

# SUMMARY OF CONCLUSIONS

## SECTION A: Comment on Bills

### 1. Adoption Amendment (Same Sex Couples) Bill 2010\*

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| 10. The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987. |
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### 2. Children and Young Persons (Care and Protection) Amendment (Children's Services) Bill 2010

#### Issue: Self-Incrimination

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| 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 <i>Legislation Review Act 1987</i> .   |

#### Issue: Commencement by Proclamation

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| 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 <i>Legislation Review Act 1987</i> . |
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### **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:**

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| <p>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.</p> <p>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.</p> |
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**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:**

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| <p>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.</p> <p>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.</p> <p>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.</p> |
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**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**

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| 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. |
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## **6. Game and Feral Animal Control Repeal Bill 2010\***

**Issue: Denial Of Compensation**

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| 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 <i>Game and Feral Animal Control Repeal Bill 2010</i> may potentially form an undue trespass to personal rights and liberties and refers the matter to Parliament for its consideration. |
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## **7. Home Building Amendment (Warranties and Insurance) Bill 2010**

**Issue: Retrospectivity**

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

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| 12. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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## **9. Ombudsman Amendment (Removal Of Legal Professional Privilege) Bill 2010\***

**Issue: Legal Professional Privilege**

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| 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. |
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| 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 <i>Ombudsman Act 1974</i> 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:**

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| 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. |
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## **11. Personal Property Securities Legislation Amendment Bill 2010**

**Issue: Commencement by Proclamation**

## **12. Plant Diseases Amendment Bill 2010**

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| 15. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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## **13. Privacy and Government Information Legislation Amendment Bill 2010**

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| 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 <i>Legislation Review Act 1987</i> . |
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#### **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*.

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| 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. |
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## **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.

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

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