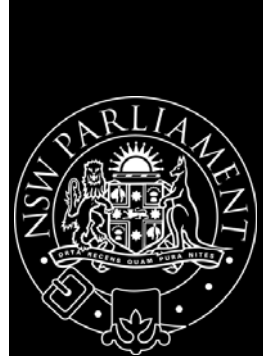


PARLIAMENT OF NEW SOUTH WALES



# **Legislation Review Committee**

## LEGISLATION REVIEW DIGEST

---

No 16 of 2006

---

10 November 2006

New South Wales Parliamentary Library cataloguing-in-publication data:

**New South Wales. Parliament. Legislative Assembly. Legislation Review Committee.**

Legislation Review Digest, Legislation Review Committee, Parliament NSW Legislative Assembly. [Sydney, NSW] : The Committee, 2006, 71 p; 30cm

Chair: Mr Allan Shearan MP

10 November 2006

ISSN 1448-6954

1. Legislation Review Committee—New South Wales
2. Legislation Review Digest No. 16 of 2006

I Title.

II Series: New South Wales. Parliament. Legislative Assembly. Legislation Review Committee Digest; No. 16 of 2006

## TABLE OF CONTENTS

Membership & Staff.....	ii
Functions of the Legislation Review Committee.....	iii
Guide to the <i>Legislation Review Digest</i> .....	iv
Summary of Conclusions.....	vi
<b>Part One – Bills.....</b>	<b>1</b>
<b>SECTION A: Comment on Bills.....</b>	<b>1</b>
1. Aboriginal Land Rights Amendment Bill 2006 .....	1
2. Banning Political Advertising (Make Labor Pay) Bill 2006* .....	3
3. Central Coast Water Corporation Bill 2006 .....	4
4. Charitable Trusts Amendment Bill 2006.....	5
5. Children and Young Persons (Care and Protection) Miscellaneous Amendments Bill 2006.....	7
6. Companion Animals Amendment Bill 2006.....	8
7. Crimes and Courts Legislation Amendment Bill 2006.....	11
8. Education Legislation Amendment Bill 2006 .....	22
9. Environmental Planning Legislation Amendment 2006.....	25
10. Home Building Amendment (Statutory Warranties) Bill 2006.....	26
11. Industrial Relations (Child Employment) Bill 2006; Industrial Relations Further Amendment Bill 2006; & Workers Compensation Amendment (Permanent Impairment Benefits) Bill 2006 .....	28
12. Legal Profession Further Amendment Bill 2006.....	34
13. Rural Communities Impacts Bill 2006* .....	35
14. Rural Lands Protection Amendment Bill 2006 .....	36
15. Superannuation Administration Amendment (Trust Deed Schemes) Bill 2006 .....	37
16. Trees (Disputes Between Neighbours) Bill 2006 .....	38
17. Water Industry Competition Bill 2006.....	41
<b>Part Two – Regulations .....</b>	<b>43</b>
<b>SECTION A: Regulations about which the Committee is Seeking Further Information.....</b>	<b>43</b>
<b>SECTION B: Copies of Correspondence on Regulations .....</b>	<b>44</b>
1. Conveyancing (Sale of Land) Amendment (Smoke Alarms) Regulation 2006 .....	45
<b>Appendix 1: Index of Bills Reported on in 2006.....</b>	<b>49</b>
<b>Appendix 2: Index of Ministerial Correspondence on Bills .....</b>	<b>54</b>
<b>Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2006.....</b>	<b>56</b>
<b>Appendix 4: Index of correspondence on regulations reported on in 2006.....</b>	<b>59</b>
* Denotes Private Member's Bill	

## MEMBERSHIP & STAFF

### Chair

**Allan Shearan MP, Member for Londonderry**

### Vice Chair

**Virginia Judge MP, Member for Strathfield**

### Members

**Shelley Hancock MP, Member for South Coast**

**Robyn Parker MLC**

**Paul Pearce MP, Member for Coogee**

**Penny Sharpe MLC**

**Russell Turner MP, Member for Orange**

**Peter Wong MLC**

### Staff

Russell Keith, Committee Manager  
Indira Rosenthal, Senior Committee Officer  
Mel Keenan, Senior Committee Officer  
Carly Sheen, 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 Philip 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

### Facsimile

### Email

### URL

02 9230 3418  
02 9230 3052  
[legislation.review@parliament.nsw.gov.au](mailto:legislation.review@parliament.nsw.gov.au)  
[www.parliament.nsw.gov.au/lrc/digests](http://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. Aboriginal Land Rights Amendment Bill 2006

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

#### 2. Banning Political Advertising (Make Labor Pay) Bill 2006\*

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

#### 3. Central Coast Water Corporation Bill 2006

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

#### 4. Charitable Trusts Amendment Bill 2006

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

#### 5. Children and Young Persons (Care and Protection) Miscellaneous Amendments Bill 2006

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

#### 6. Companion Animals Amendment Bill 2006

##### Procedural fairness: Clause 50, proposed section 58G

7. The Committee is of the view that, given that a dog is the property of its owner, no action should be taken to kill a dog without first giving notice to the owner and providing the owner with an opportunity to make representations.
8. The Committee refers to Parliament the question as to whether this amendment, by allowing a dog to be killed with no requirement that notice be given to the owner and providing no opportunity for the owner to make representations, unduly trespasses on personal rights and liberties.



## 7. Crimes and Courts Legislation Amendment Bill 2006

### Retrospectivity: proposed new s 25 & s 26 of the *Civil Liability Act 2002*

14. The Committee will always be concerned to identify the retrospective effects of legislation which may impact adversely on any person.
15. The Committee notes that proposed cl 25 and cl 26 of Part 7 of Schedule 1 to the *Civil Liability Act 2002* deem that that the proposed amendments to s 3B(1) and s 26 have always been applicable to the operation of the Act. This may directly and adversely affect the damages rights of individuals under the Act when a Court considers the application of the Part 2A offender damages trust fund provisions.
16. The Committee refers to Parliament the question of whether the retrospective application of the Bill's amendments unduly trespasses upon the rights of persons who would not otherwise be subject to the Act's restrictions relating to damages.

### Reversal of onus of proof: proposed new s 11B, s 36Y & s 36Z of the *Drugs Misuse and Trafficking Act 1985*

23. The Committee notes that proposed s 11B places on the defendant the onus of proof on whether a tablet press is used to produce tablets in connection with an activity that is not unlawful, which is the essence of the offence.
24. The Committee notes that reversing the onus of proof is inconsistent with the presumption of innocence, which is a fundamental human right.
25. The Committee notes that while reversing the onus of proof may be appropriate in certain circumstances, proposed s 11B does not fall squarely within the Commonwealth Guidelines for such provisions.
26. The Committee refers to Parliament the question whether proposed s 11B trespasses unduly on the right to the presumption of innocence by reversing the onus of proof.
35. The Committee notes that proposed s 36Y and s 36Z place on the defendant the onus of proof regarding whether a child was endangered, which is the essence of the offence.
36. The Committee notes that the basis for creating these aggravated offences is concern for the welfare of children who may be exposed to drug premises.
37. The Committee notes that s 36Z(4) also places the onus of proof on a defendant charged with assisting in the organisation or conduct of drug premises to prove that he or she did not know or could not reasonably have known, that the premises to which the charge relates were being organised or conducted as drug premises.
38. The Committee notes that reversing the onus of proof is inconsistent with the presumption of innocence, which is a fundamental human right.

39. The Committee notes that while reversing the onus of proof may be appropriate in certain circumstances, proposed s 36Y(2) and s 36Z(2) arguably fall outside the Commonwealth Guidelines for such provisions.
40. The Committee refers to Parliament the question whether proposed s 36Y and s 36Z trespass unduly on the right to the presumption of innocence by reversing the onus of proof.

## **8. Education Legislation Amendment Bill 2006**

### **Ministerial Guidelines: Proposed Division 4**

11. The Committee notes that the matters listed in proposed section 26J to be included in ministerial guidelines provide some safeguards against an undue trespass on a student's privacy rights. However, the Committee is of the view that matters which are central to the operation of the new regime should be provided for in the Act itself and not in guidelines, especially if those guidelines are not disallowable.
12. The Committee has written to the Minister for advice as to why the matters set out in section 26J are not included in the Act.
13. The Committee refers to Parliament the question as to whether providing for the matters set out in section 26J to be dealt with by ministerial guidelines rather than in the Act itself is an inappropriate delegation of legislative power.

## **9. Environmental Planning Legislation Amendment 2006**

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

## **10. Home Building Amendment (Statutory Warranties) Bill 2006**

### **Retrospectivity: Schedule 1[5]**

7. As the Bill does not change the nature of a statutory warranty and only allows further enforcement proceedings to be brought if a deficiency could not reasonably be known of when the warranty was earlier enforced, and given the important aim of consumer protection, the Committee does not consider that the retrospective application of the Bill trespasses unduly on personal rights and liberties.

## **11. Industrial Relations (Child Employment) Bill 2006; Industrial Relations Further Amendment Bill 2006; & Workers Compensation Amendment (Permanent Impairment Benefits) Bill 2006**

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

## **12. Legal Profession Further Amendment Bill 2006**

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

## **13. Rural Communities Impacts Bill 2006\***

4. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1989*.

## **14. Rural Lands Protection Amendment Bill 2006**

3. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1989*.

## **15. Superannuation Administration Amendment (Trust Deed Schemes) Bill 2006**

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

## **16. Trees (Disputes Between Neighbours) Bill 2006**

### **Restriction of action in nuisance: Proposed section 5**

15. Given that the bill establishes a targeted system to resolve disputes between neighbours, and does not limit other common law actions, the Committees does not consider that the limitation on the ability to bring an action in nuisance is a trespass on the rights of landowners or occupiers.

## **17. Water Industry Competition Bill 2006**

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



## Part One – Bills

### SECTION A: COMMENT ON BILLS

# 1. ABORIGINAL LAND RIGHTS AMENDMENT BILL 2006

Date Introduced:	24 October 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Reba Meagher MP
Portfolio:	Aboriginal Affairs

### Purpose and Description

1. Following on from a review of the *Aboriginal Land Rights Act 1983* [the Act], the Bill makes a range of amendments to the Act as set out below.
2. The Bill also amends the *Crimes Act 1900* to extend certain corruption offences to officers of an Aboriginal Land Council [ALC], and makes consequential amendments to the *Defamation Act 2005* and the *Independent Commission Against Corruption Act 1988*.

### Background

3. The following background was provided in the second reading speech:

In 2004 the former Minister for Aboriginal Affairs, the Hon. Andrew Refshauge, announced the review of the Aboriginal Land Rights Act and established a task force to oversee the review. The task force comprised the Administrator of the New South Wales Aboriginal Land Council, the Registrar of the Aboriginal Land Rights Act, and the Director General of the Department of Aboriginal Affairs.

...The bill amends the Act to improve Aboriginal Land Council governance and facilitate the better management of Aboriginal Land Council assets, investments and business enterprises. The bill will provide for the changing structure of Local Aboriginal Land Councils [LALCs] from small-scale community organisations to reflect the million dollar corporate structures some have grown into over the last 23 years. In this regard the bill is modernising the legislation to recognise that the Aboriginal Land Rights Act is moving into a new area of economic and social development for Aboriginal Land Councils. Reforms to the Local Aboriginal Land Council structure are designed to create better decision-making and fairer participation in land councils.<sup>1</sup>

### The Bill

4. The Bill amends the Act so as to:
  - enable the provision of, and provide a framework for the provision of, benefits to Aboriginal persons by ALCs and to make provision relating to existing social housing schemes [proposed new s 52];

---

<sup>1</sup> Hon M Okropoulos MP, Legislative Assembly *Hansard*, 24 October 2006.

- to provide a planning framework for the management and investment of land and other assets of ALCs through the preparation and implementation of community, land and business plans and other measures [proposed new s52A];
- change the management structures of Local Aboriginal Land Councils [LALC] by providing for each Council to have a Board elected by members and by conferring day-to-day management functions on the chief executive officer of a LALC [proposed new Part 5 Div 3];
- qualify persons listed on the Register of Aboriginal Owners in relation to land within the area of a LALC to be members of the Council and to require a person to demonstrate a sufficient association with the area of a Council to qualify for membership of a Council [proposed new s 54];
- clarify the mechanisms for the amalgamation, re-definition and dissolution of LALCs [proposed new Part 5 Div 7];
- abolish Regional Aboriginal Land Councils and to establish Regional Electoral Forums to elect councillors to the New South Wales Aboriginal Land Council [NSWALC] rather than by direct election, and to make other provisions relating to councillors [proposed new Part 6 Div 1];
- require the NSWALC to prepare and implement policies on community benefits, community, land and business plans and other matters [proposed new Part 6 Div 5];
- require the provision of training for officers and staff of ALCs [proposed new s 65];
- extend the jurisdiction of the renamed *Aboriginal Land Councils Pecuniary Interest and Disciplinary Tribunal* so that it may deal with misbehaviour by councillors of the NSWALC, Board members of LALCs, and members of staff of ALCs, and to confer on the Registrar under the Act power to deal with misbehaviour [proposed Part 10 Div 3A];
- make changes to the appointment of administrators for ALCs, including removal of the limit on the period of appointment, notice of appointment and interim appointment of administrators proposed new s 222];
- enable advisors to be appointed to assist LALCs [proposed new s 234]; and
- insert an offence relating to unauthorised land dealings [proposed new s 42A] and to enable directors of corporations and persons concerned in the management of corporations to be proceeded against for offences committed by corporations under the Act [proposed new s 249A].

## Issues Considered by the Committee

<p><b>5. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b></p>
--

*The Committee makes no further comment on this Bill.*

## 2. BANNING POLITICAL ADVERTISING (MAKE LABOR PAY) BILL 2006\*

Date Introduced: 19 October 2006  
House Introduced: Legislative Assembly  
Member Responsible: Mr Peter Debnam MP

### Purpose and Description

1. The objects of this Bill are:
  - (a) to ensure that, as far as possible, public money is not expended on government publicity for a partisan political purpose, and
  - (b) to enable the Auditor-General to scrutinise government publicity that appears to the Auditor-General to have the capacity or to be likely to have the capacity to be used for that purpose.

### 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.*

## 3. CENTRAL COAST WATER CORPORATION BILL 2006

Date Introduced: 24 October 2006  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon David Campbell MP  
Portfolio: Water Utilities

### Purpose and Description

1. The object of this Bill is to provide for the constitution and functions of the Central Coast Water Corporation and for its establishment as a water supply authority under the *Water Management Act 2000*.
2. This Bill is cognate with the *Water Industry Competition Bill 2006*.

### Background

3. The following background is provided in the second reading speech:

This bill provides for the establishment of the Central Coast Water Corporation to supply water and sewerage services on the Central Coast. As is currently the case, the responsibility for water supply will remain with the councils. The Central Coast Water Corporation would be a statutory body wholly owned by Gosford and Wyong councils with revenues raised by the corporation remaining in the region. The corporation model has been developed following a request from Gosford and Wyong Councils for a new legal entity to enable improved governance and streamlined decision-making. Both councils have been extensively consulted during the development of the proposed model.

At present, Gosford and Wyong councils have a longstanding agreement for the joint management of their head works assets. To facilitate joint operations the councils established a joint committee, the Gosford Wyong Councils Water Authority in 1977. However, the joint committee has no legal status and functions cannot be formally delegated to it, which means all its decisions must be ratified by each council. This process contributes to inefficiency and delay in decision-making. The Central Coast Water Corporation Bill responds to this problem and the request from Gosford City Council and Wyong Shire Council by enabling the establishment of a new Central Coast Water Corporation. At a joint meeting of both councils on September 28 a resolution was carried in support of the direction outlined in this bill.<sup>2</sup>

### Issues Considered by the Committee

4. **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.***

---

<sup>2</sup> The Hon David Campbell MP, Minister for Water Utilities, Legislative Assembly *Hansard*, 24 October 2006.



## 4. CHARITABLE TRUSTS AMENDMENT BILL 2006

Date Introduced:	27 October 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

### Purpose and Description

1. The object of this Bill is to amend the *Charitable Trusts Act 1993* so as to enable the trustees of certain kinds of trusts to make gifts to “eligible recipients” even though the recipients are not charitable at law. Under current law, trustees of a charitable trust cannot make gifts for non-charitable purposes.
2. The trusts to which the amendments relate are those referred to in item 2 of the table in section 30-15 of the *Income Tax Assessment Act 1997* of the Commonwealth (known as prescribed private funds and ancillary funds). This covers a particular class of trusts that are philanthropic in nature, and gifts made by them to eligible recipients are tax deductible. The regulations may extend the kinds of trusts to which the new provisions apply.
3. An *eligible recipient* is defined as a deductible gift recipient within the meaning of the *Income Tax Assessment Act 1997* of the Commonwealth. This includes entities that are not technically charitable at law, such as entities with a connection to government (eg the Sydney Opera House Trust).

### Background

4. The following background is provided in the second reading speech:

The Income Tax Assessment Act 1997 originally allowed tax exemptions only when a PPF [Prescribed Private Fund] or an ancillary fund made gifts to DGRs [Deductible Gift Recipients] that were charities. This meant that bodies such as the Sydney Opera House Trust and the Powerhouse Museum could not receive gifts from PPFs or ancillary funds, because they are not charities at law due to their connection with government.

In 2005, the Commonwealth amended the Income Tax Assessment Act 1997 to allow a PPF or an ancillary fund to donate to any DGR, regardless of whether the DGR is a charity. However, the trust deeds of most PPFs and ancillary funds do not allow the trustees to donate to bodies that are not charitable at law. If the trustees makes grants to bodies that are not considered charitable at law, then the trustees are technically in breach of their trust deeds. Trustees are generally unable to alter the trust deeds to widen the list of potential donees to reflect the new tax arrangements. This is frustrating for the trustees of a number of PPFs and ancillary funds who would like to be able to give to a wider range of DGRs, including bodies such as the Opera House or the Powerhouse Museum.

This bill will give trustees of existing and future PPFs and ancillary funds—referred to in the bill as “prescribed trusts”—the power to give to any DGR recognised by the

Commonwealth legislation. These DGRs are referred to in the bill as "eligible recipients". The bill will allow the trust instruments of new prescribed trusts to contain a power to give to eligible recipients. The bill also expands the distribution power of existing prescribed trusts to give to DGRs. However, it does not authorise a prescribed trust to make grants that are inconsistent with specific prohibitions in their trust deeds on the making of grants to certain kinds of bodies.<sup>3</sup>

## Issues Considered by the Committee

- |  |
|--|
| <p><b>5. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b></p> |
|--|

*The Committee makes no further comment on this Bill.*

---

<sup>3</sup> Mr Neville Newell, Parliamentary Secretary, Legislative Assembly *Hansard*, 27 October 2006.

## 5. CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) MISCELLANEOUS AMENDMENTS BILL 2006

Date Introduced: 24 October 2006  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Reba Meagher MP  
Portfolio: Community Services, Youth

### Purpose and Description

1. The main object of this Bill is to amend the *Children and Young Persons (Care and Protection) Act 1998* so as to provide for the following:
  - (a) greater protection to children and young persons who are at risk of harm from a parent or carer;
  - (b) reciprocal arrangements for the transfer of interstate and New Zealand child protection orders and child protection proceedings.
2. The Bill also makes amendments to the Act, including in relation to:
  - (a) the legal representation of children in proceedings before the Children's Court;
  - (b) the disclosure to parents and certain other persons of information concerning the placement of children in out-of-home care;
  - (c) the kinds of children's services that are required to be licensed under the principal Act.

### Background

3. In her second reading speech, the Minister stated that "The [Bill] contains a mix of significant and minor reforms to the *Children and Young Persons (Care and Protection) Act 1998*." She also said that the "Bill is the result of extensive review."<sup>4</sup>

### Issues Considered by the Committee

4. **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.*

---

<sup>4</sup> The Hon Reba Meagher MP, Minister for Community Services and Minister for Youth, Legislative Assembly *Hansard*, 24 October 2006.

## 6. COMPANION ANIMALS AMENDMENT BILL 2006

Date Introduced: 24 October 2006  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Kerry Hickey MP  
Portfolio: Local Government

### **Purpose and Description**

1. At present under the *Companion Animals Act 1998* (the Act), a council or a Local Court may declare a dog to be a dangerous dog if it has (without provocation) attacked or killed a person or animal or has repeatedly threatened to attack or chase a person or animal. Certain control requirements are currently imposed in relation to dogs that are declared to be dangerous (such as keeping the dog in a special enclosure and ensuring that the dog is muzzled and on a lead when it is outside of its enclosure). The Act also imposes similar control requirements in relation to dogs that are currently listed in the Act as restricted dogs (eg, pit bull terriers) regardless of whether they have been declared dangerous. If a council is of the opinion that a dog is of a breed or kind of dog listed as a restricted dog, or is a cross-breed of such a listed dog, the council may also declare the dog to be a restricted dog.
2. The object of this Bill is to amend the Act as follows:
  - (a) to enable a dog that displays unreasonable aggression or a dog that is kept or used for the purposes of hunting to be declared a dangerous dog under the Act,
  - (b) to enable authorised officers of councils to make declarations under the Act in relation to dangerous dogs and restricted dogs instead of the council itself having to make such a declaration,
  - (c) to prohibit the sale (which includes giving away) and the acquisition of dangerous dogs in the same way as restricted dogs cannot be sold or acquired at present,
  - (d) to enable a dangerous or restricted dog to be seized and destroyed if the dog attacks or bites without provocation or if the enclosure or muzzling requirements have not been complied with on 2 separate occasions over a 12-month period,
  - (e) to require the owner of a dangerous or restricted dog to obtain a certificate of compliance in relation to the enclosure in which the dog is required to be kept,
  - (f) to increase penalties for some offences under the Act (particularly in relation to dangerous and restricted dogs),
  - (g) to expressly empower an authorised officer of a council who reasonably suspects a person of having committed any offence under the Act or the regulations to arrest the person (and detain for the purposes of taking the person before a Magistrate) if the person refuses to give his or her name and address or gives a name or address that the officer suspects is false,

- (h) to require dog owners generally to take reasonable precautions to prevent their dogs from escaping from the property on which they are kept,
  - (i) to remove the exemption for working dogs (ie, stock or farm dogs) from the registration and identification requirements under the Act,
  - (j) to make a number of other amendments of a minor or consequential nature.
3. The Bill also amends:
- (a) the *Companion Animals Regulation 1999* to provide an exemption from the requirement to pay registration fees in the case of working dogs, to prohibit the misuse of the special collar that must be worn by dangerous and restricted dogs, to prescribe the maximum fee for issuing a certificate of compliance in relation to a dangerous or restricted dog enclosure, to specify additional offences that may be dealt with by way of a penalty notice and to increase the penalties that are payable for certain penalty notice offences, and
  - (b) the *Local Government (General) Regulation 2005* to require councils to include in their annual reports a detailed statement of their activities in relation to enforcing and ensuring compliance with the *Companion Animals Act 1998* and the *Companion Animals Regulation 1999*.

## Background

4. In his second reading speech, the Minister stated:

...Last year the Parliament passed extensive amendments to the *Companion Animals Act*. Those changes, which came into effect earlier this year, significantly strengthened the powers of councils to control dangerous and restricted dogs, in particular, pit bull terriers. It introduced more stringent control requirements for these animals, and significantly increased penalties for breaching those controls...

This Bill is the result of an extensive review and consultation process that has identified some barriers in the enforcement process... I met with and considered the views of leading organisations including Dogs NSW, the RSPCA, the Animal Welfare League, the Institute of Law Enforcement Officers, the Local Government and Shires Associations of New South Wales and animal behaviourists.<sup>5</sup>

## Issues Considered by the Committee

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

#### Procedural fairness: Clause 50, proposed section 58G

5. Proposed subsection 58G (2) gives an authorised officer of a council the authority to order the destruction of a dog who has been declared dangerous or restricted and who has attacked or bitten a person or animal without provocation. The Bill provides that Part 7 (other than sections 68 and 69<sup>6</sup>) does not apply in relation to a dangerous or restricted dog that has been seized because it attacked or bit a person or animal without provocation. Part 7 deals with seized or surrendered animals and includes a

---

<sup>5</sup> The Hon Kerry Hickey MP, Minister for Local Government, Legislative Assembly Hansard, 24 October 2006.

<sup>6</sup> Section 68 makes it an offence to attempt to rescue a seized animal. Section 69 limits the liability of those who lawfully seize, detain or destroy an animal under this legislation.

requirement in section 63 that the owner of a seized dog be notified. This requirement is being removed by the Bill in relation to a dangerous or restricted dog that has been seized after attacking or biting a person or animal without provocation. Further, there is no opportunity provided to the owner of such dog to make representations to the council before the dog is killed.

6. The Committee notes the importance of protecting the community from attacks by dogs and the need for clear regulation to minimise the possibility of such attacks. However, the Committee also notes that a dog may be considered to be the property of its owner and, as such, should not be subjected to arbitrary interference. Given this, the Committee is of the view that the legislation should provide for the owner of a seized dog to be notified before the dog is killed and be provided with an opportunity to be heard in accordance with fundamental principles of procedural fairness.

- |  |
|--|
| <p>7. <b>The Committee is of the view that, given that a dog is the property of its owner, no action should be taken to kill a dog without first giving notice to the owner and providing the owner with an opportunity to make representations.</b></p> <p>8. <b>The Committee refers to Parliament the question as to whether this amendment, by allowing a dog to be killed with no requirement that notice be given to the owner and providing no opportunity for the owner to make representations, unduly trespasses on personal rights and liberties.</b></p> |
|--|

*The Committee makes no further comment on this Bill.*

## 7. CRIMES AND COURTS LEGISLATION AMENDMENT BILL 2006

Date Introduced: 27 October 2006  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Bob Debus MP  
Portfolio: Attorney General

### Purpose and Description

1. The Bill amends a range of criminal and court-related legislation as set out below.

### Background

2. The following background was provided in the second reading speech:

The bill makes a number of miscellaneous amendments to the criminal law and court procedures. These amendments are designed to improve the administration of the justice system... [and] will improve the efficiency and operation of the criminal justice system and the courts.<sup>7</sup>

### The Bill

3. The Bill makes the following amendments:
  - amend the *Bail Act 1978* to create a presumption against bail in respect of certain offences under the *Drug Misuse and Trafficking Act 1985* relating to the cultivation of commercial quantities of prohibited drugs or plants or the cultivation or manufacture of prohibited drugs or plants for a commercial purpose (including where a child is exposed to the cultivation or manufacturing process) [proposed amended s 8A];
  - amend the *Child Protection (Offenders Prohibition Orders) Act 2004* to omit a redundant requirement that a person arrested under that Act be brought before an authorised person [proposed amended s 13];
  - amend the *Child Protection (Offenders Registration) Act 2000* to update a cross-reference to the *Crimes Act 1900* [proposed amended s 3];
  - amend the *Children (Criminal Proceedings) Act 1987* to make it clear that enforcement actions in respect of a breach of a good behaviour bond may be taken after the bond has expired [proposed new s 42];
  - amend the *Civil Liability Act 2002* to:
    - (i) make it clear that the exclusion from the operation of that Act of civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct applies only in relation to the civil liability of the person who carried out

---

<sup>7</sup> Mr N J Newell MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 27 October 2006.

the intentional act to a person who suffered from that act [proposed amended s 3B & Part 9 Sch 1]; and

- (ii) make it clear that the term “offender in custody” or “offender” where used in Part 2A includes persons who were “inmates”, “prisoners”, “periodic detainees”, “offenders for whom a home detention order was made” or “persons performing community service work under, or attending a place in compliance with the requirements of, a community service order” under legislation that preceded the *Crimes (Administration of Sentences) Act 1999*;
- amend the *Civil Procedure Act 2005* to extend the rule-making power to cover obtaining access to information, documents or things relating to court proceedings [proposed amended Sch 3];
- amend the *Coroners Act 1980* to extend the powers of police and other persons to establish coronial investigation scenes, investigate a place and preserve evidence [proposed new Div 1A];
- amend the *Crimes (Local Courts Appeal and Review) Act 2001* to:
  - (i) ensure that the revocation of a good behaviour bond, and orders made as a consequence of that revocation, are treated as part of an offender’s sentence under that Act [proposed amended s 3]; and
  - (ii) extend the provisions of the Act that allow a person to apply for an annulment of a conviction or sentence, to allow a person to apply for an annulment of a finding of guilt (whether or not a conviction is made) and any order made as a consequence of that finding [proposed amended s 10A];
- amend the *Crimes (Sentencing Procedure) Act 1999* to:
  - (i) allow a court that convicts a person of an offence to dispose of the proceedings without imposing any further penalty [proposed new s 10A];
  - (ii) ensure that the setting of a non-parole period, and other functions of a sentencing court under Part 4 of that Act, are exercised in relation to a suspended sentence only if the good behaviour bond relating to that sentence is revoked by the court [proposed amended s 12 & s 99(2)]; and
  - (iii) provide for additional members and functions of the New South Wales Sentencing Council [propose amended s 100I & s 100J];
- amend the *Criminal Appeal Act 1912* to:
  - (i) ensure that the revocation of a good behaviour bond, and orders made as a consequence of that revocation, are treated as part of an offender’s sentence under that Act [proposed amended s 2]; and
  - (ii) revise the system of appeals against sentences imposed by the Drug Court [proposed new s 5AF & s 5DF];
- amend the *Criminal Procedure Act 1986* to:
  - (i) establish an evidentiary presumption in respect of persons acting in their official capacity as public officers [proposed new s 3(3)];



- (ii) make it clear that certain persons have sufficient authorisation under that Act to commence proceedings [proposed amended s 48];
- (iii) enable a court attendance notice issued by a police officer to be served by a prosecutor [proposed amended s 52(1)];
- (iv) remove the requirement that an endorsement of service be filed with the court together with a court attendance notice [proposed amended s 52(4)];
- (v) exempt children from having to endorse certain written statements provided as evidence in committal proceedings [proposed new s 76(5A)];
- (vi) give a Magistrate discretion to admit prosecution evidence in committal proceedings despite non-compliance with certain requirements relating to adducing such evidence [proposed new s 86(2)];
- (vii) clarify the circumstances in which a person who provides a written statement that is proposed to be tendered as part of prosecution evidence in committal proceedings may be directed to attend to give oral evidence [proposed amended s 91];
- (viii) extend the limitation period within which proceedings for summary offences that involve a coronial investigation must be commenced; [proposed amended s 179]; and
- (ix) make provision for the expiration of arrest warrants issued under that Act [proposed amended s 237];
- amend the *Director of Public Prosecutions Act 1986* to make it clear that the DPP may take over proceedings relating to the freezing of assets brought under the *Confiscation of Proceeds of Crime Act 1989* [proposed new s 9(5)];
- amend the *District Court Act 1973* to:
  - (i) ensure consultation between the Chief Judge and the Attorney General before substantial alterations are made to the Court's sitting calendar [proposed new s 32(1A)];
  - (ii) achieve consistency in respect of the procedures relating to subpoenas between jurisdictions [proposed new s 171(5)],
- amend the *Drug Court Act 1998* to:
  - (i) provide that when imposing an initial sentence on a Drug Court participant, the Drug Court is not obliged to fix a non-parole period or comply with certain formalities [proposed new s 7A(4) & s 7B(5)];
  - (ii) make further provision with respect to proceedings for breaches of conditions of good behaviour bonds [proposed new s 7E]; and
  - (iii) modify the power of the Drug Court to deal with offences that have not been formally referred to the Court [proposed s 7A(8) and s 7D(8)];<sup>8</sup>

---

<sup>8</sup> In *R v Toman* [2004] NSWCCA 3, the Court of Criminal Appeal held that s 12(4) of the Drug Court Act applied to an appeal court in the same way as to a judge of first instance, so as to limit the final sentence imposed on appeal to one no greater than the initial sentence. The Bill amends that Act to provide that the

- amend the *Drug Misuse and Trafficking Act 1985* to:
  - (i) create a new offence relating to the possession of a tablet press [proposed new s 11B];
  - (ii) create new offences relating to the exposure of children to things done on drug premises [proposed new s 36Y];
  - (iii) extend the provisions of the Act that permit the pre-trial destruction of prohibited drugs so that they also apply to prohibited plants [proposed amended s 39B- 39M]; and
  - (iv) extend the regulation-making power in relation to the sale and storage of precursors to include apparatus capable of being used in the manufacture or production of a prohibited drug [proposed new s 45(2A);
- amend the *Electronic Transactions Act 2000* to enable an electronic case management system to be established that provides for the exchange of information relating to court proceedings between bodies or persons prescribed by rules of court [proposed new s 14B(1)(h)];
- amend the *Evidence (Audio and Audio Visual Links) Act 1998* to enable persons required to attend bail proceedings occurring during a weekend or on a public holiday to do so by way of audio visual link [proposed new s 5BB(1A) & s 5BBA(1A)];
- amend the *Evidence (Children) Act 1997* to make it clear that a recording of an interview with a child is not required to be served on a party to proceedings [proposed new s 9(1A)];
- amend the *Land and Environment Court Act 1979* to extend the preliminary conference provisions under s 34 of that Act to all Class 3 matters of the Court [proposed amended s 34];
- amend the *Local Courts Act 1982* to ensure consultation between the Chief Magistrate and the Attorney General before substantial alterations are made to the Court's sitting calendar [proposed amended s 11(2A)];
- amend the *Summary Offences Act 1988* to:
  - (i) give lawful effect to any arrangements with respect to a public assembly that are agreed between the Commissioner of Police and the organizer [proposed amended s 24]; and
  - (ii) update the method by which notices may be served under that Act [proposed amended s 23 & s 25];
- amend the *Telecommunications (Interception) (New South Wales) Act 1987* to:
  - (i) change the name of the Act so that it mirrors the name of the corresponding Commonwealth Act, ie, the *Telecommunications (Interception and Access) (New South Wales) Act 1987*; and

---

Court may pass a more severe sentence than the initial sentence imposed on the relevant offender under s 7A or s 7B thereof: proposed new s 5DC(3).

- (ii) confer reporting functions on the Ombudsman that mirror the functions of the Commonwealth Ombudsman under the corresponding Commonwealth Act [proposed new s 11(1A); and
- amend the *Witness Protection Act 1995* to allow arrangements relating to the establishment of a new identity under that Act to be extended to former participants in the witness protection program operated by police before that Act commenced [proposed new s 45].

## Issues Considered by the Committee

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

#### Retrospectivity: proposed new s 25 & s 26 of the *Civil Liability Act 2002*

4. Currently, the *Civil Liability Act 2002* [CLA] provides that its provisions do not apply to civil liability in respect of an intentional act done with intent to cause injury or death, or that is sexual assault or other sexual misconduct [s 3B(1)(a)].<sup>9</sup>
5. The Bill amends s 3B(1)(a) to read instead:

civil liability of a person in respect of an intentional act *that is done by the person* with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person.
6. Proposed new cl 25(2) of Part 9 to Sch 1 of the CLA makes it clear that this exclusion applies only in relation to the civil liability of the person who carried out the intentional act. It will not apply in circumstances where a victim of such an intentional act sues a third party for negligence for failing to prevent the act. The Explanatory Note provides as a specific example that the exclusion will not apply where an offender in custody, who has been intentionally injured by another offender in custody, sues the Department of Corrective Services for negligence for failing to prevent the intentional injury.
7. Moreover, the Bill operates retrospectively, as the amendment is deemed to have commenced at the same time as s 3B(1)(a) [proposed cl 25(3)]. Although it does not affect any final determination of legal proceedings before the commencement of proposed cl 25, it *does* apply to legal proceedings not finally determined, which relate to an award of damages, even if the proceedings which resulted in that award have been finally determined [proposed cl 25(5)].
8. It was noted in the second reading speech that these amendments arise in response to the recent Supreme Court decision in *Bujdoso v The State of New South Wales*,<sup>10</sup> a case in which a former prisoner sued the State pursuant to being attacked in Silverwater Prison, alleging negligence in its failure to take reasonable steps to protect him from the foreseeable risk that he would be the victim of an intentional act of violence. In his decision, Justice Sully held as follows:

It seems to me that had Parliament so intended [ie, for the State as third party not to be liable], nothing would have been easier than for Parliament to have said so.

<sup>9</sup> Section 3B was inserted by the *Civil Liability Amendment (Personal Responsibility) Act 2002*.

<sup>10</sup> [2006] NSWSC 896.

Parliament has not said so; and a Court should not lightly insert words, and certainly not words of great potential importance, into the chosen words of the Legislature...

As has been previously noted, the amending Act which inserted section 3B into the principal Act effected a major re-casting of the civil law of negligence, and did so upon the basis that the exercise was designed to re-balance the antecedent law by linking significant statutory caps and restrictions to a concept of personal responsibility. If there is one thing that cannot be laid at the door of this plaintiff it is that he had any personal responsibility for an unprovoked, unexpected and vicious assault. It can certainly be laid at the door of the defendant, and has been so laid by a unanimous Bench of the Court of Appeal, and subsequently by the High Court of Australia, that the defendant bears direct responsibility for the coming into existence of the opportunity for the carrying out of that assault.<sup>11</sup>

### Offenders in custody

9. The definition of “offender in custody” was also a pivotal matter in the *Bujdoso* decision.<sup>12</sup> Part 2A of the CLA applies to an award of personal injury damages against a protected defendant<sup>13</sup> in respect of the injury to, or death of, a person which occurred while that person was an offender in custody, being:

inmates, offenders serving their imprisonment by way of periodic detention, offenders serving their imprisonment by way of home detention and persons performing community service work under, or attending a place in compliance with the requirements of, a community service order [s 26A].

10. Part 2A includes s 26L, added by the *Civil Liability Amendment (Offender Damages Trust Fund) Act 2005*, which requires that any damages awarded to an offender are to be held in trust for the offender by the protected defendant liable to pay those damages, and may be paid out only as authorised by the Act [Division 6 of the CLA]. That Act also included transitional provisions, which provided that Part 2A extended to an award of personal injury damages in proceedings begun before its commencement; and that Division 6 extended to an award of damages either made:

- before the commencement of the provision that has not been satisfied by the protected defendant concerned as at that commencement; or
- after the commencement of the provision in respect of a claim for damages that arose before that commencement [cl 20 and cl 21 of Part 7 Sch 1 to the Act].

---

<sup>11</sup> [2006] NSWSC 896 at paragraphs 40 and 47.

<sup>12</sup> See [2006] NSWSC 896 at paragraphs 49 to 61.

<sup>13</sup> Namely:

- the Crown (within the meaning of the *Crown Proceedings Act 1988*) and its servants;
- a Government department and members of staff of a Government department;
- a public health organisation (within the meaning of the *Health Services Act 1997*) and members of staff of a public health organisation;
- any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person’s public official functions; and
- a management company or submanagement company (within the meaning of the *Crimes (Administration of Sentences) Act 1999* and members of staff of such a company: s 26A of the *Civil Liability Act 2002*.

11. In *Bujdoso*, the Plaintiff successfully argued that, as he was not an “offender in custody” at the relevant time, he was not bound by the provisions of Division 6, especially s 26L.
12. To avoid this situation recurring, the Bill provides that the definition of offender in custody or offender in s 26A(1) of the CLA includes, and is *taken to always have included*, all such persons as are specified therein [proposed cl 26].
13. According to the second reading speech:
 

In relation to the Bujdoso appeal presently pending in the Court of Appeal, the intention is that the amendments will have no effect on the final determination of damages, but the Court of Appeal will need to take the amendments into account when determining the issue of the application of the offender damages trust fund provisions.<sup>14</sup>

14. **The Committee will always be concerned to identify the retrospective effects of legislation which may impact adversely on any person.**
15. **The Committee notes that proposed cl 25 and cl 26 of Part 7 of Schedule 1 to the *Civil Liability Act 2002* deem that that the proposed amendments to s 3B(1) and s 26 have always been applicable to the operation of the Act. This may directly and adversely affect the damages rights of individuals under the Act when a Court considers the application of the Part 2A offender damages trust fund provisions.**
16. **The Committee refers to Parliament the question of whether the retrospective application of the Bill’s amendments unduly trespasses upon the rights of persons who would not otherwise be subject to the Act’s restrictions relating to damages.**

**Reversal of onus of proof: proposed new s 11B, s 36Y & s 36Z of the *Drugs Misuse and Trafficking Act 1985***

**Possessing a tablet press**

17. The Bill makes it an offence to be in possession of a tablet press which is capable of being used to produce a prohibited drug in tablet form. It is a defence if the defendant establishes that the tablet press is used to produce tablets in connection with an activity that is not unlawful, or otherwise has a reasonable excuse for possessing the tablet press [proposed s 11B(2)]. The penalty for such an offence is a fine of 20 penalty units (currently \$2,200), imprisonment for a term of 2 years, or both.
18. Proposed s 11B clearly reverses the onus of proof, in that the prosecution is not required to prove the fundamental elements of the offence.

**Onus of proof**

19. Reversing the onus of proof is inconsistent with the presumption of innocence, which is well recognised as a fundamental human right, protected under the common law<sup>15</sup>

<sup>14</sup> Mr N J Newell MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 27 October 2006.

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

and under international law.<sup>16</sup> However, the Committee notes that the presumption of innocence is not absolute.

20. It is widely accepted in Australia and in comparable jurisdictions that the presumption of innocence can be qualified in pursuit of legitimate objectives. This is so even in jurisdictions such as Canada where the right to be presumed innocent is constitutionally entrenched.<sup>17</sup> The European Court of Human Rights has 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 Art 6(2) of the European Convention on Human Rights.<sup>18</sup>

21. The Commonwealth Attorney-General's Department's *A Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers* states:

In general, the prosecution should be required to prove all aspects of a criminal offence beyond reasonable doubt. 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.

...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.<sup>19</sup>

22. The object of the Act is to prohibit the manufacture, supply, possession and use of certain drugs, an extensive list of which is set out in Sch 1 thereto. The object of s 11B is to criminalise possession of the means of supplying a prohibited drug in tablet form. Thus, with reference to the Commonwealth Guidelines, the intent to use a tablet press for such supply is indeed "central to the question of culpability". However, the reason for the offence is that the manufacture, supply, possession and use of certain drugs is considered to pose "a grave danger to public health or safety". Nonetheless, it is arguable that the mere possession of a tablet press is much more innocuous than being in possession of chemicals, etc, to be used in the production of a prohibited drug.

**23. The Committee notes that proposed s 11B places on the defendant the onus of proof on whether a tablet press is used to produce tablets in connection with an activity that is not unlawful, which is the essence of the offence.**

<sup>16</sup> See Article 14(2) of the International Covenant on Civil and Political Rights, which states that: Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

<sup>17</sup> See s 11 of the Canadian *Charter of Rights and Freedoms*.

<sup>18</sup> See *Salabiaku v France* (1988) 13 EHRR 379.

<sup>19</sup> See [www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/07B8DF7C133D46C8CA256E5F000339FC/\\$FILE/Consolidated+Guide+++February+2004.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/07B8DF7C133D46C8CA256E5F000339FC/$FILE/Consolidated+Guide+++February+2004.pdf)

- 24. The Committee notes that reversing the onus of proof is inconsistent with the presumption of innocence, which is a fundamental human right.**
- 25. The Committee notes that while reversing the onus of proof may be appropriate in certain circumstances, proposed s 11B does not fall squarely within the Commonwealth Guidelines for such provisions.**
- 26. The Committee refers to Parliament the question whether proposed s 11B trespasses unduly on the right to the presumption of innocence by reversing the onus of proof.**

### Drug premises

27. Proposed s 36Y(2)(b) creates the new aggravated offence of knowingly allowing premises to be used as drug premises,<sup>20</sup> where the person knows a child has access to those premises. Specifically, the prosecution must prove that the defendant “exposes” a child to:
- a prohibited drug or prohibited plant;
  - a drug supply process; or
  - any equipment capable of being used to administer a prohibited drug.
28. Proposed s 36Z(2)(b) makes similar provision in relation to organising or conducting, or assisting in organising or conducting, any drug premises.
29. The maximum penalties for an offence under s 36Y or s 36Z are a fine of 60 penalty units or imprisonment for 14 months for a first offence, and 600 penalty units and imprisonment for 6 years for a subsequent offence.

It is a defence to the offences if the defendant establishes that the relevant exposure of the child did not endanger the health or safety of the child [proposed new s 36Y(3) & s 36Z(5)].

### Endangering a child

30. The aggravating factor in the offences in proposed s 36Y(2) and s 36Z(2) is that the offending conduct endangers a child. However, the offence is drafted so that endangerment does not need to be proven by the prosecution. Rather, the onus is placed on the defendant to disprove this essential element.
31. With reference to the Commonwealth Guidelines on reversing the onus of proof set out above, the Committee notes that under proposed s 36Y and s 36Z:
- the matter is *not* peculiarly within the knowledge of the defendant;
  - the issue of endangerment is central to the question of culpability;
  - the offence carries a high penalty; and
  - whether the conduct poses a grave danger to health or safety is the issue to be proved.

---

<sup>20</sup> “Drug premises” means any premises that are used for either or both of the following:

- the unlawful supply or manufacture of prohibited drugs; or
- the unlawful commercial cultivation of prohibited plants by enhanced indoor means: s 36TA.

32. In June 2006 the Committee considered similar provisions of the *Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Act 2006*, relating to a new aggravated offence of cultivating a prohibited plant by enhanced indoor means in the presence of children.<sup>21</sup> The Committee sought advice from the Attorney General as to the justification for reversing the onus of proof, and in his response of 2 August 2006, he advised as follows:

The reversal of the onus of proof in the offences, in so far as the risk of harm is concerned, recognises the inherent risks to children of exposure to the hydroponic process, such as fire, electrocution, extreme heat, dangerous chemicals, insecticides and fumes as well as toxic gases and airborne bacteria...

It has been an all too common feature of hydroponic cannabis houses raided by Police in recent years that children are forced to inhabit the same living areas as those in which the cultivation process occurs. It is easy to see that there is great scope for things to go wrong with possibly fatal consequences...

The fact of exposure to the cultivation process or to substances stored for that purpose will have to be proved and a defence is available as a safeguard if there is no actual harm to the health and safety of the exposed child.<sup>22</sup>

#### **“Assisting” at drug premises**

33. For the purposes of s 36Z, a person assists in organising or conducting drug premises if, eg, the person acts as a lookout, door attendant or guard in respect of any premises that are organised or conducted as drug premises. It is also a defence to a prosecution under s 36Z if the defendant establishes that he or she did not know, and could not reasonably be expected to have known, that the premises to which the charge relates were being organised or conducted as drug premises [proposed new s 36Z(4)].
34. Thus, s 36Z(4) requires a defendant charged with assisting in the organisation or conduct of drug premises to prove that he or she did not know or could not reasonably have known, that the premises to which the charge relates were being organised or conducted as drug premises, thereby reversing the onus of proof.

35. **The Committee notes that proposed s 36Y and s 36Z place on the defendant the onus of proof regarding whether a child was endangered, which is the essence of the offence.**
36. **The Committee notes that the basis for creating these aggravated offences is concern for the welfare of children who may be exposed to drug premises.**
37. **The Committee notes that s 36Z(4) also places the onus of proof on a defendant charged with assisting in the organisation or conduct of drug premises to prove that he or she did not know or could not reasonably have known, that the premises to which the charge relates were being organised or conducted as drug premises.**
38. **The Committee notes that reversing the onus of proof is inconsistent with the presumption of innocence, which is a fundamental human right.**

<sup>21</sup> See Legislation Review *Digest* No 8 of 2006.

<sup>22</sup> Extract from letter of the Hon Bob Debus MP to the Committee, Legislation Review *Digest* No 9 of 2006, p 19.



- |   |
|---|
| <p><b>39. The Committee notes that while reversing the onus of proof may be appropriate in certain circumstances, proposed s 36Y(2) and s 36Z(2) arguably fall outside the Commonwealth Guidelines for such provisions.</b></p> <p><b>40. The Committee refers to Parliament the question whether proposed s 36Y and s 36Z trespass unduly on the right to the presumption of innocence by reversing the onus of proof.</b></p> |
|---|

*The Committee makes no further comment on this Bill.*

## 8. EDUCATION LEGISLATION AMENDMENT BILL 2006

Date Introduced: 27 October 2006  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Carmel Tebbutt MP  
Portfolio: Education & Training

### Purpose and Description

1. The Bill amends:
  - (a) the *Education Act 1990*:
    - (i) to facilitate the identification and management of students whose enrolment at a school would pose a risk to the health or safety of any person, and
    - (ii) to empower the Governor to make regulations for the publication of information contained in periodic reports to parents on student achievement, and
    - (iii) to facilitate successful prosecutions for failure to enrol school-age children for school or to register them for home schooling.
  - (b) the *Education Regulation 2001* to make provision, consistent with the power conferred as referred to in paragraph (a)(ii), with respect to the publication of results of annual assessments of academic achievement contained in such reports to parents, and
  - (c) the *Education (School Administrative and Support Staff) Act 1987* to provide for the sub-delegation of functions that have been delegated under that Act by the Director-General of the Department of Education and Training, and
  - (d) the *Teaching Service Act 1980*:
    - (i) to provide that regulations currently made by the Director-General of the Department of Education and Training are in future to be made by the Governor, and
    - (ii) to confirm the validity of existing regulations that have been made under that Act, whether by the Governor or by the Director-General, and of anything done or omitted to be done under those regulations, and to ensure that those regulations continue to have effect as if they had been made by the Governor, and
  - (e) the *Freedom of Information Act 1989* to include a document containing information provided about a student under Division 2 of proposed Part 5A of the *Education Act 1990* as an exempt document under that Act.

## Issues Considered by the Committee

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

#### Ministerial Guidelines: Proposed Division 4

2. Proposed Part 5A of the Bill allows the Department of Education and Training, a non-government schools authority or a school to request a “relevant agency” to provide information about a particular student. It may make such a request only for the purpose of assisting it to assess whether the enrolment of the student at the school is likely to constitute a risk to the health or safety of any person (including the student), and to develop and maintain strategies to eliminate or minimise any such risk.
3. “Relevant agencies” include schools, non-government schools authorities, NSW Police, public health organisations and the Departments of Community Services and Juvenile Justice.
4. The proposed Part allows for the information obtained to be passed on to other schools, the Department or a non-government schools authority or other person or body as determined by the Minister and set out in guidelines.
5. Proposed Division 4 of Part 5A provides that the Minister may issue guidelines in relation to the sharing of information about students. Proposed section 26J states that the guidelines must make provision for a number of different matters, including:
  - the general principles that a person must bear in mind in relation to sharing information under these amendments;
  - what is to constitute a risk to the health or safety of a person;
  - the kind of information that may or must be sought from an agency;
  - who may make a request for information;
  - who may provide information on behalf of an agency;
  - the circumstances in which a relevant agency may refuse to provide information requested;
  - the way in which information obtained is to be kept and the length of time that it is to be kept; and
  - the circumstances in which consultations are to be held with students about whom information has been obtained, with the parents of the students concerned, or with both parents and students.
6. In addition, the Minister can make provision in the guidelines for other matters, as he or she considers appropriate, and may amend or revoke the guidelines. The guidelines and any instrument amending or revoking them must be published in the Gazette, but are not disallowable instruments.
7. Under proposed section 26K, any person or agency involved in the administration, or having functions under, the provisions relating to sharing of information about a student is under a “duty” to comply with any applicable guidelines. The Bill does not make it an offence to fail to comply with any of the guidelines.

8. Most of the matters listed in section 26J that must be included in the ministerial guidelines regulate the way that information may be shared under the legislation. In effect, they are safeguards to ensure that the authority to exchange and use information obtained under the Bill is not misused. The Committee is of the view that these safeguards are vital to protecting a student's right to privacy from undue trespass under a regime that will, necessarily, trespass on that right to a significant degree.
9. In addition, most of the matters set out in section 26J for inclusion in guidelines regulate the exercise of the new information sharing powers given by the Bill and include definitions central to the appropriate exercise of those powers. For example, the Bill does not specify the kind of information that may be sought and provided to a school, even though this is at the crux of the regime. This is to be covered in the proposed ministerial guidelines.
10. The Committee is of the view that definitions which are central to the operation of a legislative regime should be provided for in the legislation itself and not in guidelines, especially if those guidelines are not disallowable.

- |   |
|---|
| <ol style="list-style-type: none"><li>11. <b>The Committee notes that the matters listed in proposed section 26J to be included in ministerial guidelines provide some safeguards against an undue trespass on a student's privacy rights. However, the Committee is of the view that matters which are central to the operation of the new regime should be provided for in the Act itself and not in guidelines, especially if those guidelines are not disallowable.</b></li><li>12. <b>The Committee has written to the Minister for advice as to why the matters set out in section 26J are not included in the Act.</b></li><li>13. <b>The Committee refers to Parliament the question as to whether providing for the matters set out in section 26J to be dealt with by ministerial guidelines rather than in the Act itself is an inappropriate delegation of legislative power.</b></li></ol> |
|---|

*The Committee makes no further comment on this Bill.*

## 9. ENVIRONMENTAL PLANNING LEGISLATION AMENDMENT 2006

Date Introduced: 24 October 2006  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Frank Sartor MP  
Portfolio: Planning

### Purpose and Description

1. The objects of this Bill are:
  - (a) to amend the *Environmental Planning and Assessment Act 1979* with respect to the certification of development, development contributions, major projects and other miscellaneous matters;
  - (b) to amend the *City of Sydney Act 1988* with respect to the Central Sydney Planning Committee;
  - (c) to amend the *Building Professionals Act 2005* with respect to the appointment of a council as principal certifying authority;
  - (d) to amend the *Local Government and Environmental Planning and Assessment Amendment (Transfer of Functions) Act 2001* with respect to miscellaneous matters; and
  - (e) to amend the *Strata Schemes (Freehold Development) Act 1973* and the *Strata Schemes (Leasehold Development) Act 1986* to introduce objective criteria that must be met before a strata certificate can be issued.

### Background

2. In his second reading speech, the Minister said:

The [Bill] is a housekeeping measure of targeted amendments that will improve the operation of the planning system. This Bill will amend six pieces of planning and building legislation...

The Bill has been developed to address issues raised by stakeholders and practitioners in eight separate areas of the planning and building system.<sup>23</sup>

### Issues Considered by the Committee

3. **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.***

<sup>23</sup> The Hon Frank Sartor, MP Minister for Planning, Legislative Assembly Hansard, 24 October 2006.

# 10. HOME BUILDING AMENDMENT (STATUTORY WARRANTIES) BILL 2006

Date Introduced:	27 October 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Diane Beamer MP
Portfolio:	Fair Trading

## Purpose and Description

1. The object of this Bill is to amend the Principal Act:
  - (a) to displace the Onerati principle<sup>24</sup> by enabling a person to bring proceedings to recover with respect to several but distinct deficiencies arising from breach of the same statutory warranty providing certain requirements are met, and
  - (b) to clarify the effect of section 18D of the Act in relation to the entitlement of a successor in title to take the benefit of the statutory warranty of a predecessor in title.

## Background

2. The second reading speech set out the following background:

In August 2006 the Court of Appeal delivered judgment in *Honeywood as executrix of the estate of the late Neville Honeywood v Munnings & Anor* [2006] NSWCA 215. In that case the homeowners sued their builder, Mr Honeywood, for alleged defective work in their dwelling. These were the second proceedings instituted by the consumers, the first being an action in the former Consumer Claims Tribunal in 1999. Mr and Mrs Munnings discovered what they allege are further defects not apparent at the time they first brought action in the tribunal and in September 2001 they commenced second proceedings in the then Fair Trading Tribunal limited to these alleged new defects.

This second legal action was subsequently referred to the Court of Appeal on a question of law. In August this year the court held that a second action based on a breach of the same statutory warranty could not be brought. It was held this was so regardless of the seriousness of the later defect or even if the homeowner was not aware of later occurring latent defects when bringing the first action. As a result, the new action by the consumers was dismissed. The basis of the court's decision is that all defects due to poor workmanship and the use of poor materials at different times during construction formed part of one composite breach of contract when the builder delivered possession of the dwelling. ... [T]he Government believes that the decision of the Court of Appeal has wide-ranging consequences for consumers and that legislative action should be taken immediately to clarify the rights of consumers. The need to provide consumers with an ability to take further legal action stems from the nature of building faults. Defects in building work often do not become apparent until

---

<sup>24</sup> This prevents a person who has previously taken legal proceedings against a contractor for breach of a statutory warranty because of a deficiency in work or materials from bringing further proceedings for breach of warranty in respect of a different deficiency that existed at the time of completion of the work.

some time after the completion of the work. In some cases these may be serious structural faults. That defects or deficiencies may not become apparent for some time after completion of the job is recognised in the seven-year period allowed in the Act to take legal proceedings for a breach of statutory warranty.<sup>25</sup>

## The Bill

3. The Bill amends the Act to provide that the fact that a person entitled to the benefit of a statutory warranty<sup>26</sup> has enforced the warranty in proceedings in relation to a particular deficiency in the work does not prevent the person from enforcing the same warranty in subsequent proceedings if the person did not know, and could not reasonably be expected to have known, of the existence of the deficiency at the conclusion of the earlier proceedings [proposed s 18E].

## Issues Considered by the Committee

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

#### Retrospectivity: Schedule 1[5]

4. Proposed Schedule 4, Part 13 applies the Bill's provisions to:
  - a breach of warranty that occurred before the Part's commencement;
  - proceedings to enforce a statutory warranty that are commenced after the commencement of the Part and are subsequent to earlier proceedings to enforce the same warranty; and
  - subsequent proceedings to enforce a statutory warranty that were commenced before the Part's commencement and that have not been heard.
5. This retrospectively changes the way a statutory warranty can be enforced, as it allows different deficiencies to be enforced at different times, as long as such deficiencies could not reasonably be known of when the warranty was earlier enforced. However, it does not change the nature of the warranty itself.
6. This may adversely affect builders who have previously had a warranty enforced against them, as under the Onerati principle such warranties could not be otherwise further enforced.

7. **As the Bill does not change the nature of a statutory warranty and only allows further enforcement proceedings to be brought if a deficiency could not reasonably be known of when the warranty was earlier enforced, and given the important aim of consumer protection, the Committee does not consider that the retrospective application of the Bill trespasses unduly on personal rights and liberties.**

***The Committee makes no further comment on this Bill.***

<sup>25</sup> Mr Neville Newell MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 27 October 2006.

<sup>26</sup> Apart from a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time.

# 11. INDUSTRIAL RELATIONS (CHILD EMPLOYMENT) BILL 2006; INDUSTRIAL RELATIONS FURTHER AMENDMENT BILL 2006; & WORKERS COMPENSATION AMENDMENT (PERMANENT IMPAIRMENT BENEFITS) BILL 2006

Date Introduced: 24 October 2006  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon John Della Bosca MLC  
Portfolio: Industrial Relations

## Purpose and Description

1. The objects of the *Industrial Relations (Child Employment) Bill 2006* [the Child Employment Bill] are to:
  - require employers that are constitutional corporations<sup>27</sup> not bound by State industrial instruments to provide certain minimum conditions of employment to children whom they employ under federal workplace agreements, or other arrangements entered into on or after 27 March 2006; and
  - continue the application of the unfair dismissal provisions that are currently contained in the NSW *Industrial Relations Act 1996* [IR Act] to the dismissal by constitutional corporations of children whom they employ.
2. The objects of the *Industrial Relations Further Amendment Bill 2006* are to:
  - (a) amend the IR Act to:
    - (i) enable the NSW Industrial Relations Commission [the Commission] to exercise certain dispute resolution functions if it is authorised or permitted to do so under federal workplace agreements;
    - (ii) enable the Commission to exercise its functions in co-operation with the industrial relations tribunals of other States;
    - (iii) enable documents and notices that are currently published in the Industrial Gazette to be published instead on a NSW industrial relations website [proposed s 208A];<sup>28</sup>

<sup>27</sup> A *constitutional corporation* is a corporation to which paragraph 51(xx) of the Commonwealth *Constitution* applies. Paragraph 51(xx) confers power on the Commonwealth Parliament to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth: proposed s 3(1).

<sup>28</sup> The NSW industrial relations website is the Internet website used for the time being by the Industrial Registrar to provide public access to information relating to NSW industrial relations matters. If a matter cannot for technical or other reasons be published on the website at a particular time, the matter may be published at that time in such other manner as the Industrial Registrar determines and published on that



---

Industrial Relations (Child Employment) Bill 2006; Industrial Relations Further Amendment Bill 2006; & Workers Compensation Amendment (Permanent Impairment Benefits) Bill 2006

- (iv) confirm the effect of certain provisions of the Act which deal with outworkers in clothing trades;
  - (v) make it an offence for certain persons (in addition to subcontractors) to give a false written statement to principal contractors for the purposes of s 127 of the Act;
  - (b) amend the *Occupational Health and Safety Act 2000* to enable certain employees who have been dismissed because of making a complaint about, or exercising certain functions in connection with, occupational health and safety matters to apply to the Industrial Court of New South Wales for reinstatement;
  - (c) amend the *Workers Compensation Act 1987* to relocate the provisions of Part 7 (Protection of injured employees) of Ch 2 of the IR Act in the former Act; and
  - (d) make consequential amendments to the *Employment Protection Act 1982* and the *Industrial Relations Commission Rules 1996*.
3. The object of the *Workers Compensation Amendment (Permanent Impairment) Bill 2006* is to amend the *Workers Compensation Act 1987* to provide for a 10% increase in the amount of permanent impairment compensation benefits payable under that Act [proposed amended s 66 & Sch 6 Part 6].

## Background

4. The *Workplace Relations Act 1996* of the Commonwealth [the Federal Act], as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* of the Commonwealth [the Federal Work Choices Act], regulates employment relationships between trading, financial or foreign corporations and their employees.
5. Section 16(1) of the Federal Act purports to exclude the operation of certain State laws (including the IR Act) in its application to such employment relationships. However, s 16(2)(c), when read with s 16(3)(e), makes it clear that the federal Act is not intended to apply to the exclusion of State laws dealing with “child labour”.<sup>29</sup>
6. It was noted in the second reading speech that:

The New South Wales Government has drafted the Industrial Relations (Child Employment) Bill to provide a safety net of minimum conditions to protect children from substandard wages and conditions if and when they enter into workplace agreements or other arrangements. The bill also gives children who are unfairly dismissed remedies that are no longer available under the Workplace Relations Act 1996. Section 16(3)(e) of the Federal Workplace Relations Act 1996 clearly states that State child labour legislation is a non-excluded State law. In other words, child labour remains a matter with respect to which the States may legislate...

Before WorkChoices it was not regarded as necessary to make child-specific labour laws in this State. General industrial relations law applied to children and continues to do so. State industrial relations instruments continue to provide appropriate wages

---

website as soon as practicable thereafter. In that case, it is taken to have been published on that website at that earlier time: proposed s 208B(3).

<sup>29</sup> Although the term “child” is not defined in the federal Act, or the *Acts Interpretation Act 1901* (Cth), the term is customarily understood to mean a person who is under the age of 18 years.

and conditions for children at work. The problem that this bill seeks to remedy is that the Federal Workplace Relations Act generally applies to children employed by a constitutional corporation.<sup>30</sup>

## The Bills

### The *Industrial Relations (Child Employment) Bill*

7. The Bill requires an applicable employer of a child to ensure that:
  - the child is provided with the same conditions of employment as the minimum conditions of employment for the child; or
  - if the conditions of employment provided to the child are different to the minimum conditions of employment for the child - the conditions of employment provided to the child do not, on balance, result in a net detriment to the child when compared to the minimum conditions of employment [proposed s 4(2)].<sup>31</sup>
8. The minimum conditions of employment for a child are:
  - the conditions of employment for employees performing similar work to that performed by the child for which provision is made from time to time in the comparable State award; and
  - such other conditions of employment for which the industrial relations legislation (within the meaning of the IR Act) makes provision that would have applied to the employment of the child if the employer of the child were bound by the comparable State award [proposed s 4(3)].
9. The Full Bench of the Commission is to set principles [the no net detriment principles] to be followed by an industrial court in determining whether an affected employer of a child has provided conditions of employment which, on balance, result in a net detriment to the child when compared to the minimum conditions of employment for the child [proposed s 5(1)]. In determining those principles, the Full Bench is to have regard, in particular, to:
  - evidence about the kinds of occupations and industries in which children are employed;
  - the State awards that apply to those occupations and industries;
  - any industrial relations legislation that may apply generally to the employment of children;

---

<sup>30</sup> Hon D A Campbell MP, Minister for Water Utilities, Legislative Assembly *Hansard*, 24 October 2006.

<sup>31</sup> The Bill applies to the employment of a child by an *affected employer* if:

- the child is employed under an agreement or other arrangement entered into on or after 27 March 2006;
- the employer of the child is a constitutional corporation that is not bound by a State industrial instrument with respect to the employment of the child; and
- a State award is in force that covers employees performing similar work to that performed by the child [a comparable State award] and that award does not bind the employer in respect of the employment of the child: proposed s 4.

---

Industrial Relations (Child Employment) Bill 2006; Industrial Relations Further Amendment Bill 2006; & Workers Compensation Amendment (Permanent Impairment Benefits) Bill 2006

- any provisions of any such State awards or industrial relations legislation that operate to provide conditions of employment that are particularly important for ensuring the well-being of children who are employed; and
  - any other laws of the State which may be relevant to the employment of children or to their well-being while employed, eg, laws dealing with occupational safety, education or child protection [proposed s 5(2)].<sup>32</sup>
10. The Bill makes it an offence for an affected employer of any child to not exhibit a copy of a relevant comparable State award in a conspicuous place at the premises of employment. The maximum penalty is 10 penalty units, currently, \$1,100 [proposed s 6].<sup>33</sup>
11. An inspector under the IR Act may issue a compliance notice to an affected employer, requiring the employer to remedy a contravention of proposed s 4, or any matters occasioning such a contravention, within the period specified in the notice [proposed s 8(1)].<sup>34</sup> It is an offence for an affected employer to refuse or fail, without reasonable excuse, to comply with such requirements, with a maximum penalty of 100 penalty units (currently \$11,000) [proposed s 11].<sup>35</sup>
12. An industrial court may also order an employer to pay a civil penalty not exceeding \$10,000, if it is satisfied that the employer is an affected employer who has contravened proposed s 4 [proposed s 15(1)].
13. The Bill incorporates into the proposed Act the IR Act's unfair dismissals provisions, and applies them to any dismissal of a child from employment by a constitutional corporation on or after the day on which the Bill was introduced into Parliament [proposed s 17(2)].

### ***The Industrial Relations Further Amendment Bill***

14. The Federal Act provides that a federal workplace agreement must include procedures for settling disputes about matters arising under the agreement [s 353]. If it does not include such procedures, then the agreement is taken to include the model dispute resolution process set out in Part 13 of that Act.
15. The Bill enables the Commission to exercise any dispute resolution functions conferred on it by or under a federal workplace agreement [proposed new s 146B(1)]. Such functions will be limited to those authorised or permitted under the workplace agreement concerned, and the federal Act [proposed new s 146B(2)].

---

<sup>32</sup> The Full Bench is to review the principles at least once every three years: proposed s 5(4)

<sup>33</sup> An affected employer must also ensure that certain records are kept in respect of the employment of children for whom the employer is an affected employer. A failure to keep such records as are required by the proposed section will be an offence. The maximum penalty for such an offence will be 20 penalty units, currently, \$2,200: proposed s 7.

<sup>34</sup> A compliance notice may include directions as to the measures to be taken to remedy such a contravention, or the matters occasioning such a contravention, to which the notice relates [proposed s 9]. A person to whom a compliance notice is issued may appeal against the notice to the Industrial Court: proposed s 12(1).

<sup>35</sup> Part 6 of Ch 7 of the IR Act, as applied by s 16, makes provision with respect to the bringing of criminal and other legal proceedings.

16. The Bill also provides for the facilitation of co-operation between the Commission and the industrial tribunals of other States [proposed new Part 9A of Ch 4]. Thus, a member of the Commission may exercise functions of the Commission in joint proceedings with a member of an industrial relations tribunal of another State [proposed new s 206B]; and the Commission may exercise a function conferred on it by an industrial law of another State unless excluded by the regulations [proposed s 206C].

### **Outworkers in clothing trades**

17. Currently, the IR Act provides that the conditions of employment set out in the *Clothing Trades (State) Award* apply as the conditions of employment for outworkers in clothing trades employed by constitutional corporations [see s 129B]. The Bill makes it clear that such conditions include provisions of the award relating to matters such as the giving out of work, and the registration of persons for the purpose of giving out work [proposed amended s 129B].<sup>36</sup>
18. The Bill also clarifies that an example of an *industrial matter* for the purposes of the IR Act includes the mode, terms and conditions under which work is given out to be performed by outworkers in the clothing trades [proposed amended s 6].

### **Amendment of *Occupational Health and Safety Act 2000***

19. The *OH&S Act* makes it an offence for an employer to dismiss an employee, injure an employee in his or her employment, or alter an employee's position to his or her detriment because the employee:
- makes a complaint about a workplace matter that the employee considers is not safe or is a risk to health;
  - is a member of an OHS committee or an OHS representative; or
  - exercises any functions conferred on the employee the Act, in relation to certain employer consultation duties in relation to occupational health and safety [s 23].
20. The Bill provides that employees who have been dismissed in contravention of s 23 may apply to the NSW Industrial Court for reinstatement [proposed new s 23A(2)].

### **Amendment of *Workers Compensation Act 1987***

21. Currently, the IR Act provides that an employee who is dismissed because he or she is not fit for employment as a result of an injury may apply, in the first instance, to their employer to be reinstated and then, if the employer does not reinstate the employee, to the Commission for a reinstatement order.
22. The Bill amends the *Workers Compensation Act 1987* to relocate these provisions to a new Part 8 of that Act [proposed new s 240 – s 250]. Certain minor modifications

---

<sup>36</sup> The Bill makes it clear that s 406 of the IR Act (Awards and other industrial instruments provide minimum entitlements) has effect in relation to the conditions of employment made applicable in relation to constitutional corporations by Part 11 of Ch 2 of that Act: proposed amended s 129C].

---

Industrial Relations (Child Employment) Bill 2006; Industrial Relations Further Amendment Bill 2006; & Workers Compensation Amendment (Permanent Impairment Benefits) Bill 2006

have been made to ensure that the provisions have the same operation despite their relocation, eg, replacing the term “employee” with “worker” for consistency.<sup>37</sup>

## Issues Considered by the Committee

<p><b>23. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b></p>
---

*The Committee makes no further comment on this Bill.*

---

<sup>37</sup> The relocated provisions, in particular, proposed s 248(2), have also been modified to take into account the effect of the amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) on State and federal industrial instruments.

## 12. LEGAL PROFESSION FURTHER AMENDMENT BILL 2006

Date Introduced: 27 October 2006  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Bob Debus MP  
Portfolio: Attorney General

### Purpose and Description

1. This Bill amends the *Legal Profession Act 2004*, including:
  - (i) to revise the role of the Legal Profession Admission Board;
  - (ii) to remove the power of the Admission Board to refer to the Supreme Court issues relating to the suitability of persons for admission to the legal profession;
  - (iii) to revise the procedures regarding payments into, and out of, the Public Purpose Fund;
  - (iv) to abolish the Legal Profession Advisory Council;
    - to align the Act with legal profession model legislation; and
    - to repeal transitional provisions concerning barristers of the ACT.
2. The Bill also amends the *Administrative Decisions Tribunal Act 1997* in relation to the qualifications for appointment of a person as the Divisional Head of the Legal Services Division of the Administrative Decisions Tribunal.

### Background

3. The second reading speech stated that the Standing Committee of Attorneys-General (SCAG) developed a national legal profession scheme and model legislation designed to achieve greater consistency and uniformity in legal profession regulation in order to facilitate legal practice across State and Territory boundaries, and to standardise consumer protections across jurisdictions. NSW enacted this model in the *Legal Profession Act 2004*. The model bill has since been amended by SCAG (in July 2006) and this Bill amends that Act to maintain uniformity with the updated national model. It also makes a number of minor amendments requested by the legal profession regulators to improve the processes of administering the legislation.<sup>38</sup>

### Issues Considered by the Committee

- |   |
|---|
| <ol style="list-style-type: none"><li>4. <b>The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b></li></ol> |
|---|

---

<sup>38</sup> Mr Neville Newell MP, Parliamentary Secretary, Second Reading Speech, Legislative Assembly Hansard, 27 October 2006.

*The Committee makes no further comment on this Bill.*

## 13. RURAL COMMUNITIES IMPACTS BILL 2006\*

Date Introduced: 26 October 2006  
House Introduced: Legislative Assembly  
Member Responsible: Mr Andrew Stoner MP

### Purpose and Description

1. The object of this Bill is to require Ministers to consider the likely impact of certain legislation and other government proposals on rural communities.
2. *Rural community* is defined in the Bill as that part of New South Wales that is outside the Sydney, Newcastle and Wollongong Metropolitan areas.

### Background

3. This Bill is similar to one introduced in 2004.

### Issues Considered by the Committee

4. **The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1989*.**

*The Committee makes no further comment on this Bill.*

## 14. RURAL LANDS PROTECTION AMENDMENT BILL 2006

Date Introduced: 24 October 2006  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Ian Macdonald MLC  
Portfolio: Primary Industries

### Purpose and Description

1. The object of this Bill is to make various amendments to the *Rural Lands Protection Act 1998* relating to the accounting, auditing and annual reporting obligations of:
  - (a) rural lands protection boards, and
  - (b) the State Council of Rural Lands Protection Boards.

### Background

2. The following background was provided in the second reading speech:

The bill had its origins in a comprehensive review of the Rural Lands Protection Act in 2004. This was a five-year statutory review required under section 248 of the Act. The review was comprehensive and included stakeholders such as the New South Wales Farmers Association, representatives of ratepayers, New South Wales Treasury, and the Cabinet Office, among others. Extensive consultation was undertaken and more than 190 submissions were received. As a result of this process, wide-ranging recommendations were made to amend the Act. The purpose of the Rural Lands Protection Bill is to put in place the first of those recommendations. The other important recommendations made by the review group will be the subject of a subsequent bill once there has been further consideration.

...

The first amendment in the bill is to ease the tight time constraints for financial reporting by State Council. The second group of amendments addresses the streamlining of the financial reporting and auditing requirements to which the boards are subject. Since 1998, the State Council and all the boards have been subject to the requirements of the Public Finance and Audit Act 1983. The statutory review group acknowledged that the compliance burden on boards in satisfying the requirements of the Public Finance and Audit Act was significant. All boards have been affected by increases in audit and accounting costs, but boards with relatively low numbers of ratepayers in particular have been most adversely affected.

### Issues Considered by the Committee

3. **The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1989*.**

*The Committee makes no further comment on this Bill.*



# 15. SUPERANNUATION ADMINISTRATION AMENDMENT (TRUST DEED SCHEMES) BILL 2006

Date Introduced: 24 October 2006  
 House Introduced: Legislative Assembly  
 Minister Responsible: The Hon John Della Bosca MLC  
 Portfolio: Treasurer

## Purpose and Description

1. The Superannuation Administration Act 1996 provides for the Treasurer, as the Minister administering that Act, to approve the preparation of trust deeds providing for superannuation schemes (trust deed schemes) for the benefit of certain employees.
2. The object of this Bill is to amend the Principal Act to provide for certain persons, to also have the benefit of trust deed schemes. Those persons are:
  - (a) local government councillors, and
  - (b) spouses or de facto partners of persons who otherwise have the benefit of a trust deed scheme.
3. The Bill also validates the prior extension of trust deed schemes to such persons.

## Background

4. The following background is provided in the second reading speech:

Section 127 of the Superannuation Administration Act 1996 currently only allows specific classes of employees, rather than persons, to be admitted into the schemes. Despite this limitation the trust deeds of the two schemes have been amended over the years, consistent with Commonwealth superannuation law provisions, to admit spouses and local government councillors as members of the schemes. The proposed amendments to the Superannuation Administration Act 1996 will validate the existing membership of spouses of members of the respective schemes. The proposed amendments will also enable the Local Government Superannuation Scheme to accept councillors as members of the scheme. Councillors will not be classified as employees entitled to compulsory employer contributions to superannuation. The Local Government Act 1993 at section 251 (1) specifically excludes councillors being deemed as an employee of a council "for the purposes of any Act".<sup>39</sup>

## Issues Considered by the Committee

5. **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.***

<sup>39</sup> Mr David Campbell, Minister for Water Utilities, Minister for Small Business, Minister for Regional Development, and Minister for the Illawarra, Legislative Assembly *Hansard*, 24 October 2006.

# 16. TREES (DISPUTES BETWEEN NEIGHBOURS) BILL 2006

Date Introduced:	25 October 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Environment

## Purpose and Description

1. The object of this Bill is to enable the bringing of proceedings in the Land and Environment Court (the Court) to resolve disputes between neighbours about trees in urban areas. In particular, the Bill enables an owner of land to apply to the Court for an order to remedy, restrain or prevent damage to the owner's property, or to prevent injury, as a consequence of a tree situated on adjoining land.

## Background

2. The following background is provided in the second reading speech:

The issue of disputes about trees in the urban environment was originally considered by the New South Wales Law Reform Commission in its report entitled "Neighbour and Neighbour Relations" Report No 88, published in 1998. The Law Reform Commission's report concluded that the common law of nuisance and abatement, which currently governs disputes between private parties about trees, does not provide an adequate dispute resolution process for people living in closely settled communities.

The bill draws upon the work undertaken by the Law Reform Commission, but adopts a different approach to that contained in a number of the commission's recommendations. The proposed legislation also reflects changes to the planning laws and other legislation that have occurred since the publication of the commission's report. An exposure draft of the bill was released earlier this year for public comment and a number of changes have been made to the bill as a result of submissions received during this process.<sup>40</sup>

## Bill

3. The bill establishes a new process for the resolution of disputes about trees between neighbours where a tree has caused, is causing, or is likely in the near future to cause, damage to an applicant's property, or is likely to cause injury to any person [proposed clause 10].
4. It applies only in relation to trees situated on land within residential, business and certain other urban zones under environmental planning instruments. It does not

---

<sup>40</sup> Mr Bob Debus, Minister for the Environment, Legislative Assembly *Hansard*, 25 October 2006.

apply to trees situated on land vested in or managed by a local council [proposed section 4].

5. An owner of land may apply to the Court for an order to remedy, restrain or prevent damage to property on the land, or to prevent injury to any person, as a consequence of a tree situated on adjoining land [proposed section 7].
6. An applicant for any such order must notify certain persons, including the owner of the tree concerned and any relevant authority who would be entitled to appear in proceedings relating to the tree. The Court may also direct that other persons be notified. The Court may also waive the requirement to give notice [proposed section 8].
7. The Court may make such orders as it thinks fit to remedy, restrain or prevent damage to property, or to prevent injury to any person, as a consequence of the tree concerned. Proposed section 9 provides a range of examples of orders that the Court may make.
8. The Court may not make such orders unless it is satisfied that the applicant has made a reasonable effort to reach agreement with the owner [proposed section 10].

## Issues Considered by the Committee

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

#### Restriction of action in nuisance: Proposed section 5

9. Proposed clause 5 provides that:

No action may be brought in nuisance as a result of damage caused by a tree to which this Act applies.
10. The common law of nuisance provides protection against physical damage to land or buildings. A remedy is available once damage or substantial interference has already occurred or where it is apparent that substantial damage or interference is a virtual certainty or is imminent.<sup>41</sup> Nuisance also protects the less tangible interest of the enjoyment that a person normally derives from residing on land.<sup>42</sup> An owner of land can either sue a neighbour for nuisance or apply for a Supreme Court order to stop the nuisance.
11. Traditionally, the common law of nuisance has been used to provide a remedy to a person who suffers damage or interference as a result of problems caused by neighbouring trees. Generally a person creates a nuisance on his or her own land, which then causes an interference with the rights of an adjoining landowner or occupier, for example, legal action has been successful where tree roots spread across a boundary and caused subsidence and damage to houses by drying out the soil on

---

<sup>41</sup> R P Balkin and J L R Davis, *Law of Torts* (2nd edition, Butterworths, Sydney, 1996) at 446-447; R A Buckley, *The Law of Nuisance* (2nd edition, Butterworths, London, 1996) at 46-47 in Report 88 (1998), Neighbour and Neighbour Relations, NSW Law Reform Commission.

<sup>42</sup> Attorney General's Department, Exposure Draft, Trees (Disputes Between Neighbours) Bill 2006, August 2006.

which the houses were built,<sup>43</sup> and where overhanging branches caused fruit trees to be stunted.<sup>44</sup>

12. The problems associated with bringing an action in nuisance for damage caused by a tree are outlined in the NSW Law Reform Commission's report:

Submissions argue that the rights of a person suffering from a neighbour's nuisance tree are hard to enforce. Many say that they had approached their neighbours about the nuisance tree, but to no avail. Other problems identified include that: going to the Supreme Court to enforce rights is too expensive for most people; it can take a number of years to enforce a right; and councils generally will not help and have only limited powers.<sup>45</sup>

13. The bill provides a new system for dealing with damage to property or person caused by trees in urban areas, which is designed to mitigate problems identified by the NSW Law Reform Commission with bringing an action in nuisance.
14. While proposed section 5 provides that no action that may be brought in nuisance in relation to neighbouring trees to which the bill applies<sup>46</sup>, it does not limit other common law actions ie. abatement<sup>47</sup> and negligence<sup>48</sup>.

**15. Given that the bill establishes a targeted system to resolve disputes between neighbours, and does not limit other common law actions, the Committees does not consider that the limitation on the ability to bring an action in nuisance is a trespass on the rights of landowners or occupiers.**

*The Committee makes no further comment on this Bill.*

---

<sup>43</sup> R A Buckley, *The Law of Nuisance* (2nd edition, Butterworths, London, 1996) at 46-47. See eg *Butler v Standard Telephone Cables Ltd* [1940] 1 All ER 121, in Report 88 (1998), Neighbour and Neighbour Relations, NSW Law Reform Commission.

<sup>44</sup> *Smith v Giddy* [1904] 2 KB 448 in Report 88 (1998), Neighbour and Neighbour Relations, NSW Law Reform Commission.

<sup>45</sup> Report 88 (1998), Neighbour and Neighbour Relations, NSW Law Reform Commission.

<sup>46</sup> However, the Attorney General's Exposure Draft states that the Bill "...does not prevent any other action being brought in nuisance..." eg. where the tree is not causing damage or doesn't pose a danger to people, but is interfering with the enjoyment that a person normally derives from residing on land.

<sup>47</sup> This allows a person to cut off overhanging branches and roots intruding onto his or her property. The encroaching branches or roots do not have to cause actual damage before a person can exercise the right of abatement. However, the person may open themselves to legal action, namely trespass, if he or she goes onto the tree owner's property to trim the branches or roots unless the branches or roots have actually caused a nuisance or are a danger to life and health.

<sup>48</sup> The tort of negligence may be available where a party can demonstrate that their neighbour knew about the problem and failed in their duty of care by not taking reasonable steps to rectify the problem.

## 17. WATER INDUSTRY COMPETITION BILL 2006

Date Introduced: 24 October 2006  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon David Campbell MP  
Portfolio: Water Utilities

### Purpose and Description

1. The objects of this Bill are:
  - (a) to establish a licensing scheme to provide for private sector involvement in the supply of water and the provision of sewerage services, and
  - (b) to establish an access regime to ensure that certain monopoly infrastructure services involved in the supply of water and the provision of sewerage services are available to persons seeking access to them, and
  - (c) to facilitate the resolution of disputes between persons operating certain sewerage infrastructure and persons seeking access to the contents of that infrastructure, and
  - (d) to facilitate the resolution of disputes between private sector bodies and their customers in relation to the supply of water and the provision of sewerage services, and
  - (e) to enact provisions to facilitate the construction, maintenance and operation of infrastructure for the supply of water and the provision of sewerage services, and
  - (f) to protect private sector involvement in the supply of water and the provision of sewerage services by means of the creation of offences for that purpose, and
  - (g) to make other provision of a minor, consequential or ancillary nature.
2. The Bill also makes consequential amendments to a number of Acts and enacts certain savings and transitional provisions.
3. The *Central Coast Water Corporation Bill 2006* is cognate with this Bill.

### Background

4. The following background is provided in the second reading speech:

The Water Industry Competition Bill opens the door to competition and new investment in three key ways. First, it promotes new recycling businesses by enabling prospective sewer miners who are not able to reach a commercial agreement with specified service providers to have the terms on which they can mine sewers determined in binding arbitration conducted by the Independent Pricing and Regulatory Tribunal. Second, the bill promotes competition by establishing a comprehensive access regime to help new suppliers to negotiate arrangements for the storage and transportation of water and sewage using existing significant water and

sewerage networks. And third, the bill ensures that licensees who wish to construct and operate new water and sewerage networks will be on broadly the same footing as the public water utilities, for things like laying pipes in public roads and reading meters.

At the same time, the Water Industry Competition Bill establishes a licensing regime for private entrants to ensure the continued protection of public health, the environment and consumers. The reforms proposed by the Water Industry Competition Bill have been subject to extensive community consultation, including the release of a discussion paper, stakeholder briefings and a public investigation into water and wastewater service provision in the greater Sydney region conducted by the Independent Pricing and Regulatory Tribunal [IPART].<sup>49</sup>

## Issues Considered by the Committee

- |  |
|--|
| <p><b>5. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b></p> |
|--|

*The Committee makes no further comment on this Bill.*

---

<sup>49</sup> The Hon David Campbell MP, Minister for Water Utilities, Legislative Assembly *Hansard*, 24 October 2006.

## Part Two – Regulations

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

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Native Vegetation Amendment (Private Native Forestry) Regulation (No 2) 2006	29/09/06	8467	13/10/06	
Road Transport (General) Regulation 2005	30/09/05	7738	13/10/06	

## SECTION B: COPIES OF CORRESPONDENCE ON REGULATIONS

Regulation & Correspondence	Gazette ref
<p>Conveyancing (Sale of Land) Amendment (Smoke Alarms) Regulation 2006</p> <ul style="list-style-type: none"><li>• Letter dated 25/08/06 from the Committee to the Minister for Lands.</li><li>• Letter dated 27/10/06 from the Minister for Lands to the Committee.</li></ul>	<p>28/04/06 page 2387</p>



# 1. Conveyancing (Sale of Land) Amendment (Smoke Alarms) Regulation 2006



PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

25 August 2006

Our Ref: LRC1815

The Hon Tony Kelly MLC  
Minister for Lands  
Level 34, Governor Macquarie Tower  
1 Farrer Place  
SYDNEY NSW 2000

Dear Minister

## **Conveyancing (Sale of Land) Amendment (Smoke Alarms) Regulation 2006**

The Legislation Review Committee considered the above regulation at its meeting today and raised concerns in relation to the potential for increased transaction costs and red tape associated with selling residential property. The Committee recognises the importance of ensuring compliance with smoke alarm laws and providing penalties for non-compliance, however, there may be more efficient and costs effective ways to achieve this objective.

The Committee is aware that the Department of Lands is in discussions with the NSW Law Society and the NSW Real Estate Institute. The NSW Law Society has provided the Committee and the Department of Lands with proposed changes to the regulation that appear to achieve the objectives of the regulation, while not significantly adding to transaction costs or red tape. They have also raised other concerns with the drafting of the regulation, including how it would apply to:

- residences sold off the plan;
- the sale of partially built structures;
- a mortgagee selling a property; and
- a contract for the sale of land where it is not clear whether the land falls under Division 7A.

The Committee seeks your advice on:

- (a) whether an estimate has been made of the costs of the regulation, and if so, the size of the costs;
- (b) whether alternative means of achieving the objectives of the regulation have been considered, and why they were not chosen.

The Committee asks that you ensure that the government imposes the minimum transaction costs and regulatory burden while achieving the important object of ensuring the proper installation of smoke alarms.

Yours sincerely



Allan Shearan MP  
Chairman

## Conveyancing (Sale of Land) Amendment (Smoke Alarms) Regulation 2006



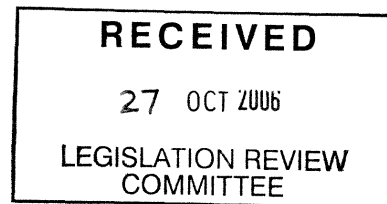
New South Wales

The Hon Tony Kelly MLC  
Minister for Justice  
Minister for Juvenile Justice  
Minister for Emergency Services  
Minister for Lands  
Minister for Rural Affairs  
Leader of the House - Legislative Council

MIN06/3565

25 OCT 2006

Mr Allan Shearan MP  
Chairman  
Legislation Review Committee  
Parliament House  
SYDNEY NSW 2000



Dear Mr Shearan

I refer to your letter regarding the Conveyancing (Sale of Land) Amendment (Smoke Alarms) Regulation 2006 ("the Regulation").

The Regulation was introduced as part of a package of legislation to implement the Government's policy, announced by the former Premier in June 2005, of requiring the installation of smoke alarms in homes and other buildings where people sleep.

The Regulation imposes an obligation on vendors, as from 1 November 2006, to attach to the contract a statement that the building has smoke alarms installed in accordance with the requirement under the Environmental Planning and Assessment Regulation and creates an offence of attaching a statement which the vendor knows to be incorrect (maximum penalty \$550).

In your letter you ask whether an estimate has been made of the costs of the Regulation and, secondly, whether alternative means of achieving the objectives of the Regulation have been considered, and why they were not chosen.

Following discussion with the Law Society of NSW and the Real Estate Institute of NSW the government has decided to amend the Regulation. The required statement of compliance will be replaced by a requirement to attach to the contract a Warning Notice bringing to the attention of vendors and purchasers the offence under the Environmental Planning and Assessment Regulation of failing to have smoke alarms installed. This proposed amendment has the support of both the Law Society of NSW and the Real Estate Institute of NSW.

Level 34, Governor Macquarie Tower  
1 Farrer Place, Sydney NSW 2000  
T (02) 9228 3999 F (02) 9228 3988

Room 809 Parliament House  
Macquarie Street, Sydney NSW 2000  
T (02) 9230 2528 F (02) 9230 2530

-2-

A Regulation giving effect to this proposal has been prepared. It is expected to be gazetted on 27 October 2006. However, the requirement to attach the Warning Notice to the contract will not commence until 1 December 2006, in order to allow solicitors, conveyancers and real estate agents time to adjust to the change as well as time to prepare and attach the Warning Notice to existing contracts.

Any costs incurred in attaching a short Warning Notice to the contract are likely to be negligible. Furthermore, once the standard contract is reprinted the Warning Notice will be incorporated into the printed contract and there will then be no additional costs of compliance. In any event, it is considered self evident that the value of lives saved by the Government's legislative package far outweighs any small costs imposed.

I trust that this information satisfactorily answers your concerns regarding the Regulation.

Yours faithfully



Tony Kelly MLC  
**Minister for Lands**

# Appendix 1: Index of Bills Reported on in 2006

	Digest Number
Aboriginal Land Rights Amendment Bill 2006	16
Adoption Amendment Bill 2006	15
Air Transport Amendment Bill 2006	2
Apiaries Amendment Bill 2006	10
Appropriation Bill 2006	9
Appropriation (Budget Variations) Bill 2006	6
Appropriation (Parliament) Bill 2006	9
Appropriation (Special Offices) Bill 2006	9
Bail Amendment (Lifetime Parole) Bill 2006	12
Banning Political Advertising (Make Labor Pay) Bill 2006*	16
Business Names Amendment Bill 2006	11
Careel Bay Protection Bill 2006*	2
Channel 7 Former Epping Site Protection Bill 2006*	10
Charter of Budget Honesty (Election Promises Costing) Bill 2006	15
Central Coast Water Corporation Bill 2006	16
Charitable Trusts Amendment Bill 2006	16
Child Protection (International Measures) Bill 2006	2
Children and Young Persons (Care and Protection) Amendment (Parent Responsibility Contracts) Bill 2006	11
Children and Young Persons (Care and Protection) Bill 2006	7
Children and Young Persons (Care and Protection) Miscellaneous Amendments Bill 2006	16
Children (Detention Centres) Amendment Bill 2006	8
Civil Liability Amendment Bill 2006	7
Coal and Oil Shale Mine Workers (Superannuation) Amendment Bill 2006	8
Community Protection (Closure of Illegal Brothels) Bill 2006*	12
Companion Animals Amendment Bill 2006	16
Constitution Amendment (Governor) Bill 2006	7
Conveyancers Licensing Amendment Bill 2006	7
Correctional Services Legislation Amendment Bill 2006	8
Courts Legislation Amendment Bill 2006	4
Courts Legislation Further Amendment Bill 2006	8
Crimes (Administration of Sentences) Amendment Bill 2006	15

	Digest Number
Crimes and Courts Legislation Amendment Bill 2005	1
Crimes and Courts Legislation Amendment Bill 2006	16
Crimes Amendment (Apprehended Violence) Bill 2006	11
Crimes Amendment (Murder of Police Officers) Bill 2006*	7
Crimes Amendment (Organised Car and Boat theft) Bill 2006	4
Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006	13
Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006	13
Crimes (Forensic Procedures) Amendment Bill 2006	14
Crimes Legislation Amendment (Gangs) Bill 2006	10
Crimes (Serious Sex Offenders) Bill 2006	5
Crimes (Sentencing Procedure) Amendment Bill 2006	5
Crimes (Sentencing Procedure) Amendment (Gang Leaders) Bill 2006*	3
Criminal Procedure Amendment (Sexual and Other Offences) Bill 2006	15
Crown Lands Legislation (Carbon Sequestration) Bill 2006	15
Deer Bill 2006	10
Duties Amendment (Abolition of State Taxes) Bill 2006	9
Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Bill 2006	8
Education Amendment (Financial Assistance to Non-Government Schools) Bill 2006	9
Education Legislation Amendment Bill 2006	16
Education Legislation Amendment (Staff) Bill 2006	6
Election Funding Amendment Bill 2006	15
Electricity Supply Amendment (Greenhouse Gas Abatement Scheme) Bill 2006	15
Electricity Supply Amendment (Protection of Electricity Works) Bill 2006	6
Environmental Planning and Assessment Amendment Bill 2006	2
Environmental Planning and Assessment Amendment (Reserved Land Acquisition) Bill 2006	4
Environmental Planning Legislation Amendment Bill 2006	16
Fair Trading Amendment Bill 2006	8
Fair Trading Amendment (Motor Vehicle Insurance and Repair Industries) Bill 2006	11
Fines Amendment (Payment of Victims Compensation Levies) Bill 2006	2
Firearms Amendment (Good Behaviour Bonds) Bill 2006*	2
Fisheries Management Amendment Bill 2006	2
Freedom of Information Amendment (Improving Public Access to Information) Bill 2006*	14
Freedom of Information Amendment (Open Government-Disclosure of Contracts) Bill 2005	1

	Digest Number
Health Legislation Amendment (Unregistered Health Practitioners) Bill 2006	12
Home Building Amendment (Statutory Warranties) Bill 2006	16
Independent Commission Against Corruption Amendment (Operations Review Committee) Bill 2006	5
Industrial Relations Amendment Bill 2006	3
Industrial Relations (Child Employment) Bill 2006	16
Industrial Relations Further Amendment Bill 2006	16
Interpretation Amendment Bill 2006	8
James Hardie (Civil Liability) Bill 2005	1
James Hardie (Civil Penalty Compensation Release) Bill 2005	1
James Hardie Former Subsidiaries (Winding up and Administration) Bill 2005	1
Judicial Officers Amendment Bill 2006	6
Jury Amendment (Verdicts) Bill 2006	5
Land Tax Management Amendment (Tax Threshold) Bill 2006	2
Law Enforcement (Controlled Operations) Amendment Bill 2006	3
Law Enforcement Legislation Amendment (Public Safety) Bill 2005	1
Legal Profession Amendment Bill 2006	5
Legal Profession Further Amendment Bill 2006	16
Liquor Amendment (2006 FIFA World Cup Hotel Trading) Bill 2006	8
Local Government Amendment (Miscellaneous) Bill 2006	6
Local Government Amendment (Waste Removal Orders) Bill 2006	8
Motor Accidents Compensation Amendment Bill 2006	3
Motor Accidents (Lifetime Care and Support) Bill 2006	3
Motor Vehicle Repairs (Anti-steering) Bill 2006*	4
Mount Panorama Motor Racing Amendment Bill 2006	14
National Parks and Wildlife (Adjustment of Areas) Bill 2006	2
National Parks and Wildlife Amendment (National Parks Volunteer Service) Bill 2006*	14
National Park Estate (Lower Hunter Regions Reservations) Bill 2006	15
Parliamentary Electorates and Elections Amendment Bill 2006	10
Passenger Transport Amendment Bill 2006	15
Pharmacy Practice Bill 2006	7
Pipelines Amendment Bill 2006	7
Police Amendment (Death and Disability) Bill 2005	1
Police Amendment (Miscellaneous) Bill 2006	15

	Digest Number
Police Amendment (Police Promotions) Bill 2006	10
Police Integrity Commission Amendment Bill 2006	10
Ports Corporatisation and Waterways Management Amendment Bill 2006	15
Professional Standards Amendment (Defence Costs) Bill 2006	12
Protection of the Environment Operations Amendment (Waste Reduction) Bill 2006	3
Public Sector Employment Legislation Amendment Bill 2006	3
Quarantine Station Preservation Trust Bill 2006*	15
Racing Legislation Amendment Bill 2006	15
Road Transport (General) Amendment (Intelligent Access Program) Bill 2006	11
Road Transport Legislation Amendment (Drug Testing) Bill 2006	12
Royal Rehabilitation Centre Sydney Site Protection Bill 2006*	3
Rural Communities Impact Bill 2006*	16
Rural Lands Protection Amendment Bill 2006	16
Security Industry Amendment (Patron Protection) Bill 2006*	7
Smoke-free Environment Amendment (Removal of Exemptions) Bill 2006*	4
Snowy Hydro Corporatisation Amendment (Parliamentary Scrutiny of Sale) Bill 2006	9
Snowy Hydro Corporatisation Amendment (Protect Snowy Hydro) Bill 2006	9
State Property Authority Bill 2006	7
State Revenue and Other Legislation Amendment (Budget Measures) Bill 2006	9
State Revenue Legislation Amendment Bill 2006	8
State Revenue Legislation Amendment (Tax Concessions) Bill 2006	15
Statute Law (Miscellaneous Provisions) Bill 2006	8
Succession Bill 2006	12
Summary Offences Amendment (Display of Spray Cans) Bill 2006	7
Superannuation Administration Amendment (Trust Deed Schemes) Bill 2006	16
Superannuation Legislation Amendment Bill 2006	8
Sydney Cricket and Sports Ground Amendment Bill 2006	8
Sydney Water Catchment Management Amendment (Warragamba) Bill 2006	14
Threatened Species Conservation Amendment (Biodiversity Banking) Bill 2006	9
Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006	6
Transport Administration Amendment (Travel Concession) Bill 2006	9
Trees (Disputes Between Neighbours) Bill 2006	16
University of Technology (Kuring-gai Campus) Bill 2006*	8



---

	Digest Number
Valuation of land Amendment Bill 2006	7
Water Industry Competition Bill 2006	16
Water Management Amendment (Water Property Rights Compensation) Bill 2006	5
Western Sydney Parklands Bill 2006	15
Workers Compensation Legislation Amendment Bill 2006	4
Workers Compensation Legislation Amendment (Miscellaneous Provisions) Bill 2005	1
Workers Compensation Legislation Amendment (Permanent Impairment Benefits) Bill 2006	16
Young Offenders Amendment (Reform of Cautioning and Warning) Bill 2006*	8

## Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2005	Digest 2006
Children (Detention Centres) Bill 2006	Minister for Juvenile Justice	02/06/06	27/06/06		8, 9
Commission for Children and Young People Amendment Bill 2005	Minister for Community Services	25/11/05	25/08/06	15	10
Companion Animals Amendment Bill 2005	Minister for Local Government	25/11/05	15/12/05		1
Confiscation of Proceeds of Crime Amendment Bill 2005	Attorney General	10/10/05	23/11/05	11	1
Correctional Services Legislation Amendment Bill 2006	Minister for Justice	02/06/06			8
Crimes Amendment (Road Accidents) Bill 2005	Attorney General	10/10/05	12/12/05	11	1
Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 & Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006	Premier	26/09/06	17/10/06		13,15
Crimes Legislation Amendment (Gangs) Bill 2006	Minister for Police	05/09/06			10
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	Attorney General	23/05/05	19/04/06	6	5
Crimes (Serious Sex Offenders) Bill 2006	Minister for Justice	28/04/06			5
Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Bill 2006	Attorney General	02/06/06	02/08/06		8,9
Education Legislation Amendment Bill 2006	Minister for Education and Training	10/11/06			16
Education Legislation Amendment (Staff) Bill 2006	Minister for Education and Training	09/05/06	23/05/06		6,8
Fair Trading Amendment Bill 2006	Minister for Fair Trading	02/06/06	07/06/06		8,12
Local Government Amendment (Waste Removal Orders) Bill 2006	Minister for Local Government		09/06/06		8,9
Motor Accidents Compensation Amendment Bill 2006 and Motor Accidents (Lifetime Care and Support) Bill 2006	Minister for Commerce	24/03/06	26/04/06		3,5
Smoke-free Environment Amendment Bill 2004	Minister for Health	05/11/05	12/01/06		2
State Revenue Legislation Amendment Bill 2005	Treasurer	20/06/05	03/01/05	8	1
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005	Attorney General	25/11/05	16/05/06	15	7
Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006	Minister for Gaming and Racing	09/05/06	24/05/06		6,8

---

<b>Bill</b>	<b>Minister/Member</b>	<b>Letter sent</b>	<b>Reply received</b>	<b>Digest 2005</b>	<b>Digest 2006</b>
Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005	Minister for Transport	25/11/05 28/04/06	05/04/06	15	5
Vocational Education and Training Bill 2005	Minister for Education and Training	04/11/05	28/11/05	13	1
Water Management Amendment Bill 2005	Minister for Natural Resources	25/11/05	05/09/06	15	11

## Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2006

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Careel Bay Protection Bill 2006*	R				
Channel 7 Former Epping Site Protection Bill 2006*	R				
Children (Detention Centres) Amendment Bill 2006	R, C				
Community Protection (Closure of Illegal Brothels) Bill 2006*	R				
Companion Animals Amendment Bill 2006	R				
Correctional Services Legislation Amendment Bill 2006	R, C				
Crimes Amendment (Apprehended Violence) Bill 2006	R				
Crimes Amendment (Murder of Police Officers) Bill 2006*	R				
Crimes and Courts Legislation Amendment Bill 2006	R				
Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006	R, C	R, C			
Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006	R, C	R, C			
Crimes (Forensic Procedures) Amendment Bill 2006	N				
Crimes Legislation Amendment (Gangs) Bill 2006	R, C				
Crimes (Sentencing Procedure) Amendment Bill 2006	R				
Crimes (Serious Sex Offenders) Bill 2006	R, C				
Criminal Procedure (Sexual and Other Offences) Bill 2006	N				

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Bill 2006	R, C				
Education Legislation Amendment Bill 2006				R, C	
Education Legislation Amendment (Staff) Bill 2006	R, C	R, C	R, C	R, C	R, C
Electricity Supply Amendment (Greenhouse Gas Abatement Scheme) Bill 2006				R	
Electricity Supply Amendment (Protection of Electricity Works) Bill 2006	R				
Environmental Planning and Assessment Amendment Bill 2006	R				
Fair Trading Amendment Bill	R, C				
Fair Trading Amendment (Motor Vehicle Insurance and Repair Industries) Bill 2006					N
Fines Amendment (Payment of Victims Compensation Levies) Bill 2006	N				
Fisheries Management Amendment Bill 2006	R				
Health Legislation Amendment (Unregistered Health Practitioners) Bill 2006	R				
Home Building Amendment (Statutory Warranties) Bill 2006	N				
Jury Amendment (Verdicts) Bill 2006	R				
Law Enforcement (Controlled Operations) Amendment Bill 2006	R				
Law Enforcement Legislation Amendment (Public Safety) Bill 2005	R				
Local Government Amendment (Waste Removal Orders) Bill 2006	R		R		
Motor Accidents (Lifetime Care and Support) Bill 2006	R, C		R, C	R	R
Motor Accidents Compensation Amendment Bill 2006	R, C		R, C		

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Motor Vehicles Repairs (Anti-steering) Bill 2006	R				
Parliamentary Electorates and Elections Amendment Bill 2006	R				
Pipelines Amendment Bill 2006			R		R
Police Amendment (Police Promotions) Bill 2006				R	
Quarantine Station Preservation Trust Bill 2006*		R			
Royal Rehabilitation Centre Sydney Site Protection Bill 2006*	R				
Security Industry Amendment (Patron Protection) Bill 2006*	R				
Threatened Species Conservation Amendment (Biodiversity Banking) Bill 2006				R	
Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006		R, C			
Transport Administration Amendment (Travel Concession) Bill 2006				R	
Trees (Disputes Between Neighbours) Bill 2006	N				
University of Technology (Kuring-gai Campus) Bill 2006*	R				

**Key**

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

## Appendix 4: Index of correspondence on regulations reported on in 2006

<b>Regulation</b>	<b>Minister/Correspondent</b>	<b>Letter sent</b>	<b>Reply</b>	<b>Digest 2006</b>
Centennial Park and Moore Park Trust Regulation 2004	Minister for Tourism and Sport and Recreation	29/04/05	19/01/06	1
Companion Animals Amendment (Penalty Notices) Regulation 2005	Minister for Local Government	12/09/05	21/12/05	1
Conveyancing (Sale of Land) Amendment (Smoke Alarms) Bill 2006	Minister for Lands	25/08/06	27/10/06	16
Electricity (Consumer Safety) Regulation 2006	Minister for Fair Trading	28/04/06	20/06/06	9
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005	Minister for Planning	12/09/05	24/12/06	3
Gaming Machine Amendment (Payment of Prize Money) Regulation 2006	Minister for Gaming and Racing	25/08/06	10/10/06	14
Health Records and Information Privacy Regulation 2006	Minister for Health	28/04/06	27/06/06	9
Hunter Water (General) Regulation 2005	Minister for Utilities	04/11/05	09/01/06	1
Motor Accidents Compensation Regulation 2005	Minister for Commerce	28/04/06	24/07/06	9
Photo Card Regulation 2005 and Photo Card Amendment (Fee and Penalty Notice Offences) Regulation 2006	Minister for Roads	25/08/06	06/10/06	14
Protection of the Environment Operations (Waste) Regulation 2005	Minister for the Environment	04/11/05	29/11/05	1
Stock Diseases (General) Amendment Regulation 2005	Minister for Primary Industries	12/09/05	07/02/06	1
Photo Card Regulation 2005	Minister for Roads	26/04/06 25/08/06	21/08/06	9
Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003	Minister for Roads		03/08/06	9
Workers Compensation Amendment (Advertising) Regulation 2005	Minister for Commerce	12/09/05	28/11/05	1