bill 2005	7
Sydney University Settlement Incorporation Amendment Bill 2005*	7
Terrorism Legislation Amendment (Warrants) Bill 2005	8
Transport Administration Amendment (Transport Levy For Major Events) Bill 2005	2
Transport Legislation Amendment (Implementation of Waterfall Rail Inquiry Recommendations) Bill 2005*	2
Transport Legislation Amendment (Waterfall Rail Inquiry Recommendations) Bill 2005	7
Water Efficiency Labelling and Standards (New South Wales) Bill 2005	3
Workplace Surveillance Bill 2005	6

Appendix 2: Index of Ministerial Correspondence on Bills for 2005

Bill	Minister/Member	Letter sent	Reply	Digest 2004	Digest 2005
Building Professionals Bill 2005	Minister for Infrastructure and Planning (Planning Administration)	03/06/05	22/06/05		7, 9
Child Protection (Offender Prohibition Orders) Bill 2004	Minister for Police	18/06/04	12/09/05	6	10
Civil Liability Amendment (Offender Damages) Bill 2005	Minister for Justice	01/03/05	08/03/05		2, 3, 5
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	Attorney General	23/05/05			6
Criminal Procedure Further Amendment (Evidence) Bill 2005	Attorney General	01/05/05	21/06/05		4, 9
Electricity Supply Amendment Bill 2005	Minister for Energy and Utilities	01/03/05	30/03/05		2, 5
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005	Minister for Infrastructure and Planning	03/06/05	24/06/05		7, 9
Gaming Machines Amendment Bill 2005	Minister for Gaming and Racing	20/06/05	20/09/05		8, 11
Independent Commission Against Corruption Amendment Bill 2005	Premier	01/03/05	02/03/05		2, 3
Legal Profession Amendment Bill 2005					8
Legal Profession Bill 2004	Attorney General	17/02/05	07/04/05		1, 5
Licensing And Registration (Uniform Procedures) Amendment (Photo ID) Bill 2004	Minister for Commerce	03/12/04	09/12/04	17	1
Local Government Amendment Bill 2005	Minister for Local Government	20/06/05	05/09/05		8, 9
Marine Safety Amendment (Random Breath Testing) Bill 2004	Minister for Ports	17/02/05			1
Photo Card Bill 2004	Minister for Roads	17/02/05	30/06/05		1, 9
Prisoners (Interstate Transfer) Amendment Bill 2005	Minister for Justice	01/04/05	18/04/05		4, 5
Road Transport (General) Bill 2004	Minister for Roads	17/02/05 01/04/05	14/03/05 19/07/05 23/09/05		1, 4, 10, 11
Road Transport (General) Amendment (Licence Suspension) Bill 2004	Minister for Roads	18/06/04	01/12/04	9	1, 5
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	Minister for Roads	17/02/05 01/04/05	14/03/05 23/05/05		1, 4, 7

Bill	Minister/Member	Letter sent	Reply	Digest 2004	Digest 2005
Security Industry Amendment Bill 2005	Minister for Police	12/09/05			9
Smoke-free Environment Amendment Bill 2004	Minister for Health	05/11/04		15	
State Revenue Legislation Amendment Bill 2005	Treasurer	20/06/05			8

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2005

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Anti-Discrimination Amendment (Religious Tolerance) Bill 2005*	N				
Building Professionals Bill 2005	N, C				
Civil Liability Amendment (Food Donations) Bill 2004	N			N	
Civil Liability Amendment (Offender Damages) Bill 2005	N, C				
Civil Liability Amendment (Offender Damages Trust Fund) Bill 2005	N				
Civil Procedure Bill 2005	N			N	
Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+ Films) Bill 2005*	R				
Confiscation of Proceeds of Crime Amendment Bill 2005	R, C				
Crimes Amendment (Road Accidents) Bill 2005	R, C				
Court Security Bill 2005				N	
Crimes Amendment (Protection of Innocent Accused) Bill 2005*	R				
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	R, C		R		
Criminal Appeal Amendment (Jury Verdicts) Bill 2004*	R				
Criminal Assets Recovery Amendment Bill 2005	R				
Criminal Procedure Amendment (Evidence) Bill 2005	N				
Criminal Procedure Further Amendment (Evidence) Bill 2005	C			N	
Criminal Procedure (Prosecutions) Bill 2005	N				
Drug Misuse and Trafficking Amendment Bill 2005				N	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005				N	
Electricity Supply Amendment Bill 2005				C	
Energy Administration Amendment (Water and Energy Savings) Bill 2005				R, N	
Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004			N	N	N
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005	N, R	C	N, C		R, C
Gaming Machines Amendment Bill 2005	C				
Independent Commission Against Corruption Amendment Bill 2005				C	
Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004	R			N	
Legal Profession Amendment Bill 2005	N			R	
Legal Profession Bill 2004	N,C			N	
Local Government Amendment Bill 2005	C, R				
Marine Safety Amendment (Random Breath Testing) Bill 2004				C	
National Parks and Wildlife (Adjustment of Areas) Bill 2005				N	
Parliamentary Electorates and Elections Amendment (Voting Age) Bill 2005*	R				
Passenger Transport Amendment (Maintenance of Bus Services) Bill 2005	R	R	R	R	
Photo Card Bill 2004				C	
Police Integrity Commission Amendment (Shaw Investigation) Bill 2005*	N				
Prisoners (Interstate Transfer) Amendment Bill 2005				C	
Protection of Agricultural Production (Right to Farm) Bill 2005*	R				

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Protection of the Environment Operations Amendment Bill 2005	R				
Road Transport (General) Bill 2004	N	C		C	
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	N			C	
Rural Workers Accommodation Amendment Bill 2005	R				
Security Industry Amendment Bill 2005	C,R				
Sheriff Bill 2005				N	
Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004	R, N				
State Emergency and Rescue Management Amendment Bill 2005	C				
State Revenue Legislation Amendment Bill 2005	N, C, R				
State Revenue Legislation Amendment (Budget Measures) Bill 2005	N				
Surveying Amendment Bill 2005	N				
Terrorism Legislation Amendment (Warrants) Bill 2005	R				
Water Efficiency Labelling and Standards (New South Wales) Bill 2005	N			N	N

Key

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

Appendix 4: Index of correspondence on regulations reported on in 2005

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2005
Architects Regulation 2004	Minister for Commerce	21/09/04	30/11/04	1
Centennial and Moore Park Trust Regulation 2004	Minister for Tourism and Sport and Recreation	05/11/04 29/04/05	21/04/05	5
Environmental Planning and Assessment Amendment (ARTC Rail Infrastructure) Regulation 2004	Minister for Infrastructure and Planning	26/10/04 17/02/05	01/02/05	1
Forestry Regulation 2004	Minister for Primary Industries	26/10/04 17/02/05	18/01/05	1
Hunter-Central Rivers Catchment Management Authority Regulation 2005	Minister for Natural Resources	20/06/05	04/09/05	10
Institute of Teachers Regulation 2005	Minister for Education and Training	01/04/05 03/06/05	26/05/05	7
Mental Health Amendment (Transfer of Queensland Civil Patients) Regulation 2005	Minister for Health	29/04/05	11/07/05	9
Occupational Health and Safety Amendment (Transitional) Regulation 2004	Minister for Commerce	01/04/05 23/05/05	17/05/05	6
Passenger Transport (Drug and Alcohol Testing) Regulation 2004	Minister for Transport Services	30/04/04 01/03/05	17/02/05	2
Protection of the Environment Operations (Luna Park) Regulation 2005	Minister for the Environment	29/04/05	10/08/05	9
Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2005	Minister for Roads	01/04/05	12/07/05	9
Stock Diseases (General) Regulation 2004	Minister for Primary Industries	05/11/04	16/12/04	1
Sydney Olympic Park Amendment Regulation 2004	Minister for Sport and Recreation	05/11/04	03/12/04	1

Appendix 5: Notice of Discussion Paper on the Right to Silence

The Legislation Review Committee is seeking comment in relation to the principles it should apply when considering bills that trespass on the right to silence. The Committee will then use these comments when suggesting standards and principles to which the Parliament should have regard when considering bills that trespass on this fundamental right.

The Committee has prepared a Discussion Paper raising a number of questions. This Discussion Paper is available online at **www.parliament.nsw.gov.au** under “Inquiries receiving Submissions”. Copies are also available from the Committee’s Secretariat.

Tel: (02) 9230 3418 or 9230 2899

Fax: (02) 9230 3052

Legislation.Review@parliament.nsw.gov.au

Submissions responding to the Discussion Paper should be sent to:

Chairman
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
Sydney NSW 2000

Alternatively, submissions can be made on-line by following the links at **www.parliament.nsw.gov.au**

The closing date for submissions is **30 November 2005**.