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Legislation Review Committee

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

(1) The functions of the Committee with respect to Bills are:
   (a) to consider any Bill introduced into Parliament, and
   (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
      (i) trespasses unduly on personal rights and liberties, or
      (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
      (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
      (iv) inappropriately delegates legislative powers, or
      (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny

(2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations:

(1) The functions of the Committee with respect to regulations are:
   (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
   (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
      (i) that the regulation trespasses unduly on personal rights and liberties,
      (ii) that the regulation may have an adverse impact on the business community,
      (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
      (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
      (v) that the objective of the regulation could have been achieved by alternative and more effective means,
      (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
      (vii) that the form or intention of the regulation calls for elucidation, or
      (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
   (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

(2) Further functions of the Committee are:
   (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
   (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

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

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

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

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 iv).

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 2010

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

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 2010

This table specifies the action the Committee has taken with respect to Bills that received comment in 2010 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

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. Adoption Amendment (Same Sex Couples) Bill 2010*

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

2. Children and Young Persons (Care and Protection) Amendment (Children's Services) Bill 2010

Issue: Self-Incrimination

12. The Committee is of the view that the right to withhold information or refrain from answering questions that might incriminate oneself is a fundamental, longstanding principle of the common law and would ordinarily raise its concerns with any abrogation or variation of that right, such as the requirements placed on a child care provider to disclose information or answer questions set out in proposed section 219R(2).

13. However, the Committee also notes that the obligation on a child care provider to disclose information or answer questions that may incriminate oneself is tempered by section 219R(3) that, in effect, renders inadmissible as evidence against a person in criminal proceedings information obtained under the same Part of the Act.

14. In light of this, the Committee does not consider the provisions of the Act that compel a child care provider to provide information or answer questions that may incriminate oneself to be a trespass on individual rights and liberties under section 8A(1)(b)(i) of the *Legislation Review Act 1987.*

Issue: Commencement by Proclamation

17. The Committee recognises the significant administrative arrangements that need to take place before this Bill can commence operation and therefore has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

3. Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2010

Issue: Reversal Of Onus Of Proof - amendment of *Criminal Assets Recovery Act 1990* - Schedule 1 [1] – proposed section 3 (a1) - Principal objects; and Schedule 1 [14] – proposed insertion of section 28B (3) – assessment for unexplained wealth order:

31. The Committee considers that the reversal of onus of proof on the person to proving that his or her current or previous wealth was not illegally acquired property or proceeds of illegal activities, may form a key element of the provision for the making an unexplained wealth order.

32. The Committee also notes that the presumption of innocence is a fundamental right and reversing the onus of proof is inconsistent with this right. By also taking into account that the proposed unexplained wealth orders will not include a requirement to establish that the serious criminal activity occurred in the past six years, and the period over which the unexplained wealth order may be calculated will also not be limited in time, the Committee refers the proposed section 3 (a1) and proposed section 28B (3) to Parliament for consideration as to whether the reversal of the onus of proof in these circumstances may unduly trespass on personal rights and liberties.

Issue: Strict Liability - amendment of *Criminal Assets Recovery Act 1990* - Schedule 1 [14] – proposed insertion of section 28A (2)(b) – making of unexplained wealth order:

34. This imposes strict liability in relation to the person against whom the unexplained wealth order is made as the person is not required to know or suspect that the property was derived from serious crime related activity of another person.

35. Strict liability will in some cases cause concern as it displaces the common law requirement that the prosecution prove the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is usually considered inappropriate), and the availability of any defences or safeguards.

36. By taking into consideration that the proposed unexplained wealth orders will not include a timeframe requirement to establish that the serious criminal activity occurred only in the past six years, and the calculation period for the unexplained wealth order may also not be limited in time, in addition to the reversal onus of proof on the person against whom the order is made, the Committee is concerned that personal rights and liberties may be unduly trespassed by the strict liability imposed under proposed section 28A (2)(b) and, accordingly refers it to Parliament.

Issue: Double Jeopardy - amendment of *Criminal Assets Recovery Act 1990* - Schedule 1 [14] – proposed insertion of section 28C (4) and (5) – general provisions applying to proceeds assessment and unexplained wealth orders:

38. The Committee is concerned that under the proposed section 28C (5), there may be the potential for numerous civil and criminal proceedings involving the same person to commence at different times for different types of orders arising from the same serious crime related activities or offences (proceedings for the proceeds assessment order, unexplained wealth order, restraining order or assets forfeiture order, as well as criminal proceedings for the serious crime related activities).

39. The rule against double jeopardy provides that a person shall not be convicted of, or punished for, the same crime twice.

41. Article 14(7) of the *International Covenant on Civil and Political Rights* states that: 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.

42. The Committee notes that the proposed section 28C (4) reads: The quashing or setting aside of a conviction for a serious crime related activity does not affect the validity of a proceeds assessment order or unexplained wealth order.

43. It appears to the Committee that there may be sound reasons for the State not to be able to make repeated attempts to punish an individual for an alleged offence, especially if the conviction for such an offence has already been quashed or set aside.

44. Accordingly, the Committee refers the proposed section 28C (4) and (5) to Parliament for consideration as to whether the rights and liberties of such persons are unduly trespassed.

Issue: Retrospectivity - amendment of *Criminal Assets Recovery Act 1990* - Schedule 1 [14] – proposed insertion of section 28A (5) – making of unexplained wealth order; proposed insertion of section 28B (4) – assessment for unexplained wealth order; and the proposed insertion of 28C (7) – general provisions applying to proceeds assessment and unexplained wealth orders:

51. The Committee notes the right established by Article 15 of the *International Covenant on Civil and Political Rights* that a person not be subject to a heavier penalty than what was applicable at the time of the commission of the offence.

52. Accordingly, the Committee refers to Parliament to consider whether personal rights and liberties are unduly trespassed by the retrospective effects arising from the new sections 28A (5); 28B (4); and 28C (7).

4. Duties Amendment (NSW Home Builders Bonus) Bill 2010

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

5. Electronic Transactions Amendment Bill 2010

Issue: Commencement by Proclamation

13. The Committee appreciates that this Bill forms part of a nationwide effort to introduce uniform legislation regarding electronic transactions with respect to international and domestic contracts. The Committee notes that the nature of cooperative federalism will, at times, affect the ability of the NSW Parliament to set commencement dates for its own legislative agenda. As the Committee has not identified any other concerns with this Bill that may trespass on the rights and liberties of individuals, the Committee does not regard the commencement by proclamation to be an inappropriate delegation of legislative power in this instance.

6. Game and Feral Animal Control Repeal Bill 2010*

Issue: Denial Of Compensation

12. The Committee is usually of the view that the right to seek damages or compensation is an important individual right that should not be fettered by statutory interference unless there are good policy reasons for doing so. Therefore, the Committee considers that Clause 5 of the *Game and Feral Animal Control Repeal Bill 2010* may potentially form an undue trespass to personal rights and liberties and refers the matter to Parliament for its consideration.

7. Home Building Amendment (Warranties and Insurance) Bill 2010

Issue: Retrospectivity

18. Although the provisions of this Bill relating to insurance or warranty payments to non-contracting owners have retrospective application, the Committee is of the opinion that because the legislative intent is to clarify rights for property owners who are non-contracting parties to a development on their property, the retrospective aspect of this Bill does not unduly trespass on individual rights and liberties.

8. Law Enforcement and National Security (Assumed Identities) Bill 2010

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

9. Ombudsman Amendment (Removal Of Legal Professional Privilege) Bill 2010*

Issue: Legal Professional Privilege

16. The Committee regards legal professional privilege as instrumental to the administration of justice and is an imperative legal right that should be maintained in most circumstances.

17. The Committee would ordinarily raise concerns with any attempt to abrogate legal professional privilege as an undue trespass on individual rights and liberties.

18. However, the Committee notes that legal professional privilege is not an absolute right and there are examples where it would be considered fair and reasonable that legal professional privilege be set aside, the granting to an oversight body the power toobtain information from a public authority to serve the public interest arguably being one such example.

19. The Committee is also of the understanding that New South Wales is the only state to retain legal professional privilege in its equivalent Ombudsman legislation and that the NSW Joint Parliamentary Committee on the Ombudsman and Police Integrity Commission has backed the removal of privilege rights for public authorities appearing before the Ombudsman.

20. The Committee notes that rescinding the right to claim legal professional privilege for the purposes of the *Ombudsman Act 1974* is unlikely to trespass on individual rights, as the party adversely affected by the rescission will always be a public authority. In these circumstances, the Committee would not ordinarily regard the removal of privilege as an undue trespass on individual rights and liberties.

10. Parliamentary Contributory Superannuation Amendment Bill 2010

Issue: Retrospectivity - Clause 2 – Commencement:

12. Therefore, by taking into consideration of the above reasons, the Committee is of the view that the retrospective commencement of the proposed Act (clause 2), will not trespass unduly on individual rights and liberties.

11. Personal Property Securities Legislation Amendment Bill 2010

Issue: Commencement by Proclamation

12. Plant Diseases Amendment Bill 2010

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

13. Privacy and Government Information Legislation Amendment Bill 2010

15. The Committee recognises that appropriate administrative and transitory arrangements need to take place before the Bill can commence operation. The Committee does not consider the commencement by proclamation to be an inappropriate delegation of legislative power under s 8A(1)(b)(iv) of the Legislation Review Act 1987.

14. Summary Offences Amendment (Full-face Coverings Prohibition) Bill 2010*

Issue: Freedom Of Expression And Freedom Of Religion – Schedule 1 – Amendment of *Summary Offences Act 1988* – insertion of Part 2, Division 2C - Proposed section 11I – wearing full-face coverings in public places:

39. The Committee takes into consideration our existing legislation on anti-discrimination. Under NSW *Anti-Discrimination Act 1977*, section 7 covers discrimination on the ground of race which includes colour, nationality, descent and ethnic, ethno-religious or national origin. The Commonwealth *Racial Discrimination Act 1975* includes section 9 that deals with unlawful racial discrimination and section 11 deals with access to places and facilities. Further, the Committee notes the exemption for religious practices created by Section 56 (d) of the NSW *Anti-Discrimination Act 1977*.

40.* The Committee also refers to Article 18 of the *International Covenant on Civil and Political Rights* (ICCPC), which sets out the right to freedom of thought, conscience and religion. Article 19 of the ICCPC establishes the right to freedom of expression and opinions. Article 27 establishes the right of ethnic or religious minorities to enjoy their own culture and practice. The Committee also notes Article 2 (e) and (f) and Article 5 (e) of the *Convention on All Forms of Discrimination Against Women.

41. Therefore, the Committee is of the view that the proposed legislation may not remain valid if challenged under the NSW *Anti-Discrimination Act 1977* and the Commonwealth *Racial Discrimination Act 1975*, and it may also be contrary to the *International Covenant on Civil and Political Rights*.

42. The Committee considers that a human right may be subject under law to such reasonable limits as can be demonstrably justified in a free and democratic society based on equality and freedom. It is unclear to the Committee as to whether these limits imposed by this Bill are reasonable and can be demonstrably justified in this instance when taking into consideration the concerns and comments shared by other prominent organisations or bodies, such as the Muslim Executive of Belgium, the French parliamentary commission, the French highest administrative legal body (the Council of State), the Council of Europe's Commissioner for Human Rights, Amnesty International, the South Australian Equal Opportunity Commission, as well as observing the recent objections raised by the UK immigration Minister and the UK environment secretary.

43. The Committee is also concerned with the low level (if any) of consultations with the United Muslim Women Association of NSW or many Muslim women (including the minority who choose to wear the burqa or niqab) in NSW on the likely impact arising from this Bill.

44. When determining whether a trespass is undue on the right to religious freedom including the right to ethno-cultural practice or religious belief, and the right to expression including an individual right to choose how to dress, this may involve the consideration of the importance of the purpose of the trespass such as for public safety, public order or morals, and the assessment of the necessity of trespassing on that right to achieve the intended legislative object, including a comparison of the result of trespassing on the right with the best alternative or least restrictive means to achieving that object and leaving the right intact.

45. The Committee is concerned that the impact of the Bill may disproportionately disadvantage a minority of Muslim women who choose to wear the burqa or niqab, even if the Bill does not use the word 'burqa' or 'niqab'. As expressed by the Council of Europe's Commissioner for Human Rights, the Committee is also of the view that there is no compelling evidence "to show that these garments in any way undermine democracy, public safety, order or morals", and therefore, the importance of the purpose of the trespass or limitation to the rights, such as in the interest of democracy, public safety, order or morals, has not been demonstrated.

46. As already stated by the South Australian Equal Opportunity Commissioner: "the right to choose how we dress applies equally to everyone. We already have laws against armed robbery, against terrorism and other crimes, regardless of what you are wearing when you commit them". Accordingly, the Committee considers that there is not a strong or compelling necessity to trespass unduly on the right to religion and freedom of religious belief or ethno-cultural practice, right to freedom of expression and to dress as one chooses when there is already an array of laws against armed robbery, terrorism and other crimes which can achieve the same purpose of protecting the public from criminal acts. Otherwise, a range of other garments such as sunglasses, beanies, hoodies, baseball caps, could also serve the purpose of concealing or hiding a person's face from identity in public, and may also require a similar ban unnecessarily.

47. Therefore, the Committee refers the undue trespass on personal rights and liberties arising from schedule 1 of the Bill, by the insertion of the proposed section 11I of part 2, division 2C, to Parliament for consideration.

Issue: Reversal Of Onus Of Proof - amendment of *Summary Offences Act 1988* - insertion of Part 2, Division 2C - Proposed section 11I (6) – wearing full-face coverings in public places:

51. The proposed section 11I (6) reverses the onus of proof that traditionally requires the authority or prosecution to prove all the elements of an offence. This is inconsistent with a presumption of innocence, a fundamental right established by Article 14(2) of the *International Covenant on Civil and Political Rights*.

52. The Committee refers the proposed section 11I (6) of Part 2, Division 2c of Schedule 1, to Parliament for consideration as to whether the reversal of the onus of proof in these circumstances may unduly trespass on personal rights and liberties.

15. Terrorism (Police Powers) Amendment Bill 2010

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

17. Therefore, the Committee has not identified any issues regarding Clause 2 under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

16. Workers Compensation Legislation Amendment Bill 2010

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

32. Therefore, the Committee has not identified any issues regarding Clause 2 under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. ADOPTION AMENDMENT (SAME SEX COUPLES) BILL 2010*

Date Introduced:	24 June 2010
House Introduced:	Legislative Assembly
Member with Carriage:	Clover Moore
Portfolio:	Private Members' Bill

Purpose and Description

1. The object of this Bill is to amend the *Adoption Act 2000* to allow couples of the same sex to adopt children. At present under the Act, a couple is defined to mean a man and a woman who are married or who have a de facto relationship. The Bill amends that definition, along with the definition of spouse, so that they include persons who are de facto partners. The definition of de facto partner in the *Interpretation Act 1987* refers to persons whether they are of the same sex or a different sex. The Bill will also enable the same sex de factor partner of a person who is the adoptive parent of a child to adopt that child in his or her capacity as a step a parent.

2. The Bill also makes consequential amendments to other legislation so as to enable the provision and recording of information about the adoption of children by couple of the same sex.

Background

3. Existing adoption excludes families headed by same-sex couples. Unlike heterosexual couples, same-sex couples cannot adopt a child together.

4. Despite this, it is estimated that more than 4,300 children live in same-sex couple families in Australia.

5. In a 1997 New South Wales Law Reform Commission report, it was recommended that legislation permit adoption by either a couple, whether married or de facto, heterosexual or same-sex, or by a single person. Despite this, reforms to adoption procedures in 2000 did not extend adoption rights to same-sex couples.

6. Meanwhile, the Australian Human Rights Commission 2007 'Same-Sex: Same Entitlement' report regards the exclusion of same-sex adoptions on the basis of sexuality as a breach of article 21 of the Convention on the Rights of the Children, which requires that the best interests of a child be the paramount consideration in adoption.

7. In its July 2009 report entitled 'Adoption by same-sex couples', the Standing Committee on Law and Justice concluded that 'same-sex parenting is as likely to result in positive developmental outcomes for children as opposite-sex parenting'. However, the Committee report was not endorsed unanimously and dissenting statements by two Members were provided.

8. Provisions under this Bill reflect the recommendations made by the Legislative Council Standing Committee on Law and Justice 'Adoption by same-sex couples' report.

The Bill

9. Outline of Provisions

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

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

Schedules 1 and 2 make the amendments described in the above Overview.

Issues Considered by the Committee

10. 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.

2. CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) AMENDMENT (CHILDREN'S SERVICES) BILL 2010

Date Introduced:	24 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Linda Burney MP
Portfolio:	Community Services

Purpose and Description

1. The object of this Bill is to amend the *Children and Young Persons (Care and Protection) Act 1998* to extend the statement of principles underlying the provisions of children's services.

2. In addition, this Bill replaces the licensing system of children's services.

3. The Bill provides for a more extensive range of investigation and enforcement powers in connection with the regulation of children's services as well as improving access to information about children's services.

4. Lastly, the Bill makes other consequential and ancillary amendments, including amendments to various other Acts.

Background

5. The amendments set out in this Bill, are designed to lay the foundation for the application of national legislation to the majority of children's services in New South Wales in 2012.

6. According to the Agreement in Principle speech, the Council of Australian Governments has been working toward the development of a national quality framework for early childhood education and care, to which the Department of Community Services has been closely involved.

The Bill

7. Outline of Provisions

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

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

Schedule 1 Amendment of *Children and Young Persons (Care and Protection) Act 1998* No 157

Chapter 12 of the *Children and Young Persons (Care and Protection) Act 1998* (***the principal Act***) regulates the provision of children's services. Generally speaking, a children's service is a service that provides education or care (or both) for one or more children under the age of 6 years who do not ordinarily attend school.

Principles underlying the provision of children's services
The Bill extends the list of principles underlying the provision of children's services to include the following principles:

> (a) children's services should assist the development and education of the children who attend them,
> (b) children's services should be planned and operated in a manner that recognises the diversity of the children who attend them and of the communities that they serve,
> (c) parents have a right to information about the children's services which their children attend.

Schedule 1 [4] provides for this amendment.

Changes to licensing system
The Bill replaces the current licensing system for providers of children's services. At present, a licence that authorises a person to provide children's services must specify the children's service to which the licence relates, the premises from which the service is to be provided and the person who is authorised by the licence to have the overall supervision of the children's service concerned. This means that the particulars of a licence must be changed whenever there is a change in operator of a children's service or a change in authorised supervisors.

Under the new provisions, the Director-General of the Department of Human Services (***the Director-General***) may issue a licence to authorise a person to provide a specified type or types of children's services. The licence (a ***service provider licence***) will authorise the licensee to provide any children's services of the specified type and will no longer have to specify the premises at which the services are to be provided or the authorised supervisor.

The new provisions enable the Director-General to issue a separate approval (a ***children's service approval***) that authorises the operation of a particular children's service. This children's service can then be provided by any licensed service provider that is authorised by a service provider licence to provide that type of children's service. For home based children's services, however, the children's service approval will apply only to a specific licensed service provider. The Director-General will also be able to grant a separate approval (a ***supervisor approval***) that authorises a person to supervise the operation of any specified children's service or type of children's service. A licensee of an approved children's service is required to appoint at least one authorised supervisor for an approved children's service. Subject to the regulations, the licensee may appoint any authorised supervisor who is authorised by his or her supervisor approval to supervise the operation of the children's service concerned.

The Bill makes provision for:

> (a) conditions of licences and approvals, and

(b) variation of licences and approvals (including variation of conditions), and
(c) revocation and suspension of licences and approvals.

Under the new provisions, a licence or approval may be granted for a fixed term or with no fixed term. A licence or approval with no fixed term remains in force until it is revoked. It will be an offence to provide or advertise a children's service without the appropriate licence and children's service approval. The relevant provisions are contained in **Schedule 1 [5]**, in proposed Part 3 of Chapter 12.

Investigation powers
The Bill gives the Director-General more extensive powers of investigation in connection with children's services. In particular, the Bill enables the Director General:

(a) to require any person involved in the provision of children's services to provide records kept in connection with children's services or other documents to the Director-General, and
(b) to require any person involved in the provision of children's services to answer questions about matters in respect of which information is required for the administration or enforcement of Chapter 12 of the principal Act.

The Bill makes it clear that these functions also may be exercised in respect of a person who is outside the State if the children's services concerned are or were provided in this State. It will be an offence to fail to comply with these requirements or to give false or misleading information in purported compliance with a requirement.

The relevant provisions are contained in **Schedule 1 [5]**, in proposed Part 4 of Chapter 12.

Enforcement powers
The Bill gives the Director-General more extensive enforcement powers in connection with children's services. The Bill enables the Director-General to require a person who is contravening a provision of Chapter 12 of the principal Act to remedy the contravention. It will be an offence to fail to comply with the requirement.

The Bill also enables the Director-General to accept a written undertaking given by a person in connection with a matter in relation to which the Director-General has a function under Chapter 12 of the principal Act. The District Court may make various orders (including an order requiring a person to pay compensation) in the event that the undertaking is contravened.

The Bill also remakes existing provisions of Chapter 12 of the principal Act which give the Director-General power to inform parents about the advisability of a child attending a children's service and to exclude particular persons from the premises at which a children's service is provided. However, it will no longer be an offence for a parent to send a child to a children's service in contravention of a direction of the Director-General. The relevant provisions are contained in **Schedule 1 [5]**, in proposed Part 5 of Chapter 12.

In addition, **Schedule 1 [7]** will enable penalty notices to be issued for a contravention of the principal Act or the regulations.

Information concerning children's services
The Bill remakes an existing provision that requires the licensee of a children's service to provide parents of children enrolled in the service with ready access to information about the service. It also remakes an existing provision that requires a licensee of an approved children's service to afford any parent contact with his or her child at any time that the service is being provided.

New provisions will require the Director-General to keep a children's services register. The Director-General is to record in the register information about each approved children's service, including the following:

> (a) particulars of the children's service approval applying to the children's service,
> (b) the name and address of the licensed service provider that operates the children's service,
> (c) particulars of the service provider licence under which the licensed service provider operates,
> (d) the name of any person who is an authorised supervisor of the children's service and particulars of his or her supervisor approval,
> (e) particulars of any enforcement action taken against the licensee or an authorised supervisor of the approved children's service.

The children's services register is to be made available for public inspection on the Internet.

The relevant provisions are contained in **Schedule 1 [5]**, in proposed Parts 6 and 7 of Chapter 12.

Miscellaneous provisions
The amendments in **Schedule 1 [5]**, in proposed Part 8 of Chapter 12, generally re-make existing provisions of Chapter 12 of the principal Act. However, the provisions include a more extensive regulation-making power in relation to children's services, as a consequence of the changes to the licensing system made by the Bill.

Schedule 1 [6] provides for the review, by the Administrative Decisions Tribunal, of the following decisions:

> (a) a decision to refuse to grant a licence or approval,
> (b) a decision to impose a condition on the grant of a licence or approval,
> (c) a decision to vary, suspend or revoke a licence or approval.

This amendment will transfer to the Act existing review provisions contained in the regulations.

Schedule 1 [1], [2] and [3] insert in the principal Act definitions of expressions used in the new provisions in Chapter 12.

Schedule 1 [8] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [9] facilitates the transition of existing licences and licence holders to the new licence and approval system.

Schedule 2 Amendment of other Acts

Schedule 2 amends the following Acts, as a consequence of the new licence and approval system to be established by the Bill:

(a) the *Children and Young Persons Legislation (Repeal and Amendment) Act 1998*,
(b) the *Commission for Children and Young People Act 1998*,
(c) the *Companion Animals Act 1998*,
(d) the *Criminal Records Act 1991*,
(e) the *Ombudsman Act 1974*,
(f) the *Young Offenders Act 1997*.

The amendments also remove certain references to a provider of child care services that have been made redundant by the changes to Part 7 of the *Commission for Children and Young People Act 1998* made by the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009*.

Issues Considered by the Committee

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

Issue: Self-Incrimination

8. The Committee notes that proposed section 219R(2) of this Bill provides that, in relation to the requirement of a children's service provider to disclose documents or information to, or to answer questions asked by, the Department of Community Services, a person is not excused from a requirement to disclose the documents or information, or answer the questions, on the grounds that it might incriminate the person or make the person liable to a penalty. The maximum failure to comply with such a request is 200 penalty units as per proposed section 219P of the Bill. The Committee notes that section 200 of the *Children and Young Persons (Care and Protection) Act 1988* defines a children's service provider as a kindergarten or other like organisation but expressly excludes babysitters or other child minding agencies.

9. Historically, the common law has recognised a privilege against self-incrimination in which individuals have the right (within certain limitations) to not do or say anything that might be used as evidence against them in criminal proceedings. The Committee recognises that the right against self-incrimination as a fundamental, longstanding principle and would ordinarily raise its concerns to any abrogation or variation of that right.

10. However, the Committee also notes that the requirement for a children's service provider to provide information or documents to, or answer questions asked by, the Department of Community Services is tempered by proposed section 219R(3) which provides that information provided or answers given by a natural person in

compliance with their statutory requirements is not admissible in evidence against that person in criminal proceedings in certain circumstances. These circumstances include where the person objected at the time to providing information or answering questions on the ground that it might incriminate that person. Another circumstance is when the person was not warned that they have the right to object to providing the information or answering the question on the ground that it might incriminate the person.

11. In light of this, it appears that the right against self-incrimination is largely protected insofar that information obtained is inadmissible as evidence against the person in criminal proceedings. Therefore, the Committee does not consider the provisions of the Act that compel a child care provider to provide information, including information that may incriminate oneself, to be a trespass on individual rights and liberties under section 8A(1)(b)(i) of the *Legislation Review Act 1987.*

12. The Committee is of the view that the right to withhold information or refrain from answering questions that might incriminate oneself is a fundamental, longstanding principle of the common law and would ordinarily raise its concerns with any abrogation or variation of that right, such as the requirements placed on a child care provider to disclose information or answer questions set out in proposed section 219R(2).

13. However, the Committee also notes that the obligation on a child care provider to disclose information or answer questions that may incriminate oneself is tempered by section 219R(3) that, in effect, renders inadmissible as evidence against a person in criminal proceedings information obtained under the same Part of the Act.

14. In light of this, the Committee does not consider the provisions of the Act that compel a child care provider to provide information or answer questions that may incriminate oneself to be a trespass on individual rights and liberties under section 8A(1)(b)(i) of the *Legislation Review Act 1987.*

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

Issue: Commencement by Proclamation

15. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all.

16. However, the Committee recognises that this Bill primarily deals with the provision of children's services, including the replacement of the existing licensing system and establishment of a new children's services register. The Committee recognises that various administrative arrangements need to be put in place before this scheme can commence operation. Given that the Committee has not identified any other issue with this Bill that may unduly trespass on individual rights and liberties, the Committee does not consider the commencement by proclamation to be an inappropriate delegation of power in this instance.

17. The Committee recognises the significant administrative arrangements that need to take place before this Bill can commence operation and therefore has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

3. CRIMINAL ASSETS RECOVERY AMENDMENT (UNEXPLAINED WEALTH) BILL 2010

Date Introduced:	22 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Michael Daley MP
Portfolio:	Police

Purpose and Description

1. This Bill amends the *Criminal Assets Recovery Act 1990* with respect to the recovery of unexplained wealth; and for other purposes.

2. By amending the *Criminal Assets Recovery Act 1990*, the New South Wales Crime Commission can apply to the court for an unexplained wealth order when it has reasonable suspicions that the person is involved in serious criminal activity or when it holds reasonable suspicions that the person's wealth is derived from the serious criminal activity of another person or persons. The court must then be satisfied on the balance of probabilities that the wealth is not, or was not, illegally acquired property. However, the court has the discretion to not make the order or to reduce the amount payable if it considers that it is in the public interest to do so.

3. These amendments will be in addition to existing powers already available to the New South Wales Crime Commission to commence confiscation proceedings relating to restraining orders, assets forfeiture orders and proceeds assessment orders.

4. The proposed unexplained wealth regime will differ in some aspects. The threshold about which the court must be satisfied concerning criminal activity in respect of an unexplained wealth order will be changed from a balance of probabilities (the civil standard), to a reasonable suspicion test. It is not proposed to change the definition of serious criminal activity already contained in the Act.

5. If the court is not satisfied on the balance of probabilities that the wealth has been lawfully obtained, the court will be able to make an unexplained wealth order and the amount payable pursuant to the unexplained wealth order will become a debt due to the Crown.

6. Unlike existing assets forfeiture orders and proceeds assessment orders, the new unexplained wealth orders will not include a requirement to establish that the serious criminal activity occurred in the past six years. The period over which the unexplained wealth order may be calculated will also not be limited in time. This is consistent with the recent Commonwealth unexplained wealth legislation.

7. The proposals are aimed at those suspected criminal persons, or their family members and associates, who law enforcement discovers have wealth well in excess of that which their legitimate occupations could explain. The court will only consider

wealth about which the New South Wales Crime Commission has presented evidence. The public interest test includes that the court may reduce the amount payable under the order. This is intended to ensure that the court may provide for the hardship imposed on dependants, such as young children, so that they may not suffer unduly.

8. Under the current *Criminal Assets Recovery Act*, only the New South Wales Crime Commission has standing to make applications. However, nothing in this Bill affects the role of a New South Wales police officer acting as an authorised officer, nor the role of both agencies in joint operations or task forces in bringing persons before the court.

9. The objects of the Bill will include concepts of unexplained wealth and distinguish these from proceeds assessment orders. The definitions will be made consistent with the new unexplained wealth regime and define unexplained wealth orders. References to proceeds assessment orders throughout the legislation will also refer to unexplained wealth orders. Interstate proceeds assessment orders will now include unexplained wealth orders to ensure that where other jurisdictions also have the new unexplained wealth orders the provisions in this legislation will apply.

10. The Bill clarifies that a person includes a corporation. However, the provision is retained with regard to proceeds assessment orders where a child under the age of 18 years cannot have an order made against them. Unexplained wealth orders will also apply to restraining orders. The restraining order may apply to all the interests in property, not just specified interests, of a person suspected of deriving property from serious crime-related activity as a consequence of the application.

11. The Bill also clarifies that the suspicion of the authorised officer may attach to the serious crime-related activities of another person. This will mean an unexplained wealth order may be obtained for persons who are suspected of having derived their wealth from the crimes of their family or associates. These provisions will ensure that when serious criminals attempt to hide their money by giving it away to their family or allies, those persons are still made to account for it.

12. The New South Wales Crime Commission may apply for an unexplained wealth order or a proceeds assessment order, or both. However, the court is to only make one order, whichever is the greater amount. These orders are located within the existing confiscation regime. This Bill introduces unexplained wealth orders under an existing process.

13. Three new sections provide for the application by the New South Wales Crime Commission for an unexplained wealth order. The court must make the order if it finds there is a reasonable suspicion that the defendant has engaged in serious crime-related activity or has derived the proceeds from the serious crime related activity of another person. The Bill does not affect the capacity of the New South Wales Crime Commission to apply to the court to confiscate the assets of persons who would previously have been targeted under assets forfeiture orders.

14. The assessment of a person's unexplained wealth includes the total current or previous wealth other than that part of the wealth the court is satisfied, on the balance of probabilities, was not lawfully acquired. This Bill sets out what is included in the

current and previous wealth of a person. Wealth that has been expended, disposed of or consumed and wealth provided to others as a service, advantage or benefit, is included in the calculations.

15. The court is also to include in the assessment any wealth that is outside New South Wales as well as within the State. The value of current property will be whichever is the greater: the value at the time of application or the value when a property was acquired. The value of consumed or disposed of property will be whichever is the greater: the value at the time the property was acquired or the value immediately before the property was consumed or disposed of.

16. When assessing the amount to be paid under an unexplained wealth order, the court must deduct the value of any interests in property already forfeited under *Criminal Assets Recovery Act*, a similar interstate order or orders made under the *Confiscation of Proceeds of Crime Act*. The person subject to the order must still be given notice of the application to the court for an unexplained wealth order.

17. The unexplained wealth order differs from a proceeds assessment order in the following ways: the threshold to which the NSW Crime Commission must satisfy the court on application for the new unexplained wealth order will be a reasonable suspicion that the defendant has engaged in serious crime-related activity as opposed to the balance of probabilities. This reasonable suspicion includes that the crime-related activity occurred at any time. The six-year time limit that applies to other orders under the Act is not applicable for unexplained wealth.

18. The last amendments relate to the allocation of the confiscated wealth. The amendments will provide that 50 per cent of all proceeds assessment confiscations and/or unexplained wealth confiscations, which would otherwise be paid into the Confiscated Proceeds Account, will be allocated to the Victims Compensation Fund. This allocation will occur after all court orders, disbursements or sharing of proceeds with other law enforcement agencies in other jurisdictions have been accounted for.

Background

19. The Agreement in Principle speech explained that:

> The national movement towards adoption of unexplained wealth confiscation regimes to assist in combating organised crime was confirmed by national senior officers meetings on 5 June 2009, 17 July 2009 and 5 February 2010. Two Commonwealth parliamentary reports have also commented favourably upon unexplained wealth provisions. The Commonwealth Senate Standing Committee on Legal and Constitutional Affairs supported unexplained wealth confiscation, stating that the Committee: wholeheartedly endorses the purpose of the unexplained wealth provisions: namely targeting the people at the head of criminal networks, who receive the lion's share of the proceeds of crime, whilst keeping themselves safely insulated from liability for particular offences.

20. Currently, the six-year limitation may prevent the NSW Crime Commission from seeking to confiscate wealth from 10 years ago under an assets forfeiture order. With the unexplained wealth proceedings, this could now commence for that additional wealth. The court may refuse to make an order, or may reduce the amount payable under the order, if it thinks it is in the public interest to do so. This is to ensure that the court has to be satisfied as to the suspicions of the serious criminal activity and the

lawfulness of the sources of the person's wealth. The court may exclude a portion of the wealth from the order to provide for dependants and ensure that they do not suffer any undue hardship as a result of the confiscation.

21. Current general provisions in the Act are retained for proceeds assessment orders. Most of these will also apply to unexplained wealth orders. These provisions relate to matters such as ancillary orders, the effect of confiscation orders or actions taken by the jurisdictions, the setting aside of convictions, actions to be taken when a person has died or is not present, and evidence in relation to drugs or drug plants.

22. The making of an assets forfeiture order does not prevent the making of a proceeds assessment order or an unexplained wealth order. However, an unexplained wealth order may exclude any assets forfeited or that are subject to other confiscation orders. This ensures that the debt due to the Crown does not include wealth already confiscated by another order or confiscated under another Act, including from other jurisdictions, even though those assets may be included in the calculation of the wealth.

23. According to the Agreement in Principle speech:

> To ensure that the wealth may include any, or all, of the ill-gotten gains, the suspicion attached to the unexplained wealth being derived from criminal activity is also over any period of time. The six-year time limit in similar Federal legislation was also considered at length by the Commonwealth Senate Legal and Constitutional Affairs Legislation Committee. It concluded:
>
> > The committee accepts the evidence it received that the six year limitation period on non-conviction based confiscation causes significant difficulties where the DPP is pursuing confiscation in matters involving complex and ongoing offences. The committee therefore supports the removal of this limitation period.
>
> However, the court will make the single final confiscation order based on the balance of probabilities that the wealth is not or has not been illegally acquired. The burden of proof will rest with the person to prove to the court that the wealth was not illegally acquired. The Government has not taken this particular step lightly nor is it alone in considering the import of such a significant amendment. The Commonwealth Senate Legal and Constitutional Affairs Legislation Committee stated in its report on the Commonwealth Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009:
>
> > The placing of the onus of proof on a respondent in proceedings where the respondent faces a penalty of forfeiting property is an exceptional step because it represents a departure from the axiomatic principle that those accused of criminal conduct ought to be presumed innocent until proven guilty. Despite this, the committee accepts that it would defeat the purpose of the provisions if the onus was not on the respondent: the purpose of unexplained wealth orders is to require the respondent to explain the source of his or her wealth.
>
> These are serious amendments with serious consequences and the Government has ensured that there are safeguards to these provisions. Of course the primary safeguard of the right of appeal is not altered by the amendments. Importantly, the Supreme Court will have the discretion to decline to make an unexplained wealth order, or to reduce the amount payable under the order, if it considers it is in the public interest to do so.

The Bill

24. The object of this Bill is to amend the *Criminal Assets Recovery Act 1990* (the ***Principal Act***) to provide for unexplained wealth orders as a means of recovery of criminal assets by the NSW Crime Commission (in addition to assets forfeiture orders and proceeds assessment orders). An unexplained wealth order (like a proceeds assessment order) requires the Supreme Court to order a person who has engaged in serious crime related activity (or who has obtained illegally acquired property from the activities of such a person) to pay the Treasurer an amount equal to the value of the person's current or previous illegally acquired wealth. The main features of the proposed unexplained wealth order provisions are as follows:

    (a) The NSW Crime Commission may apply for an unexplained wealth order or a proceeds assessment order (or for both, in which case the Court is to make whichever of the orders requires the payment of the greatest amount).

    (b) The Court is required to make an unexplained wealth order against a person if there is a reasonable suspicion that the person has at any time engaged in a serious crime related activity. A serious crime related activity is the commission of any offence with a maximum penalty of 5 years or more (such as a drug offence, a serious assault or homicide, theft, tax evasion or intentional damage to property of more than $500 in value), whether or not the person has been charged with the offence and (if charged) whether or not the person has been convicted or acquitted.

    (c) The Court is also required to make an unexplained wealth order against a person who has at any time acquired any property derived from the serious crime related activity of another person (whether or not the person against whom the order is made knew or suspected that the property was derived from illegal activities).

    (d) The amount required to be paid by an unexplained wealth order is the total value of all the current and previous wealth of the person against whom the order is made, less any wealth that the person can establish was not illegally obtained. The assessment of the unexplained wealth of a person extends to the value of any interest in property owned or under the control of the person, any property previously expended, consumed or otherwise disposed of and any service, benefit or advantage provided to the person or to another at his or her request.

    (e) The Court is given a discretion to refuse to make an unexplained wealth order, or to reduce its amount, if it is in the public interest to do so.

The proposed unexplained wealth order provisions differ in a number of respects from the existing continued provisions relating to proceeds assessment orders, including in the following respects:

    (a) The Court is required to make a proceeds assessment order only if it is satisfied that it is more probable than not that the person has engaged in a

serious crime related activity or acquired the proceeds of any such activity from another person (and not just a reasonable suspicion).

(b) The Court can only make a proceeds assessment order if the relevant serious crime related activity occurred within 6 years of the application for the order (and not just at any time).

(c) The Court cannot make a proceeds assessment order (on the basis of the acquisition of proceeds of the activity of another) unless the person knew or ought to have known that the proceeds were from some illegal activity. Such an order also cannot be made against a child under 18 years of age.

(d) The amount required to be paid by a proceeds assessment order is not assessed on an unexplained wealth basis but on the basis of wealth assessed to be derived from any illegal activity within the previous 6 years, including a presumption that wealth is so obtained if it is the difference between total wealth before the illegal activity and total wealth (including expenditure) afterwards.

(e) The assessment of the amount payable under a proceeds assessment order may include the value of property forfeited or taken into account under another confiscation order under the Principal Act or under related legislation that applies to court orders on conviction (any such assessment is not available for unexplained wealth orders).

The Court is not given a discretion to refuse to make a proceeds assessment order (or reduce the amount payable) if it is in the public interest to do so.

25. Outline of provisions

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

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

Schedule 1 Amendment of *Criminal Assets Recovery Act 1990* No 23

Schedule 1 [1] includes unexplained wealth orders in the objects of the Principal Act.
Schedule 1 [2], [3], [4], [5], [8] and [12] make consequential amendments on the inclusion of unexplained wealth orders as an alternative to proceeds assessment orders.
Schedule 1 [6] and [7] enable a restraining order to be sought over all the interests in property (and not just specified interests) of a person suspected of deriving proceeds from serious crime related activities as a consequence of the application of the unexplained wealth order provisions to such a person.
Schedule 1 [9] enables the NSW Crime Commission to apply for an unexplained wealth order or a proceeds assessment order (or for both, in which case the Court is to make whichever of the orders requires the payment of the greatest amount).
Schedule 1 [10] ensures that the provision that prevents a proceeds assessment order being made against a child under 18 years of age who merely acquires crime derived property does not also prevent an order from being made against a corporation.
Schedule 1 [11], [13] and [14] (in so far as it inserts proposed section 28C) transfer general provisions relating to proceeds assessment orders so that they also apply to unexplained wealth orders.

Schedule 1 [14] also inserts proposed sections 28A and 28B. Proposed section 28A enables the NSW Crime Commission to apply to the Supreme Court for an unexplained wealth order against a person (the ***defendant***) requiring payment of the amount assessed by the Court as the unexplained wealth of the person. The Court must make such an order if it finds that there is a reasonable suspicion that the defendant has at any time engaged in a serious crime related activity or derived wealth from a serious crime related activity of another person. The Court may refuse to make an order or exclude wealth from an order if it thinks it is in the public interest to do so. Proposed section 28B provides for the assessment of the unexplained wealth of a person, which is defined as the total current or previous wealth of the person other than any part of that wealth that the Court is not satisfied on the balance of probabilities is not or was not illegally acquired wealth. The proposed section sets out the things included in the current or previous wealth of a person, including property expended, consumed or otherwise disposed of and any service, benefit or advantage provided to the person or to another at his or her request.
Schedule 1 [15] provides that half of the proceeds of unexplained wealth orders and proceeds assessment orders are to be paid to the credit of the Victims Compensation Fund established under the *Victims Support and Rehabilitation Act 1996*. The proceeds are to be calculated after deducting amounts payable under other orders or to the Commonwealth, another State or a Territory or to an authority of the Commonwealth, another State or a Territory.
Schedule 1 [16] enables regulations containing provisions of a savings or transitional nature to be made consequent on the enactment of the proposed Act.
Schedule 1 [17] provides that the amendments made to the Principal Act do not affect existing applications for proceeds assessment orders or restraining orders, and requires proceeds of existing proceeds assessment orders, received after the commencement of the proposed Act, to be paid to the Victims Compensation Fund in accordance with the amended provisions.

Issues Considered by the Committee

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

Issue: Reversal Of Onus Of Proof - amendment of *Criminal Assets Recovery Act 1990* - Schedule 1 [1] – proposed section 3 (a1) - Principal objects; and Schedule 1 [14] – proposed insertion of section 28B (3) – assessment for unexplained wealth order:

26. Schedule 1 [1] inserts proposed section 3 (a1) of the Principal objects: to enable the current and past wealth of a person to be recovered as a debt due to the Crown if the Supreme Court finds there is a reasonable suspicion that the person has engaged in a serious crime related activity (or has acquired any of the proceeds of any such activity of another person) ***unless the person can establish that the wealth was lawfully acquired***.

27. Schedule 1 [14] inserts proposed section 28B (3): The ***burden of proof*** in proceedings against a person for an unexplained wealth order ***is on the person to prove*** that the person's current or previous wealth is not or was not illegally acquired property or the proceeds of an illegal activity.

28. These provisions reverse the onus of proof that traditionally requires the authority or prosecution to prove all the elements of an offence. This is inconsistent with a presumption of innocence, a fundamental right established by Article 14(2) of the *International Covenant on Civil and Political Rights*.

29. However, the Committee observes that reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is peculiarly in the possession of one party.

30. The Law Council of Australia[1] raised similar concerns to the Parliamentary Joint Committee on Australian Crime Commission on Legislative Arrangements To Outlaw Serious And Organised Crime Groups[2]. Specifically, the Law Council was concerned that the reversal onus of proof undermines the presumption of innocence with regard to the development of unexplained wealth provisions.

31. The Committee considers that the reversal of onus of proof on the person to proving that his or her current or previous wealth was not illegally acquired property or proceeds of illegal activities, may form a key element of the provision for the making an unexplained wealth order.

32. The Committee also notes that the presumption of innocence is a fundamental right and reversing the onus of proof is inconsistent with this right. By also taking into account that the proposed unexplained wealth orders will not include a requirement to establish that the serious criminal activity occurred in the past six years, and the period over which the unexplained wealth order may be calculated will also not be limited in time, the Committee refers the proposed section 3 (a1) and proposed section 28B (3) to Parliament for consideration as to whether the reversal of the onus of proof in these circumstances may unduly trespass on personal rights and liberties.

Issue: Strict Liability - amendment of *Criminal Assets Recovery Act 1990* - Schedule 1 [14] – proposed insertion of section 28A (2)(b) – making of unexplained wealth order:

33. Schedule 1 [14] inserts proposed section 28A (2)(b) so that the Supreme Court must make an unexplained wealth order if the Court finds that there is a reasonable suspicion that the person against whom the order is sought has, at any time before the making of the application for the order:

> (b) acquired serious crime derived property from any serious crime related activity of another person (***whether or not the person against whom the order is made knew or suspected that the property was derived from illegal activities***).

34. This imposes strict liability in relation to the person against whom the unexplained wealth order is made as the person is not required to know or suspect that the property was derived from serious crime related activity of another person.

[1] Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 12.

[2] 17 August 2009, Commonwealth of Australia.

35. Strict liability will in some cases cause concern as it displaces the common law requirement that the prosecution prove the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is usually considered inappropriate), and the availability of any defences or safeguards.

36. By taking into consideration that the proposed unexplained wealth orders will not include a timeframe requirement to establish that the serious criminal activity occurred only in the past six years, and the calculation period for the unexplained wealth order may also not be limited in time, in addition to the reversal onus of proof on the person against whom the order is made, the Committee is concerned that personal rights and liberties may be unduly trespassed by the strict liability imposed under proposed section 28A (2)(b) and, accordingly refers it to Parliament.

Issue: Double Jeopardy - amendment of *Criminal Assets Recovery Act 1990* - Schedule 1 [14] – proposed insertion of section 28C (4) and (5) – general provisions applying to proceeds assessment and unexplained wealth orders:

37. Schedule 1 [14] inserts proposed section 28C (5): The making of a proceeds assessment order or unexplained wealth order does not prevent the making under Division 1 of an assets forfeiture order based on the serious crime related activity, or on all or any of the serious crime related activities, in relation to which the proceeds assessment order or unexplained wealth order is made.

38. The Committee is concerned that under the proposed section 28C (5), there may be the potential for numerous civil and criminal proceedings involving the same person to commence at different times for different types of orders arising from the same serious crime related activities or offences (proceedings for the proceeds assessment order, unexplained wealth order, restraining order or assets forfeiture order, as well as criminal proceedings for the serious crime related activities).

39. The rule against double jeopardy provides that a person shall not be convicted of, or punished for, the same crime twice.

40. The rationale behind the double jeopardy rule is:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[3]

[3] *Green v United States* (1957) 355 US 184 at 187 per Black J

41. Article 14(7) of the *International Covenant on Civil and Political Rights* states that: 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.

42. The Committee notes that the proposed section 28C (4) reads: The quashing or setting aside of a conviction for a serious crime related activity does not affect the validity of a proceeds assessment order or unexplained wealth order.

43. It appears to the Committee that there may be sound reasons for the State not to be able to make repeated attempts to punish an individual for an alleged offence, especially if the conviction for such an offence has already been quashed or set aside.

44. Accordingly, the Committee refers the proposed section 28C (4) and (5) to Parliament for consideration as to whether the rights and liberties of such persons are unduly trespassed.

Issue: Retrospectivity - amendment of *Criminal Assets Recovery Act 1990* - Schedule 1 [14] – proposed insertion of section 28A (5) – making of unexplained wealth order; proposed insertion of section 28B (4) – assessment for unexplained wealth order; and the proposed insertion of 28C (7) – general provisions applying to proceeds assessment and unexplained wealth orders:

45. Schedule 1 [14] inserts proposed section 28A (5): Engagement in a serious crime related activity or the acquisition of serious crime derived property referred to in subsection (2) extends to engagement in an activity or the acquisition of property ***before the commencement of this section***.

46. Proposed subsection (2) refers to the Supreme Court making an unexplained wealth order.

47. Schedule 1 [14] inserts proposed section 28B (4): The current or previous wealth of a person is the amount that is the sum of the values of the following:

> (a) all interests in property of the person,
>
> (b) all interests in property that are subject to the effective control of the person,
>
> (c) all interests in property that the person has, at any time, expended, consumed or otherwise disposed of (by gift, sale or any other means),
>
> (d) any service, advantage or benefit provided at any time for the person or, at the person's request or direction, to another person, whether acquired, disposed of or provided ***before*** or after ***the commencement of this section*** and whether within or outside New South Wales.

48. Schedule 1 [14] also inserts proposed section 28C (7): If a proceeds assessment order or unexplained wealth order is made against a dead person, subsection (6) ***has effect before final distribution of the estate as if the person had died the day after the making of the order***.

49. Proposed subsection (6) provides for: the amount a person is required to pay under a proceeds assessment order or unexplained wealth order is a debt payable by the person to the Crown on the making of the order and is recoverable as such.

50. The Committee will always be concerned to identify the retrospective effects of legislation that may have an adverse impact on a person.

51. The Committee notes the right established by Article 15 of the *International Covenant on Civil and Political Rights* that a person not be subject to a heavier penalty than what was applicable at the time of the commission of the offence.

52. Accordingly, the Committee refers to Parliament to consider whether personal rights and liberties are unduly trespassed by the retrospective effects arising from the new sections 28A (5); 28B (4); and 28C (7).

The Committee makes no further comment on this Bill.

4. DUTIES AMENDMENT (NSW HOME BUILDERS BONUS) BILL 2010

Date Introduced:	23 June 2010
House Introduced:	Legislative Council
Minister Responsible:	Eric Roozendaal MLC
Portfolio:	Treasurer

Purpose and Description

1. The object of this Bill is to amend the *Duties Act 1997* to make further provision in relation to the NSW Home Builders Bonus (the duty exemption and concession scheme established by the *State Revenue Legislation Amendment Act 2010)*.

2. The Bill revises requirements relating to the commencement of construction of a new home and removes requirements relating to the completion of construction.

3. In addition, the Bill extends the pre-construction duty exemption to certain off-the-plan purchases that are made after construction has commenced.

4. Finally, the Bill makes provision generally for the application of the scheme to off-the-plan purchases that are entered into for the purposes of replacing an earlier agreement.

Background

5. This Bill is a budgetary measure designed to provide additional stimulus to the construction industry by offering discounts to homebuyers in certain circumstances.

6. Under the NSW Home Builders Bonus initiative, stamp duty has been cut to zero for purchases of homes worth up to $600,00 bought off the plan in the pre-construction stage. Further, for purchases of homes worth up to $600,000 that are currently under construction or newly completed, the existing stamp duty has been reduced by 25%.

7. The Bill seeks to make minor, technical amendments to these arrangements. These amendments include: the removing of completion date provisions for off-the-plan purchases; enabling vendors that have acquired a development from the original builder or developer of the property to still have access to the Home Builders Bonus scheme even if only 25% or less of the building work has been completed; and finally, in the case of multi-building developments on a common foundation the off-the-plan exemption will continue to be available for subsequent buildings once the initial tower has been built.

8. <u>This Bill was introduced into Parliament on 23 June 2010, passed both houses of Parliament on the same date and was assented on 28 June 2010.</u>

The Bill

9. Outline of Provisions

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

Clause 2 provides for the commencement of the proposed Act on 1 July 2010.

Schedule 1 Amendment of *Duties Act 1997* No 123

Commencement and completion requirements
Schedule 1 [2] removes completion requirements that must be complied with for an off the plan purchase or vacant land purchase to be eligible for a duty concession or exemption under the NSW Home Builders Bonus scheme (the ***scheme***). Under the amendment, it will no longer be necessary for the off the plan purchase, or the construction of the new home, to be completed within a specified time.

Schedule 1 [1] relocates and revises an existing requirement that, for a vacant land purchase, the laying of the foundations for the home must commence within 26 weeks. As a result of the amendments, the 26 weeks will start from the date the agreement for sale or transfer is completed (rather than the date the agreement is entered into), or the date the transfer occurs.

Pre-construction duty exemption
The general rule for the pre-construction duty exemption under the scheme is that the exemption only applies where construction of the new home has not commenced. Construction commences when the laying of the foundations of the new home, or of the building in which it is located, begins.

Schedule 1 [3] provides that a pre-construction duty exemption applies to an off the plan purchase that is approved under the scheme if the off the plan purchase replaces another off the plan purchase that was approved under the scheme and to which the pre-construction duty exemption applied. In such a case it will not matter that construction of the new home has commenced.

Schedule 1 [4] enables the pre-construction duty exemption to be applied in cases where a new home is to be constructed as part of a staged development, and construction of the foundations of the building in which the new home is located has already commenced. A new home is to be constructed as part of a staged development if the new home is part of a development that will comprise 2 or more multi-storey buildings that have common foundations, and which are to be constructed in separate stages. In such a case, construction of the new home is taken to begin when construction of the first residential level of the relevant building begins.

Schedule 1 [5] provides that a pre-construction duty exemption also applies to an off the plan purchase that is approved under the scheme if: (a) construction of the new home commenced when the land was owned by a person who is not the vendor under the off the plan purchase, and (b) no more than 25% of the construction work required to construct the new home, or the building in which it is located, has been completed, and (c) no construction work in relation to the new home has been carried out between the date that the vendor acquired the land and the date the off the plan purchase was entered into.

Replacement agreements

Schedule 1 [6] provides that an application may be made under the scheme in relation to an off the plan purchase entered into on or after 1 July 2012 if the off the plan purchase replaces an off the plan purchase that was approved under the scheme.

Schedule 1 [7] provides that, for the purposes of the scheme, an off the plan purchase ***replaces*** another off the plan purchase only if the agreements concerned relate to substantially the same property and have the same purchaser or purchasers.

Issues Considered by the Committee

10. 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.

5. ELECTRONIC TRANSACTIONS AMENDMENT BILL 2010

Date Introduced:	23 June 2010
House Introduced:	Legislative Council
Minister Responsible:	John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. The object of this Bill is to amend the *Electronic Transactions Act 2000* to enact the model provisions developed and agreed to by the Standing Committee of Attorneys-General on 7 May 2010. The proposed amendments update the law on electronic transactions to reflect internationally recognised standards in accordance with the United Nations Convention on the Use of Electronic Communications in International Contracts.

Background

2. The basis of New South Wales' current electronic transactions regime is the 1996 UNCITRAL Model Law on Electronic Commerce, developed by the United Nations Commission on International Trade Law. The Commonwealth and all other States and Territories have electronic transactions Acts based on this Model Law with NSW introducing its *Electronic Transactions Act* in 2000.

3. The United Nations Convention on the Use of Electronic Communication in International Contracts was adopted by the United Nations in 2005 and updates many of the concepts in the 1996 Model Law.

4. The primary aim of the United Nations convention is to facilitate international trade by enhancing legal certainty and commercial predictability when electronic communications are used in relation to international contracts.

5. In 2008, the Standing Committee of Attorneys-General agreed to the development of a public consultation paper on the Australian Government's proposal to accede to the convention. The paper sought comment on whether the convention rules should also apply to domestic contracts to avoid having different regimes for domestic and international contracts. In all, nine submissions were received, all of which generally favoured Australia's accession to the United Nations convention with none addressing the issue of applying the convention's rules to domestic contracts.

6. In 2009, the Standing Committee's Ministers agreed to the drafting of a model bill to implement obligations under the United Nations convention. At its meeting in May 2010, Ministers agreed to update their uniform electronic transactions in legislation to adopt the model Bill within 12 months. New South Wales is the first jurisdiction to introduce the model legislation.

7. These amendments do not significantly alter the electronic transactions regime as it applies in New South Wales. Instead, they are designed to update or refine many of the existing provisions. Meanwhile, the additional rules proposed in the Bill clarify traditional rules on contract formation to address the needs of electronic commerce, designed to provide legal certainty on those matters. The additional rules relate to automated message systems; invitations to treat in an electronic context; electronic signatures; location of parties' rules; and default rules for time and place of dispatch and receipt.

8. Although the United Nations convention is only concerned with international business contracts, the proposed amendments in this Bill will apply to domestic contracts too, including for personal, family or household purposes. This is designed to ensure commonality of rules between domestic and international contracts involving electronic communications and therefore seeks to avoid any potential problems arising from having two separate electronic communications regime.

The Bill

9. Outline of Provisions

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

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

Schedule 1 Amendment of Electronic *Transactions Act 2000* No 8

Contracts involving electronic communications
Schedule 1 [18] inserts additional provisions (proposed Part 2A, sections 14A–14E) into the *Electronic Transactions Act 2000* (the ***principal Act***) that apply to contracts involving electronic communications.

Proposed section 14A provides that the provisions apply to contracts involving electronic communications where the proper law of the contract is the law of New South Wales, whether or not some or all of the parties are located in Australia or elsewhere and whether the contracts are for business, personal or other purposes.

Proposed section 14B provides that a proposal to form a contract made through an electronic communication that is not addressed to a specific party and is generally accessible to parties making use of information systems is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

Proposed section 14C provides that a contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, is not invalid, void or unenforceable merely because automated message systems were used. **Schedule 1 [2]** inserts a definition of ***automated message system***.

Proposed section 14D enables a natural person who makes an input error in an electronic communication exchanged with the automated message system of another party to withdraw the portion of the electronic communication in which the input error was made if

the person notifies the other party of the error as soon as possible and if the person has not received any material benefit or value from any goods or services received from the other party.

Proposed section 14E deals with the application of the principal Act to certain contracts.

Schedule 1 [1] inserts a summary of these new provisions into the simplified outline of the principal Act.

Schedule 1 [17] is a consequential amendment that transfers provisions relating to courts and electronic case management systems to a new Schedule 1 so that the new provisions for contracts involving electronic communications can be numbered consistently with the equivalent legislation of the Commonwealth and other States and Territories.

Time and place of dispatch and receipt of electronic communications
Schedule 1 [15] amends the provisions relating to the time and place of dispatch and receipt of electronic communications and provides the following default rules:

> (a) the time of dispatch of an electronic communication is the time when the electronic communication leaves an information system,
> (b) the time of receipt of an electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee,
> (c) an electronic communication is taken to have been dispatched at the place where the originator has its place of business,
> (d) an electronic communication is taken to have been received at the place where the addressee has its place of business.

Schedule 1 [3] updates the definition of ***place of business*** for the purposes of these provisions to include a place where a person maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location. Under the amendments, a party's place of business is assumed to be the location indicated by the party, unless another party demonstrates that the party making the indication does not have a place of business at that location. If a party has not indicated a place of business and has multiple places of business, the place of business is that which has the closest relationship to the underlying transaction. A location is not a place of business merely because that is where the equipment and technology supporting an information system used by a party are located.

Schedule 1 [2] inserts definitions of ***addressee*** and ***originator*** for the purposes of these provisions.

Other amendments
Currently, the requirement for a signature of a person is met in an electronic communication if a method is used to identify the person and to indicate the person's approval of the information communicated. **Schedule 1 [7] and [9]** provide that rather than indicating the person's approval of the information, it is sufficient that the signature in the electronic communication indicates the person's intention in respect of the information communicated. **Schedule 1 [10]** is a related amendment.
Schedule 1 [8] makes it clear that whether or not a signature in an electronic communication is reliable should be decided in light of all the circumstances, including any

relevant agreement, to prevent a party to a transaction from repudiating its signature in bad faith.

Schedule 1 [3] extends the definition of ***transaction*** to include any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract, agreement or other arrangement.

Schedule 1 [4] extends the regulation-making powers in the principal Act so that regulations may be made to exempt certain transactions, electronic communications and other matters from all or specified provisions of the principal Act and to provide that all or specified provisions of the principal Act do not apply to specified laws of New South Wales. **Schedule 1 [5]**, **[14] and [16]** omit regulation-making powers that are now included in this new provision. **Schedule 1 [6] and [11]–[13]** are consequential amendments.

Schedule 1 [19] contains transitional provisions.

Schedule 2 Consequential amendments to other legislation

Schedule 2.1 and 2.2 update cross-references to the principal Act in the *Electronic Transactions Regulation 2007* and the *Electronic Transactions (ECM Courts) Order 2005* as a consequence of Schedule 1 [17], which transfers existing Part 2A to new Schedule 1.

Issues Considered by the Committee

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

Issue: Commencement by Proclamation

10. The Committee notes that this Bill is to commence on a day or days to be appointed by proclamation. This may delegate to the Government the power to commence the Act on whatever day it chooses or not at all.

11. However, the Committee notes that this Bill forms part of a nationwide effort to harmonise existing legislation regarding electronic transactions that relate to international and domestic contracts. The Committee appreciates the merit in achieving uniform legislation with respect to achieving legislative certainly and commercial predictability.

12. The Committee also appreciates that each jurisdiction operates to its own legislative timetable and, at times, the nature of cooperative federalism can affect the ability of the NSW Parliament to set commencement dates for its own legislative agenda. As the Committee has not identified any other concerns with this Bill that may trespass on the rights and liberties of individuals, the Committee does not regard the commencement by proclamation to be an inappropriate delegation of legislative power in this instance.

13. The Committee appreciates that this Bill forms part of a nationwide effort to introduce uniform legislation regarding electronic transactions with respect to international and domestic contracts. The Committee notes that the nature of cooperative federalism will, at times, affect the ability of the NSW Parliament to set commencement dates for its own legislative agenda. As the Committee has not identified any other concerns with this Bill that may trespass on the rights and liberties of individuals, the Committee does not regard the commencement by proclamation to be an inappropriate delegation of legislative power in this instance.

The Committee makes no further comment on this Bill.

6. GAME AND FERAL ANIMAL CONTROL REPEAL BILL 2010*

Date Introduced:	23 June 2010
House Introduced:	Legislative Council
Member with Carriage:	Lee Rhiannon MLC
Portfolio:	Private Members' Bill

Purpose and Description

1. The object of this Bill is to repeal the *Game and Feral Animal Control Act 2002* and all regulations made pursuant to that Act.

2. In addition, the Bill expressly abolishes the Game Council and provides for the transfer of its assets, right and liabilities to the Crown.

3. Lastly, the Bill prohibits hunting for sporting or recreational purposes on national park estate land, Crown land and State forests.

Background

4. The *Game and Feral Animal Control Act* was passed in 2002 to provide for the effective management of native and introduced species of game animals and to promote responsible and orderly hunting of those game animals on public and private land and of certain pest animals on public land.

5. The Act set up the Game Council, a separate statutory authority to represent licensed game hunters and to administer the game hunting licensing system.

6. In 2005, the *Game and Feral Animal Control Act 2002* was amended. Key features of the amendment Bill included providing the Game Council with the additional functions of promoting, funding, developing or delivering educational courses regarding game animals. The amendment Bill also provided that, all fines, or amounts payable under penalty notices, recovered in relation to offences against the *Game and Feral Animal Control Act 2002* was to be credited to the Game Council Account.

7. This Bill seeks to abolish the Game Council, repeal the game hunting licensing system, prohibit recreational hunting on Crown land and transfer all functions now performed by the Game Council to the New South Wales Department of Primary Industries.

The Bill

8. Outline of Provisions

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

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

Clause 3 repeals the *Game and Feral Animal Control Act 2002* and the *Game and Feral Animal Control Regulation 2004*.

Clause 4 abolishes the Game Council (which is constituted by the *Game and Feral Animal Control Act 2002*).

Clause 5 makes it clear that no remuneration or compensation is payable to any person because of the abolition of the Game Council or the repeal of the Game and Feral Animal Control legislation.

Clause 6 provides for the transfer of the assets, rights and liabilities of the Game Council to the Crown.

Clause 7 enables regulations of a savings or transitional nature to be made as a consequence of the proposed Act.

Schedule 1 Amendment of legislation

Schedule 1.1, 1.5 and 1.7 provide for the prohibition of hunting for sporting or recreational purposes on national park estate land, Crown land and State forests. The other amendments made by Schedule 1 are consequential on the abolition of the Game Council or the repeal of the Game and Feral Animal Control legislation.

Issues Considered by the Committee

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

Issue: Denial Of Compensation

9. Clause 5 of the amendment Bill provides that no remuneration or compensation is payable to any person because of the abolition of the Game Council or the repeal of the *Game and Feral Animal Control Act 2002* or any regulation made pursuant to it.

10. The Committee is usually of the view that the right to seek damages or compensation is an important individual right that should not be fettered by statutory interference unless there are good policy reasons for doing so. The Committee generally regards the courts as the most appropriate arbiters in deciding whether a cause of action has merit and, subsequently, whether it should be successful.

11. In this respect, the Committee is of the view that the Clause 5 of this Bill may unfairly close legitimate avenues for an individual to seek a remedy for a cause of action and therefore may unduly trespass on individual rights and liberties.

12. The Committee is usually of the view that the right to seek damages or compensation is an important individual right that should not be fettered by statutory interference unless there are good policy reasons for doing so. Therefore, the Committee considers that Clause 5 of the *Game and Feral Animal Control Repeal Bill 2010* may potentially form an undue trespass to personal rights and liberties and refers the matter to Parliament for its consideration.

The Committee makes no further comment on this Bill.

7. HOME BUILDING AMENDMENT (WARRANTIES AND INSURANCE) BILL 2010

Date Introduced:	22 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Virginia Judge MP
Portfolio:	Fair Trading

Purpose and Description

1. The object of this Bill is to amend the *Home Building Act 1989* to ensure that, where a contractor enters into a contract for residential building work on land with a party or parties who are not the owners of the land, the owner or owners of the land will be deemed to be persons on whose behalf work is done and will be entitled to the benefit of any statutory warranty. As a consequence, any successors in title will also be able to recover for the breach of statutory warranty.

2. As a consequence, any contract of insurance is deemed to extend to such an owner and the insurer will, without the need for specific provision in a contract of insurance, be able to pay a claim under a contract of insurance on the basis of this extended operation of the statutory warranties, contracts and insurance policies and will be entitled to recover the amount from the contractor.

3. This Bill seeks to overcome the effect of the decision in the *Ace Woollahra Case* (see below) without affecting the actual decision in that case or the rights of the parties involved.

Background

4. In *Ace Woollahra Pty Ltd v The Owners – Strata Plan 61424 & Anor* [2010] NSWCA (the Ace Woollahra Case), the Court of Appeal held, in effect, that only a contracting party and any successors in title to that person are entitled to enforce the statutory warranties under Part 2C of the *Home Building Act 1989* and to obtain compensation under home warranty insurance the *Home Building Act 1989.*

5. This judgement was contrary to the Government's understanding of the extent of the *Home Building Act 1989*. In its Agreement in Principle Speech, the Minister for Fair Trading, the Hon. Virginia Judge advised the Parliament that the Government had thought that the benefits of the existing Act would flow to a landowner even if someone else was the contracting party and that any successors in title would similarly be protected. The Minister further advised that it was generally accepted that the insurance industry operated on this understanding too.

6. The Court of Appeal's judgement on 17 May 2010 changed this understanding when it held that only the person who actually contracts with the builder and that person's successors in title are entitled to the benefits of the statutory warranties and insurance. The court decision precludes from the scheme any owner or successor in title where the person who contracted with the builder was not the owner of the land.

7. To protect future intended beneficiaries, the Bill is designed to restore the intended benefits by providing that a legal action or insurance claim cannot be defeated due to the owner of the land not being a contracting party at the time the contract is entered into by providing that a person who is a non-contracting owner in relation to a contract to do residential building work is entitled to the same rights as a party to the contract has in respect of a statutory warranty or insurance.

8. <u>This Bill was introduced into Parliament on 22 June 2010, passed both houses of Parliament on 23 June 2010 and was assented on 28 June 2010.</u>

The Bill

9. Outline of Provisions

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

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

Schedule 1 Amendment of *Home Building Act 1989* No 147

Schedule 1 [2], [4] and [5] amend sections 18D, 92C and 99, respectively, of the Principal Act to achieve the object described in the Overview of the Bill.

Schedule 1 [1] and [3] make consequential amendments to the Principal Act.
Schedule 1 [6] is an amendment by way of statute law revision to clarify the effect of section 101 of the Principal Act in its application to persons doing building work otherwise than under contract.

Schedule 1 [7] enables the making of savings and transitional regulations.

Schedule 1 [8] contains savings and transitional provisions.

Issues Considered by the Committee

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

Issue: Retrospectivity

10. Clause 103 of Schedule 1 provides that the amendments made by the amending Act extend to any existing insurance policies and claims and proceedings entered into before the commencement of the amendments and that are not finally determined by the courts before the commencement of the amendments.

11. Clause 103 also provides that any payment purporting to be made under the Home Building Act to a non-contracting owner under an existing contract or to a beneficiary under an indemnity provided before the commencement of the amendments made by the amending Act, is taken to have been validly made if it could validly have been made if those amendments were then in force. In other words, this provision validates those payments made to a non-contracting owner on reliance of what was generally understood to be the intention of the Home Building Act to provide warranty

coverage to non-contracting owners before the court's judgement in the *Ace Woollahra Case* decided otherwise.

12. The Committee is aware that the court decision in the *Ace Woollahra Case* has raised questions about the payments previously made under the *Home Building Act* to a non-contracting party under an existing contract. The Committee recognises that these legitimate legal issues require clarification to ensure non-contracting owners are still entitled to lodge claims and receive payments as a result of defective building work.

13. The Committee notes that the provisions of this Bill to extend warranty coverage to non-contracting owners of property have retrospective effect, applying to contracts of insurance entered into on or after 1 May 1997.

14. Whilst the Committee appreciates the need to correct unintended consequences of legislation and clarify the legislative purpose, the Committee has always been concerned to identify provisions that have retrospective application.

15. However, in these circumstances, the Committee notes that the Bill intends only on either furthering or clarifying protections to individual homeowners with only possible adverse consequences for insurers, to this end the retrospective application of the Act is unlikely to unduly trespass on individual rights and liberties. In any case, the Committee understands that payment of compensation to non-contracting owners has generally been standard industry practice until the *Ace Woollahra Case* and this Bill merely reaffirms the previous arrangements.

16. The Committee also notes that the Bill does not set aside the judgment of the *Ace Woollahra Case* or other proceedings before a court or tribunal that have been finally determined.

17. In these circumstances, the Committee feels that the retrospective provisions of this Bill do not unduly trespass on individual rights and liberties.

18. Although the provisions of this Bill relating to insurance or warranty payments to non-contracting owners have retrospective application, the Committee is of the opinion that because the legislative intent is to clarify rights for property owners who are non-contracting parties to a development on their property, the retrospective aspect of this Bill does not unduly trespass on individual rights and liberties.

The Committee makes no further comment on this Bill.

8. LAW ENFORCEMENT AND NATIONAL SECURITY (ASSUMED IDENTITIES) BILL 2010

Date Introduced:	24 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Michael Daley MP
Portfolio:	Police

Purpose and Description

1. The purpose of this Bill is to facilitate cross-border recognition for the acquisition and use of assumed identities, by both officers of certain law enforcement and national security agencies, as well as other members of the public, such as those participating in a witness protection program.

2. The Bill repeals and re-enacts the *Law Enforcement and National Security (Assumed Identities) Act 1998*. Much of the 1998 Act is restated in the Bill in the terms of the model law. There are, however, new matters in which this Bill makes additional provisions, outlined below.

3. The Bill stipulates the procedure for applying for an assumed identity and the grounds for authorising the acquisition and use of an assumed identity. In addition, the Bill makes provisions relating to the contents of an authority to acquire and use an assumed identity.

4. The Bill provides for the mutual recognition of corresponding authorities and laws across other jurisdictions that have enacted legislation based on the model law.

5. The Bill provides for sanctions for the misuse of an assumed identity or for the disclosure of information about an assumed identity in certain aggravating circumstances.

6. Lastly, the Bill details the effect of a person the subject of an authority being unaware of its variation or cancellation.

Background

7. In 1997, the Wood Royal Commission into the (then) New South Wales Police Service criticised the fact that no legislative regime existed in any Australian jurisdiction to regulate police use of assumed names or identities in controlled and undercover operations.

8. As a result of this Report, a number of jurisdictions introduced legislation pertaining to the acquisition and use of assumed identities. In New South Wales, this was

achieved through passage of the *Law Enforcement and National Security (Assumed Identities) Act 1998.*

9. In 2003, the Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers published the *Cross-Border Investigative Powers for Law Enforcement Report.* This Report provided a model law for adoption at the State level.

10. This Bill substantially adopts the provisions of the model law, with some exceptions, to create a broadly nationally consistent scheme with mutual recognition across participating jurisdictions.

The Bill

11. Outline of Provisions

Part 1 Preliminary

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

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

Clause 3 provides for the objects of the proposed Act.

Clause 4 defines certain words and expressions used in the proposed Act. In particular, a ***law enforcement agency*** (referred to as an ***authorised agency*** in the 1998 Act) means the following agencies:

(a) the NSW Police Force,
(b) the Independent Commission Against Corruption,
(c) the New South Wales Crime Commission,
(d) the Police Integrity Commission,
(e) Corrective Services NSW,
(f) the Australian Crime Commission,
(g) such of the following agencies as may be prescribed by the regulations as law enforcement agencies for the proposed Act:
    (i) the Australian Federal Police,
    (ii) the Australian Security Intelligence Organisation,
    (iii) the Australian Secret Intelligence Service,
    (iv) Customs (within the meaning of the *Customs Administration Act 1985* of the Commonwealth),
    (v) the Australian Taxation Office.

Part 2 Authority for assumed identity

Clause 5 sets out the procedure for applying for an authority. The procedure allows a law enforcement officer of a law enforcement agency to apply to the chief officer of the agency for an authority for the law enforcement officer or any other person (***a civilian***). The application must be in writing and contain various specified details in support of the application and any additional information the chief officer may require. A separate application must be made in respect of each assumed identity to be acquired or used.

Clause 6 sets out the procedure for determining an application for an authority. After considering the application and any additional information, a chief officer to whom an application is made may either grant the authority (with or without conditions) or refuse the application. However, the chief officer may only grant the application if satisfied on reasonable grounds that certain specified circumstances exist. A separate authority is required for each assumed identity. Clause 6 also provides for supervisory arrangements that a law enforcement agency must comply with if an authority is granted for a civilian.

Clause 7 requires an authority to be in writing and sets out the particulars that it must contain.

Clause 8 provides for the duration of an authority (being until cancellation if the authority is for a law enforcement officer and, if the authority is for a civilian, until the end of the period (of no longer than 3 months) specified in the authority, unless sooner cancelled).

Clause 9 allows a chief officer who grants an authority, to vary or cancel it at any time. However, the chief officer must cancel an authority if satisfied that it is no longer necessary. Clause 9 also provides for notification of a cancellation or variation of an authority and for when the variation or cancellation takes effect.

Clause 10 requires a chief officer to conduct a minimum 12-monthly review of each authority granted by the chief officer that authorises the use of an assumed identity in a participating jurisdiction. The chief officer must cancel the authority if satisfied on a review that the assumed identity is no longer necessary.

Clause 11 sets out the procedure for making an entry in the Births, Deaths and Marriages Register in relation to an assumed identity. A chief officer of a law enforcement agency of this jurisdiction, or under a corresponding law, may apply to an eligible Judge (under clause 12) to order the Registrar to make such an entry. An eligible Judge may make such an order only on being satisfied that it is justified having regard to the nature of the activities undertaken or to be undertaken by a law enforcement officer or civilian under an authority. The application for the order must be heard in a closed court. Clause 11 also provides for the period within which the Registrar must give effect to the order.

Clause 12 provides for the declaration of Supreme Court Judges as eligible Judges for the purposes of clauses 11 and 14.

Clause 13 requires a chief officer who cancels an authority for an assumed identity in relation to which an entry has been made in the Births, Deaths and Marriages Register or a corresponding register in a participating jurisdiction to apply for an order to cancel the entry within 28 days.

Clause 14 allows an eligible Judge to order the Registrar to cancel an entry that has been made in the Births, Deaths and Marriages Register under clause 11 on application by the chief officer who applied for the order to make the entry. The Registrar must give effect to the order within 28 days. The application for the order must be heard in a closed court.

Part 3 Evidence of assumed identity

Clause 15 allows a chief officer who grants an authority, to request the chief officer of an ***issuing agency*** (being a government or non-government agency that issues evidence of identity) specified in the authority to produce evidence of an assumed identity and give that evidence to the law enforcement officer or civilian in respect of whom the authority applies.

Clause 16 requires the chief officer of a government issuing agency to issue evidence of an assumed identity if requested to do so under clause 15 by the chief officer granting the authority for the assumed identity.

Clause 17 gives the chief officer of a non-government issuing agency a discretion to issue evidence of an assumed identity if requested to do so under clause 15 by the chief officer granting the authority for the assumed identity.

Clause 18 requires the chief officer of an issuing agency to cancel evidence of an assumed identity if directed to do so in writing by the chief officer granting the authority for the assumed identity.

Clause 19 makes lawful things done by the chief officer or other officer of an issuing agency in good faith to comply with a request for evidence of an assumed identity under clause 15 or a direction to cancel evidence of an assumed identity under clause 18.

Clause 20 requires a law enforcement agency, the chief officer of which makes a request to an issuing agency under clause 15 or gives a direction to an issuing agency under clause 18, to indemnify the issuing agency and its officers for any civil liability they incur in complying with the request or direction in the course of duty.

Part 4 Effect of authority

Clause 21 allows an ***authorised officer*** or an ***authorised civilian*** (being a law enforcement officer or civilian in respect of whom an authority applies) to acquire and use an assumed identity if the acquisition or use is in accordance with the authority. The acquisition or use must also be in the course of duty (in the case of an authorised officer) or (in the case of an authorised civilian) in accordance with any direction by the person's supervisor.

Clause 22 makes lawful anything done by an authorised officer or authorized civilian in the course of acquiring or using an assumed identity if doing the thing would not be unlawful if the assumed identity were the person's real identity and if it is done in accordance with the authority and in the course of duty (in the case of an authorised officer) or (in the case of an authorised civilian) in accordance with any direction of the person's supervisor.

Clause 23 requires a law enforcement agency, the chief officer of which grants an authority to a law enforcement officer or civilian, to indemnify the authorised officer or authorised civilian for any civil liability he or she incurs because of something he or she has done in accordance with the authority and (in the case of an authorized officer) in the course of duty or (in the case of an authorised civilian) in accordance with any direction of the person's supervisor.

Clause 24 makes it clear that an ***authorised person*** (being an authorised officer or an authorised civilian) will not be protected from liability under clause 22 or indemnified under clause 23 for anything the person does that requires a particular qualification, if the person

does not in fact have that qualification (regardless of whether the person has acquired documentation that establishes that he or she has that qualification).

Clause 25 allows a person whose authority is cancelled or varied to continue to be protected from liability, or indemnified, under Part 4 of the proposed Act so long as the person is unaware of the variation or cancellation and not reckless about its existence.

Clause 26 restates the power (provided for in the 1998 Act in relation to authorized officers) of a chief officer who grants an authority under the proposed Act, to make any false or misleading representation about the authorised person to whom it relates, in connection with the acquisition or use of the assumed identity by that person.

Part 5 Mutual recognition under corresponding laws

Clause 27 allows a chief officer who grants an authority, to request an issuing agency in a ***participating jurisdiction*** (being a jurisdiction in which a law corresponding to the proposed Act (a ***corresponding law***) is in force) to issue evidence of the assumed identity the subject of the authority.

Clause 28 requires a chief officer of a government issuing agency who receives a request from a participating jurisdiction for evidence of an assumed identity, to issue that evidence but gives a chief officer of a non-government issuing agency a discretion to comply with such a request.

Clause 29 requires a chief officer of an issuing agency who has issued evidence of an assumed identity on request from a participating jurisdiction to cancel it if directed to do so by the chief officer who granted the authority for the assumed identity.

Clause 30 requires a law enforcement agency, the chief officer of which makes a request to an issuing agency in a participating jurisdiction under clause 27, to indemnify the issuing agency and its officers for any civil liability they incur in complying with the request in the course of duty.

Clause 31 allows an authority granted by a law enforcement agency in a participating jurisdiction to be recognised in this jurisdiction for the purposes of applying specified provisions of the proposed Act to things done in this jurisdiction in relation to the authority.

Part 6 Compliance and monitoring
Division 1 Misuse of assumed identity and information

Clause 32 makes it an offence for an authorised officer or authorised civilian to misuse an assumed identity. The maximum penalty for the offence is 2 years imprisonment.

Clause 33 makes it an offence for a person to disclose information (except in certain specified circumstances) that reveals, or is likely to reveal, that an assumed identity is not a person's real identity. A maximum penalty of 10 years imprisonment applies where the disclosure endangers or will endanger the health or safety of a person or prejudices or will prejudice the effective conduct of an operation or implementation of a witness protection program, or if the person making the disclosure intends that outcome. A maximum penalty of 5 years imprisonment applies to other disclosures.

Division 2 Disclosure of identity in legal proceedings

Clause 34 imposes restrictions (provided for in the 1998 Act in relation to authorized officers) on the disclosure in legal proceedings of the identity of a person in respect of whom an authority is or was in force. The maximum penalty for contravening an order in force under the clause with respect to the suppression of evidence given in such proceedings is 50 penalty units (currently $5,500) or 12 months imprisonment, or both.

Division 3 Reporting and record-keeping

Clause 35 requires a chief officer of a law enforcement agency to submit a report to the Minister that includes certain specified information relating to authorities, assumed identities and the administration of the proposed Act. The report (excluding specified types of sensitive information) must be laid before each House of Parliament within 15 sitting days after the Minister receives it.

Clause 36 provides for the keeping of records by a chief officer of a law enforcement agency in relation to authorities, assumed identities and the operation of the proposed Act in respect of the agency concerned.

Clause 37 requires a minimum 6-monthly audit of the records relating to an authority issued by a law enforcement agency that authorises the use of an assumed identity in a participating jurisdiction and a minimum 12-monthly audit of the records relating to each other authority issued by the agency. The clause also limits the persons who may conduct an audit.

Part 7 General

Clause 38 provides that the proposed Act binds the Crown.

Clause 39 is a power of delegation allowing a chief officer of a law enforcement agency to delegate any of the chief officer's functions under the proposed Act (except the power of delegation). The clause limits to 4 the number of delegations that may
be in force at any one time in respect of any one law enforcement agency. The clause also imposes limits on the officers to whom functions can be delegated.

Clause 40 makes it clear that the proposed Act does not limit or otherwise affect the *Law Enforcement (Controlled Operations) Act 1997* or the *Witness Protection Act 1995*.

Clause 41 provides for the taking of proceedings for offences under the proposed Act.

Clause 42 is a general regulation-making power.

Clause 43 provides for the Minister to review the operation of the proposed Act as soon as possible after the period of 12 months from its commencement.

Clause 44 repeals the *Law Enforcement and National Security (Assumed Identities) Act 1998* and the *Law Enforcement and National Security (Assumed Identities) Regulation 2004*.

Schedule 1 Savings and transitional provisions

Schedule 1 contains provisions of a savings and transitional nature consequent on the enactment of the proposed Act.

Schedule 2 Consequential amendment of other legislation

Schedule 2 makes consequential amendments to the *Criminal Procedure Act 1986* and other legislation.

Issues Considered by the Committee

12. 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.

9. OMBUDSMAN AMENDMENT (REMOVAL OF LEGAL PROFESSIONAL PRIVILEGE) BILL 2010*

Date Introduced:	22 June 2010
House Introduced:	Legislative Assembly
Private Members' Bill:	Peter Besseling MP
Portfolio:	Private Members' Bill

Purpose and Description

1. At present, section 21 of the *Ombudsman Act 1974* provides that the Ombudsman must set aside a requirement that a person provide information during an investigation or inquiry if it appears that the information is subject to a privilege of a public authority based on legal professional privilege (now known as client legal privilege).

2. The object of this Bill is to amend the *Ombudsman Act 1974* to enable the Ombudsman to obtain information that is subject to the client legal privilege of a public authority.

Background

3. In March 2008, the Ombudsman raised with the Parliamentary Joint Committee on the Ombudsman and Police Integrity Commission the issue that the *Ombudsman Act 1974* is the only Parliamentary Ombudsman legislation in Australia that permits a claim of legal professional privilege by an agency to prevent the Ombudsman from accessing information. In its final report to Parliament, the Parliamentary Joint Committee commented that it 'cannot see that such an exemption is needed' and resolved to 'write to the Premier and the Attorney General seeking an amendment to the *Ombudsman Act* to remove the legal professional privilege exemption'.

4. In February 2009, the Ombudsman made a number of recommendations to the Premier following an investigation into the RTA's handling of a number of Freedom of Information requests and reiterated the Parliamentary Joint Committee's view that the right of a public authority to claim legal professional privilege be set aside when called upon to provide information before the Ombudsman.

5. In June 2009, the NSW Ombudsman produced a special report to Parliament titled 'Removing Nine Words – Legal Professional Privilege and the NSW Ombudsman'. The major purpose of the report was to recommend the removal of legal professional privilege.

The Bill

6. Outline of Provisions

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

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

Clause 3 amends the *Ombudsman Act 1974* to remove exception relating to legal professional privilege so that the Ombudsman may require information, or enter premises to inspect any document or thing, despite any privilege of a public authority that the public authority might claim in a court of law. The amendment also enables regulations of a savings or transitional nature consequent on the enactment of proposed Act to be made.

Schedule 1 Amendment of *Home Building Act 1989* No 147

Schedule 1 [2], [4] and [5] amend sections 18D, 92C and 99, respectively, of the Principal Act to achieve the object described in the Overview of the Bill.

Schedule 1 [1] and [3] make consequential amendments to the Principal Act.

Schedule 1 [6] is an amendment by way of statute law revision to clarify the effect of section 101 of the Principal Act in its application to persons doing building work otherwise than under contract.

Schedule 1 [7] enables the making of savings and transitional regulations.

Schedule 1 [8] contains savings and transitional provisions.

Issues Considered by the Committee

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

Issue: Legal Professional Privilege

7. The Committee regards legal professional privilege as instrumental to the administration of justice and recognises it as an imperative legal right that should be maintained in almost all circumstances.

8. In *Daniels v ACCC,* the majority of the High Court noted:

> 'Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity…'[4]

9. In *Grant v Downs,* Stephen, Mason and Murphy JJ observed that:

> 'The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers…This is done by keeping secret their communications, thereby inducing the client to retain the solicitor

[4] (2002) 213 CLR 543

> and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor…'[5]

10. The rationale behind the breadth of protection for such communications under the common law is not solely the importance of privacy of communications. Legal professional privilege relates more fundamentally to the proper administration of justice. As the High Court observed in *Carter v Northmore Hale Davy & Leake*:

> 'It plays an essential role in protecting and preserving the rights, dignity and freedom of the ordinary citizen - particularly the weak, the unintelligent and the ill-informed citizen - under the law'.[6]

11. Given these considerations, the Committee would ordinarily raise concerns with any attempt to abrogate legal professional privilege as an improper affront to a historic and deep-rooted right, with potentially far-reaching consequences to the proper administration of justice.

12. However, the Committee notes that legal professional privilege is not an absolute right and there are examples where it would be considered fair and reasonable that legal professional privilege be set aside. For example, the granting to an oversight body the power to obtain information from a public authority for investigative purposes is arguably one such circumstance in which the argument could be raised that legal professional privilege is not an absolute right. In its report, 'Removing nine words', the Ombudsman comments that

> 'it is clearly in the public interest for my office to be able to access all relevant information we need to conduct full and thorough investigations, drawing on all, not only some, of the facts'. [7]

13. In the Ombudsman's view, public bodies may have invoked legal professional privilege to frustrate or delay proceedings initiated by the Ombudsman. As the role of the Ombudsman is to deal with complaints about administrative processes within the public sector, including those related to freedom of information and protected disclosures, the Committee appreciates that the Ombudsman may require complete access to information, unencumbered by the withholding of information, to provide an effective deliberation on the issue of the inquiry.

14. The Committee is also of the understanding that New South Wales is the only state to retain legal professional privilege in its equivalent Ombudsman legislation and that the NSW Joint Parliamentary Committee on the Ombudsman and Police Integrity Commission has backed the removal of privilege rights for public authorities appearing before the Ombudsman.

15. Generally, the Committee only raises concerns when individual rights are affected. The Committee notes that rescinding the right to claim legal professional privilege for the purposes of the *Ombudsman Act 1974* is unlikely to trespass on individual rights, as the party adversely affected by the rescission will always be a public authority. In these circumstances, the Committee would not ordinarily regard the removal of privilege as an undue trespass on individual rights and liberties.

[5] (1976) 135 CLR 674
[6] (1995) 183 CLR 121
[7] Foreward, *Removing nine words: Legal professional privilege and the NSW Ombudsman,* NSW Ombudsman, June 2010.

16. The Committee regards legal professional privilege as instrumental to the administration of justice and is an imperative legal right that should be maintained in most circumstances.

17. The Committee would ordinarily raise concerns with any attempt to abrogate legal professional privilege as an undue trespass on individual rights and liberties.

18. However, the Committee notes that legal professional privilege is not an absolute right and there are examples where it would be considered fair and reasonable that legal professional privilege be set aside, the granting to an oversight body the power to obtain information from a public authority to serve the public interest arguably being one such example.

19. The Committee is also of the understanding that New South Wales is the only state to retain legal professional privilege in its equivalent Ombudsman legislation and that the NSW Joint Parliamentary Committee on the Ombudsman and Police Integrity Commission has backed the removal of privilege rights for public authorities appearing before the Ombudsman.

20. The Committee notes that rescinding the right to claim legal professional privilege for the purposes of the *Ombudsman Act 1974* is unlikely to trespass on individual rights, as the party adversely affected by the rescission will always be a public authority. In these circumstances, the Committee would not ordinarily regard the removal of privilege as an undue trespass on individual rights and liberties.

The Committee makes no further comment on this Bill.

10. PARLIAMENTARY CONTRIBUTORY SUPERANNUATION AMENDMENT BILL 2010

Date Introduced:	23 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Michael Daley MP
Portfolio:	Finance

Purpose and Description

1. This Bill amends the *Parliamentary Contributory Superannuation Act 1971* to correct drafting oversights in the scheme closure provisions of that Act.

2. It seeks to clarify arrangements under the *Parliamentary Contributory Superannuation Act 1971* for certain members of the Legislative Council and the treatment of a parliamentary pension when a beneficiary returns to the Parliament.

3. It corrects uncertainty arising from the *Parliamentary Superannuation Legislation Amendment Act 2005*, which closed the Parliamentary Contributory Superannuation Fund to members first elected at the 2007 general election. The fund was also closed at that time to former members re-elected after a break of more than three months from the Parliament. A member eligible to remain in the fund after the 2007 election is termed a continuing member under the Act.

4. The Bill amends the definition of a "continuing member" to confirm that a member of the Legislative Council elected in 2003 may retain membership of the fund. This includes a person who filled a Legislative Council vacancy for a member elected in 2003. The person must have been a member during the period of three months before polling day at the 2007 general election. The member also needs to serve the Parliament after that election without a break of more than three months to remain a continuing member of the fund.

5. This Bill also clarifies the treatment of a parliamentary pension when a beneficiary returns to the Parliament. It seeks to ensure that the pension for a person who is not a continuing member is suspended when the person re-enters the Parliament. The pension resumes once the latest period of parliamentary service ends. For example, if the person is a former member who re-enters the Parliament after a break of more than three months.

Background

6. Before amendments to the *Parliamentary Contributory Superannuation Act 1971* can be passed in the Legislative Assembly, the Parliamentary Remuneration Tribunal must certify that the amendments are warranted. Such certification has been provided by the tribunal with regard to the amendments in this Bill.

7. The Bill has been prepared with the assistance of the trustees and administrators of the Parliamentary Contributory Superannuation Fund.

The Bill

8. The object of this Bill is to amend the *Parliamentary Contributory Superannuation Act 1971* to correct drafting oversights in amendments made to that Act by the *Parliamentary Superannuation Legislation Amendment Act 2005* to close the pension-based Parliamentary Contributory Superannuation Scheme to new members elected at or after the 2007 general election. The Scheme continues to apply to continuing members first elected before that general election. The Parliamentary Remuneration Tribunal has, as required by section 4 of the *Parliamentary Contributory Superannuation Act 1971*, approved the introduction of this Bill into Parliament.

9. Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on 7 December 2005, the date of commencement of the *Parliamentary Superannuation Legislation Amendment Act 2005*.

Schedule 1 Amendment of *Parliamentary Contributory Superannuation Act 1971* No 53

Schedule 1 [1] corrects an oversight that would have excluded from the Parliamentary Contributory Superannuation Scheme, after the next general election, members of the Legislative Council who were elected at the 2003 general election for a term expiring at the 2011 general election (or who replaced members so elected because of a casual vacancy arising before the 2011 general election). Unless such a member ceases to be a member for more than 3 months, the member is a continuing member who is not subject to the closure of the Scheme to new members elected at or after the 2007 general election.

Schedule 1 [2] corrects an unintended consequence of the closure of the Scheme to continuing members elected before the 2007 general election who cease to be a member and become entitled to a pension, but who subsequently again become a member. When the member subsequently again becomes a member, section 25 (1) provides that the pension ceases. If the person ceased to be a member for less than 3 months, the person on re-election remains a continuing member who contributes to the Scheme and acquires further qualifying service during the period he or she again becomes a member (in which case, the person will on ceasing to be a member for the second time be entitled to a pension based on the previous service and the further additional service). However, if the break of service is more than 3 months, the person on again becoming a member will not be a continuing member and accordingly will not contribute or be entitled to qualifying service for the period the person again becomes a member. In this case, without an amendment to section 25 a new pension to replace the pension that ceased would not be payable. The amendment to section 25 provides that the original pension of such a person is merely suspended, so that it will be restored (without any increase for additional service) when the person ceases to be a member for a second time.

Schedule 1 [3] is consequential on the amendment made by Schedule 1 [2].

Issues Considered by the Committee

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

Issue: Retrospectivity - Clause 2 – Commencement:

10. Clause 2 reads: This Act is taken to have commenced on 7 December 2005 (the date of commencement of the *Parliamentary Superannuation Legislation Amendment Act 2005*).

11. The Committee will always be concerned with retrospective applications of provisions. However, the Committee also notes the object of the Bill is to correct the following:

- drafting oversights in amendments made to that Act by the *Parliamentary Superannuation Legislation Amendment Act 2005* to close the pension-based Parliamentary Contributory Superannuation Scheme to new members elected at or after the 2007 general election. The Scheme continues to apply to continuing members first elected before that general election;

- uncertainty arising from the *Parliamentary Superannuation Legislation Amendment Act 2005*, which closed the Parliamentary Contributory Superannuation Fund to members first elected at the 2007 general election. The fund was also closed at that time to former members re-elected after a break of more than three months from the Parliament;

- an unintended consequence of the closure of the Scheme to continuing members elected before the 2007 general election who cease to be a member and become entitled to a pension, but who subsequently again become a member. If the person ceased to be a member for less than 3 months, the person on re-election remains a continuing member who contributes to the Scheme and acquires further qualifying service during the period he or she again becomes a member (in which case, the person will on ceasing to be a member for the second time be entitled to a pension based on the previous service and the further additional service). However, if the break of service is more than 3 months, the person on becoming a member again, requires the amendment to section 25 so that the original pension of such a person is merely suspended, and that it will be restored (without any increase for additional service) when the person ceases to be a member for a second time.

12. Therefore, by taking into consideration of the above reasons, the Committee is of the view that the retrospective commencement of the proposed Act (clause 2), will not trespass unduly on individual rights and liberties.

The Committee makes no further comment on this Bill.

11. PERSONAL PROPERTY SECURITIES LEGISLATION AMENDMENT BILL 2010

Date Introduced:	22 June 2010
House Introduced:	Legislative Council
Minister Responsible:	John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. The objects of this Bill are to amend certain Acts and Regulations so as to declare certain State statutory rights not to be personal property for the purposes of the *Personal Property Securities Act 2009* of the Commonwealth.

2. In addition, the Bill amends Acts and Regulations to displace priority rules set out in the Commonwealth Act in favour of rules set out in State law in relation to the determination of priorities between certain State statutory interests and security interests to which the Commonwealth Act applies.

3. The Bill removes and updates references to the *Registration of Interests in Goods Act 1986* and the *Security Interests in Goods Act 2005* (which are both to be repealed following the commencement of the Commonwealth Act).

4. Lastly, the Bill amends the *Personal Property Securities (Commonwealth Powers) Act 2009* to make further provision for savings and transition matters consequent on the enactment of the Commonwealth Act (including enacting provisions to ensure the continued efficacy of certain State laws that make provision in relation to abandoned, uncollected or impounded goods, criminal assets and proceeds and certain other restricted dealings involving property).

Background

5. The Bill is part of a range of reforms to improve the law of personal property securities through the establishment of a single, national legislative scheme for the regulation and registration of security interests in personal property. A personal property security is created when a financier takes an interest in personal property as security for a loan or other obligation, or enters into a transaction that involves the provision of secured finance. Personal property includes all forms of property other than real property. It includes tangible property, such as motor vehicles, machinery, office furniture, and intangible property, such as contractual rights, trademarks and patents.

6. In 2009, the NSW Government passed the *Personal Property Securities (Commonwealth Powers) Act* that referred power to the Commonwealth to implement the national scheme for the registration of personal property securities.

7. In late 2009, the Commonwealth Parliament passed the *Personal Property Securities Act 2009* to give effect to the Personal Properties Securities scheme for it to take effect in May 2011.

8. In December 2009, the New South Wales Parliament passed supplementary legislation, the *Personal Properties Securities (Commonwealth Powers) Amendment Bill,* which enacted provisions based on the referral of matters made by the Parliament of NSW and other State Parliaments

9. This Bill makes consequential amendments to various other New South Wales Acts as part of the Personal Properties Securities implementation process and is the final tranche of reform in a series of amendments designed to facilitate the implementation of national personal properties securities law.

10. **This Bill was introduced into Parliament on 22 June 2010, passed both houses of Parliament on 24 June 2010 and was assented on 28 June 2010.**

The Bill

11. Outline of Provisions

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

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

Clause 3 makes it clear that the explanatory notes contained in Schedule 1 do not form part of the proposed Act.

Schedule 1 Amendment of Acts and Regulations

Schedule 1 contains the amendments referred to in the Overview.

Issues Considered by the Committee

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

Issue: Commencement by Proclamation

12. The Committee notes that this Bill is to commence on a day or days to be appointed by proclamation. This may delegate to the Government the power to commence the Act on whatever day it chooses or not at all.

13. However, the Committee notes that this Bill forms part of a nationwide effort, in concert with the Federal Government, relating to the implementation of a Personal Properties Securities register. The Committee appreciates the merit in a nationwide scheme for the regulation and registration of security interests in personal property.

14. The Committee also appreciates that the nature of cooperative federalism can affect the ability of the NSW Parliament to set commencement dates for its own legislative agenda, especially when it involves the referral of matters to the Commonwealth Parliament and is contingent on the passage of Commonwealth legislation. As the

Committee has not identified any other concerns with this Bill that may trespass on the rights and liberties of individuals, the Committee does not regard the commencement by proclamation to be an inappropriate delegation of legislative power in this instance.

The Committee makes no further comment on this Bill.

12. PLANT DISEASES AMENDMENT BILL 2010

Date Introduced:	23 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Steve Whan MP
Portfolio:	Primary Industries

Purpose and Description

1. This Bill amends the *Plant Diseases Act 1924* with respect to orders to prevent the introduction or spread of diseases and pests affecting plants or fruit; and for other purposes.

2. It makes three main amendments to the *Plant Diseases Act 1924*, in order to improve the effectiveness of the biosecurity management systems and controls. The first amendment is aimed to enable New South Wales to put in place effective controls more quickly.

3. The first amendment aims to modernise the *Plant Diseases Act* and bring it into line with similar legislation such as the *Animal Disease (Emergency Outbreaks) Act 1991*. The amendment will give the Minister for Primary Industries, rather than the Governor, the power to make orders to regulate or prohibit the importation or introduction of anything likely to introduce plant diseases or pests into New South Wales or any part of the State.

4. Under this amendment, the Minister is able to delegate the power to senior officers in Industry and Investment NSW. This power would be delegated to senior officers with the necessary technical expertise such as the Director of Plant Biosecurity. If the Minister formally delegates this power, the senior officer with the delegation will also be able to make orders. This aims to enable the Government to respond more quickly to biosecurity threats to the agricultural products from plant pests and diseases. Orders, as with the Governor's proclamation, will still need to be published in the gazette, with further notice of the order to be published on Industry and Investment NSW's website. Alternatively, the further notice of the order can appear in a newspaper, or broadcast on radio or television in the area to which the order applies.

5. The second amendment establishes a mechanism for the State to react in extreme circumstances. If the order needs to be made urgently, it can first appear in the newspapers, be announced on radio or television in the area to which the order applies, or appear on the department's website prior to publication in the gazette. This aims to ensure that in these circumstances the order can have effect more quickly.

6. The third main amendment relates to the powers of inspectors to issue permits to a person or a particular group of people. The permits will allow the movement of infected plants and fruit, or anything that has come into contact with an infected plant or fruit or anything that, in the inspector's opinion, is likely to cause or capable of causing the introduction or spread of plant pests or diseases.

7. A permit may also be issued for the movement of plants, fruit and other things into or out of a quarantine area. These permits will provide additional flexibility for specific circumstances that do not fall within the terms of a Ministerial order. For example, if a pest or disease infects the property it may be quarantined, which would prohibit the movement of all things off the property because of the risk of the disease spreading.

Background

8. The *Plant Diseases Act 1924* aims to prevent the introduction and spread of diseases and pests affecting plants or fruit in New South Wales. This Bill aims to improve the Government's ability to respond more quickly and with greater flexibility to biosecurity threats to plants and fruit in the State.

9. The Agreement in Principle speech explained that:

> Currently, the power to regulate or prohibit the importation or introduction of anything that is likely to introduce plant diseases or pests into the State or any part of the State resides with the Governor. Given this power resides with the Governor there are limitations with the timeframe in which the power can be exercised.

10. The Agreement in Principle speech continued to explain that:

> In addition, the Act requires the conditions that apply to the movement or treatment of the items that pose a risk of introducing the pests or diseases to be detailed in the Governor's proclamation. The requirements for movement conditions are often detailed and complex. In addition, having to specify the conditions in the proclamation is inflexible because they cannot be changed quickly. This restricts the Government's ability to respond to an emergency or to changes in circumstances, or our understanding of pests or diseases and how best to fight them.

11. The recent examples of incursions of the pest red imported fire ant and the disease citrus canker in Queensland highlight how this Bill will enable the Government to respond more quickly and with greater flexibility.

12. The amendment will also bring the Act into line with other biosecurity legislation, such as the *Stock Diseases Act 1923*. The Bill provides for the making of regulations for permit applications and fees.

The Bill

13. The object of this Bill is to amend the *Plant Diseases Act 1924* (***the principal Act***):

> (a) to allow the Minister to make orders (rather than the Governor making proclamations as is presently the case) regulating or prohibiting the importation or introduction of anything that is likely to introduce plant diseases or pests into the State or any part of the State, and
> (b) to allow inspectors to issue permits that authorise a person, or class of persons, to move plants, fruit, coverings, goods or other things that are infected or that may have come into contact with, or are likely to introduce or spread, plant pests or diseases or to move plants, fruit, coverings, goods or other things into, or out of, a quarantine area.

14. Outline of provisions

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

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

Schedule 1 Amendment of *Plant Diseases Act 1924* No 38:

Currently, section 4 of the principal Act provides that the Governor may, by proclamation published in the Gazette, regulate or prohibit the importation or introduction into the State, or the bringing into one portion of the State from any other portion of the State, any plant, fruit, covering, good or other thing which, in the Governor's opinion, is likely to introduce or spread any disease or pest.

Schedule 1 [1] amends that section to enable the Minister, rather than the Governor, to exercise that power by order instead of by proclamation.

Schedule 1 [4] also amends section 4 of the principal Act to enable the Minister to make an urgent order regulating or prohibiting the importation or introduction into the State of anything that is likely to introduce or spread any disease or pest by publishing the order in a newspaper circulating, or by radio or television broadcast, in the area to which the order applies or by causing a copy of the order to be published on the Department's internet website. The order must be published in the Gazette as soon as practicable after being made. **Schedule 1 [2], [3], [5], [6], [7], [9] and [10]** make consequential amendments.

Schedule 1 [8] inserts proposed section 16A into the principal Act which enables an inspector to issue a permit to a person, or class of persons, that authorises the moving of infected plants and fruit or plants, fruit, coverings, goods or other things that have come into contact with infected plants or fruit or that are likely to introduce or spread any disease or pest or the moving of plants or fruit into, or out of, a quarantine area.

Schedule 1 [11] enables the making of regulations relating to applications for permits under the principal Act, including a fee for any such application.

Schedule 1 [12] enables the making of regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [13] provides that an existing proclamation made by the Governor that regulates or prohibits the importation or introduction of things that are likely to introduce or spread any disease or pest is taken to be an order made by the Minister under section 4 of the principal Act.

Issues Considered by the Committee

15. 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.

13. PRIVACY AND GOVERNMENT INFORMATION LEGISLATION AMENDMENT BILL 2010

Date Introduced:	23 June 2010
House Introduced:	Legislative Council
Minister Responsible:	John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. This Bill amends various Acts to provide for the Information and Privacy Commission and the Information and Privacy Advisory Committee, and to make further provisions with respect to privacy protection principles and the office, role, functions and staff of the Information Commissioner and the Privacy Commissioner.

2. In particular, this Bill merges the Office of the Information Commissioner and Privacy NSW by establishing the Information and Privacy Commission.

3. The Bill also sets out the functions of the new Office, including how the Commissioners are to be appointed, staff are to be employed and various reporting requirements.

4. The Bill replaces the Privacy Advisory Committee with the Information and Privacy Advisory Committee. In addition, the Joint Committee on the Office of the Ombudsman and the Police Integrity Commission will be responsible for oversight of the Privacy Commissioner's functions.

5. The Bill also sets up consultation duties by the Commissioners by requiring the Commissioner's to liaise with each other before the issuing of certain guidelines, as well as setting the parameters for the Commissioners' right of appearance before the Administrative Decisions Tribunal.

6. Lastly, the Bill repeals parts of the *Privacy and Personal Information Protection Act 1998* relating to the obligation of government agencies to amend their records due to similar requirements being recently introduced in the *Government Information (Public Access Act) 2009.*

Background

7. In 2009, the Government introduced the *Government Information (Public Access) Act 2009,* which commenced on 1 July 2010. The Act is designed to improve the transparency and integrity of Government through the establishment of the independent Office of the Information Commissioner (OIC).

8. In 1998, the NSW Government introduced the *Privacy and Personal Information Protection Act,* which established enforceable standards for the NSW public sector when collecting, using and disclosing an individual's personal information. Questions

about the privacy of personal information and access to government information may often overlap, for example when an individual seeks access to their own person records held on a government file. Similarly, there are circumstances in which there could be tension with each other, for example when a person seeks access to government information that includes a third party's personal information.

9. In recognition of the values of open government and protection of personal information, and in particular the way those values often overlap or compete, the Office of the Information Commissioner and Privacy NSW have been merged to create a new body, the Information and Privacy Commission.

10. The creation of this body gives effect to the 2009 New South Wales Law Reform Commission report 'The Offices of the Information and Privacy Commissioners' in which its chief recommendation that a single office administer legislation pertaining to privacy and access to government information, in effect, creating a 'one-stop shop'. The creation of this new body is in line with similar moves to combine the two functions into one agency at a Commonwealth level.

11. The New South Wales Law Reform Commission noted that the creation of a single office assists in ensuring that agencies and individuals receive consistent information and advice, allows for coordinated training and provides a common point of contact for the public. It is intended that this will help reduce referral fatigue and maximise operational efficiencies.

The Bill

12. Outline of Provisions

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

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

Schedule 1 Amendment of *Privacy and Personal Information Protection Act 1998* No 133

Privacy Commissioner
Schedule 1 [3] aligns the procedure for the appointment, removal and staff of the Privacy Commissioner with the procedure for the appointment, removal and staff of the Information Commissioner. **Schedule 1 [5] and [15]** make consequential amendments.

Schedule 1 [12] requires the Privacy Commissioner to report on his or her work and activities and the operation of PPIPA to Parliament each year. **Schedule 1 [13]** is a consequential amendment.

Schedule 1 [2] provides that the Privacy Commissioner's guidelines may make provision with respect to requests for the alteration of personal information held by a public sector agency, which includes a Minister and a Minister's personal staff.

Schedule 1 [4] requires the Privacy Commissioner to consult with the Information Commissioner before preparing guidelines about the information protection principle concerning limits on disclosure of personal information.

Schedule 1 [6] makes the Joint Committee responsible for the oversight of the Privacy Commissioner's functions, as well as the Information Commissioner's functions as is currently the case.

Information and Privacy Commission

Schedule 1 [23] provides for the transfer of staff of the Privacy Commissioner (who are currently employed in the Department of Justice and Attorney General) to the Information and Privacy Commission. The Commission is established by **Schedule 4.3**, which renames the Office of the Information Commissioner as the Information and Privacy Commission. The Information Commissioner is the head of the Commission. The Commission is a merger of the Office of the Information Commissioner with Privacy NSW.

Information and Privacy Advisory Committee

Schedule 1 [11] replaces the Privacy Advisory Committee with an Information and Privacy Advisory Committee. The Committee will consist of the Information Commissioner, the Privacy Commissioner and 6 part-time members who are appointed by the Governor.

Schedule 1 [16]–[21] make consequential amendments to Schedule 2 to PPIPA, which contains provisions relating to the members and procedures of the Committee.

Schedule 1 [14] is a consequential amendment.

Amendment of records

Schedule 1 [10] repeals a Part of PPIPA that will be transferred from the *Freedom of Information Act 1989* when that Act is repealed on 1 July 2010. The Part gives a person the right to apply for the amendment of government records that concern the person's personal affairs and that are incomplete, incorrect, out of date or misleading. Section 15 of PPIPA provides for the making of corrections to government records for similar purposes.

Other provisions

Schedule 1 [7] and [8] provide that a person aggrieved by the conduct of a Minister or a Minister's personal staff in relation to the alteration of personal information is not entitled to an internal review of the conduct but is still entitled to seek a review of the conduct by the Administrative Decisions Tribunal (the ***ADT***).

Schedule 1 [9] requires the Privacy Commissioner to be notified by the ADT of any applications for reviews made to the ADT and allows the Privacy Commissioner to appear and be heard in any review proceedings. The Information Commissioner must also be notified of any review that relates to the provision of government information by an agency and is entitled to appear and be heard in those proceedings.

Schedule 1 [1] inserts a definition of ***Information Commissioner***.

Schedule 1 [22] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Schedule 2 Amendment of *Government Information (Information Commissioner) Act 2009* No 53

Schedule 2 [2] provides that the same person is not entitled to hold both the office of Privacy Commissioner and the office of Information Commissioner.

Schedule 2 [3] provides that a person acting in the office of the Information Commissioner, during the illness or absence of the Information Commissioner, is also taken to be the Chairperson of the Information and Privacy Advisory Committee during that period.

Schedule 2 [4] provides that the annual report of the Information Commissioner is to be included as part of the annual report of the Information and Privacy Commission. **Schedule 2 [5]–[7]** are consequential amendments. **Schedule 2 [1]** inserts a definition of ***Privacy Commissioner***.

Schedule 3 Amendment of *Government Information (Public Access) Act 2009* No 52

Schedule 3 [1] requires the Information Commissioner to consult with the Privacy Commissioner before issuing guidelines about a privacy-related public interest consideration against disclosure.

Schedule 3 [2] requires the Information Commissioner to consult with the Privacy Commissioner before making a recommendation about a decision of an agency that concerns a privacy-related public interest consideration against disclosure.

Schedule 3 [4] requires the Minister to consult with the Privacy Commissioner before a regulation is made under GIPAA that concerns the protection of individual privacy or a privacy-related public interest consideration against disclosure.

Schedule 3 [3] gives the Privacy Commissioner a right to appear and be heard in ADT proceedings in relation to a review of a decision concerning a privacy-related public interest consideration against disclosure.

Schedule 3 [5] requires the statutory review of GIPAA to include a consideration of the relationship between GIPAA and PPIPA. **Schedule 3 [6]** requires the Minister conducting the review to consult with the Privacy Commissioner, in addition to the Information Commissioner.

Schedule 3 [7] requires the Joint Committee to consult with the Privacy Commissioner on any review of the privacy-related public interest considerations against disclosure.

Schedule 3 [8] inserts a definition of ***Privacy Commissioner***.

Schedule 4 Amendment of other Acts

Schedule 4 contains consequential amendments and amendments relating to the merging of the Office of the Information Commissioner and Privacy NSW into the new Information and Privacy Commission.

Issues Considered by the Committee

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

Issue: Commencement by Proclamation

13. The Committee notes that this Bill is to commence on a day or days to be appointed by proclamation. This may delegate to the Government the power to commence the Act on whatever day it chooses or not at all.

14. However, the Committee also notes that this Bill proposes to merge two existing agencies into one. This Committee appreciates that this development requires appropriate administrative and transitory arrangements to take place before the Act can commence operation. As the Committee has not identified any other concerns with this Bill that may trespass on the rights and liberties of individuals, the Committee does not regard the commencement by proclamation to be an inappropriate delegation of legislative power in this instance.

15. The Committee recognises that appropriate administrative and transitory arrangements need to take place before the Bill can commence operation. The Committee does not consider the commencement by proclamation to be an inappropriate delegation of legislative power under s 8A(1)(b)(iv) of the Legislation Review Act 1987.

The Committee makes no further comment on this Bill.

14. SUMMARY OFFENCES AMENDMENT (FULL-FACE COVERINGS PROHIBITION) BILL 2010*

Date Introduced:	22 June 2010
House Introduced:	Legislative Council
Minister Responsible:	Reverend the Hon Fred Nile MLC
Portfolio:	Christian Democratic Party (Fred Nile Group)

Purpose and Description

1. This Bill prohibits people wearing full-face coverings in public places.

2. It seeks to prohibit the concealing of a personal identity whilst in public without a reasonable excuse to do so. This is set out in schedule 1, part 2, new division 2C, new section 11 I.

3. Proposed subsection (1) creates an offence for a person without reasonable excuse to wear a face covering while in a public place. The penalty on conviction is five penalty points ($550 fine). Proposed subsection (2) of the Bill defines face covering as any item of clothing or personal wear, such as helmets, which conceals a person's identity. This is the case in all such circumstances where identity is concealed, even if as stated in new subsection (5) part of the face is still visible.

4. Proposed subsection (3) provides further clarification by stating certain circumstances that qualify as a reasonable excuse: the lawful pursuit of the person's occupation; participation in a lawful entertainment, recreation or sport; and, legal regulatory requirements. In relation to the defence of reasonable excuse the onus of proof lies with the defendant, as specified in new subsection (6).

5. Proposed subsection (4) states that "religious or cultural belief does not constitute a reasonable excuse", except within a religious place of worship, which includes a mosque, a temple, a church or any other religious place of worship.

6. New subsection (7) stipulates that a person who compels another person to conceal their identity is guilty of an offence. The penalty on conviction is 10 penalty points ($1,100 fine).

Background

7. On 11 May 2010, the French Parliament unanimously passed a motion on a bill to prohibit any face coverings that concealed a person's identity. A Bill was also unanimously passed by the House of Representatives, Belgium Parliament on 9 April 2010, to amend the criminal code on the introduction of a ban on the wearing of face veils and robes in public spaces and public places.

8. The lower house of the French parliament on 13 July 2010 has voted to ban the face veil in public spaces. This was passed in the French National Assembly's lower

house and is expected to have similarly easy passage through the Senate in September 2010.

9. Similar laws proposed to ban the burqa are also pending in Belgium, Spain and in some parts of Italy.

10. If the French law is passed by the Senate, it could then face a challenge by the French highest legal body, the Constitutional Council. However, the Council of State, France's top legal advisory body, has already questioned whether such a proposed ban is compatible with their constitution and the European Convention on Human Rights.

11. According to the Second Reading speech, this Bill is based on the Belgium Bill, and:

> …nowhere does the Bill mention "burqa" or "Muslim". While this legislation has become known as the Burqa Bill, the scope of the Bill is much broader than just that one item of clothing.

12. It explained that:

> The content of this Bill is based on the Belgium Bill 52K2289, which was passed by 136 votes to nil on 30 April 2010 and…this Bill is also based on the draft French legislation, which will be rubberstamped in July following the passing of resolution No. 459 by 434 votes to nil on 11 May 2010.

13. The Second Reading speech continued that:

> The practical defence of reasonable excuse protects citizens from inadvertently committing an offence. If one takes part in a parade in Sydney or is suddenly hit by a blizzard and ski masks are the latest fashion, there is a reasonable excuse in evidence.
>
> …Throughout the history of human civilisation those seeking to circumvent the law of the land have taken steps to conceal personal identity to avoid being caught either prior to or post the commission of an offence. For this reason, banks and other institutions have long prohibited the wearing of any item that conceals personal identity whilst within their premises. Another relatively recent development in world events is the increasing prominence of identity-concealing attire being worn in public by rioters, thugs and social anarchists. Such attire is a regular feature at events such as the G7, G12 and G20 rallies where individuals seek to avoid prosecution from criminal acts when they smash windows, usually of bank buildings, or attack those they regard as the enemy of society, the local McDonald's restaurant…
>
> …Some seek public concealment in order to facilitate a criminal act rather than to avoid the consequences. Since 2001 there have been dozens of cases around the world where terrorists have made use of an ancient cultural item of clothing called the burqa to conceal weapons and explosives intended for murderous purposes. Terrorists have repeatedly used burqas for such purposes in Afghanistan, Pakistan, the United Kingdom, Iraq, the Gaza strip, India, Somalia and other countries. I want to make this very clear: I am not saying that concealing attire alone makes a person a criminal or a terrorist. Many individuals are law-abiding citizens going about their daily business. Some need, or are required to wear such attire, as I mentioned before when I referred to new subsection (3).

14. From the Second Reading speech:

> In some cases individuals are required or forced to wear concealing attire due to cultural pressures. For example, some women within Islamic society are being forced to wear the burqa, in contravention of the principles of freedom and equality of sex in our society. The garment is an ancient cultural form of sexual repression. Many Islamic clerics and public leaders have joined a worldwide chorus to have the clothing banned. Shikh Mohammed Tantawi, who was the Grand Mufti of Egypt and the highest Sunni authority in the Islamic world, banned the burqa from the al-Azhar Islamic college, stating "it had no connection with religion". The Muslim Canadian Congress has stated:
>
> > The Quran teaches modesty, however it does not have one word about covering the face. It is a tribal custom that is promoted by extremists such as al-Qaeda and the Taliban.
>
> Switzerland has also passed this motion in its Council of States, "The burka is a symbol of dominance of men over women", and Switzerland will also introduce legislation. Last week Spain stated that it will ban face coverings in public after the towns of Barcelona, Lerida and El Venrell had already taken the initiative to do so themselves. The Spanish Justice Minister, Francisco Caamano, stated, "We believe that there are things like the burqa which are hard to reconcile with human dignity and which pose problems of identification in public places."…Turkey banned the burqa in 1923, even though the majority of the population—well over 90 per cent—were Muslims.

The Bill

15. The object of this Bill is to make it an offence (maximum penalty of $550) for a person, without reasonable excuse, to wear a face covering while in a public place. A face covering is defined as any article of clothing or other thing (such as a helmet) that hides the face of a person in a way that conceals the person's identity. The Bill provides that a person's religious or cultural belief does not constitute a reasonable excuse for the purposes of the proposed offence. The prohibition does not extend to the wearing of face coverings in churches or other places of worship. The Bill also makes it an offence (maximum penalty of $1,100) to compel another person, by means of a threat, to commit the proposed offence of wearing a face covering in a public place.

16. Outline of provisions

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

Schedule 1 amends the *Summary Offences Act 1988* for the purposes described in the above Overview.

Issues Considered by the Committee

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

Issue: Freedom Of Expression And Freedom Of Religion – Schedule 1 – Amendment of *Summary Offences Act 1988* – insertion of Part 2, Division 2C - Proposed section 11I – wearing full-face coverings in public places:

17. The object of the Bill is to prohibit the concealing of a personal identity whilst in public without a reasonable excuse to do so. The Second Reading speech referred to

incidents of terrorists attacks and criminal acts in Afghanistan, Pakistan, the United Kingdom, Iraq, the Gaza strip, India, Somalia and other countries, while acknowledging that the concealing attire alone does not make a person a criminal or a terrorist.

18. The Second Reading speech also explained how: "some women within Islamic society are being forced to wear the burqa, in contravention of the principles of freedom and equality of sex in our society. The garment is an ancient cultural form of sexual repression. Many Islamic clerics and public leaders have joined a worldwide chorus to have the clothing banned". It mentioned overseas and European nations taking similar moves to introduce legislation to ban such full-face coverings and burqas in public places. For instance, Turkey in 1923 has banned the burqa; Spain stated that it will ban face coverings in public after the towns of Barcelona, Lerida and El Venrell have done so; Switzerland has passed a motion in its Council of States to introduce similar legislation; Belgium's House of Representatives passed a bill on 9 April 2010 to amend the criminal code on the introduction of a ban on the wearing of face veils and robes in public spaces and public places; and the French Parliament passed a motion on 11 May 2010, to introduce similar legislation before the National Assembly in July 2010.

19. The Committee notes the reasons and comments made in the Second Reading speech that outlined the support and rationale for the Bill.

20. However, the Committee also notes that the French parliamentary commission in January 2010 only recommended a partial ban on any veils that cover the face, which would apply in public places like hospitals and schools and on public transport, and to those who receive public services, but would not apply to people wearing the veils on the street or generally in the public. The French parliamentary commission did not recommend a full ban because not all of the 32 commission members could agree.[8] Accordingly, "any law directed at full veils is likely to be challenged in the courts both in France and at the European level".[9]

21. The French highest administrative legal body, the Council of State, has also warned the French government that it might be legally impossible to impose and enforce a full ban on full-face veils from public places.[10]

22. The Muslim Executive of Belgium has criticised the Belgium bill to ban the burqa or full-face coverings, saying: "it would lead to women who do wear the full veil to be trapped in their homes".[11] The vice-president of the Muslim Executive of Belgium, Isabelle Praile, said that the wearing of a full-face veil is part of the individual freedoms protected by European and international rights laws.[12] The Catholic Bishop

[8] "France moves toward partial burqa ban", CNN's Jim Bittermann in Paris contributed to this report, 26 January 2010, http://edition.cnn.com/2010/WORLD/europe/01/26/france.burqa.ban/index.html

[9] "France moves toward partial burqa ban", CNN's Jim Bittermann in Paris contributed to this report, 26 January 2010, http://edition.cnn.com/2010/WORLD/europe/01/26/france.burqa.ban/index.html

[10] "French cabinet approves burqa ban law", published on *France24*, 19 May 2010, http://www.france24.com/en

[11] "Belgian lawmakers pass burka ban", BBC News, 30 April 2010, http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/8652861.stm?ad=1

[12] "Belgian lawmakers vote to ban Islamic burqa in public", 30 April 2019, http://www.dawn.com/wps/connect/dawn-content-library/dawn/news/world/14-belgian-lawmakers-vote-to-ban-islamic-burqa-in-public-02-sa

in the southern town of Tournai in Belgium, Guy Harpigny, also asked: "Does the state really have the right to regulate the symbols of personal beliefs?"[13]

23. The Committee further notes the following prominent organisations and speakers who have expressed concerns and objections to proposals for banning full-face veils.

24. The United Kingdom's immigration minister, Damian Green said it would be 'undesirable' for Parliament to pass such a law as it goes against the UK's 'tolerant and mutually respectful society'. He stated that: "Telling people what they can and can't wear, if they're just walking down the street, is a rather un-British thing to do". [14]

25. The UK Environment Secretary, Caroline Spelman added that: "I don't, living in this country as a woman, want to be told what I can and can't wear…One of the things we pride ourselves on in this country is being free, and being free to choose what you wear is a part of that".[15]

26. The Committee also notes the *Convention on All Forms of Discrimination Against Women*, in particular, Article 2 (e) and (f) and Article 5 (a). Article 2 (e) aims to take action to eliminate all forms of discrimination against women while Article 2 (f) aims to take appropriate measures to modify or abolish existing laws, regulation, customs and practices which constitute discrimination against women. Article 5 (a) aims to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

27. The Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, opposed the bans on face veils on human rights grounds. He noted nations' obligations to uphold the *European Convention on Human Rights* and cited legal precedents that go against such limitations. He wrote that the ban supporters: "have not managed to show that these garments in any way undermine democracy, public safety, order or morals".[16]

28. Amnesty International warned that such a ban would set a "dangerous precedent". Amnesty International said it would "violate the rights to freedom of expression and religion of those women who wear the burqa or niqab as an expression of their identity and beliefs".[17] Amnesty International stated that restrictions on human rights must always be proportionate to a legitimate goal and a total ban on full face veils would not be.[18]

29. The Committee takes note of the statement given by the South Australian Equal Opportunity Commission's Acting Commissioner, Kylie O'Connell in May 2010:

[13] "Belgian lawmakers vote to ban Islamic burqa in public", 30 April 2019, http://www.dawn.com/wps/connect/dawn-content-library/dawn/news/world/14-belgian-lawmakers-vote-to-ban-islamic-burqa-in-public-02-sa
[14] "UK immigration minister Damian Green rules out burqa ban", Sarah Gordon, *Herald Sun*, 19 July 2010
[15] "UK immigration minister Damian Green rules out burqa ban", Sarah Gordon, *Herald Sun*, 19 July 2010
[16] "Belgium unites to ban the burqa", Teri Schultz, 29 April 2010, GlobalPost, http://www.globalpost.com/dispatch/belgium/100429/belgium-burqa-ban?page=0,2
[17] "Burqa Ban bill passes chamber reading", Issue 9 May 2010, New Europe, http://www.neueurope.eu/articles/Burqa-Ban-bill-passes-chamber-reading/100734.php
[18] "Burqa Ban bill passes chamber reading", Issue 9 May 2010, New Europe, http://www.neueurope.eu/articles/Burqa-Ban-bill-passes-chamber-reading/100734.php

> In South Australia, to date, women are free to choose how they will dress. Walk down a city street in your lunch hour and you will see the hijab, the sari and the miniskirt. In general, I expect most people feel that it's a free country and that we have a right to dress as we like, whether our reasons are cultural, religious or just personal. We don't expect the government to tell us what to wear. There are limits to this, of course, and safety is one of them. If you want to work on a building site, you can be required to wear a hard hat. If you want to enter a bank, you must remove your helmet. So it's an interesting question where the law should stand on the wearing of the burqa. Is this about religious and cultural freedom, or is it about public safety? As it happens, South Australia last year passed laws that protect the right to wear religious dress and adornments at work or in education. As a result of these new laws, everyone has the right to wear the garments, jewellery, hairstyles or other dress symbols of their religion in their workplace or at school or college. A taxi company cannot insist that drivers who follow the Sikh religion remove their turbans at work, for instance, and a state school cannot require Muslim girl students to remove their hijabs. There is a legal right to wear clothing that symbolises your religion, even if your workmates or teachers are uncomfortable with this. Again, there are limits. There is an exception to the law where the religious dress would create a safety hazard or stop you doing your job properly. There is also an exception where it is necessary to see a person's face to check their identity, for instance, where a student attends to sit an exam. A balance has been struck. In my view, we should think carefully about any proposal to ban the burqa. For a woman whose culture includes wearing the burqa, a ban may mean she chooses to stay at home. This could deprive her of ordinary freedom to participate in society. It's true that some people might misuse the burqa as a form of disguise. But that's true of the balaclava, the crash helmet and the nylon stocking too – should we ban these as well? …The right to choose how we dress applies equally to everyone. We already have laws against armed robbery, against terrorism and other crimes, regardless of what you are wearing when you commit them. Let's leave it at that. [19]

30. The United States President Barack Obama delivered the following speech in Cairo in June 2009:

> Freedom of religion is central to the ability of peoples to live together. We must always examine the ways in which we protect it…Likewise, it is important for Western countries to avoid impeding Muslim citizens from practising religion as they see fit – for instance, by dictating what clothes a Muslim woman should wear. We cannot disguise hostility toward any religion behind the pretense of liberalism. [20]

31. The Committee observes that from the Second Reading speech, it does not appear that the United Muslim Women Association of NSW or many Muslim women (including those who choose to wear the burqa or niqab) in NSW have been widely consulted on the likely impact arising from this type of Bill. As hijabi-wearing women, Samah Hadid, the 2010 Australian Youth Representative to the United Nations, and Rayann Bekdache, a freelance journalist, made the following comments in the Sydney Morning Herald, on 8 May 2010:

> The burqa is obligatory for women in Yemen or Afghanistan, but this cannot be the case for all women in France, Italy or Belgium who have clearly asserted their personal choices in wearing the full veil…Why should any state determine what women should wear? And how is this in line with liberalism…What about Article 27 of the International

[19] http://www.eoc.sa.gov.au/site/eo_resources/media_and_events/what_the_commissioner_says/the_burqa_ban_debate.jsp

[20] "Quebec Burqa Ban? Province Moves to Prohibit the 'Total Veil'", Sarah Wildman, 22 April 2010, Politics Daily, http://www.politicsdaily.com/2010/04/22/quebec-burqa-ban-province-moves-to-prohibit-the-total-veil/print

> Covenant on Civil and Political Rights and the rights of minority groups to preserve their culture?…The long-term effects of such bans will limit the participation of Muslim women in public life. Last year, during a presentation given to the United Nations Office of the High Commissioner for Human Rights, we reported on the state of the Muslim minority in Australia…but what was also highlighted was the various responses from Muslim Australians, notably the burkini – Muslim Australia's very own creation. This specially made swimsuit for Muslim women has encouraged the participation of Muslim women in Australia's iconic beach culture…Months after our presentation, the burkini was banned in several European cities. [21]

32. According to Luara Ferracioli, from the Australian National University, at the International Conference on Migration, Citizenship and Intercultural Relations held in November 2009, she found that most arguments fail to make a compelling case against the burqa when voluntarily used. She suggested that the ban does not in itself restore women's autonomy and concluded that: "there are a number of more fruitful avenues that would ensure that all conditions are in place for women to gain or maintain agency over their lives" if there is a commitment to protect Muslim women's rights in Australia.[22]

33. Ferracioli also argued that the rationale for identification requirements for roads, policing, welfare, medical purposes are different from claiming that it is impermissible for them to wear full-face coverings or the burqa on a day-to-day basis in public. She concluded that: "even if we believe that not to veil is a more appropriate act, we should nevertheless treat women as autonomous beings who should be free to give special weight to cultural and/or religious concepts of the good".[23]

34. Ferracioli explained that full veiling is not defended by the Koran and most Muslim women do not wear the burqa. However, she found that it is a 'cultural' practice among specific Muslim communities.

35. Therefore, it could be argued as an ethnic or ethno-religious belief or practice. This may fall under the definition of 'race' in the NSW *Anti-Discrimination Act 1977* which defines 'race' as including "colour, nationality, descent and ethnic, ethno-religious or national origin", constituting a ground for discrimination. Further, Section 56 (d) of the Act creates an exemption for "any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.".

36. According to Paul Morris, in the Human Rights Research Journal: "there are a variety of different forms of the hijab (Arabic, covered) or veil, ranging from the headscarf (hijab), via the two-piece veil, the al-amira, the long rectangular scarf or shayla worn widely in the Gulf states, the waist-length cape or khimar, the Iranian chador, the full-face veil or niqab, up to the most concealing of Muslim veils, the burqa, covering the

[21] "What women wear is their business", Samah Hadid and Rayann Bekdache, 8 May 2010, Sydney Morning Herald, http://www.smh.com.au/opinion/society-and-culture/what-women-wear-is-their-business-20100507-ujlz.html

[22] "Women's Autonomy and a Burka Ban in Australia", *International Conference on Migration, Citizenship and Intercultural Relations*, held at Deakin University Australia, Luara Ferracioli, Institute for Citizenship and Globalisation, Australian National University, 19 – 20 November 2009

[23] "Women's Autonomy and a Burka Ban in Australia", *International Conference on Migration, Citizenship and Intercultural Relations*, held at Deakin University Australia, Luara Ferracioli, Institute for Citizenship and Globalisation, Australian National University, 19 – 20 November 2009

entire face and body".[24] He explained that: "Veiling or not – whether of the hijab, the al-amira, the shayla, the khimar, the niqab, or the burqa – is a complex matter much debated across the Muslim world…In Afghanistan the practice of wearing the burqa is near universal and understood to be authorised by the traditions and texts above. Veiling allows for a public declaration of the acknowledgement of the authority of tradition and surrender to Allah. In practice, it is a widespread cultural practice taken on by individual or communal choice and the loss of the veil threatens the usual degree of privacy in public, identity, protection and mandated modesty. The removal of the 'veil' can be profoundly disorienting and lead to vulnerability".[25]

37. Morris commented that: "It is interesting to note that veiling also has a widespread Western cultural history, the remnants of which are still evident in the nun's wimple and the bridal veil, and in some European cultures widows still wear the veil. The cultural variation of Christian practices is a useful parallel to Muslim cultural diversity". He continued: "Cultural practices within the law are part of the self-determination of cultural groups and communities, and decisions as to their nature and authority are best left to these communities".[26]

38. However, aside from the burqa, niqab or face veils, 'hoodies' or zip-up balaclava hoodies could also come under this Bill. For instance, the Committee notes that Deputy Commissioner Dave Owens of NSW Police Force, stated that the zip-up hoodies were used by vandals to cover their faces and avoid being identified by CCTV cameras in response to the All Ironlak Graffiti Competition in Sydney.[27] In a similar line of argument, sunglasses, beanies, baseball caps when pulled down, could also be used to conceal a person's face from being identified, but which may not be treated as a 'full-face covering' under this Bill.

39. The Committee takes into consideration our existing legislation on anti-discrimination. Under NSW *Anti-Discrimination Act 1977*, section 7 covers discrimination on the ground of race which includes colour, nationality, descent and ethnic, ethno-religious or national origin. The Commonwealth *Racial Discrimination Act 1975* includes section 9 that deals with unlawful racial discrimination and section 11 deals with access to places and facilities. Further, the Committee notes the exemption for religious practices created by Section 56 (d) of the NSW *Anti-Discrimination Act 1977*.

40. **The Committee also refers to Article 18 of the *International Covenant on Civil and Political Rights* (ICCPC), which sets out the right to freedom of thought, conscience and religion. Article 19 of the ICCPC establishes the right to freedom of expression and opinions. Article 27 establishes the right of ethnic or religious minorities to enjoy their own culture and practice. The Committee also notes Article 2 (e) and (f) and Article 5 (e) of the *Convention on All Forms of Discrimination Against Women.***

[24] Paul Morris, "Covering Islam – Burqa And Hijab: Limits To The Human Right To Religion", 2 *Human Rights Research Journal*, 2004, at p 4.
[25] Paul Morris, "Covering Islam – Burqa And Hijab: Limits To The Human Right To Religion", 2 *Human Rights Research Journal*, 2004, at p 6.
[26] Paul Morris, "Covering Islam – Burqa And Hijab: Limits To The Human Right To Religion", 2 *Human Rights Research Journal*, 2004, at pp 6 – 7.
[27] "Graffiti kids hide behind bala-hoodie", Geoff Chambers, 28 June 2010, Daily Telegraph, http://www.dailytelegraph.com.au/news/graffiti-kids-hide-behind-bala-hoodie/story-e6freuy9-1225884922905

41. Therefore, the Committee is of the view that the proposed legislation may not remain valid if challenged under the NSW *Anti-Discrimination Act 1977* and the Commonwealth *Racial Discrimination Act 1975*, and it may also be contrary to the *International Covenant on Civil and Political Rights*.

42. The Committee considers that a human right may be subject under law to such reasonable limits as can be demonstrably justified in a free and democratic society based on equality and freedom. It is unclear to the Committee as to whether these limits imposed by this Bill are reasonable and can be demonstrably justified in this instance when taking into consideration the concerns and comments shared by other prominent organisations or bodies, such as the Muslim Executive of Belgium, the French parliamentary commission, the French highest administrative legal body (the Council of State), the Council of Europe's Commissioner for Human Rights, Amnesty International, the South Australian Equal Opportunity Commission, as well as observing the recent objections raised by the UK immigration Minister and the UK environment secretary.

43. The Committee is also concerned with the low level (if any) of consultations with the United Muslim Women Association of NSW or many Muslim women (including the minority who choose to wear the burqa or niqab) in NSW on the likely impact arising from this Bill.

44. When determining whether a trespass is undue on the right to religious freedom including the right to ethno-cultural practice or religious belief, and the right to expression including an individual right to choose how to dress, this may involve the consideration of the importance of the purpose of the trespass such as for public safety, public order or morals, and the assessment of the necessity of trespassing on that right to achieve the intended legislative object, including a comparison of the result of trespassing on the right with the best alternative or least restrictive means to achieving that object and leaving the right intact.

45. The Committee is concerned that the impact of the Bill may disproportionately disadvantage a minority of Muslim women who choose to wear the burqa or niqab, even if the Bill does not use the word 'burqa' or 'niqab'. As expressed by the Council of Europe's Commissioner for Human Rights, the Committee is also of the view that there is no compelling evidence "to show that these garments in any way undermine democracy, public safety, order or morals"[28], and therefore, the importance of the purpose of the trespass or limitation to the rights, such as in the interest of democracy, public safety, order or morals, has not been demonstrated.

[28] "Belgium unites to ban the burqa", Teri Schultz, 29 April 2010, GlobalPost, http://www.globalpost.com/dispatch/belgium/100429/belgium-burqa-ban?page=0,2

46. As already stated by the South Australian Equal Opportunity Commissioner: "the right to choose how we dress applies equally to everyone. We already have laws against armed robbery, against terrorism and other crimes, regardless of what you are wearing when you commit them".[29] Accordingly, the Committee considers that there is not a strong or compelling necessity to trespass unduly on the right to religion and freedom of religious belief or ethno-cultural practice, right to freedom of expression and to dress as one chooses when there is already an array of laws against armed robbery, terrorism and other crimes which can achieve the same purpose of protecting the public from criminal acts. Otherwise, a range of other garments such as sunglasses, beanies, hoodies, baseball caps, could also serve the purpose of concealing or hiding a person's face from identity in public, and may also require a similar ban unnecessarily.

47. Therefore, the Committee refers the undue trespass on personal rights and liberties arising from schedule 1 of the Bill, by the insertion of the proposed section 11I of part 2, division 2C, to Parliament for consideration.

Issue: Reversal Of Onus Of Proof - amendment of *Summary Offences Act 1988* - insertion of Part 2, Division 2C - Proposed section 11I (6) – wearing full-face coverings in public places:

48. Proposed section 11I (6) reads: The onus of proof of reasonable excuse in proceedings for an offence under subsection (1) lies on the defendant.

49. Proposed section 11I (3) provides that: Without limitation, it is a reasonable excuse for the purposes of this section if the wearing of the face covering is reasonably necessary in all the circumstances for any of the following purposes:

(a) the lawful pursuit of the person's occupation,

(b) participation in a lawful entertainment, recreation or sport,

(c) such other purposes as may be prescribed by the regulations.

50. Proposed section 11I (4) also reads: However, a religious or cultural belief does not constitute a reasonable excuse for the wearing of a face covering.

51. The proposed section 11I (6) reverses the onus of proof that traditionally requires the authority or prosecution to prove all the elements of an offence. This is inconsistent with a presumption of innocence, a fundamental right established by Article 14(2) of the *International Covenant on Civil and Political Rights*.

52. The Committee refers the proposed section 11I (6) of Part 2, Division 2c of Schedule 1, to Parliament for consideration as to whether the reversal of the onus of proof in these circumstances may unduly trespass on personal rights and liberties.

[29] http://www.eoc.sa.gov.au/site/eo_resources/media_and_events/what_the_commissioner_says/the_burqa_ban_debate.jsp

The Committee makes no further comment on this Bill.

15. TERRORISM (POLICE POWERS) AMENDMENT BILL 2010

Date Introduced:	24 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. This Bill amends the *Terrorism (Police Powers) Act 2002* as a consequence of a review carried out under section 36 of that Act.

2. Item [1] of schedule 1 provides a definition of impaired intellectual functioning. The Ombudsman noted that there were inconsistent definitions in the Act regarding incapable persons and recommended that the definition be made consistent. The Government supported this recommendation and has adopted a definition recommended by the Ombudsman, which is used in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

3. Item [2] provides that Police must provide a written statement regarding the use of the special search powers under the Act within 30 days of a request being made. The Bar Association noted in its submission that the Act provided for people subject to the powers to request a statement from Police that the search was conducted in pursuance of the Act, however, it did not provide a timeframe within which such a statement should be provided. The provision aims to remedy this.

4. Item [3] inserts a new section that gives the Supreme Court the power to order that where it is in the interests of justice to do so, the Legal Aid Commission should provide legal aid to a person in relation to preventative detention proceedings. This will override the general tests that are applied by the commission in considering whether to grant someone legal aid. However, the Government accepts the Ombudsman's recommendation, given the extraordinary nature of preventative detention proceedings.

5. The Ombudsman noted that the Act provides that where a police officer is satisfied that the grounds on which a preventative detention order was made have ceased to exist they must make an application to have the order revoked. However, there is no provision requiring the release of the person in such circumstances. Item [4] of this Bill inserts a provision providing that a person is to be released immediately in these circumstances.

6. Items [5] through [8] of the Bill relate to the requirements under the Act for a person being detained under a preventative detention order to be informed of certain matters. The new provisions will ensure that the person is informed of their general right to contact the Ombudsman and the Police Integrity Commission.

7. Item [10] implements a recommendation of the Ombudsman: that detainees be entitled to have contact with authorised chaplains where they are detained.

8. Items [17] to [19] and items [21] to [25] relate to the reporting requirements under the Act. The Ombudsman recommended that his limited reporting role under the Act should be extended indefinitely, given the seriousness of the powers involved. The Government has implemented a rolling scheme of reviews every three years. The current monitoring role of the Ombudsman is preserved.

Background

9. This Bill gives effect to recommendations made in a statutory review of the *Terrorism (Police Powers) Act 2002* conducted by the Department of Justice and Attorney General. The statutory review took into consideration the recommendations made by the Ombudsman in his 2008 review of parts 2A and 3 of the Act.

10. The *Terrorism (Police Powers) Act* confers special powers on police officers to deal with imminent threats of terrorist activity and to respond to terrorist attacks. The Act was drafted in conjunction with a reference of powers to the Commonwealth to allow for a nationally consistent set of terrorism offences. The legislation provides for extraordinary powers to be exercised by Police in limited circumstances. The powers relate to the exercise of special search and seizure powers in a target area, placing a person in preventative detention and undertaking covert searches authorised by warrant. The powers are able to be exercised only when it is believed a terrorist attack is about to occur, or in the immediate period after it has occurred.

11. Two previous statutory reviews had been conducted in 2005-06 and 2007.

12. The amendments in this Bill represent the result of the third statutory review and make minor amendments to the Act to clarify its operation. The review was conducted in late 2009 and sought comment from the public and key stakeholders regarding whether the objectives and provisions of the Act remained valid.

13. The Agreement in Principle speech explained that:

> Following consideration of the Ombudsman's previous review and the submissions made, the statutory review found that the objectives of the Act remain valid and made 15 recommendations to improve the operation of its provisions. Eleven of these recommendations will be implemented as a result of the current Bill. Of the balance, one proposes an amendment to the regulations, which are currently being drafted. Two involve operational matters for the New South Wales Police Force, and one recommends further consultation. Any necessary amendments arising from that consultation will be progressed separately.

The Bill

14. The object of this Bill is to amend the *Terrorism (Police Powers) Act 2002* (***the Principal Act***) to implement the recommendations arising from the statutory review of the Principal Act. In particular, the Bill:

(a) enables the Supreme Court to order the Legal Aid Commission to provide legal aid to a person in relation to whom a preventative detention order is being sought or who is subject to such an order, and
(b) provides that a person detained under a preventative detention order must be released as soon as is practicable after the grounds on which the order was made have ceased to exist, and
(c) provides that a person detained under a preventative detention order is entitled to have contact with an authorised chaplain, and
(d) makes other amendments relating to contact between persons detained under preventative detention orders and other persons, and
(e) provides for the ongoing scrutiny by the Ombudsman of the exercise of powers conferred by Part 2A (Preventative detention orders) and Part 3 (Covert search warrants) of the Principal Act, and
(f) makes other miscellaneous amendments.

15. Outline of provisions

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

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

Schedule 1 Amendment of *Terrorism (Police Powers) Act 2002* No 115

Schedule 1 [1], [11], [15], [16] and [26] make amendments to make terminology used in the Principal Act describing vulnerable persons for whom special provision needs to be made consistent with that used in the *Law Enforcement (Powers and Responsibilities) Act 2002*. Specifically, the amendments replace the term "incapable of managing his or her affairs" with "impaired intellectual functioning" and provide a definition for that term.

Section 23 (2) of the Principal Act requires the Commissioner of Police to arrange for a written statement to be provided, on request, to a person who was searched, or whose vehicle or premises were searched, under Part 2 of that Act stating that the search was conducted in pursuance of that Part. **Schedule 1 [2]** provides that the written statement is to be provided within 30 days of the request being made.

Schedule 1 [3] inserts proposed section 26PA into the Principal Act to provide that the Supreme Court may, if it is satisfied it is in the interests of justice to do so, order the Legal Aid Commission to provide legal aid to the person in relation to whom a preventative detention order is being sought or is in force for proceedings in connection with an application for the making or revocation of a preventative detention order or prohibited contact order. The proposed section also provides that if the Supreme Court makes such an order, the police officer who is detaining the person must give the person reasonable assistance to enable the person to contact the Legal Aid Commission to obtain the legal aid.

Schedule 1 [4] inserts proposed section 26W (1A) into the Principal Act to provide that the police officer who is detaining a person under a preventative detention order must release the person from detention under the order as soon as is practicable after the police officer is satisfied that the grounds on which the order was made have ceased to exist.

Schedule 1 [5] and [7] make amendments to make it clear that as soon as practicable after a person is first taken into custody under a preventative detention order, the police officer who is detaining the person under the order must inform the person of the person's entitlement to contact the Ombudsman.

Schedule 1 [6] and [8] make amendments to make it clear that as soon as practicable after a person is first taken into custody under a preventative detention order, the police officer who is detaining the person under the order must inform the person of the person's right to complain to the Police Integrity Commission in relation to the application for, or the making of, the order or the treatment of the person by a police officer in connection with the person's detention under the order.

Section 26ZG of the Principal Act deals with the entitlement of a person detained under a preventative detention order to contact a lawyer. Section 26ZG (3) more specifically states that if the person being detained asks to be allowed to contact a particular lawyer and either the person is not entitled to contact that lawyer because of a prohibited contact order or the person is not able to contact that lawyer, the police officer who is detaining the person must give the person reasonable assistance to choose another lawyer for the person to contact.

Schedule 1 [9] inserts proposed section 26ZG (3A) into the Principal Act to provide that, without limiting the assistance that may be given to a person under that subsection, the police officer may refer the person to the Legal Aid Commission.

Schedule 1 [10] inserts proposed section 26ZGA into the Principal Act to provide that a person detained under a preventative detention order is entitled to contact an authorised chaplain, being:

> (a) a person who is authorised under the *Crimes (Administration of Sentences) Act 1999* to perform the functions of a chaplain in a correctional centre, and
> (b) in relation to a person being detained under a preventative detention order who is under 18 years of age and who is detained in a detention centre within the meaning of the *Children (Detention Centres) Act 1987*—a minister of religion authorised by the Chief Executive of Juvenile Justice, Department of Human Services to minister to detainees at that detention centre.

Schedule 1 [13] is a consequential amendment to make it clear that contact with an authorised chaplain is subject to monitoring under section 26ZI of the Principal Act.

Schedule 1 [12] inserts proposed section 26ZH (7) into the Principal Act to provide that a police officer who is detaining a person under a preventative detention order who is under 18 years of age or has impaired intellectual functioning is, as far as is reasonably practicable, to assist the person in exercising the person's entitlement to contact under Division 5 of Part 2A of that Act (that is contact with persons under that section, contact with a lawyer and contact with the Ombudsman and the Police Integrity Commission).

Section 26ZG of the Principal Act provides that a person being detained under a preventative detention order is entitled to contact a lawyer for certain permitted purposes (basically to obtain legal advice). Section 26ZI of that Act provides for that contact to be monitored by police (and where necessary interpreters).

Section 26ZI (6) makes it an offence for a person to disclose information so monitored if it is information that is communicated for one of the permitted purposes.

Schedule 1 [14] inserts proposed section 26ZI (7) into the Principal Act to provide that a monitor does not commit an offence under subsection (6) in relation to the disclosure of information to a lawyer for the purpose of obtaining advice as to:

> (a) whether the information is information communicated between the detainee and the detainee's lawyer for one of the purposes referred to in section 26ZG, and
> (b) the monitor's obligations under the Principal Act in relation to that information.

Schedule 1 [17], [18], [19], [21], [22] and [24] make amendments to provide for the ongoing scrutiny by the Ombudsman of the exercise of powers conferred by Part 2A (Preventative detention orders) and Part 3 (Covert search warrants) of the Principal Act. Scrutiny of Part 2A is to expire 5 years after the commencement of that Part (being on 16 December 2010). Scrutiny of Part 3 expired 2 years after the commencement of that Part (being 13 September 2007). Ongoing reports on the exercise of powers under Parts 2A and 3 are to be prepared by the Ombudsman every 3 years and furnished to the Attorney General and the Minister for Police for tabling in Parliament. The first report under the amended provisions is due as soon as practicable after 16 December 2010.

Schedule 1 [20] omits section 27W of the Principal Act which requires the Commissioner of Police or the Commissioner for the New South Wales Crime Commission to ensure that any copy, photocopy or other record made in the execution of a covert search warrant is destroyed as soon as practicable after determining that its retention is no longer reasonably required for the purpose of an investigation or proceedings.

Schedule 1 [23] makes a law revision amendment to make it clear that it is the Attorney General's responsibility to ensure that the Ombudsman's report under section 27ZC of the Principal Act is tabled in Parliament.

Schedule 1 [25] amends section 36 of the Principal Act to require the Attorney General (being the Minister administering that Act) to continue to undertake reviews to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. A review is to be undertaken, every 3 years, as soon as possible after the Ombudsman's reports under sections 26ZO and 27ZC have been tabled in Parliament.

Schedule 1 [27] enables regulations of a savings or transitional nature consequent on the enactment of the proposed Act to be made.

Issues Considered by the Committee

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

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

16. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. However, the Committee notes from the Agreement in Principle speech that following the Ombudsman's previous review and the submissions made, the statutory review made 15 recommendations to improve the operation of its provisions. Eleven of these recommendations will be implemented as a result of the current Bill. Of the balance, one proposes an amendment to the regulations, which are currently being drafted. Therefore, these will involve appropriate administrative and transitional arrangements to be made, and may require discretion for the commencement by proclamation.

17. Therefore, the Committee has not identified any issues regarding Clause 2 under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

16. WORKERS COMPENSATION LEGISLATION AMENDMENT BILL 2010

Date Introduced:	23 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Michael Daley MP
Portfolio:	Finance

Purpose and Description

1. This Bill amends workers compensation legislation to make further provision for determination of compensation and work injury damages, workplace rehabilitation, medical assessment, appeals and other matters.

2. It includes an amendment to give the commission power to make determinations with regard to expenses for treatment not yet incurred. The Bill addresses recent case law, which has extended the grounds of appeals against the decisions of arbitrators and approved medical specialists. The Bill includes an amendment to make it clear that an appeal against a decision of an arbitrator is not a full review of the arbitrator's decision and is limited to a determination as to whether the decision appealed against was affected by error. It also includes an amendment to make it clear that an appeal against a medical assessment by an approved medical specialist is limited to the ground on which the appeal is made and is not a review of any other aspect of the medical assessment.

3. It clarifies the operation of provisions that enable certain matters in the Workers Compensation Commission to be reconsidered as an alternative to formal legal appeals or challenges. The reconsideration provisions as currently drafted have led to unintended outcomes, in particular the use of reconsideration powers to hear matters that have not satisfied any grounds of appeal.

4. The Bill will clarify provisions that enable certain matters in the Workers Compensation Commission to be reconsidered as an alternative to formal legal appeals or challenges. Section 378 of the 1998 Act provides for reconsideration of an assessment made by the registrar, an approved medical specialist or a medical appeal panel. The objective of section 378 is to lessen the need for formal appeal or review and to expedite resolution of matters by an approved medical specialist where relevant information was inadvertently overlooked or not passed on to the approved medical specialist by the registrar of the commission. The provision allows reconsideration for error.

5. The Bill will increase the monetary threshold for appeals from $5,000 to $7,500, and make other changes to ensure that the appeal threshold remains current and appropriate to workers compensation disputes. It removes the current threshold requiring the amount being appealed to be more than 20 per cent of the amount awarded. The amendment gives the commission discretion to hear appeals of an interlocutory nature and makes clear that appeals made within the required time

frame that meet the monetary threshold of $7,500 will automatically be referred by the registrar to a presidential member if procedural requirements are met. Increasing the threshold for appeals from $5,000 to $7,500 ensures that the threshold is the same as other thresholds for disputes at the commission; for example, the maximum amount for an interim payment direction for medical expenses is $7,500.

6. It also provides for the appointment of one or more senior approved medical specialists to assist with the professional development, mentoring and appraisal of approved medical specialists.

7. It includes an amendment to ensure that injured workers are not encouraged to settle a common law claim without knowing they had an entitlement to other statutory lump sum amounts. The amendment provides that injured workers who reach a threshold level of 15 per cent whole person impairment must have been paid their lump sum statutory entitlements before they are able to settle a work injury damages claim. This seeks to protect workers by ensuring that they know about and are paid a statutory entitlement to a lump sum for which they are eligible and that any amount for work injury damages is paid separately.

8. The amendment does not prevent a work injury damages claim being made before the worker's statutory lump sum entitlement has been paid. Another amendment will ensure that injured workers will continue to be paid weekly benefits by scheme agents and insurers, pending an appeal. Where an arbitrator has determined that weekly benefits should be paid to a worker, a scheme manager or insurer can appeal that decision.

9. The Bill will provide for insurers to pay injured workers once they have received a determination from an arbitrator, whether or not that decision is being appealed. This amendment reflects the general law where an appeal does not automatically stay the original decision, and this will clarify that this is the case in relation to weekly workers compensation payments. However, it also makes it clear that decisions regarding medical expenses and permanent impairment are stayed pending an appeal. This seeks to protect injured workers from later debt recovery action for treatment not found to be reasonably necessary or lump sum payments found not to be compensable.

10. This Bill also contains miscellaneous amendments including provisions for a worker’s entitlement to reimbursement for the cost of obtaining a permanent impairment medical certificate to be part of the claim for permanent impairment.

11. There are administrative amendments to reflect the implementation by WorkCover of the Nationally Consistent Approval Framework for Workplace Rehabilitation Providers. All references to "occupational rehabilitation service" are replaced with references to "workplace rehabilitation service" and all providers of workplace rehabilitation services will be approved rather than accredited.

Background

12. The Workers Compensation Commission provides an independent and impartial statutory tribunal for disputed workers compensation claims in New South Wales. The Bill aims to address a number of issues to help improve commission’s ability to deliver prompt and effective dispute resolution services.

13. Workers compensation legislation provides for the commission to approve the payment of expenses for reasonably necessary medical treatment. However, a presidential decision has determined that the commission has jurisdiction to make determinations for medical or other treatment only where the expense has already been incurred. This means that where there is a dispute between the scheme, agent or insurer, and a worker with regard to whether treatment is reasonably necessary, workers are unable to have their dispute heard unless they first pay for the treatment themselves. The Bill will ensure that the commission has the power to make a decision about whether treatment requested, but not yet received, is reasonably necessary. This will be achieved by ensuring that an approved medical specialist gives an opinion with regard to the treatment, and the opinion of the approved medical specialist is taken into account in the decision.

14. The Agreement in Principle speech explained that:

> Processes used in the commission are designed to support its objective of providing a fair and cost-effective resolution service for disputed workers compensation claims. However, recent court decisions have impacted the way that appeal mechanisms in the commission operate. In *Sapina v Coles Myer Limited [2009] NSWCA 71* the Court of Appeal extended the scope of appeal rights by determining that an appeal is to proceed by way of a full review of the arbitrator's decision, irrespective of the identification of any error by the arbitrator. The Sapina decision has the potential to lead to delays and increased costs in the commission, without achieving any benefit to workers in the system. To overcome this, the Bill will restrict appeals under section 352 of the *Workplace Injury Management and Workers Compensation Act 1998* to cases where there is "legal, factual or discretionary error". The amendment reverses the effects of the court's decision and reflects the original intent of the relevant appeal provisions.

15. The Agreement in Principle speech continued to explain that:

> Decisions by higher courts have also broadened the scope of appeals to the commission's Medical Appeal Panel and have the potential to undermine the registrar's role in determining whether grounds for appeal exist. The case of *Siddik v WorkCover Authority of NSW [2008] NSWCA 116* decided that a medical appeal panel is not confined to considering the grounds of review under which the appeal was permitted to proceed or the grounds stated by the appealing party. It is proposed to amend section 328 of the 1998 Act to ensure that the issues considered by a medical appeal panel are limited only to those issues in the grounds of appeal. This amendment will also clarify that additional evidence will be admitted only when it was not available before the medical assessment and the evidence could not reasonably have been obtained before that medical assessment.

16. The Bill also contains a provision to index the threshold for appeal and the maximum amount for an interim payment direction for medical expenses, to ensure these thresholds remain relative to the amount in dispute and the cost of medical treatment over time. To offset any loss of appeal right associated with the increase in the threshold, the Bill will remove the requirement that the amount being appealed is at least 20 per cent of the amount in dispute.

17. The measure to improve the efficiency of the Workers Compensation Commission will involve the engagement of senior approved medical specialists by the president of the commission. These positions will come from the pool of existing approved medical specialists. Senior approved medical specialists will have additional responsibilities above their existing role as an approved medical specialist, including

assisting with the professional development, mentoring and appraisal of approved medical specialists.

18. The Bill makes it clear that for partially incapacitated workers who are seeking employment or who return to work, the maximum weekly compensation amount is a limit on the compensation payable and not a limit on the combined total of compensation and earnings. The amendment allows workers to be paid up to the maximum weekly compensation amount in addition to the earnings from their employer. The current limit on maximum weekly payments for workers who unreasonably reject suitable payment is retained.

19. There will be a measure to restrict the jurisdiction of the Workers Compensation Commission to review the Nominal Insurer's discretion to waive rights of recovery against uninsured employers. This amendment aims to overcome a court decision that found that under the current legislation, the Workers Compensation Commission has the jurisdiction to override the Nominal Insurer's discretion with regard to waiving liability of an uninsured employer to reimburse the Workers Compensation Insurance Fund.

20. The Nominal Insurer is responsible for the management of the Workers Compensation Insurance Fund and any payment made for an uninsured liability claim comes out of the fund. The decision to waive liability for reimbursement to the Workers Compensation Insurance Fund is a commercial one that rests properly with the Nominal Insurer, as the body responsible for the management of the fund. The *Workers Compensation Act 1987* sets out procedures that give protection to uninsured employers. These procedures include giving notice to uninsured employers and providing an opportunity for them to dispute liability and to address the matters set out in section 145 (2), including their capacity to meet the liability.

21. The Nominal Insurer then considers submissions made by employers in the course of determining whether recovery should be pursued. An employer can also take proceedings in the Supreme Court challenging decisions of the Nominal Insurer to issue a recovery notice where it is considered that there is no legal basis for a notice to be issued. The second measure is to allow self- and specialised insurers and retro-paid loss employers to give security to WorkCover by insurance bonds.

22. Self- and specialised insurers and employers participating in the retro-paid loss premium calculation method are required to give security to WorkCover to cover the cost of their claims liabilities should they become unable to meet them. Security is usually given by a direct deposit. The legislation allows for two other forms of security: Commonwealth and State bonds or bank guarantees.

23. Bank guarantees have been the most commonly used form of providing financial security. However, according to the Agreement in Principle speech:

> retro-paid loss employers have advised that the cost of a guarantee has increased significantly since the onset of the global financial crisis and their availability is limited. Some employers have reported that banks providing guarantees have required a deposit to the same value as the guarantee. This ties up capital in the same way as a direct deposit, leaving a bank guarantee of no value as an alternative form of giving security. Some large employers and self- and specialised insurers have expressed an interest in insurance bonds as an alternative form of providing financial security, and the Bill contains a proposal to allow this to happen. Making this amendment ensures

that the workers compensation system in New South Wales remains flexible and responsive to the needs of employers.

24. WorkCover will require that insurance bonds given as security are issued by providers who are both regulated by the Australian Prudential Regulatory Authority and meet appropriate credit rating thresholds.

25. This Bill will provide for the cost of permanent impairment medical certificates to be met by insurers as part of the resolution of claims for lump sum permanent impairment. The amendment will ensure that scheme agents and insurers meet the cost of those reports, which form the basis of a determination for lump sum permanent impairment.

26. This Bill will also amend section 151A of the *Workers Compensation Act 1987* to ensure that the change to the retiring age is appropriately recognised and accounted for in any decision or settlement of a claim for damages under part 5 of the *Workers Compensation Act 1987*.

27. Another miscellaneous amendment provides that an applicant for a specialised insurer licence is not required to obtain an authority under section 12 of the Commonwealth *Insurance Act 1973* if the applicant is exempt from the operation of the Commonwealth Act. Section 12 of the Commonwealth Act deals with the power of the Australian Prudential Regulatory Authority to issue licences to insurers, but it does not apply to some entities established by State laws. For example, Racing NSW, which is a specialised insurer, is established under State law and is exempt from the operation of the Commonwealth Act. This amendment will allow Racing NSW to renew its specialised insurer licence.

28. The list of rehabilitation services will be removed from the legislation to reflect the model of workplace rehabilitation that has been adopted by the Nationally Consistent Approval Framework for Workplace Rehabilitation Providers. This model reflects more accurately the full range of services required to assist an injured worker back to work and is currently being adopted across the Commonwealth, States, Territories and New Zealand.

The Bill

29. The object of this Bill is to amend the Workers Compensation Act 1987 and Workplace Injury Management and Workers Compensation Act 1998 as follows:

(a) to extend the jurisdiction of the Workers Compensation Commission (***the Commission***) in relation to disputes about treatment and services that have been provided to an injured worker so as to cover disputes about treatment and services that are proposed to be provided,
(b) to make it clear that an appeal against a decision of an Arbitrator is not a full review of the Arbitrator's decision and is limited to a determination as to whether the decision appealed against was affected by error,
(c) to make it clear that an appeal against a medical assessment is limited to the grounds on which the appeal is made and is not a review of any other aspect of the medical assessment,

(d) to make it clear that fresh evidence cannot be adduced on an appeal against a medical assessment or an Arbitrator's decision unless the evidence was *both* not available to the appellant and not reasonably obtainable by the appellant before the proceedings concerned,

(e) to prevent a general provision for the review of approved medical specialist decisions being used to circumvent the required grounds for an appeal against or further assessment of such a decision,

(f) to increase the monetary threshold for an appeal against an Arbitrator's decision to $7,500 (currently $5,000) and to remove the additional threshold that required the amount of compensation at issue to be at least 20% of the amount awarded in the decision appealed against,

(g) to provide for appeals against interlocutory decisions of Arbitrators with the leave of the Commission,

(h) to make it clear that there is an automatic right of appeal against an Arbitrator's decision once procedural requirements for such an appeal are satisfied,

(i) to provide for the automatic indexation of the $7,500 threshold for appeals against Arbitrator decisions and the limit on interim payment directions for medical expenses compensation,

(j) to align the maximum age for determining economic loss for calculating work injury damages with the age for entitlement to the age pension,

(k) to provide for the approval (rather than accreditation) of providers of rehabilitation services (for consistency with the *Nationally Consistent Approval Framework for Workplace Rehabilitation Providers*) and to make consequential changes to terminology for consistency,

(l) to remove restrictions on the maximum amount for which an employer is liable for workplace rehabilitation services provided to an injured worker,

(m) to exempt a specialised insurer from the requirement to be authorised under the *Insurance Act 1973* of the Commonwealth to carry on insurance business if the insurer does not require that authorisation to lawfully carry on the business,

(n) to prevent a worker from recovering work injury damages until the worker has been paid any lump sum compensation to which the worker is entitled, so that the worker will not lose the entitlement to compensation by recovering damages before compensation is paid,

(o) to ensure that the compensation to which a worker is entitled in respect of the obtaining of a permanent impairment medical certificate is paid as part of the worker's claim for permanent impairment compensation,

(p) to restrict the jurisdiction of the Commission to determine the liability of an employer or insurer to reimburse the Insurance Fund so that the Commission will not be authorised to waive recovery against the employer or insurer or to interfere with a decision of the Nominal Insurer about waiver of recovery,

(q) to provide that an appeal against an Arbitrator's decision about weekly payments of compensation does not stay the decision, so that weekly payments of compensation will remain payable pending determination of an appeal,

(r) to ensure that workers in receipt of weekly payments of compensation during partial incapacity who have returned to work will receive compensation up to the maximum rate in addition to earnings from their employer (by making it clear that the maximum rate operates as a limit on the compensation payable and not as a limit on the combined total of compensation and earnings),

(s) to provide for the provision of a security bond as a means of satisfying a requirement for the deposit of an amount of money as security by self-insurers, specialised insurers and retro-paid loss employers,
(t) to provide for the appointment of one or more senior approved medical specialists,
(u) to enact consequential amendments and savings and transitional provisions.

30. Outline of provisions

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

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

Schedule 1 Amendment of *Workers Compensation Act 1987* No 70

Maximum weekly payments during partial incapacity
Schedule 1 [3]–[6] make it clear that for workers who return to work during partial incapacity, the maximum weekly compensation amount is a limit on the compensation payable and not a limit on the combined total of compensation and earnings. The amendments allow a worker to be paid up to the maximum weekly compensation amount in addition to the earnings from their employer (with the total of earnings and compensation not to exceed pre-injury earnings). The current limit on maximum weekly payments for workers who unreasonably reject suitable employment is not changed.

Occupational rehabilitation services
Schedule 1 [8] and [9] remove the definition that lists the services that constitute occupational rehabilitation services and replace it with a new definition of ***workplace rehabilitation service***, which is defined to mean any services provided by a person approved as a provider of rehabilitation services for the purposes of return-to-work plans of employers. **Schedule 1 [1], [2], [7], [10], [12] and [13]** make consequential changes to reflect the change in terminology from ***occupational rehabilitation service*** to ***workplace rehabilitation service***. The amendments flow from amendments to the 1998 Act to provide for the approval (rather than accreditation) of providers of rehabilitation services and are for the purpose of achieving consistency with the *Nationally Consistent Approval Framework for Workplace Rehabilitation Providers*. **Schedule 1 [14]** omits provisions that set a maximum amount for which an employer is liable for occupational rehabilitation services provided to an injured worker.

Disputes about prospective medical treatment
Schedule 1 [11] provides that the jurisdiction of the Commission with respect to disputes about payment of medical, hospital and rehabilitation expenses extends to disputes about any proposed treatment or service. This will enable the Commission to determine a dispute about whether a treatment or service is reasonably necessary before the treatment or service is provided.

Reimbursement of medical certificate costs
Schedule 1 [15] ensures that the cost of obtaining a permanent impairment medical certificate is paid as part of the worker's claim for permanent impairment compensation so that liability for these costs will be properly assessed in conjunction with settlement of the claim for permanent impairment compensation.

Reimbursement of Insurance Fund—Commission's jurisdiction
Schedule 1 [19] restricts the jurisdiction of the Commission when it determines the liability of an employer or insurer to reimburse the Insurance Fund in respect of liabilities incurred by the Nominal Insurer on behalf of an employer or insurer. The Commission will not have jurisdiction to waive a liability to contribute to the Fund or to limit or otherwise affect any function of the Nominal Insurer to decide whether or not any such liability should be waived.

Retirement age for calculating economic loss
Schedule 1 [20] aligns the maximum age beyond which the earning capacity of a worker is to be disregarded when determining future economic loss with the age set under the *Social Security Act 1991* of the Commonwealth as the age of entitlement to the age pension. This maximum operates for the purposes of awarding damages for future economic loss due to deprivation or impairment of earning capacity or (in the case of an award of damages under the *Compensation to Relatives Act 1897*) loss of expectation of financial support.

Other amendments
Schedule 1 [16]–[18] provide for the automatic indexation of the $7,500 threshold for appeals against Arbitrator decisions and the limit on interim payment directions for medical expenses compensation. Indexation is on the basis of an index that tracks movements in award rates of pay, which is the same index that is used to automatically index various benefits under the 1987 Act.

Schedule 1 [22] exempts a specialised insurer from the requirement to be authorized under the *Insurance Act 1973* of the Commonwealth to carry on insurance business if the insurer does not require that authorisation to lawfully carry on the business.

Schedule 1 [21], [23] and [24] provide for the provision of a security bond as a means of satisfying a requirement for the deposit of an amount of money as security by self-insurers, specialised insurers and retro-paid loss employers.

Schedule 2 Amendment of *Workplace Injury Management and Workers Compensation Act 1998* No 86

Approval of rehabilitation service providers
Schedule 2 [2] provides for the approval (instead of accreditation, as at present) of providers of rehabilitation services for the purposes of employers' return-to-work programs. The amendment is for consistency with the *Nationally Consistent Approval Framework for Workplace Rehabilitation Providers*. **Schedule 2 [1] and [3]–[7]** make consequential amendments.

Payment of lump sum compensation
Schedule 2 [8] prevents a worker from recovering work injury damages until the worker has been paid any permanent impairment and pain and suffering compensation to which the worker is entitled. Section 151A of the 1987 Act prevents the payment of compensation after damages have been recovered. The amendment will prevent a worker from losing an entitlement to compensation by recovering damages before compensation is paid.

Appeal against medical assessment
Schedule 2 [12] and [14] make the following amendments to provisions dealing with appeals against medical assessments:

(a) An appeal against a medical assessment on the ground of additional relevant information will only be available if the additional information was both not available to and could not reasonably have been obtained by the appellant before the medical assessment. (**Schedule 2 [12]**)
(b) An appeal against a medical assessment will be limited to a review on the grounds of appeal, to make it clear that the appeal is not a full review of the medical assessment. Provision for receiving fresh evidence on an appeal is clarified by being limited to evidence that was both not available and not reasonably obtainable before the medical assessment. (**Schedule 2 [14]**)

Appeal against decision of Arbitrator
Schedule 2 [15]–[18] make the following amendments to provisions dealing with appeals against decisions of Arbitrators:

(a) It will be made clear that an appeal against an Arbitrator's decision is to be limited to a determination of whether there was an error of fact, law or discretion (and to the correction of such an error) and that the appeal is not a review or new hearing. (**Schedule 2 [16]**)
(b) It will be made clear that an appeal does not stay the operation of a decision for the payment of weekly payments of compensation, but otherwise does operate to stay the decision appealed against. (**Schedule 2 [16]**)
(c) The Commission's discretion to admit new evidence on the appeal will be limited to cases where the new evidence was both not available to the appellant and not reasonably obtainable by the appellant before the proceedings concerned, or where failure to admit the new evidence would cause substantial injustice. (**Schedule 2 [17]**)
(d) The monetary threshold for appeals will be increased to $7,500 and the existing additional requirement that the amount at issue in the appeal be at least 20% of the amount awarded will be deleted. (**Schedule 2 [15]**)
(e) The requirement for the leave of the Commission for an appeal will be deleted and it will be made clear that an appeal is automatically available if the monetary threshold and other procedural requirements are met. (**Schedule 2 [15]**)
(f) An appeal against an interlocutory decision will not be available except with the leave of the Commission and leave will not be able to be granted unless the Commission is satisfied that it is necessary or desirable for the proper and effective determination of the dispute. (**Schedule 2 [15] and [18]**)

Further assessment or reconsideration of medical assessments
Schedule 2 [13] limits provision for referral of a medical assessment for further assessment or reconsideration to cases where there are grounds for appeal, to make it clear that further assessment is an alternative to appeal only where grounds for appeal exist. **Schedule 2 [19]** removes power for the reconsideration of matters by approved medical specialists, to avoid use of the reconsideration power as a means of avoiding the requirements for appeals against medical assessments.

Issues Considered by the Committee

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

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

31. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation, and a proclamation under this section may appoint a particular time on a day as the time for commencement on that day. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. However, the Committee notes from the Agreement in Principle speech that there are numerous amendments to be made. They include, for example, the list of rehabilitation services that will be removed from the legislation to reflect the model of workplace rehabilitation that has been adopted by the Nationally Consistent Approval Framework for Workplace Rehabilitation Providers, and is currently being adopted across the Commonwealth, States, Territories and New Zealand. Amendments also relate to some large employers and self- and specialised insurers interested in insurance bonds as an alternative form of providing financial security, and the Bill contains a proposal to allow this to happen. WorkCover will then require the insurance bonds given as security are issued by providers who are both regulated by the Australian Prudential Regulatory Authority and meet appropriate credit rating thresholds. Therefore, many of the amendments may involve appropriate administrative and transitional arrangements to be made, and as such, require discretion for the commencement by proclamation.

32. Therefore, the Committee has not identified any issues regarding Clause 2 under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

Part Two – Regulations

SECTION A: POSTPONEMENT OF REPEAL OF REGULATIONS

Notification of Postponement

S. 11 Subordinate Legislation Act 1989
Paper No: 5398

NOTIFICATION OF THE PROPOSED POSTPONEMENT OF THE REPEAL OF ELECTRICITY SUPPLY (GENERAL) REGULATION 2001; GAS SUPPLY (NATURAL RETAIL COMPETITION) REGULATION 2001; DANGEROUS GOODS (GAS INSTALLATIONS) REGULATION 1998 AND PIPELINES REGULATION 2005.

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Files Ref: LRC2676

Minister for Energy

Issues

1. By correspondence received 10 August 2010, the Minister advised the Committee that he has written to the Premier and requested the postponement of the above regulations.

Recommendation

2. That the Committee advise the Minister that it does not have any concerns with the postponements of the repeal of these regulations.

Comment

Electricity Supply (General) Regulation 2001

Gas Supply (Natural Gas Retail Competition) Regulation 2001

3. The Minister has proposed the postponement of the repeal of the Electricity Supply (General) Regulation 2001 for the fifth time and proposed the postponement of the repeal of the Gas Supply (Natural Gas Retail Competition) Regulation 2001 for the fourth time.

4. The reason for this request is to take into account the extensive reforms that are currently underway in relation to these Regulations.

5. The Ministerial Council on Energy's national energy market reform program is expected to result in the transfer of many of the distribution and retail functions currently contained in the Regulations to a proposed National Energy Customer Framework.

6. According to the Minister, the timeframe for completing the Framework has been extended due to the complex nature of the reforms and the considerable consultation process required for such significant reforms. It is envisaged that substantial revisions to the current Regulations will be required as a result of the implementation of the proposed Framework.

Dangerous Goods (Gas Installations) Regulation 1998

7. The Minister has proposed the postponement of the repeal of the Dangerous Goods (Gas Installations) Regulation 1998 for the first time.

8. The Better Regulation Office is presently overseeing a process under the *Gas Supply Amendment Bill 2009* to transfer responsibility for the regulation to the Minister for Fair Trading. The Minister for Energy and the Minister for Fair Trading jointly support postponement to allow transfer of regulatory responsibility to proceed smoothly.

Pipelines Regulation 2005

9. The Minister has proposed the postponement of the repeal of the Pipelines Regulation 2005 for the first time.

10. It is understood that the *Pipelines Act 1967* will undergo major reform in 2010. It is anticipated that this reform will require substantial reworking of the regulation.

The Hon **Paul Lynch** MP
Minister for Industrial Relations
Minister for Commerce
Minister for Energy
Minister for Public Sector Reform
Minister for Aboriginal Affairs

V10/1358

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

10 JUL 2010

Dear Mr Shearan

Electricity Supply (General) Regulation 2001, Gas Supply (Natural Gas Retail Competition) Regulation 2001, Dangerous Goods (Gas Installations) Regulation 1998 and Pipelines Regulation 2005 – request for postponement of staged repeal

I have recently written to the Premier requesting the postponement of the staged repeal of the above regulations.

This will be the fifth postponement of the *Electricity Supply (General) Regulation 2001* which commenced on 29 June 2001 and was previously postponed on 1 September 2006, 1 September 2007, 1 September 2008 and 1 September 2009. It will be the fourth postponement of the *Gas Supply (Natural Gas Retail Competition) Regulation 2001* which commenced on 21 December 2001 and was previously postponed on 1 September 2007, 1 September 2008 and 1 September 2009. It will be the first postponement of both the *Dangerous Goods (Gas Installations) Regulation 1998* and *Pipelines Regulation 2005*.

The reason for this request is to take into account the extensive reforms that are currently underway in relation to each of the above regulations. In particular, postponement will allow stakeholders to focus on the consultation processes for these separate regulatory reforms already taking place.

In the case of the *Electricity Supply (General) Regulation 2001* and *Gas Supply (Natural Gas Retail Competition) Regulation 2001*, the Ministerial Council on Energy's national energy market reform program is expected to result in the transfer of many of the distribution and retail functions currently contained in the Regulations to a proposed National Energy Customer Framework (the Framework).

The timeframe for completing the Framework has been extended due to the complex nature of the reforms and considerable consultation process required for such significant reforms.

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Substantial revisions to the current Regulations will be required in the future as a result of New South Wales' commitment to implement the proposed Framework.

In the case of the *Dangerous Goods (Gas Installations) Regulation 1998,* the Better Regulation Office is currently overseeing a process under the *Gas Supply Amendment Bill 2009* to transfer responsibility for the regulation to the Minister for Fair Trading. The Minister for Energy and the Minister for Fair Trading jointly support postponement to allow the transfer of regulatory responsibility to proceed smoothly.

In the case of the *Pipelines Regulation 2005,* the *Pipelines Act 1967* under which it is made will undergo major reform in 2010. It is anticipated that this reform will require substantial reworking of the regulation.

In the case of each of the regulations, a further postponement will allow members of the public and stakeholders to focus on one regulatory process only at a time.

Should you wish to discuss this issue further, please contact the Department's Director, Energy Legal, Ms Frances Beck on (02) 8281 7747.

Yours sincerely

Paul Lynch MP
Minister for Energy
19 JUL 2010
cc: The Hon. Kristina Keneally, Premier

Notification of Postponement

S. 11 Subordinate Legislation Act 1989
Paper No: 5385

NOTIFICATION OF THE PROPOSED POSTPONEMENT OF THE REPEAL OF ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION 2000 (5)

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File Ref: LRC 315

Minister for Planning

Issues

1. By correspondence received 22 June 2010, the Minister advised the Committee that he has written to the Premier requesting a postponement of the repeal of the above regulation.

Recommendation

2. That the Committee approves the publication of this report to advise the Minister that it does not have any concerns with the postponement of the repeal of the regulation.

Comment

Environmental Planning And Assessment Regulation 2000

3. The Minister has proposed the postponement of the repeal of the above regulation for the fifth time, until 1 September 2011.

4. The need for the postponement has arisen from the substantial progress the Department of Planning has made on preparing a new Regulation. Due to the significance of the new Regulation on the administration of the planning system, the Department wishes to conduct a comprehensive consultation program with stakeholders for an eight week period during August and September 2010. The exhibition of the draft Regulation will follow on from the proposed July 2010 commencement of the new Part 5B (Development Conditions) of the *Environmental Planning and Assessment Act*. As the changes to the local council infrastructure charges are a significant part of the reform and given the significance of the new provisions, the draft Regulation to be exhibited should incorporate these changes. Once the new Regulation is exhibited in August and September, the Department will then have adequate time to make any recommendations and gazette the new Regulation on 1 December 2010.

Hon Tony Kelly MLC
Minister for Planning
Minister for Infrastructure
Minister for Lands
Deputy Leader of the Government in the Legislative Council
Leader of the House in the Legislative Council

Mr Allan Shearan MP
Committee Chairperson
Legislation Review Committee
Parliament House
Macquarie St
SYDNEY NSW 2000

RECEIVED
22 JUN 2010
LEGISLATION REVIEW COMMITTEE

10/12317

15 JUN 2010

Dear Mr Shearan,

This letter is to provide the Legislation Review Committee with notice of my intention to seek a further one year postponement of the repeal of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation).

I have written to the Premier requesting a postponement of the repeal of the EP&A Regulation until 1 September 2011. Under Section 11 of that Act, the Governor may, by order, postpone by one year the date on which a specified statutory rule is due for repeal.

The EP&A Regulation sets out procedural requirements in relation to a wide range of plan making and development control matters. The EP&A Regulation was initially due for repeal on 1 September 2006. However, due to ongoing planning reforms over recent years, four extensions have been granted postponing the repeal of the Regulation.

The Department of Planning has made substantial progress on preparing a new Regulation. However, because of the significance of this new Regulation on the administration of the planning system, the Department wishes to conduct a comprehensive consultation program with stakeholders for an eight week period during August and September 2010.

The exhibition of the draft Regulation will follow on from the proposed July 2010 commencement of the new Part 5B (Development Contributions) of the EP&A Act. The changes to local council infrastructure charges are a significant part of the Government's planning reform agenda announced in the 2010-11 NSW Budget, and form an important part of the Government's Comprehensive Housing Supply Strategy. Given the significance of these new provisions, the draft Regulation to be exhibited should incorporate those changes.

Once the new Regulation is exhibited in August and September, the Department will then have adequate time to make any amendments and gazette the new Regulation on 1 December 2010.

Yours sincerely

The Hon Tony Kelly MLC

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Macquarie Street, Sydney NSW 2000
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Notification of Postponement

S. 11 Subordinate Legislation Act 1989
Paper No: 5400

NOTIFICATION OF THE PROPOSED POSTPONEMENT OF THE REPEAL OF INDUSTRIAL RELATIONS (GENERAL) REGULATION 2001; EMPLOYMENT PROTECTION REGULATION 2001

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Files Ref: LRC2820

Minister for Industrial Relations

Issues

1. By correspondence received 16 July 2010, the Minister advised the Committee that it is proposed that the above two Regulations will be the subject of a repeal postponement recommendation to the Governor.

Recommendation

2. That the Committee advise the Minister that it does not have any concerns with the postponements of the repeal of these regulations.

Comment

Industrial Relations (General) Regulation 2001

3. The Minister has proposed the postponement of the repeal of this regulation for the fourth time.

4. The Minister advises that the Governor's postponement of repeal of this Regulation is to be sought as a result of NSW joining the national industrial relations system from 1 January 2010.

5. While there has been some recent consequential amendments to the *Industrial Relations Act 1996* arising from the referral of powers to the Commonwealth, the Minister advises that it will be necessary to undertake a review of the Act as a consequence of the operation of the *Fair Work Act 2009.* The Minister advises that this will ensure that appropriate amendments are made to remove inoperative provisions of the *Industrial Relations Act 1996* and to make the Act more relevant to public sector employment.

6. Given the current timeframe, the Minister further advises that it will not be possible to undertake a full review of the Act prior to the staged repeal of the Regulation.

Employment Protection Regulation 2001

7. The *Employment Protection Regulation 2001* relates to the operation of the employment termination notice requirements of the *Employment Protection Act 1982,* including notice requirements and their manner of service.

8. Given that matters pertaining to termination and payment of severance pay will be considered in line with the review of the Industrial Relations Act, the Minister considers it appropriate that postponement of the *Employment Protection Regulation* be on the same basis as the *Industrial Relations (General) Regulation 2001.*

The Hon **Paul Lynch** MP
Minister for Industrial Relations
Minister for Commerce
Minister for Energy
Minister for Public Sector Reform
Minister for Aboriginal Affairs

NSW IR No: 10DOC0043

Mr A Shearan MP
Chairperson
Legislation Review Committee
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Shearan

I refer to the *Industrial Relations (General) Regulation 2001 and the Employment Protection Regulation 2001* which are scheduled for automatic repeal under the staged repeal program of the *Subordinate Legislation Act 1989* on 1 September 2010.

Pursuant to section 11(4) of the Subordinate Legislation Act, I advise the Legislation Review Committee that it is proposed that these two Regulations will be the subject of a repeal postponement recommendation to the Governor. This will be the fourth repeal postponement occasion for each Regulation. For the reasons explained below, these Regulations cannot be allowed to lapse or be re-made before 1 September 2010.

Industrial Relations (General) Regulation 2001

The Industrial Relations (General) Regulation contains provisions essential to the operation of the *Industrial Relations Act 1996*. It includes matters relating to unfair dismissal exemption situations; notification of parties to enterprise agreements; pay slip and employer records requirements; union prosecution rights; issue of penalty notices; Industrial Relations Commission; Industrial Magistrates; union machinery matters; deemed employment situations; and Commission fee prescriptions.

The Governor's postponement of repeal of this Regulation under the Subordinate Legislation Act is to be sought as a result of NSW joining the national industrial relations system from 1 January 2010.

While there has been some recent consequential amendments to the *Industrial Relations Act 1996* arising from the referral of powers to the Commonwealth, it will be necessary to undertake a review of the Act as a consequence of the operation of the *Fair Work Act 2009*.

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This will ensure that appropriate amendments are made to remove inoperative provisions of the Industrial Relations Act and to make the Act more relevant to public sector employment. A recent example of this is the transfer of jurisdiction from the Government and Related Employees Appeal Tribunal to the Industrial Relations Commission of NSW to enable the Commission to hear public sector promotion and disciplinary appeals. Other jurisdictional amendments are contemplated in the near future to ensure that the Commission has the necessary functionality to deal with national and State system industrial matters.

Given the current timeframes, it will not be possible to undertake a full review of the Act prior to the staged repeal of the Regulation. It is contended that this situation amounts to 'exceptional circumstances' justifying non interference with the present NSW industrial relations regulatory arrangements through the staged repeal program. This will be the fourth occasion that postponement of this Regulation has been sought.

Employment Protection Regulation 2001

The Employment Protection Regulation importantly controls the operation of the employment termination notice requirements of the *Employment Protection Act 1982* by specifying the factors when notice is not required (eg work unregulated by an award/agreement, severance payments already within an award/agreement or equivalent to the Schedule standard, short-term employees). Additionally, the Regulation prescribes the forms of notice and their manner of service. This will be the fourth occasion that postponement of this Regulation has been sought.

Given that matters pertaining to termination and payment of severance pay will be considered in line with the review of the Industrial Relations Act, it is appropriate that postponement of the Employment Protection Regulation be on the same basis as the *Industrial Relations (General) Regulation 2001*. This will be the fourth occasion that postponement of this Regulation has been sought.

Any inquiries which your officers may have in relation to this matter may be directed to Peter Boland of NSW Industrial Relations, Legal Services Branch on telephone number 9020 4628 or by e-mail Peter.Boland@services.nsw.gov.au.

Yours sincerely

Paul Lynch MP
Minister for Industrial Relations

Notification of Postponement

S. 11 Subordinate Legislation Act 1989
Paper No: 5401

NOTIFICATION OF THE PROPOSED POSTPONEMENT OF THE REPEAL OF LOCAL GOVERNMENT (MANUFACTURED HOME STATES, CARAVAN PARKS, CAMPING GROUNDS AND MOVEABLE DWELLINGS) REGULATION 2005

...

Files Ref: LRC1463

Minister for Local Government

Issues

1. By correspondence received 16 July 2010, the Minister advised the Committee that she has requested the Premier to postpone the repeal of the above Regulation.

Recommendation

2. That the Committee advise the Minister that it does not have any concerns with the postponement of the repeal of this Regulation.

Comment

Industrial Relations (General) Regulation 2001

3. This Regulation relates to the establishment of standards for the design of caravan parks, camping grounds and manufactured home estates (MHEs), for the design and construction of manufactured homes and other moveable dwellings and their siting, and for promoting the health, safety and amenity of the occupiers of manufactured homes and other moveable dwellings.

4. Caravan parks, camping grounds and MHEs currently require approval under both the *Environmental Planning and Assessment Act 1979* and the *Local Government Act 1993.* Approval of the installation of manufactured homes and other moveable dwellings is under the *Local Government Act 1993,* although development consent to use land for the purpose of installing those homes might also be required under the *Environmental Planning and Assessment Act 1979* in some circumstances.

5. As a result, the Minister for Planning has advised the Minister for Local Government that there is a need for investigation of how the approval and regulation of the subject parks, grounds, estates and moveable dwellings can be simplified and improved.

6. Extensive stakeholder consultations have taken place to decide how best to streamline the approval process, including the possibility of transferring the Regulation of the operation of caravan parks, camping grounds and MHEs and the installation of moveable dwellings from the *Local Government Act 1993* to the *Environment Planning and Assessment Act 1979.*

7. A transfer of Regulation of the subject activities would require amending legislation following the proposed consultations. As such, the Minister advises that legislation might not be made until after the currently due repeal date for Regulations at 1 September 2010 and advises that postponement of the repeal of the Regulation until 1 September 2011, is preferable.

THE HON. BARBARA PERRY MP
Minister for Local Government,
Minister for Juvenile Justice,
Minister Assisting the Minister for Planning,
and Minister Assisting the Minister for Health (Mental Health)

Ref:
MIN: EA1586341
Doc ID: A220002

Mr A Shearan MP
Member for Londonderry
Chair
Legislation Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan

I am writing to advise that I have requested the Premier, the Hon Kristina Keneally MP, that the repeal of the Local Government (Manufactured Home States, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 (the Regulation) should be postponed to September 2011.

By way of background, on 14 October 2009 I wrote to the former Premier in respect of the staged repeal of certain regulations within my administration that are due for automatic repeal on 1 September 2010 by section 10 of the *Subordinate Legislation Act 1989*.

In that letter I sought approval to postpone the repeal of the Local Government (General) Regulation 2005 until 1 September 2011.

In that letter I also advised that the Minister for Planning may write to the former Premier advising as to the lapse, remaking or repeal of the Local Government (Manufactured Home States, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 (the Regulation).

This is because the Regulation has been administered by the Department of Planning since 1999 due to the delegation of concurrence functions under section 82(3) of the *Local Government Act 1993* (LGA) as it applies to caravan parks and camping grounds. The functions were formally delegated to the Director General of the former Department of Urban Affairs and Planning under section 745 of the LGA.

By letter of 18 June 2010, the Minister for Planning, the Hon Tony Kelly MLC, requested that I write to the Premier to seek a first one year postponement of the repeal of the Regulation. The reasons for requesting the postponement are set out below.

Level 32 Governor Macquarie Tower | 1 Farrer Place, Sydney NSW 2000 | P: (02) 9228 4820 | F: (02) 9228 4484 | E: office@perry.minister.nsw.gov.au

The Regulation establishes standards for the design of caravan parks, camping grounds and manufactured home estates (MHEs), for the design and construction of manufactured homes and other moveable dwellings and their siting, and for promoting the health, safety and amenity of the occupiers of manufactured homes and other moveable dwellings.

When the day to day administration of the Regulation was transferred from the former Department of Local Government to the former Department of Urban Affairs and Planning, the intention was that the regulation of the operation of caravan parks, camping grounds or MHEs and the installation of manufactured homes, moveable dwellings and associated structures on land would be transferred from Chapter 7 of the LGA to the *Environmental Planning and Assessment Act 1979* (EP&A Act). However, to date that transfer has not occurred.

Caravan parks, camping grounds and MHEs currently require approval under both the EP&A Act and the LGA. Approval of the installation of manufactured homes and other moveable dwellings is under the LGA, although development consent to use land for the purpose of installing those homes might also be required under the EP&A Act in some circumstances.

In light of the above, the Minister for Planning is of the view that there is a need for investigation of how the approval and regulation of the subject parks, grounds and estates and the erection of moveable dwellings can be simplified and improved.

To this end, the Department of Planning has held initial discussions with various stakeholders on the potential for reform, including officers of the Division of Local Government, who are supportive of this reform.

The Minister for Planning has advised me that he asked the Department of Planning to undertake further extensive stakeholder consultations over the coming months on how the approval process for the above establishments and dwellings might be streamlined. This includes the possibility of a transfer of regulation of the operation of caravan parks, camping grounds and MHEs, and the installation of moveable dwellings from the LGA to the EP&A Act.

A transfer of regulation of the subject activities would require amending legislation following the proposed consultations. As such legislation might not be made until after the currently due repeal date for the Regulation. It is therefore necessary for the Regulation to remain in force beyond September 2010 while the reforms are formulated and put into place.

It is also desirable for a transfer of regulation (if it proceeds) to have a delayed commencement to give stakeholders time to familiarise themselves with the new provisions before they come into force. It is likely this opportunity would not be available if a new or modified approval system started on the currently scheduled repeal date for the Regulation.

If following the current consultation it is decided not to proceed with a transfer of regulation, there may be insufficient time left before I September 2010 for the preparation of any proposed new draft replacement local government Regulation and the associated regulatory impact statement process.

If a one year postponement of the repeal of the Regulation was granted this would not prevent a transfer of regulation of the subject activities taking place prior to September 2011, if it is decided to proceed with that transfer.

I trust this information is of assistance.

Yours sincerely

Barbara Perry MP
Minister

Notification of Postponement

S. 11 Subordinate Legislation Act 1989
Paper No: 5399

NOTIFICATION OF THE PROPOSED POSTPONEMENT OF THE REPEAL OF MINING REGULATION 2003

...

Files Ref: LRC358

Minister for Mineral and Forest Resources

Issues

1. By correspondence received 29 July 2010, the Minister requested a late postponement of the automatic repeal of the above regulation from the Committee.

Recommendation

2. That the Committee advise the Minister that it does not have any concerns with the postponements of the repeal of this regulation.

Comment

Mining Regulation 2003

3. The Minister has proposed the postponement of the repeal of this regulation for the third time.

4. The Minister advises that postponement is sought due to a change in circumstances. Specifically, the proposed Regulation Regulatory Impact Statement was released for public consultation from 14 May 2010 to 18 June 2010. As a significant number of submissions were received in response to the public consultation process, the proposed Regulation has not been finalised. The Minister has advised that it may be difficult to finalise the regulation by 1 September 2010 and, moreover, it is important for industry and stakeholders to have the assurance that the current 2003 Regulation will remain in place in the interim.

The Hon **Paul McLeay** MP
Minister for Ports & Waterways
Minister for Mineral and Forest Resources
Minister for the Illawarra | Member for Heathcote

MOC10/2271

RECEIVED
10 AUG 2010
LEGISLATION REVIEW COMMITTEE

Mr Allan Shearan MP
Chair, Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan

I am writing to request a late postponement of the automatic repeal of the *Mining Regulation 2003* ("2003 Regulation") on 1 September 2010, due to a significant change in circumstances. This would be the third postponement of the repeal of this Regulation.

A first postponement was sought in 2008 due to the introduction of the *Mining Amendment Act* Bill into Parliament in that year. A second postponement was sought in 2009 to ensure continuity of the regulatory regime should consultation on the draft proposed *Mining Regulation 2010* ("the proposed Regulation") raise issues that required greater time to work through than was anticipated.

The proposed Regulation and Regulatory Impact Statement were released for public consultation from 14 May to 18 June 2010. A large number of submissions were received in response to the public consultation process and the proposed Regulation is currently being finalised.

It may not be possible to complete drafting in time to make the proposed Regulation by the 1 September repeal date.

It is important for the Government, industry and stakeholders that the 2003 Regulation remains in place in the event that the proposed Regulation cannot be made by 1 September.

On this basis I have sought a further postponement of the repeal of the 2003 Regulation. I expect that the proposed Regulation will be remade this year.

Should you require any further information on this matter, please do not hesitate to have your staff contact Mr Sam Crosby, Chief of Staff in my office, on 9228 4777.

Yours sincerely

29 JUL 2010

Paul McLeay MP
Minister

Sydney Office Level 36 Governor Macquarie Tower 1 Farrer Place, Sydney NSW 2000 Australia | **P** 61 2 9228 4777 | **F** 61 2 9228 5196
Wollongong Office Ground Floor State Office Block 84 Crown Street Wollongong NSW 2500 | **P** 61 2 4229 5744 | **F** 61 2 4229 9113
Email office@mcleay.minister.nsw.gov.au

Notification of Postponement
S. 11 Subordinate Legislation Act 1989
Paper No: 5384

NOTIFICATION OF THE PROPOSED POSTPONEMENT OF THE REPEAL OF WORKERS COMPENSATION REGULATION (3)

...

File Ref: LRC 391

Minister for Finance

Issues

1. By correspondence received 22 July 2010, the Minister advised the Committee that he has requested a postponement of the staged repeal of the above regulation.

Recommendation

2. That the Committee approves the publication of this report to advise the Minister that it does not have any concerns with the postponement of the staged repeal of the regulation.

Comment

Workers Compensation Regulation 2003

3. The Minister has proposed the postponement of the staged repeal of the above regulation for the third time, until end of the year. He advised that:

> Public consultation on a replacement Regulation is underway and closes on 6 August 2010. However, despite this progress it is now clear that the new Regulation cannot be made in time for the staged repeal of the existing one. Since November last year considerable work has been undertaken in preparing to remake the *Workers Compensation Regulation 2003*, including:
>
> - Consultation within WorkCover and the Workers Compensation Commission to identify where the Regulation could be improved;
> - Analysis of proposed amendments;
> - Production of a Regulatory Impact Statement and consultation draft Regulation.

4. The Minister further advised that the delay in making the new Regulation should be minimal, with the amended timetable scheduling the *Workers Compensation Regulation 2003* to be remade by the end of the year.

NSW GOVERNMENT

Michael Daley MP
Minister for Police
Minister for Finance

Ref: WC01205/10

19 JUL 2010

The Hon Allan Shearan MP
Chair
Legislation Review Commitee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan Allan

I am writing to make a late application to postpone the staged repeal of the *Workers Compensation Regulation 2003* on 1 September 2010.

This will be the third postponement of the staged repeal of the *Workers Compensation Regulation 2003*.

Public consultation on a replacement Regulation is underway and closes on 6 August 2010. However, despite this progress it is now clear that the new Regulation cannot be made in time for the staged repeal of the existing one.

Since November last year considerable work has been undertaken in preparing to remake the *Workers Compensation Regulation 2003*, including:

- consultation within WorkCover and the Workers Compensation Commission to identify where the Regulation could be improved;
- analysis of proposed amendments;
- production of a Regulatory Impact Statement and consultation draft Regulation.

Should this application be approved, the delay in making the new Regulation should be minimal, with the amended timetable scheduling the *Workers Compensation Regulation 2003* to be remade by the end of the year.

Yours sincerely

Michael Daley

MICHAEL DALEY MP
MINISTER FOR FINANCE

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Appendix 1: Index of Bills Reported on in 2010

	Digest Number
Adoption Amendment (Same Sex Couples) Bill 2010*	10
Appropriation Bill 2010	9
Appropriation (Parliament) Bill 2010	9
Appropriation (Special Offices) Bill 2010	9
Banana Industry Repeal Bill 2010	8
Building and Construction Industry Long Service Payments Amendment Bill 2009	1
Carers Recognition Bill 2010*	3
Carers Recognition Bill 2010*	5
Carers (Recognition) Bill 2010	5
Casino Control Amendment Bill 2010	2
Charter of Budget Honesty Amendment (Independent Election Costings) Bill 2010*	5
Children and Young Persons (Care and Protection) Amendment (Children's Services) Bill 2010	10
Children and Young Persons (Care and Protection) Amendment (Parental Responsibility) Bill 2010*	4
Coal Mine Health and Safety Amendment Bill 2010	4
Coastal Protection and Other Legislation Amendment Bill 2010	9
Community Relations Commission and Principles of Multiculturalism Amendment Bill 2010	8
Companion Animals Amendment (Dogs in Outside Eating Areas) Bill 2010*	4
Companion Animals Amendment (Outdoor Dining Areas) Bill 2010	5
Court Information Bill 2010	4
Courts Legislation Amendment Bill 2010	9
Credit (Commonwealth Powers) Bill 2010	2
Crimes (Administration of Sentences) Amendment Bill 2010	2
Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010	9
Crimes Amendment (Child Pornography and Abuse Material) Bill 2010	3
Crimes Amendment (Grievous Bodily Harm) Bill 2010*	4
Crimes Amendment (Police Pursuits) Bill 2010	2
Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2010	10
Duties Amendment (NSW Home Builders Bonus) Bill 2010	10
Electricity and Gas Supply Legislation Amendment (Retail Price Disclosures and Comparisons) Bill 2010	8
Electronic Transactions Amendment Bill 2010	10

	Digest Number
Environmental Planning and Assessment Amendment (Development Consents) Bill 2010	5
Fair Trading Amendment (Unfair Contract Terms) Bill 2010	9
Firearms Legislation Amendment Bill 2010*	8
Game and Feral Animal Control Repeal Bill 2010*	10
Gas Supply Amendment Bill 2009	1
Health Legislation Amendment Bill 2010	8
Home Building Amendment (Warranties and Insurance) Bill 2010	10
Housing Amendment (Community Housing Providers) Bill 2009	1
Industrial Relations Amendment (Public Sector Appeals) Bill 2010	9
James Hardie Former Subsidiaries (Winding Up and Administration) Amendment Bill 2009	1
Jury Amendment Bill 2010	8
Law Enforcement and National Security (Assumed Identities) Bill 2010	10
Macedonian Orthodox Church Property Trust Bill 2010*	9
Marine Parks Amendment (Moratorium) Bill 2010*	8
Mining and Petroleum Legislation Amendment (Land Access) Bill 2010	5
National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010	2
National Park Estate (Riverina Red Gum Reservations) Bill 2010	5
National Parks and Wildlife Amendment Bill 2010	2
National Parks and Wildlife Amendment (Visitors and Tourists) Bill 2010	8
NSW Self Insurance Corporation Amendment (Home Warranty Insurance) Bill 2010	5
Ombudsman Amendment (Removal of Legal Professional Privilege) Bill 2010*	10
Paediatric Patient Oversight (Vanessa's Law) Bill 2010*	5
Parliamentary Contributory Superannuation Amendment Bill 2010	10
Parliamentary Electorates and Elections Amendment Bill 2010	4
Personal Property Securities Legislation Amendment Bill 2010	10
Plant Diseases Amendment Bill 2010	10
Police Legislation Amendment (Recognised Law Enforcement Officers) Bill 2010	9
Privacy and Government Information Legislation Amendment Bill 2010	10
Registrar-General Legislation (Amendment and Repeal) Bill 2010	4
Relationships Register Bill 2010	5
Residential Tenancies Bill 2010	8
Road Transport Legislation Amendment (Unauthorised Vehicle Use) Bill 2010	4

	Digest Number
State Emergency Service Amendment (Volunteer Consultative Council) Bill 2010	5
State Revenue Legislation Amendment Bill 2010	9
State Senate Bill 2010	2
Statute Law (Miscellaneous Provisions) Bill 2010	9
Summary Offences Amendment (Full-face Coverings Prohibition) Bill 2010	10
Superannuation Legislation Amendment Bill 2010	9
Sydney Olympic Park Authority Amendment Bill 2009	1
Terrorism (Police Powers) Amendment Bill 2010	10
Trees (Dispute Between Neighbours) Amendment Bill 2010	5
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010	3
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010 (No 2)	4
Weapons and Firearms Legislation Amendment Bill 2010	4
Workers Compensation Amendment (Commission Members) Bill 2010	2
Workers Compensation Legislation Amendment Bill 2010	10

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009	Digest 2010
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1			
Casino Control Amendment Bill 2010	Minister for Gaming and Racing and Attorney General	08/03/10	18/03/10				2, 5
Civil Liability Legislation Amendment Bill 2008	Attorney General	28/10/08			12		
Contaminated Land Management Amendment Bill 2008	Minister for Climate Change and the Environment	22/09/08	03/12/08		10	1	
Credit (Commonwealth Powers)	Minister for Fair Trading	08/03/10					2
Crimes (Administration of Sentences) Amendment Bill 2008	Attorney General and Minister for Justice	2/12/07			15		
Crimes (Administration of Sentences) Amendment Bill 2009	Minister for Corrective Services	08/08/09				10	
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08	06/02/09		9		
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		1		2	
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1		
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning		12/06/08		8		
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7			
Home Building Amendment	Minister for Fair Trading		30/10/08		10, 13		
Liquor Legislation Amendment Bill 2008	Minister for Gaming and Racing	24/11/08	05/01/09		14	2	
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		1		2	
Parking Space Levy Bill 2009	Minister for Transport	23/03/09	26/05/09			3, 8	
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1,2			

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009	Digest 2010
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1			
Water Management Amendment Bill 2008	Minister for Water	28/10/08	15/12/08		12	2	

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2010

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Building and Construction Long Service Payments Amendment Bill 2009				N	
Casino Control Amendment Bill 2010	N, R, C		N, R		
Children and Young Persons (Care and Protection) Amendment (Children's Services) Bill 2010	N			N	
Children and Young Persons (Care and Protection) Amendment (Parental Responsibility) Bill 2010*	N				
Coal Mine Health and Safety Amendment Bill 2010	N, R			N, R	
Coastal Protection and Other Legislation Amendment Bill 2010	N, R	N, R		N	
Court Information Bill 2010	N, R			N	
Courts Legislation Amendment Bill 2010	N, R				
Credit (Commonwealth Powers) Bill 2010	N, R, C			N, R, C	
Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010	N, R		N, R	N	
Crimes Amendment (Child Pornography and Abuse Material) Bill 2010	N			N	
Crimes Amendment (Grievous Bodily Harm) Bill 2010*	N, R				
Crimes Amendment (Police Pursuits) Bill 2010	N, R				
Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2010	N, R				
Electricity and Gas Supply Legislation Amendment (Retail Price Disclosures and Comparisons) Bill 2010				N	
Electronic Transactions Amendment Bill 2010				N	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Environment Planning and Assessment Amendment (Development Consents) Bill 2010			N, R		
Fair Trading Amendment (Unfair Contract Terms) Bill 2010				N	
Game and Feral Animal Control Repeal Bill 2010	N, R				
Gas Supply Amendment Bill 2009				N	
Health Legislation Amendment Bill 2010	N, R			N, R	
Home Building Amendment (Warranties and Insurance) Bill 2010	N				
Housing Amendment (Community Housing Providers) Bill 2009	N				
James Hardie Former Subsidiaries (Winding Up and Administration) Amendment 2009				N	
Jury Amendment Bill 2010	N, R			N	
Macedonian Orthodox Church Property Trust Bill 2010*				N	
Mining and Petroleum Legislation Amendment (Land Access) Bill 2010	N, R				
National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010				N	N
National Parks and Wildlife Amendment Bill 2010	N, R			N, R	
National Parks and Wildlife Amendment (Visitors and Tourists) Bill 2010				N	
NSW Self Insurance Corporation Amendment (Home Warranty Insurance) Bill 2010	N, R			N	
Ombudsman Amendment (Removal of Legal Professional Privilege) Bill 2010*	N				
Parliamentary Contributory Superannuation Amendment Bill 2010	N				
Personal Property Securities Legislation Amendment Bill 2010				N	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Police Legislation Amendment (Recognised Law Enforcement Officers) Bill 2010				N	
Privacy and Government Information Legislation Amendment Bill 2010				N	
Relationships Register Bill 2010	N			N	
Residential Tenancies Bill 2010	N, R			N, R	
Road Transport Legislation Amendment (Unauthorised Vehicle Use) Bill 2010				N, R	
Statute Law (Miscellaneous Provisions) Bill 2010	N				
Summary Offences Amendment (Full-face Coverings Prohibition) Bill 2010	N, R				
Superannuation Legislation Amendment Bill 2010				N	
Sydney Olympic Park Authority Amendment Bill 2009	N, R			N	
Terrorism (Police Powers) Amendment Bill 2010				N	
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010	N			N	
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010 (No 2)				N	
Weapons and Firearms Legislation Amendment Bill 2010	N, R			N	
Workers Compensation Legislation Amendment Bill 2010				N	

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

Appendix 4: Index of correspondence on regulations

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2008	Digest 2009	Digest 2010
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12		
Criminal Procedure Amendment (Local Court Process Reforms) Regulation 2010	Attorney General	23/02/10	28/04/10			1, 5
Fisheries Management Legislation Amendment (Fishing Closures) Regulation 2009	Minister for Primary Industries	23/11/09	11/01/10		16	1
Liquor Regulation 2008	Minister for Gaming and Racing and Minister for Sport and Recreation	22/09/08	5/01/09	10	2	
Retirement Villages Regulation 2009	Minister for Fair Trading	22/02/10				1, 8
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10		