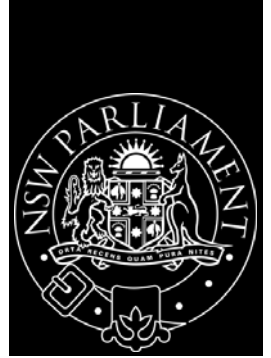


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 3 of 2010

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TABLE OF CONTENTS

Membership & Staff.....	ii
Functions of the Legislation Review Committee.....	iii
Guide to the <i>Legislation Review Digest</i>	iv
Summary of Conclusions	vi
Part One – Bills.....	1
SECTION A: Comment on Bills.....	1
1. Carers Recognition Bill 2010*	1
2. Crimes Amendment (Child Pornography and Abuse Material) Bill 2010	4
3. Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010	10
Part Two – Regulations	16
Appendix 1: Index of Bills Reported on in 2010	18
Appendix 2: Index of Ministerial Correspondence on Bills	19
Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2010	21
Appendix 4: Index of correspondence on regulations	22

* Denotes Private Member's Bill

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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 iii).

Section B: Ministerial correspondence – Bills previously considered

This section contains the Committee's reports on correspondence it has received relating to Bills and copies of that correspondence. The Committee may write to the Minister responsible for a Bill, or a Private Member of Parliament in relation to his or her Bill, to seek advice on any matter concerning that Bill that relates to the Committee's scrutiny criteria.

Part Two – Regulations

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

This table lists the Regulations about which the Committee is seeking further information from the Minister responsible for the instrument, when that request was made and when any reply was received.

Copies of Correspondence on Regulations

This part of the *Digest* contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought information. The Committee's letter to the Minister is published together with the Minister's reply.

Appendix 1: Index of Bills Reported on in 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. Carers Recognition Bill 2010*

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

2. Crimes Amendment (Child Pornography and Abuse Material) Bill 2010

Issue: Clause 2 – Commencement by proclamation – Provides the executive with unfettered control over the commencement

12. The Committee accepts the reasons as to why the legislation is to commence by proclamation and has thus not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

Issue – Proposed section 91FB – Freedom of Expression

17. The Committee is generally concerned where legislation impacts on artistic pursuits and freedom of expression generally. However, in this instance the retention of the classified material defence and the incorporation of ‘artistic merit’ as a factor that must be taken into account when determining if material constitutes ‘child abuse material’ appears to ensure that appropriate safeguards have been put in place so that artists and their work are not unintentionally caught by the offence provisions of the Bill.

3. Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010

Issue: Denial of Compensation – Clause 23(2)(c) of Part 4 and Clause 24(1) of Part 4:

14. The Committee usually considers that the right to seek damages or compensation is an important personal right and that these rights should not be removed or restricted by legislation unless there is a compelling public interest in doing so.
15. However, the Committee is of the view that safeguards are provided under clause 23(2) and clause 24(2). The Committee notes that clause 23(3) ensures protection of the rights and obligations of the parties to a transaction arrangement in respect of the performance of obligations under the transaction arrangement, and together with clause 24(2), ensures that compensation may be payable under a transaction arrangement to a party to the transaction arrangement in connection with the performance of obligations under the transaction arrangement. Accordingly, the Committee does not consider clauses 23(2)(c) and 24(1) of Part 4 unduly trespass on personal rights and liberties.

Issue: Commencement by proclamation – Clause 2(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(2) under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. CARERS RECOGNITION BILL 2010*

Date Introduced:	12 March 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Andrew Constance MP
Portfolio:	Private Member - Liberal Party

Purpose and Description

1. This Bill provides for the recognition of carers; and for other purposes.
2. The objects of this Bill are:
 - (a) to recognise the valuable contribution of carers to our society and to the people they care for,
 - (b) to recognise the benefit, including the social and economic benefit, provided by carers to the community,
 - (c) to ensure the provision of services necessary to enable carers to achieve their maximum potential as members of the community,
 - (d) to provide, through carers' assessments, for the interests, needs and choices of carers to be considered in decisions about the provision of services that impact on their role,
 - (e) to identify and address specific needs of families with children and young people who are carers,
 - (f) to deliver culturally appropriate services for Aboriginal and Torres Strait Islander carers and carers from culturally and linguistically diverse backgrounds.

Background

3. This Bill seeks to recognise the contribution of carers and to the people they care for. A carer is defined, for the purposes of this Bill, an individual who provides ongoing care or assistance to a person in the target group in the *Disability Services Act 1993* such as a person with a mental illness or chronic illness or a person who, because of frailty, requires assistance to carry out everyday tasks. However, a carer does not include designated service providers under that Act or persons providing care or assistance under a contract of service or as a volunteer. A person is also not a carer solely because the person has a relationship of spouse, de facto, parent or guardian with the person that they are for.
4. NSW government agencies will be required under this Bill to take action to reflect the principles of the NSW Carers Charter when providing services that affect carers. The Charter is set out in Schedule 1.

5. It also proposes for the establishment of the Ministerial Advisory Council for Carers which will prepare a report for the Minister with regard to the performance by NSW government agencies of their obligations under the proposed Act and the compliance or non-compliance of NSW government agencies with the proposed Act.

The Bill

6. The objects of the Bill are:
- (a) to enact a NSW Carers Charter to recognise the contribution to society of persons who care for other persons who have a disability, mental illness or chronic illness or are frail with an aim to enable carers to achieve their maximum potential as members of the community, and
 - (b) to require NSW government agencies to take action to reflect the principles of the Charter when providing services that affect carers, and
 - (c) to establish a Ministerial Advisory Council for Carers.

7. 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 sets out the objects of the proposed Act which include to recognise the valuable contribution of carers to our society and to the people they care for and to enable carers to achieve their maximum potential as members of the community.

Clause 4 defines certain words and expressions used in the proposed Act.

Clause 5 defines the term **carer** for the purposes of the proposed Act. The term means an individual who provides ongoing care or assistance to a person in the target group referred to in the *Disability Services Act 1993*, a person with a mental illness or chronic illness or a person who, because of frailty, requires assistance to carry out everyday tasks. A carer does not include designated service providers under that Act or persons providing care or assistance under a contract of service or as a volunteer. A person is not a carer solely because the person has a relationship of spouse, de facto, parent or guardian with the person that he or she cares for.

Part 2 NSW Carers Charter

Clause 6 provides that the NSW Carers Charter is the Charter set out in proposed Schedule 1.

Clause 7 requires a NSW government agency to take reasonable steps to ensure that its officers, employees and agents are aware of, and understand, the Charter and that the agency takes action to reflect the principles of the Charter when providing services that affect carers.

Clause 8 makes it clear that the proposed Act does not give rise to any civil action.

Part 3 Ministerial Advisory Council for Carers

Clause 9 establishes a Ministerial Advisory Council for Carers.

Clause 10 provides that the Advisory Council consists of the Minister administering the proposed Act, other Ministers who are responsible for providing key support services to carers and persons appointed by the Minister as members who have knowledge of, and experience in, matters relevant to carers. A majority of members must be primary carers.

Clause 11 sets out the functions of the Advisory Council which include to work to advance the interests of carers and promote compliance by NSW government agencies with the proposed Act.

Clause 12 requires the Advisory Council to prepare a report each year for the Minister, and at such other times as the Minister requests, on certain matters including the performance by NSW government agencies of their obligations under the proposed Act.

Part 4 Miscellaneous

Clause 13 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 14 provides for the review of the proposed Act in 5 years.

Schedule 1 NSW Carers Charter

Schedule 1 sets out the provisions of the NSW Carers Charter.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

2. CRIMES AMENDMENT (CHILD PORNOGRAPHY AND ABUSE MATERIAL) BILL 2010

Date Introduced:	10 March 2010
House Introduced:	Legislative Assembly
Responsible Minister	Hon John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. The objects of this Bill are as follows:

(a) to amend the *Crimes Act 1900* to change the law as it relates to child pornography (which will now be referred to as child abuse material) so that:

(i) the defence relating to material produced for child protection, scientific, medical, legal, artistic or other public benefit purposes will no longer be available, and

(ii) the law is generally more consistent with Commonwealth offences relating to child pornography,

(b) to amend the *Criminal Procedure Act 1986* to provide for the use of random sample evidence in proceedings for a child abuse material offence,

(c) to amend the *Criminal Procedure Act 1986* to extend to a witness in sexual offence proceedings the same protections as those afforded to a complainant in the proceedings, in cases where it is alleged that the accused person has committed a sexual offence against the witness that is not the subject of the proceedings concerned,

(d) to make consequential and related amendments to the above Acts and other legislation.

Background

2. In its 2008 report, 'Penalties relating to Sexual Assault Offences in New South Wales', the NSW Sentencing Council recommended that artistic purposes be removed as a defence to child pornography charges. In addition, the Sentencing Council recommended the establishment of a Child Pornography Working Party to evaluate and report on these issues.

3. In late 2008, the Government established its Working Party and appointed Judge Peter Berman SC as its chair. The party included representatives across a broad range of Government departments and interested parties. The working party was asked to consider a number of issues that had arisen in the prosecution of child

Crimes Amendment (Child Pornography and Abuse Material) Bill 2010

pornography offences and, in particular, how to remove the artistic purposes defence from child pornography offences in the *Crimes Act 1900* without infringing on the rights of journalists and artists to depict valid situations involving children.

4. Among its recommendations, the Working Party suggested that ‘material that is otherwise offensive because of the way in which it depicts children should not be protected because its creator claims an overriding artistic purpose for it’. The Working Party was of the opinion that the defence of artistic merit lead to the impression that material that would otherwise constitute child pornography is acceptable if the material was produced whilst acting for a genuine artistic purpose.
5. The Working Party also recommended that in defining ‘child pornography’, the legislation provide a list of factors that must be taken into account in determining whether material is offensive, and that the defences be amended to mirror existing Commonwealth legislation.
6. The Bill now removes the stand alone defence of artistic merit and, in its place, reworks the definition of child abuse material to include a list of factors that must be taken into account when determining whether material is ‘offensive’ which include, amongst others, the existence of any artistic merit.
7. The Bill also allows for random sample evidence in circumstances where the quantity and gravity of child pornography makes it undesirable to adduce to the Court in its entirety. The random sample evidence limits the exposure of those associated with the proceedings to viewing unnecessary amounts of child pornography but still allows them to understand a representative sample of the material.
8. The Bill also extends certain protections currently afforded to complainants in sexual offence proceedings, to witnesses in the proceedings who also allege that the accused person has committed a sexual offence against him or her.

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.

Schedule 1 Amendment of *Crimes Act 1900 No 40*

Schedule 1 [6] and [9] replace provisions of the *Crimes Act 1900* relating to child pornography. The new provisions are generally consistent with the approach to child pornography taken in the *Criminal Code Act 1995* of the Commonwealth. At present, **child pornography** is defined as material that depicts or describes (or appears to depict or describe), in a manner that would in all the circumstances cause offence to reasonable persons, a person who is (or appears to be) a child:

- (a) engaged in sexual activity, or
- (b) in a sexual context, or
- (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).

It is an offence to produce, disseminate or possess child pornography. The new provisions expressly extend to a greater range of material, including material that depicts or describes the private parts of a child. The material concerned will now be referred to as child abuse material.

Child abuse material is defined as material that depicts or describes, in a way that reasonable persons would regard as being, in all the circumstances, offensive:

(a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or

(b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or

(c) a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or

(d) the private parts of a person who is, appears to be or is implied to be, a child.

The existing offence of producing, disseminating or possessing child pornography is retained, with updated terminology. However, it will no longer be a defence to that offence that the material concerned was produced, used or intended to be used by the defendant acting for a genuine child protection, scientific, medical, legal, artistic or other public benefit purpose.

Instead, the new provisions set out the factors to be taken into account in deciding whether reasonable persons would regard particular material as being, in all the circumstances, offensive. These factors include any literary, artistic, educational or journalistic merit of the material.

The new provisions contain the following defences, which are similar to the defences available under Commonwealth law:

(a) a defence that the conduct engaged in by the defendant was of public benefit (with public benefit including conduct necessary for or of assistance in enforcing or administering the law),

(b) a defence that the defendant was a law enforcement officer acting in the course of his or her duties,

(c) a defence that the conduct of the defendant was necessary for or of assistance in conducting scientific, medical or educational research approved by the Attorney General.

An existing defence relating to the state of mind of the defendant is retained, so that it will be a defence in proceedings for the offence of producing, disseminating or possessing child abuse material that the defendant did not know, and could not reasonably be expected to

have known, that he or she produced, disseminated or possessed child abuse material. An existing defence relating to the material that has been classified (other than as refused classification) under Commonwealth classification law is also retained.

Schedule 1 [1]–[4], [7] and [8] update existing provisions of the *Crimes Act 1900* to reflect the new terminology. The existing offence of using a child for the production of pornographic material is changed so that it will now be an offence to use a child for the production of child abuse material.

Schedule 1 [4] also inserts a new definition of **data**. This definition relates to a new provision which makes it clear that having possession of child abuse material includes, in the case of child abuse material in the form of computer data, having possession of a computer or data storage device holding or containing the data.

Schedule 1 [5] is a consequential amendment.

Schedule 2 Amendment of *Criminal Procedure Act 1986 No 209*

Use of random sample evidence

Schedule 2 [3] provides for the use of random sample evidence in proceedings for a child abuse material offence. The amendment enables an authorised analyst to conduct an examination of a random sample of the child abuse material or alleged child abuse material the subject of the proceedings. The prosecutor may adduce evidence of the findings of the authorised analyst. Evidence of the findings of the authorised analyst as to the nature and content of the random sample is admissible as evidence of the nature and content of the whole of the material from which the random sample was taken. Accordingly, it is open to a court to find that any type of child abuse material present in a particular proportion in the random sample of the material is present in the same proportion in all of the material.

Evidence of the findings of an authorised analyst may be given in the form of a certificate. The provision permits regulations to be made that will provide for the circumstances or types of cases in which random sample evidence may be adduced by the prosecutor, and the procedure for taking and examining random sample evidence.

Random sample evidence may be admitted under the provision only if the accused person, or his or her Australian legal practitioner, has been given an opportunity to view all of the material concerned.

Schedule 2 [10] includes a transitional provision that extends the new arrangements to proceedings that have already been commenced.

Extension of protections afforded to complainants in sexual offence cases

At present, special arrangements apply to the giving of evidence by complainants in sexual offence cases. For example, complainants may give their evidence during an in camera session of court or may give their evidence from outside the courtroom by means of closed-circuit television facilities. An accused person is not permitted to personally examine or cross-examine the complainant.

Schedule 2 [6] extends these special arrangements to sexual offence witnesses. A

sexual offence witness is a witness (other than the complainant) against whom it is alleged that the accused has committed a sexual offence (not being the sexual offence that is the subject of the proceedings). The provision also allows a court to make an order directing that the identity of a sexual offence witness not be publicly disclosed.

Such an order will invoke provisions of the *Crimes Act 1900* which make it an offence to publish any matter which identifies the complainant in sexual offence proceedings.

Schedule 2 [4] and [5] are consequential amendments, which ensure that the definition of **sexual offence witness** is consistent with the definition of **complainant**.

Schedule 2 [10] includes a transitional provision that extends the new arrangements to proceedings that have already been commenced.

Other amendments

Schedule 2 [1], [2], [7] and [8] make amendments that are consequential on the amendments relating to child abuse material set out in Schedule 1.

Schedule 2 [9] enables savings and transitional regulations to be made as a consequence of the amendments.

Schedule 3 Amendment of other legislation

Schedule 3 makes amendments that are consequential on the amendments relating to child abuse material set out in Schedule 1. These generally replace the expression **child pornography** with the expression **child abuse material**.

Issues Considered by the Committee

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

Issue: Clause 2 – Commencement by proclamation – Provides the executive with unfettered control over the commencement

10. The Committee notes that, with the exception of Schedule 2 [4] – [6] and [10], the proposed Act is to commence on a day or days to be appointed by proclamation. The remaining provisions commence on the date of assent. This may delegate to the government the power to commence the majority of the provisions of the Act on whatever day it chooses, or not at all. However, the Committee notes that Schedule 1 is a significant change to the law surrounding child pornography - including alteration of the definitions and the terminology used, and has been informed that this will require changes police will have to make to their Cops System (regarding the name of the charge etc), policies and procedures. Police and the Director of Public Prosecutions will also need time to inform their officers of the changes.
11. Meanwhile, the Committee has been informed that Schedule 2 concerning the 'use of random sample evidence' commences on proclamation to allow Police officers who will be designated as 'analysts' time to be authorised by the Director of Public Prosecutions and the Attorney General. In addition, changes to the regulations will need to be finalised.

- 12. The Committee accepts the reasons as to why the legislation is to commence by proclamation and has thus not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.**

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

Issue – Proposed section 91FB – Freedom of Expression

13. Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that:
- ‘everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.’
14. The Committee is generally concerned where legislation impacts on artistic pursuits and its attendant affects on freedom of expression. However, in discussions the Committee has had with the National Association for the Visual Arts and the Arts Law Centre for Australia, the Committee is of the understanding that stakeholders appear satisfied that the Bill will not adversely impact the work of artists.
15. The Committee notes that the Bill retains the defence of classified material at proposed section 91HA(7) which allows an absolute defence when the material concerned was classified (whether before or after the commission of the alleged offence) under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth, other than as refused classification. In this regard, artists may seek classification of their work by the Classification Board to determine what restrictions, if any, will apply to their work. The retention of this provision safeguards artists, and their work, from being unintentionally caught by the definition of ‘child abuse material’.
16. The Bill requires that artistic merit be one of the factors to be taken into account when determining if material is ‘child abuse material’. By removing artistic purposes as a defence and, in its place, including artistic merit as one of the factors to be taken into account when determining whether material constitutes ‘child abuse material’, the Court is able to view the material holistically and with regard to various other factors provided for in the definition.
- 17. The Committee is generally concerned where legislation impacts on artistic pursuits and freedom of expression generally. However, in this instance the retention of the classified material defence and the incorporation of ‘artistic merit’ as a factor that must be taken into account when determining if material constitutes ‘child abuse material’ appears to ensure that appropriate safeguards have been put in place so that artists and their work are not unintentionally caught by the offence provisions of the Bill.**

3. WASTE RECYCLING AND PROCESSING CORPORATION (AUTHORISED TRANSACTION) BILL 2010

Date Introduced: 10 March 2010
House Introduced: Legislative Assembly
Minister Responsible: Hon Michael Daley MP
Portfolio: Finance

Purpose and Description

1. This Bill provides for the transfer of the business of the Waste Recycling and Processing Corporation; and for other purposes.
2. The Waste Recycling and Processing Corporation (WSN), which trades as WSN Environmental Solutions, operates a State-owned waste collection and processing business.
3. Part 2 authorises the transfer of WSN to the private sector. To provide flexibility, Part 3 authorises the transfer of WSN to the private sector through various methods:
 - through direct vesting of assets and liabilities;
 - through the conversion of WSN to a *Corporations Act 2001* company and the subsequent transfer of its shares; or,
 - through the establishment and transfer of a new company.
4. The Bill provides the Treasurer with the powers and functions to effect the transfer to the private sector through one of the above methods. It includes a provision allowing the new owner to be excluded from the payment of State taxes relating to this transaction, such as stamp duty. Section 52A of the *Conveyancing Act 1919* will not apply to a contract for the sale of land that is entered into for the purposes of this transaction.
5. Clause 19 makes it clear that provisions in the *State Owned Corporations Act 1989* do not prevent, restrict or otherwise limit the carrying out of this transaction. This applies also to the *Waste Recycling and Processing Corporatisation Act 2001*. There are provisions to allow for the repeal of that Act after the successful completion of the transaction.
6. The Bill also establishes the Waste Assets Management Corporation, which will retain and manage sites not transferred to the new owner as part of this transaction. The Waste Assets Management Corporation will be under the direction and control of the Treasurer. A general manager will be appointed and staff may be employed under chapter 1A of the *Public Sector Employment and Management Act 2002*.

Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010

7. The Bill authorises the transfer of employees to the private sector and the continuation of their existing leave and superannuation entitlements, as well as a three-year employment guarantee for permanent employees. Temporary employees will receive a three-year guarantee or to the end of their fixed term, whichever occurs first. This Bill also empowers the Treasurer to provide transfer payments to those employees who choose to move to the private sector. It also includes a provision to allow permanent and temporary WSN employees to remain with the public sector.

Background

8. In late 2008, the Government announced that it intended to investigate the possible sale of WSN. Financial, legal, tax, accounting and environmental advisors were appointed to do a review of WSN. Following the completion of this review, the Government announced its intention to proceed with the transaction and, is now introducing this enabling legislation.

9. According to the Agreement in Principle speech:

The Government has decided to proceed with this transaction for a number of important reasons. Firstly, the sale of WSN addresses the inherent conflict between the Government being both owner and regulator of this business. Secondly, WSN operates in an increasingly competitive market along with private sector operators, who are best placed to make the significant technological development and capital investment necessary in what is a growing industry. There is growing demand for alternative waste technology facilities, which serve the critical function of diverting waste from landfill and providing recycling opportunities.

The Bill

10. The object of this Bill is to authorise and facilitate the transfer to the private sector of the assets, rights and liabilities of the Waste Recycling and Processing Corporation. In this Bill, the Corporation is referred to as **WSN** (to reflect the Corporation's trading name, WSN Environmental Solutions), and its assets, rights and liabilities are referred to as **WSN assets**. The Bill has detailed provisions dealing with the transfer of WSN employees and their rights and entitlements on transfer. See **Schedule 4**.

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 most of the provisions of the proposed Act on the date of assent, with provisions that will disestablish WSN as a statutory State owned corporation to commence on a day to be appointed by proclamation.

Clause 3 contains definitions of key terms used in the proposed Act. Schedule 1 contains other definitions. The clause defines **authorised transaction** to mean the transfer of WSN assets authorised by Part 2.

Part 2 The authorised transaction:

Clause 4 authorises the transfer to the private sector of WSN assets.

Clause 5 authorises the transfer of WSN assets to one or more public sector agencies.

Clause 6 requires the proceeds of the transfer of WSN assets pursuant to the authorised transaction, after deduction of certain amounts for debt repayment and payment of expenses, to be paid into the Consolidated Fund.

Part 3 Facilitating the authorised transaction:

Clause 7 provides that the Treasurer has and may exercise all such functions as are necessary or convenient for the purposes of the authorised transaction.

Clause 8 provides for the establishment of companies as **transaction companies** for the purposes of the authorised transaction (including by means of the corporate conversion of WSN).

Clause 9 provides that WSN and each transaction company has and may exercise all such functions as are necessary or convenient for the purposes of the authorised transaction. The clause also authorises the Treasurer to act for and on behalf of and in the name of WSN or a transaction company in the exercise of any of its functions for the purposes of the authorised transaction.

Clause 10 provides that WSN and transaction companies are subject to the direction and control of the Treasurer in the exercise of any of their functions for the purposes of the authorised transaction.

Clause 11 provides for the Treasurer to give directions for the grant of any relevant authorisation under various laws to a person who becomes or is proposed to become the new operator of WSN assets pursuant to the authorised transaction.

Clause 12 authorises the Treasurer to make vesting orders under Schedule 3 for the purposes of the authorised transaction.

Clause 13 references Schedule 4 which provides for the transfer of employment of employees of WSN in connection with the authorised transaction.

Clause 14 establishes the Waste Assets Management Corporation to hold WSN assets acquired by it or transferred to it and to carry on any activities or business that relate to any WSN assets held by it.

Clause 15 provides that various State taxes and charges are not payable by public sector agencies in connection with transactions for the purposes of the authorised transaction and authorises the Treasurer to exempt other persons from liability for State taxes and charges in connection with the authorised transaction.

Clause 16 exempts contracts for the sale of land from section 52A of the *Conveyancing Act 1919* when entered into for the purposes of the authorised transaction.

Part 4 Miscellaneous:

Clause 17 authorises the release of information by the Auditor-General for the purposes of the authorised transaction.

Clause 18 authorises the Treasurer to delegate any function of the Treasurer under the proposed Act to the Secretary of the Treasury or any other officer of the Government Service prescribed by the regulations.

Clause 19 provides for the proposed Act to bind the State and all other Australian jurisdictions.

Clause 20 provides for the provisions of the proposed Act to prevail in the event of an inconsistency between the proposed Act and other State legislation.

Clause 21 provides for the operation of the proposed Act outside the State.

Clause 22 provides for the interpretation of the proposed Act so as not to exceed the legislative power of the State.

Clause 23 prevents the operation of the proposed Act and the various arrangements and actions that it authorises from constituting a breach of various civil obligations.

Clause 24 protects the State from claims for compensation in connection with the enactment or operation of the proposed Act.

Clause 25 provides for the issue of evidentiary certificates by the Treasurer.

Clause 26 is a general regulation-making power.

Clause 27 provides a savings and transitional regulation-making power.

Clause 28 repeals the *Waste Recycling and Processing Corporation Act 2001*.

Schedule 1 Interpretative provisions

Schedule 1 contains definitions and other interpretative provisions for the purposes of the proposed Act.

Schedule 2 Corporate conversion of WSN

Schedule 2 provides the procedure for the corporate conversion of WSN into a transaction company.

Schedule 3 Vesting of assets, rights and liabilities

Schedule 3 provides for the making of vesting orders by the Treasurer for the purposes of the authorised transaction. Vesting orders operate to vest assets, rights and liabilities of WSN or a transaction company in the transferee specified in the order.

Schedule 4 Employee protections

Schedule 4 provides for the transfer of employees of WSN either to an employer in the private sector or to a Public Service Department as an excess employee of the Department or as staff of the proposed Waste Assets Management Corporation. Permanent and temporary employees can elect not to be transferred to the private sector.

The following employment protections will apply for the benefit of transferred employees:

- (a) the terms and conditions of employment of an employee transferred to the private sector are to be the same as applied to the employee immediately before transfer,
- (b) those terms and conditions will not be able to be varied for permanent and temporary employees during their **employment guarantee period** (which is 3 years, or a shorter period for those temporary employees who have less than 3 years to run on their appointment),
- (c) employment of permanent and temporary employees with the private sector employer will not be able to be terminated during their employment guarantee period (with exceptions for such things as serious misconduct and disciplinary termination),
- (d) employees transferred to a Public Service Department will be employed on the terms and conditions that applied before their transfer and (in the case of employees who are transferred as excess employees) their employment will be managed in accordance with the Public Service excess employee policy,
- (e) employees will be entitled to remain as members of or contributors to their current superannuation schemes and will retain any rights to accrued leave,
- (f) service with WSN will count as service with the new employer.

The Schedule also authorises the payment of transfer payments to transferred employees.

Schedule 5 Waste Assets Management Corporation

Schedule 5 makes further provision for the proposed Waste Assets Management Corporation, including provision for the following:

- (a) the management and staff of the Corporation,
- (b) the formation or acquisition of subsidiaries of the Corporation,
- (c) the transfer of assets, rights and liabilities of the Corporation,
- (d) dissolution of the Corporation.

Schedule 6 Amendment of Acts

Schedule 6 makes consequential amendments to various Acts in connection with the authorised transaction.

Issues Considered by the Committee

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

Issue: Denial of Compensation – Clause 23(2)(c) of Part 4 and Clause 24(1) of Part 4:

12. Clause 23 of Part 4 prevents the operation of the proposed Act and the various arrangements and actions that it authorises from constituting a breach of various civil obligations. Clause 23(2) reads that none of the matters or things to which this section applies are to be regarded as (c) giving rise to any right or remedy by a party to a contract or other instrument, or as causing or permitting the termination of, or exercise of rights under, any contract or other instrument.
13. Clause 24 of Part 4 protects the State from claims for compensation in connection with the enactment or operation of the proposed Act. Clause 24 (1) reads that compensation is not payable by or on behalf of the State: (a) because of the enactment or operation of this Act, or for any consequence of that enactment or operation, or (b) because of any statement or conduct relating to the enactment of this Act.

14. **The Committee usually considers that the right to seek damages or compensation is an important personal right and that these rights should not be removed or restricted by legislation unless there is a compelling public interest in doing so.**
15. **However, the Committee is of the view that safeguards are provided under clause 23(2) and clause 24(2). The Committee notes that clause 23(3) ensures protection of the rights and obligations of the parties to a transaction arrangement in respect of the performance of obligations under the transaction arrangement, and together with clause 24(2), ensures that compensation may be payable under a transaction arrangement to a party to the transaction arrangement in connection with the performance of obligations under the transaction arrangement. Accordingly, the Committee does not consider clauses 23(2)(c) and 24(1) of Part 4 unduly trespass on personal rights and liberties.**

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]**Issue: Commencement by proclamation – Clause 2(2) - Provide the executive with unfettered control over the commencement of an Act.**

16. The Committee notes that except for subsection (2) where proposed section 28 and Schedule 6.2 will commence on a day to be appointed by proclamation, the rest of the proposed Act will commence on the date of assent to this Act under clause 2(1). Clause 2(2) may delegate to the government the power to commence the proposed section 28 and schedule 6.2 on whatever day it chooses or not at all. However, the Committee notes that the provisions to disestablish WSN as a statutory State owned corporation to commence on a day to be appointed by proclamation will involve appropriate administrative and transitional arrangements to be made in order to allow for the repeal of the *Waste Recycling and Processing Corporatisation Act 2001* once the successful completion of the transaction has taken place.

17. **Therefore, the Committee has not identified any issues regarding Clause 2(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: REGULATIONS FOR THE SPECIAL ATTENTION OF PARLIAMENT UNDER S 9(1)(B) OF THE *LEGISLATION REVIEW ACT 1987*

Energy and Utilities Administration Amendment (Fees) Regulation 2010
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Recommendation

That the Committee:

- 1) for the purposes of s 9(1A) of the *Legislation Review Act 1987*, resolve that
 - (a) this Regulation requires no further action, and
 - (b) the reasons provided by the Office for the Minister for Energy with regard to the fee increases are reasonable.

Person contacted	Ms Tess Woods, Departmental Liaison Officer (Energy), Office of the Minister for Energy
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Explanatory Note

The object of this Regulation is to amend the *Energy and Utilities Administration Regulation 2006* by increasing from \$150 to \$205 the fee that is required to accompany an application for the registration of electrical equipment in the register of electrical equipment kept by the Energy Corporation of New South Wales.

This Regulation is made under the *Energy and Utilities Administration Act 1987*, including section 38 and section 53 (the general regulation-making power).

Comment

1. The following information is a summary of the advice provided by the Office for the Minister for Energy.
2. From 1999 until 2008, registration fees in New South Wales, Victoria and Queensland were set at \$150. Victoria and Queensland, however, have increased their registration fees.
3. This variation in registration fees is encouraging applicants to register their products in NSW, which is putting pressure on available administrative and technical resources.
4. It is proposed to increase the NSW registration fee to \$205 which reflects the level of inflation between 1999 and 2009.

Energy and Utilities Administration Amendment (Fees) Regulation 2010

5. The Committee notes the above reasons and information provided by the Office for the Minister for Energy with regard to the fees as reasonable, and finds this Regulation requires no further action.

Appendix 1: Index of Bills Reported on in 2010

	Digest Number
Building and Construction Industry Long Service Payments Amendment Bill 2009	1
Carers Recognition Bill 2010*	3
Casino Control Amendment Bill 2010	2
Credit (Commonwealth Powers) Bill 2010	2
Crimes (Administration of Sentences) Amendment Bill 2010	2
Crimes Amendment (Child Pornography and Abuse Material) Bill 2010	3
Crimes Amendment (Police Pursuits) Bill 2010	2
Gas Supply Amendment Bill 2009	1
Housing Amendment (Community Housing Providers) Bill 2009	1
James Hardie Former Subsidiaries (Winding Up and Administration) Amendment Bill 2009	1
National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010	2
National Parks and Wildlife Amendment Bill 2010	2
State Senate Bill 2010	2
Sydney Olympic Park Authority Amendment Bill 2009	1
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010	3
Workers Compensation Amendment (Commission Members) Bill 2010	2

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					2
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		
Credit (Commonwealth Powers) Bill 2010	N, R, C			N, R, C	
Crimes Amendment (Child Pornography and Abuse Material) Bill 2010	N			N	
Crimes Amendment (Police Pursuits)	N, R				
Gas Supply Amendment Bill 2009				N	
Housing Amendment (Community Housing Providers) Bill 2009	N				
James Hardie Former Subsidiaries (Winding Up and Administration) Amendment 2009				N	
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	
Sydney Olympic Park Authority Amendment Bill 2009	N, R			N	
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010	N			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				1
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
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10		