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Legislation Review Committee

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No 5 of 2006

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TABLE OF CONTENTS

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Contact Details	Legislation Review Committee Legislative Assembly Parliament House Macquarie Street Sydney NSW 2000
Telephone **Facsimile** **Email** **URL**	02 9230 3418 02 9230 3052 legislation.review@parliament.nsw.gov.au www.parliament.nsw.gov.au/lrc/digests

FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

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

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

9 Functions with respect to Regulations:

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

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

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

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

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

Section B: Ministerial correspondence – Bills previously considered

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

Part Two – Regulations

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

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

Appendix 1: Index of Bills Reported on in 2005

This table lists the Bills reported on in the calendar year and the *Digests* in which any reports in relation to the Bill appear.

Appendix 2: Index of Ministerial Correspondence on Bills for 2005

This table lists the recipient and date on which the Committee sent correspondence to a Minister or Private Member of Parliament in relation to Bills reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Bill and correspondence appear.

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

This table specifies the action the Committee has taken with respect to Bills that received comment in 2005 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

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

This table lists the recipient and date on which the Committee sent correspondence to a Minister in relation to Regulations reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Regulation and correspondence appear.

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Crimes (Sentencing Procedure) Amendment Bill 2006

Retrospectivity: Clause 5

9. The Committee notes that it is a well established right, protected by Article 15 of the International Covenant on Civil and Political Rights, that a person should not suffer a heavier penalty for an offence than the one that was applicable at the time the offence was committed.

10. The Committee notes that the Bill applies provisions expanding the scope of circumstances of aggravation, which lead to higher penalties, to offences that were committed at any time before the commencement of the Act (unless earlier dealt with).

11. The Committee notes that the Bill is intended to clarify the existing provisions rather than apply them to circumstances that were clearly outside their original scope.

12. The Committee refers to the Parliament the question of whether the retrospective application of the amendments in the Bill trespasses unduly on personal rights and liberties.

2. Crimes (Serious Sex Offenders) Bill 2006

Traditional Justification for Punishment/Deprivation of Liberty: Part 3

26. The Committee refers to Parliament the question of whether continuing to detain a person or subjecting a person to extended supervision on the basis of an assessment of risk rather than as punishment for an offence committed unduly trespasses on personal rights and liberties.

27. The Committee also refers to Parliament the question of whether treating a person detained for the objects of safety and protection of the community and rehabilitation (rather than the object of punishment) in the same manner as persons detained for punishment of offences committed unduly trespasses on personal rights and liberties.

28. The Committee has written to the Minister for advice as to why a person subject to a CDO is to be treated as a convicted inmate under the *Crimes (Administration of Sentences) Act 1999* when the objects of their detention is safety and protection of the community and rehabilitation rather than punishment.

Standard of Proof – Departure from 'Beyond Reasonable Doubt'

33. The Committee refers to Parliament the question of whether the Bill unduly trespasses on rights and liberties by applying a lower standard of proof than the criminal standard of 'beyond reasonable doubt' in determining if the person is to be kept in continued detention.

Retrospectivity

39. The Committee refers to the Parliament the question of whether the Bill, by effectively allowing the imposition of a heavier penalty than the one that was applicable at the time when the criminal offence was committed, unduly trespasses on personal rights and liberties.

Double Jeopardy

42. The Committee refers to Parliament the question of whether exposing a person who is the subject of an order under the Bill to what is in effect a second or subsequent sentence for the same offence unduly trespasses on their rights and liberties.

Arbitrary detention

47. The Committee refers to Parliament the question of whether the Bill unduly trespasses on personal rights and liberties by providing for arbitrary detention.

Privileged & confidential communications: Clause 25

57. The Committee is of the view that legal professional privilege is an important common law principle relating to the proper administration of justice and that abrogating it is only justifiable in the public interest in exceptional circumstances.

58. The Committee is also of the view that other forms of professional communications normally afforded confidentiality are also important for the protection of personal rights such as privacy and the ability of the profession to perform its functions. The Committee notes that such communications are sometimes subject to mandatory disclosure in the public interest.

59. The Committee is of the view that if the legislation is intended to abrogate legal professional privilege and to remove any possibility of a "defence" of privilege or confidential communication, such as those between a doctor and patient, it should do so explicitly.

60. Further, the Committee is of the view that the legislation should be explicit so that those who hold information referred to in this clause can know whether privilege has been abrogated or whether applicable confidentiality principles apply. This is especially so given the high penalty prescribed for non-compliance, including imprisonment for 2 years.

61. The Committee also notes that the clause is extremely broad and provides no threshold to distinguish a justified order from an unjustified one.

62. The Committee has written to the Minister for advice on the following matters:

(i) whether it is intended that the Bill abrogate legal professional privilege and remove any possible "defence" of privilege or confidential communication on other grounds;

(ii) if abrogation from the privilege is intended, whether the Bill can be amended to make that explicit in the interests of fairness; and

(iii) the justification for the breadth of clause 25 in applying to "any sex offender" at any time, without any connection to proceedings or orders made under the Bill.

63. The Committee refers to Parliament the question of whether clause 25 unduly trespasses on personal rights.

Safeguards

68. The Committee notes the additional safeguards found in comparable legislation in Victoria, Queensland and Western Australia, namely expressly providing that:

- the prisoner is entitled to obtain an independent assessment report by a psychiatrist or psychologist;

- the prisoner may file material at a preliminary hearing for an application for a CDO or ESO;

- the prisoner is entitled to appear at a preliminary hearing, in addition to the other hearings arising out of the operation of the Act;

- the Supreme Court must provide detailed reasons for making any order under the Bill;

- the Supreme Court must conduct an annual review into the ongoing detention of a person under a CDO;

- psychiatrists ordered by the Supreme Court at a preliminary hearing to examine a prisoner must make a report that contains specified information and that copies of those reports be given to the offender and the Attorney General within a specified period.

69. The Committee has written to the Minister for advice as to why the Bill does not contain these safeguards.

3. Independent Commission Against Corruption Amendment (Operations Review Committee) Bill 2006

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

4. Jury Amendment (Verdicts) Bill 2006

Majority verdicts - right to fair trial: proposed s 55F

15. The Committee notes that trial by jury is a central feature of the Australian criminal justice system, which helps to protect the rights of accused persons. The Committee further notes that the High Court has consistently maintained that unanimity is an essential feature of the right to trial by jury for criminal offences under the Commonwealth Constitution.

16. The Committee also notes that the right to be presumed innocent until proved guilty beyond reasonable doubt is a fundamental personal right. The Committee further notes that a dissenting juror objectively suggests the existence of reasonable doubt regarding a person's guilt and allowing a conviction in such circumstances increases the risk of convicting the innocent.

17. The Committee notes the assertion that majority verdicts should reduce the incidence of retrials.

18. The Committee also notes that the Bill purports to mitigate any adverse impact on personal rights by requiring that a majority verdict be made by 11 of 12 jurors and only after a minimum of 8 hours of deliberation during which it has not been possible to reach a unanimous verdict.

19. The Committee brings to Parliament's attention the opinion of the High Court which stated, inter alia, that "*a verdict returned by a majority of jurors, over the dissent of others, objectively suggests the existence of a reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict*." The Committee refers to Parliament the question of whether majority verdicts unduly trespass on the right to be presumed innocent until proved guilty beyond reasonable doubt.

5. Legal Profession Amendment Bill 2006

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

6. Water Management Amendment (Water Property Rights Compensation) Bill 2006*

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

SECTION B: Ministerial Correspondence — Bills Previously Considered

7. Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005

8. The Committee notes that the Attorney General has not answered the question as to whether the Act contravenes Australia's obligations under the UN Convention on the Rights of the Child, and if so, the justification for that contravention.

9. The Committee thanks the Attorney for his reply.

8. Motor Accidents Compensation Amendment Bill 2006 and the Motor Accidents (Lifetime Care and Support) Bill 2006

6. The Committee thanks the Minister for his reply.

9. Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005

9. The Committee thanks the Minister for his reply.

10. The Committee has again written to the Minister for further advice as to why administrative protections are preferable to statutory protections such as making the PTTC subject to NSW privacy law in the Bill itself or prescribing PTTC as an authority to be opted into the *Federal Privacy Act 1998*.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. CRIMES (SENTENCING PROCEDURE) AMENDMENT BILL 2006

Date Introduced:	6 April 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The object of this Bill is to amend the *Crimes (Sentencing Procedure) Act 1999* with respect to sentencing for crimes committed against pubic transport workers or community workers (such as surf lifesavers).

2. The Bill:

- amends the current provision, that makes it a factor of aggravation in sentencing that the victim was a vulnerable person due to their occupation, such as a taxi driver, extends to a bus driver or other public transport worker.
- provides that the current provision, that makes it a factor of aggravation in sentencing that the person was a community worker and the offence arose because of the victims occupation, extends to volunteer community workers (such as surf life savers) where the offence arose because of the victim's voluntary work.

Background

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

> During 2005 there were a number of occasions when transport workers, specifically bus drivers, were assaulted. The transport union raised the matter with the Government and called for heavier penalties for those who assaulted transport workers. Similarly, surf lifesavers give up their summer weekends to patrol our beaches. They perform a life-saving public service at no cost to beachgoers… The bill therefore recognises the particularly aggravating factor that applies to workers in these frontline occupations.[1]

The Bill

4. The second reading speech stated:

[1] Mr Tony Stewart MP, Member for Bankstown, Legislative Assembly *Hansard*, 6 April 2006.

> Section 21A (2) of the Crimes (Sentencing Procedure) Act provides for aggravating factors which are to be taken into account by the sentencing judge. Section 21A (2) (a) provides the following as an aggravating circumstance at sentence: the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker or other public official, exercising public or community functions and the offence arose because of the victim's occupation. Surf lifesavers fall under the definition of 'community worker', but the use of the term 'occupation' may imply that the victim is remunerated for his or her duties. In many cases, lifesavers do voluntary, unpaid work and may have a Monday to Friday occupation unrelated to voluntary lifesaving.
>
> Schedule 1 of the bill therefore amends section 21A (2) (a) so that it reads 'and the offence arose because of the victim's occupation or voluntary work.' This clarifies that community workers, who may be exercising public functions that are so beneficial to our society on a voluntary basis, will be protected by this provision. The common law has long recognised the circumstance of aggravation where an offence is committed against people in certain occupations that are, for whatever reasons, more highly exposed to criminal activity.[2]

5. Section 21A (2) (l) of the Crimes (Sentencing Procedure) Act 1999 provides that the following is an aggravating circumstance at sentence:

> the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as taxi driver, bank teller or service station attendant)

Schedule 1 of the Bill amends this section so that 'bus driver and other public transport worker' is inserted after taxi driver.

Issues Considered by the Committee

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

Retrospectivity: Clause 5

6. Clause 5 provides that the outlined amendments apply to the determination of a sentence for an offence whenever committed, unless,

   (a) the court has convicted the person being sentenced of the offence, or

   (b) a court has accepted a plea of guilty and the plea has not been withdrawn, before the commencement of the Act.

7. Article 15(1) of the International Covenant on Civil and Political Rights provides that it is not acceptable to impose 'a heavier penalty than the one that was applicable at the time when the criminal offence was committed.'

8. While the second reading speech states that the bill is designed to clarify the existing law, the proposed amendments may have the effect of increasing the maximum

[2] Mr Tony Stewart MP, Member for Bankstown, Legislative Assembly *Hansard*, 6 April 2006.

penalty for a person who has not yet been charged with an offence, or where proceedings are already commenced and a not guilty plea has been entered.[3]

9. The Committee notes that it is a well established right, protected by Article 15 of the International Covenant on Civil and Political Rights, that a person should not suffer a heavier penalty for an offence than the one that was applicable at the time the offence was committed.

10. The Committee notes that the Bill applies provisions expanding the scope of circumstances of aggravation, which lead to higher penalties, to offences that were committed at any time before the commencement of the Act (unless earlier dealt with).

11. The Committee notes that the Bill is intended to clarify the existing provisions rather than apply them to circumstances that were clearly outside their original scope.

12. The Committee refers to the Parliament the question of whether the retrospective application of the amendments in the Bill trespasses unduly on personal rights and liberties.

[3] Section 21 A (2) requires that the aggravating factors listed are to be taken into account in determining the appropriate sentence for an offence.

2. CRIMES (SERIOUS SEX OFFENDERS) BILL 2006

Date Introduced:	29 March 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Tony Kelly MLC
Portfolio:	Justice

Pursuant to a suspension of Standing Orders, the Bill passed all stages in the Legislative Assembly on 29 March 2006 and in the Legislative Council on 30 March 2006. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.

Purpose and Description

1. This Bill provides for extended supervision orders, or continued detention beyond the term of imprisonment given at sentencing, for serious sex offenders.

Background

2. In the second reading speech, the Minister for Police stated:

> [T]his scheme relates to a handful of high-risk, hard-core offenders... These offenders make up a very small percentage of the prison population, yet their behaviour poses a very real threat to the public. These concerns are compounded where the offender never qualifies for parole and is released at the end of their sentence totally unsupervised. The Bill addresses this problem by allowing this small group of high-risk offenders to be placed on extended supervision, or, in only the very worst cases, kept in custody. The Department of Corrective Services has advised that only a small number of offenders would fall into this very high-risk category.[4]

The Bill

3. Clause 3 states the objects of the Bill as providing for the extended supervision and continuing detention of serious sex offenders so as:

> (a) to ensure the safety and protection of the community; and
>
> (b) to facilitate the rehabilitation of serious sex offenders.

4. Accordingly, the Bill enables the Attorney General to apply to the Supreme Court for an extended supervision order (ESO) or a continuing detention order (CDO) against a sex offender who is currently in custody serving a sentence for a serious sex offence or an offence of a sexual nature or while under supervision pursuant to an existing extended supervision order or continuing detention order. The Attorney General cannot seek such an order until the last 6 months of the offender's current custody or supervision.

[4] The Hon Carl Scully MP, Minister for Police, Second Reading Speech, Legislative Assembly Hansard, 29 March 2006.

5. An application for either type of order must be served on the person concerned within 2 business days after it is filed. A preliminary hearing to determine if there is a case against the person must then be conducted within 28 days after filing [cl 7]. If the Supreme Court finds there is a case, it must order a psychiatric examination of the person. The Attorney General must disclose to the person all available and relevant material, whether or not intended to be tendered in evidence.

6. The Supreme Court may make an interim extended supervision order or an interim continuing detention order to keep the person under supervision or in detention as the case may be pending its final determination of the application. Interim orders may have effect for up to 28 days at a time, but can be extended for a total of 3 months.

7. The Supreme Court may grant the application for an extended supervision order or a continuing detention order if it is satisfied, to a high degree of probability, that the offender is likely to commit a further serious sex offence if he or she is not kept under supervision. However, the Court cannot make a continuing detention order unless it is satisfied that an extended supervision order would not provide adequate supervision.

8. In both cases, the Court must have regard to matters specified in the Bill or to any other matter it considers relevant before making its determination. The specified matters include:

   - the safety of the community;
   - the reports received from the psychiatrists appointed under the Bill to conduct psychiatric examinations of the offender;
   - the results of any statistical or other assessment as to the likelihood of persons with histories and characteristics similar to those of the offender committing a further serious sex offence;
   - any treatment or rehabilitation programs in which the offender has had an opportunity to participate, the willingness of the offender to participate in any such programs, and the level of the offender's participation in any such programs;
   - the level of the offender's compliance with any obligations to which he or she is or has been subject while on release on parole or while subject to an earlier extended supervision order;
   - the offender's criminal history (including prior convictions and findings of guilt in respect of offences committed in New South Wales or elsewhere), and any pattern of offending behaviour disclosed by that history; and
   - any other information that is available as to the likelihood that the offender will in future commit offences of a sexual nature.

9. Extended supervision orders can impose conditions on the person to whom it relates, including:

   - accepting home visits by and making periodic reports to, a corrective services officer;
   - participating in treatment and rehabilitation programs;

- wearing electronic monitoring equipment;
- not residing in specified locations or classes of locations;
- not associating or making contact with specified persons or classes of persons;
- not engaging in specified conduct or employment or classes of conduct or employment; or
- not changing his or her name.

10. The maximum term for an extended supervision order or a continuing detention order is 5 years. However, the Supreme Court may grant further extended supervision orders or a continuing detention orders upon application by the Attorney General if satisfied that the conditions prescribed in the Bill for the making of such orders are met. There is no limit to the number of such orders it can make.

11. A breach of an extended supervision order is punishable by 100 penalty units or 2 years imprisonment or both [cl 12].

12. The Bill provides that proceedings under the Bill are civil proceedings, to be conducted in accordance with the law relating to civil proceedings. However, no order for costs may be made against a sex offender in relation to proceedings under the proposed Act.

13. The Bill allows either party to apply at any time to the Supreme Court to revoke or vary an extended supervision order or a continuing detention order. Further, for the purposes of the making such an application, the Commissioner of Corrective Services must give the Attorney General a report of any person subject to an extended supervision order or a continuing detention order at intervals of not more than 12 months.

14. Either party may appeal any Supreme Court determination made under the Bill to the Court of Appeal.

Comparable legislation in other Australian jurisdictions

15. Queensland, Victoria and, most recently, Western Australia have enacted similar legislation. The Queensland *Dangerous Prisoners (Sexual Offenders) Act 2003* and the Western Australian *Dangerous Sexual Offenders Act 2006*, which has not yet received Royal Assent, provide for the making of extended supervision orders and continuing detention orders for serious sexual offenders by the Supreme Court of those States on application by the Attorney General (Qld Act) or the Director of Public Prosecutions (WA Act). The Victorian *Serious Sex Offenders Monitoring Act 2005* allows the Attorney General of that State to apply for extended supervision orders over serious sex offenders upon their release from gaol.

16. Significantly, while the Queensland and Western Australian Acts enable the making of ESOs and CDOs, they both expressly provide for important safeguards for the rights of the offender concerned that are absent from the present Bill. For example:

- both Acts expressly provide that the prisoner concerned may file material at the preliminary hearing in response to an application for a CDO or ESO;[5]
- the Queensland Act also provides that the prisoner is entitled to appear at a preliminary hearing, in addition to the other hearings arising out of the operation of the Act;[6]
- both Acts require the respective Supreme Courts to provide detailed reasons for making any order under their respective Acts, namely an interim ESO or CDO or an ESO or CDO;
- both Acts require the respective Supreme Courts to conduct an annual review into the ongoing detention of a person under a CDO, whereas the present Bill merely requires the Commissioner of Corrective Services to provide the Attorney General with an annual report on the offender concerned and does not require the Attorney General to take any action in relation to such reports; and
- both Acts require psychiatrists ordered by the Supreme Court at a preliminary hearing to examine a prisoner to make a report that contains specified information and require that copies of those reports are given to the offender concerned, as well as the Attorney General or DPP, as the case may be, within a specified period.

Fardon v Attorney General of Queensland

17. In the case of *Fardon v Attorney General of Queensland*, the High Court considered the Constitutional validity of comparable legislation: the Queensland *Dangerous Prisoners (Sexual Offenders) Act 2003.* In this case, the High Court considered one question only, namely whether the Act, contrary to Chapter III of the Commonwealth Constitution

> …confer[s] on the Supreme Court [of Queensland] a function which is incompatible with the Court's position, under the Constitution, as a potential repository of federal jurisdiction, the function [of determining if prisoners who have been convicted of serious sexual offences should be the subject of continuing detention orders on the ground that they are a serious danger to the community] being repugnant to the Court's institutional integrity.[7]

18. The majority of the Court found that it was not invalid. However, It is important to recognize, that this decision turned on the Court's assessment of the scope of the Queensland Parliament's law-making power under the Australian Constitution. It did not address the '[s]ubstantial questions of civil liberty' which are raised by legislation, such as the Bill, which provides for the 'continuing detention of offenders who have

[5] While clause 27 of the Bill provides that the Act does not affect the right of any party to proceedings under the Bill to appear, call witnesses, cross examine witnesses and make submissions to the Court, the equivalent provisions in the Qld and WA Acts are stronger and more explicit. Arguably, the express identification of these rights in the legislation would provide a better safeguard for offenders. Characterisation of these rights and entitlements under the Bill may also be relevant in terms of access to legal aid, preparedness of the judge to grant adjournments to allow the offender to arrange independent assessment etc. This aspect of the Bill tends to give the impression that the process is one in which the offender is expected to be a passive 'subject' rather than an active participant in an adversarial hearing.

[6] Ibid.

[7] *Fardon v Attorney General of Queensland* [2004] HCA 46, per Gleeson CJ, at para 1.

served their terms of imprisonment, and who are regarded as a danger to the community when released' ([3] per Gleeson CJ). It is also important to note Kirby J's dissenting opinion to the effect that the law was invalid as inconsistent with Chapter III of the Commonwealth Constitution.

Issues Considered by the Committee

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

Traditional Justification for Punishment/Deprivation of Liberty: Part 3

19. One of the basic principles of fairness which has traditionally guided the criminal justice system is that a person should be deprived of liberty only in relation to criminal conduct in which they have engaged in the past – not criminal conduct in which they may engage in the future.

20. In *Fardon*, Kirby J (in dissent) put it as follows:

> In this country, judges do not impose punishment on people ... for future crimes that people fear but which those concerned have not committed.[8]

21. To the extent that the Bill departs from the principle that punishment based on 'status' or 'future risk' is illegitimate, it trespasses on personal rights and liberties. It might, however, be argued that the Bill is not inconsistent with this principle because although it authorises the deprivation of liberty (detention in custody) or the imposition of limitations on liberty (supervisions after release from detention) it does not provide for *criminal punishment*.

22. Clause 3 of the Bill indicates that its aims are community protection and rehabilitation (rather than retribution and deterrence), and it could therefore be argued that the orders are not punishment. However, there is nothing in the decision-making considerations (cl 9(3) and 17(4)) that suggests that the Supreme Court should consider whether the offender would have access to rehabilitation programmes in considering whether an order should be made.

23. Moreover, there is no attempt to demarcate these orders from the existing system of criminal punishment. Supervision under an ESO is to be by corrective service officers (s 11), and CDOs are to be served in correctional centres (s 20). Further, a person subject to a CDO is a "convicted inmate" for the purposes of the *Crimes (Administration of Sentences) Act 1999* [schedule 1 [1] – [3]].

24. Preconditions for making an order under the Bill include not only a prediction of the likelihood of re-offending, but also that the person has committed a serious sex offence in the past and is currently serving a sentence, either for a serious sex offence or an offence of a sexual nature. In other words, orders can only be made against convicted offenders who are in custody. While the Bill characterises the proceedings under which ESOs and CDOs can be made as civil proceedings (s 21), orders cannot be made against those who have not been convicted of an offence, even if highly

[8] *Fardon*, per Kirby J, at para 126.

persuasive evidence could be produced predicting the likelihood of them committing a serious sex offence in the future.

25. In light of the strong association between the origins and consequences of orders under the Bill and the existing system of criminal punishment, it is difficult to avoid the conclusion that the *effect* of the powers which the Bill vests in the Supreme Court is extended punishment.

26. The Committee refers to Parliament the question of whether continuing to detain a person or subjecting a person to extended supervision on the basis of an assessment of risk rather than as punishment for an offence committed unduly trespasses on personal rights and liberties.

27. The Committee also refers to Parliament the question of whether treating a person detained for the objects of safety and protection of the community and rehabilitation (rather than the object of punishment) in the same manner as persons detained for punishment of offences committed unduly trespasses on personal rights and liberties.

28. The Committee has written to the Minister for advice as to why a person subject to a CDO is to be treated as a convicted inmate under the *Crimes (Administration of Sentences) Act 1999* when the objects of their detention is safety and protection of the community and rehabilitation rather than punishment.

Standard of Proof – Departure from 'Beyond Reasonable Doubt'

29. The Bill exposes individuals to periods of prison detention or community supervision on the basis of a standard which is lower than the traditional formulation used to determine whether a person should be punished for criminal conduct, namely beyond reasonable doubt.

30. Before making an ESO or a CDO, the Supreme Court must be "satisfied to a *high degree of probability* that the offender is likely to commit a further serious sex offence". This standard is expressly incorporated into the Bill, notwithstanding the general characterisation of the proceedings as civil proceedings under cl 21. This is presumably on the basis that employment of the civil 'balance of probabilities' standard for the purpose of assessing ESO and CDO applications would be too great a departure from the standard of proof that has traditionally been employed in order to ensure that only those that undoubtedly deserve to be deprived of their liberty are so deprived. In adopting a 'compromise' standard, the Bill clearly trespasses on rights and liberties – almost by definition in terms of traditional civil liberties in the criminal justice context.

31. The Committee notes that this infringement may be justified in the context of this Bill, given the countervailing interests of the wider community and potential victims, and the inherent difficulty of removing all reasonable doubt in relation to a decision concerning anticipated future behaviour.

32. On the other hand, the Committee notes that it could be argued that despite their 'civil' designation, proceedings under the Bill are, in effect, criminal proceedings and

can lead to deprivation of liberty, and therefore should be governed by the traditional criminal standard of proof – beyond reasonable doubt.

33. The Committee refers to Parliament the question of whether the Bill unduly trespasses on rights and liberties by applying a lower standard of proof than the criminal standard of 'beyond reasonable doubt' in determining if the person is to be kept in continued detention.

Retrospectivity

34. The availability of ESOs and CDOs may also be considered to offend against the principle that criminal punishment should not be retrospective. Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that it is not acceptable to impose "a heavier penalty … than the one that was applicable at the time when the criminal offence was committed."

35. Under the Bill, a person who was convicted and sentenced prior to the coming into force of the Bill, and who has served the entirety of the sentence handed down upon their conviction, may discover just prior to their expected release date that the Supreme Court has ordered that he or she should be detained for a further period of up to 5 years.

36. Further, under the Bill, the Attorney General may make unlimited subsequent applications for a CDO in relation to the same offender. Consequently, the Bill creates the possibility that a person originally sentenced to a finite maximum sentence (eg, 15 years) may, in fact, end up being imprisoned for a substantially longer period, conceivably until they die. This may be regarded as a 'worst case scenario'. The legislative intention would appear to be that prolonged use of CDOs would only be for "the very worst cases".[9] Moreover, cl 17(3), which allows the making of such an order, is designed to ensure that CDOs will be used as a last resort – where the Supreme Court is satisfied that an ESO would be ineffective.

37. The same concerns regarding retrospective sentence expansion may be raised in relation to ESOs, though clearly, the extent of the liberty infringement is more modest than in the case of CDOs. Nonetheless, under the Bill, an offender who has a legitimate expectation that they will be released from prison – with or without parole conditions – may become the subject of an ESO for a number or years, potentially up to the date of their death.

38. Further, the conditions that may be imposed under an ESO (cl 11) have the potential to trespass on a range of fundamental rights and liberties, including freedom of movement, association and from arbitrary interference with privacy, (ICCPR, Article 12(1)). However, the Committee notes that such rights are not absolute and may be restricted in the interest of competing and compelling public interest grounds, such as public safety or the need to protect the 'rights and freedoms of others' in the community (eg, Article 12(3), ICCPR).

[9] The Hon Carl Scully MP, Minister for Police, Second Reading Speech, Legislative Assembly Hansard, 29 March 2006.

39. The Committee refers to the Parliament the question of whether the Bill, by effectively allowing the imposition of a heavier penalty than the one that was applicable at the time when the criminal offence was committed, unduly trespasses on personal rights and liberties.

Double Jeopardy

40. The same essential objection to the Bill might also be expressed with reference to the traditional prohibition on exposing a person to 'double jeopardy'. While primarily understood in terms of the prospect of re-prosecution for the same crime after final acquittal, the rule against double jeopardy also extends to secondary punishment for a crime for which a person has already been convicted and sentenced (see ICCPR, Article 14(7)[10]).

41. In relation to CDOs, the Committee refers to its discussion above on the punitive nature of continued detention under a CDO.

42. The Committee refers to Parliament the question of whether exposing a person who is the subject of an order under the Bill to what is in effect a second or subsequent sentence for the same offence unduly trespasses on their rights and liberties.

Arbitrary detention

43. Freedom from arbitrary detention is a fundamental human right and a fundamental principle of the common law. Article 9 of the ICCPR provides that

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary … detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[11]

44. Although the Bill contains a list of factors to be considered by the Supreme Court in determining an application for a ESO or a CDO [cll 9, 17], the central criterion – whether there is a 'high degree of probability that the offender is likely to commit a further serious sex offence' [cll 9(2), 17(2)-(3)] – turns on an assessment of *risk*.

45. In a recent decision handed down by the United Nations Human Rights Committee in relation to New Zealand legislation that provided for the indefinite detention of serious offenders, a number of that Committee's members advanced the position that "the

[10] Article 14(7) of the ICCPR provides: "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."

[11] The Committee notes that lawful detention may still be arbitrary if it is unreasonable. The UN Human Rights Committee has stated that detention is considered unreasonable if it is unnecessary or disproportionate to the legitimate end being sought. See *Toonen v Australia*, UN Human Rights Committee, 4 April 1994, CCPR/C/50/D/488/1992. Referred to in submission no. 80, Senate Constitutional and Legal Committee, Inquiry into the provisions of the *Anti-Terrorism Bill (No. 2) 2005*, www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/submissions/sublist.htm.

very principle of detention based solely on potential dangerousness" was problematic in terms of the prohibition on arbitrary detention under Article 9 of the ICCPR. [12]

46. In *Fardon*, Kirby J suggested that the Queensland Act:

> ...ultimately deprives people ... of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or 'informed guess'.[13]

47. The Committee refers to Parliament the question of whether the Bill unduly trespasses on personal rights and liberties by providing for arbitrary detention.

Privileged & confidential communications: Clause 25

48. Clause 25 provides:

> The Attorney General may, by order in writing served on any person, require that person to provide to the Attorney General any document, report or other information in that person's possession, or under that person's control, that relates to the behavior, or physical or mental condition, of any sex offender.

49. Failure to comply is an offence, punishable by a maximum 100 penalty units, 2 years imprisonment or both.

50. This clause purports to compel a person to give all relevant information under his or her control and does not provide explicit exemptions for confidential or privileged information, such as documentation that may be subject to legal professional privilege.

51. Legal professional privilege is a common law right in Australia and is acknowledged by the High Court to be a fundamental human right or civil right.[14] 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: "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".[15]

52. The Committee notes that this clause may also compel a person, such as a doctor or psychologist, to provide information in breach of confidentiality.

53. The Committee notes the important privacy reasons for communications between doctors and their patients remaining confidential. The Committee also notes that

[12] *Rameka v New Zealand*, Communication No 1090/2002: New Zealand (15 December 2003) CCPR/C/79/D/1090/2002, Individual Opinion of Committee members Mr Prafullachandra Natwarlal Bhagwati, Ms Christine Chanet, Mr Glèlè Ahanhanzo and Mr Hipólito Solari Yrigoyen.

[13] *Fardon,* per Kirby J, at para 125. See also B McSherry 'Indefinite and Preventive Detention Legislation: From Caution to an Open Door' (2005) 29 Crim LJ 94, 105-107.

[14] *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543: "Australian courts have classified legal professional privilege as a fundamental right or immunity": at 563 per McHugh J; "Legal professional privilege is also an important human right deserving of special protection" at 575 per Kirby J.

[15] *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 133, per Deane J.

health professionals are already subject to a number of mandatory disclosure laws in relation to matters of serious public interest (eg, suspected child abuse). The Committee is of the view that the confidentiality of such communications should only be undermined when clearly in the public interest and then only to the extent absolutely necessary to meet that interest.

54. The Committee is strongly of the view that if the legislation is intended to abrogate legal professional privilege and to remove any possibility of a "defence" of privilege or confidential communication, such as those between a doctor and patient, it should do so explicitly. This is especially important given the high penalty prescribed for non-compliance, including imprisonment.

55. The Committee also notes the breadth of clause 25. It empowers the Attorney General to order the provision of information whether or not any proceedings under the Bill are currently on foot. In fact, it is not even limited to sex offenders who are the subject of the Bill.

56. In this context, there is no threshold to distinguish a justified order from an unjustified one and no court supervision over the orders the Attorney General can make under the clause. The Committee is of the view that this further undermines the important protections afforded by legal professional privilege and other communications normally accorded confidentiality in the interests of privacy.

57. The Committee is of the view that legal professional privilege is an important common law principle relating to the proper administration of justice and that abrogating it is only justifiable in the public interest in exceptional circumstances.

58. The Committee is also of the view that other forms of professional communications normally afforded confidentiality are also important for the protection of personal rights such as privacy and the ability of the profession to perform its functions. The Committee notes that such communications are sometimes subject to mandatory disclosure in the public interest.

59. The Committee is of the view that if the legislation is intended to abrogate legal professional privilege and to remove any possibility of a "defence" of privilege or confidential communication, such as those between a doctor and patient, it should do so explicitly.

60. Further, the Committee is of the view that the legislation should be explicit so that those who hold information referred to in this clause can know whether privilege has been abrogated or whether applicable confidentiality principles apply. This is especially so given the high penalty prescribed for non-compliance, including imprisonment for 2 years.

61. The Committee also notes that the clause is extremely broad and provides no threshold to distinguish a justified order from an unjustified one.

62. The Committee has written to the Minister for advice on the following matters:

(i) whether it is intended that the Bill abrogate legal professional privilege and remove any possible "defence" of privilege or confidential communication on other grounds;

(ii) if abrogation from the privilege is intended, whether the Bill can be amended to make that explicit in the interests of fairness; and

(iii) the justification for the breadth of clause 25 in applying to "any sex offender" at any time, without any connection to proceedings or orders made under the Bill.

63. The Committee refers to Parliament the question of whether clause 25 unduly trespasses on personal rights.

Safeguards

64. Given the significant potential that the Bill has to trespass on the rights and liberties of persons who are the subject of an application for an ESO or a CDO, the need for procedural safeguards is high. The Committee notes that the following provisions of the Bill provide some measure of safeguard for the rights of the prisoner:

- the requirement that the offender be promptly notified after an application has been filed (cl 7(1), 15(1));
- the Attorney-General's obligations of disclosure to the offender (cl 7(2), 15(2));
- the requirement for two court-appointed psychiatrists, whose assessment reports represent an important part of the evidence base on which the Supreme Court's decision is based (cl 8(4), 15(4), 9(3)(b), 17(4)(b));
- a right of appeal (cl 22);
- provision for variation or revocation of an order at any time, upon application by the Attorney General or the offender (cl 13, 19);
- a requirement that the Commissioner of Corrective Services report annually to the Attorney General on all offenders who are the subject of an ESO or a CDO (cl 13(2), 19(2));
- provision for a review of the Act after three years of operation (cl 32).

65. However, the Committee is of the view that further safeguards may be warranted. For example, the Committee notes that under equivalent Victorian legislation an express provision is made for an entitlement for the offender to obtain an independent assessment report by a psychiatrist or psychologist for the purposes of a hearing to determine an application for an ESO.[16]

66. In this context, the Committee also notes that although the Police Minister has indicated that psychiatrists who are 'State employees' will not be eligible to be

[16] See *Serious Sex Offenders Monitoring Act 2005* (Vic), ss 33, s 10.

appointed by the Supreme Court,[17] this purported guarantee of independence is not expressed in the Bill. Under cll 8(4) and 15(4) of the Bill, the Court must appoint 'qualified psychiatrists'. A 'qualified psychiatrist' is defined in cl 4 simply as 'a registered medical practitioner who is a fellow if the Royal Australian and New Zealand College of Psychiatrists'.

67. Interim orders under the Bill do not even require the support of a psychiatrist: they can be made, lasting in total for up to 3 months, on the basis of the assessment contained in a single report prepared by a registered medical practitioner, as distinct from an expert psychiatrist or registered psychologist (cl. 6(3)(b) & 14(3)(b)).

68. The Committee notes the additional safeguards found in comparable legislation in Victoria, Queensland and Western Australia, namely expressly providing that:

- **the prisoner is entitled to obtain an independent assessment report by a psychiatrist or psychologist;**
- **the prisoner may file material at a preliminary hearing for an application for a CDO or ESO;**
- **the prisoner is entitled to appear at a preliminary hearing, in addition to the other hearings arising out of the operation of the Act;**
- **the Supreme Court must provide detailed reasons for making any order under the Bill;**
- **the Supreme Court must conduct an annual review into the ongoing detention of a person under a CDO;**
- **psychiatrists ordered by the Supreme Court at a preliminary hearing to examine a prisoner must make a report that contains specified information and that copies of those reports be given to the offender and the Attorney General within a specified period.**

69. The Committee has written to the Minister for advice as to why the Bill does not contain these safeguards.

The Committee makes no further comment on this Bill.

[17] Second Reading Speech.

3. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (OPERATIONS REVIEW COMMITTEE) BILL 2006

Date Introduced:	4 April 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Morris Iemma MP
Portfolio:	Premier

Purpose and Description

1. The Bill amends the *Independent Commission Against Corruption Act 1998* (the Act) to abolish the Operations Review Committee.

Background

2. The Operations Review Committee's role has been to advise the Commissioner of the Independent Commission Against Corruption (ICAC) whether the Commission should investigate a complaint made under the Act or discontinue an investigation of such a complaint.

3. The Inspector of the ICAC now undertakes a general oversight of the Commission.

4. The second reading stated that:

> [T]he inspector provides a structurally superior form of accountability than the Operations Review Committee... [and] has sufficient time and resources to focus appropriate attention on reviewing the commission's procedures... This will ensure that a more systematic approach can be taken, improving the quality of the commission's decision-making processes.

5. The Bill implements Mr McClintock's recommendation from his review of the Operations Review Committee, that the Committee be abolished.

Issues Considered by the Committee

6. 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.

4. JURY AMENDMENT (VERDICTS) BILL 2006

Date Introduced:	5 April 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The Bill amends the *Jury Act 1977* (the Act) to allow for majority jury verdicts in criminal proceedings.

Background

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

> The central aim of this bill is to reduce the number of hung juries in order to give certainty and finality to criminal proceedings; it is not necessarily aimed at achieving a greater number of convictions by majority verdict. It is to ensure that jury deliberations are not thwarted by a single person who is unwilling to engage in a proper examination of the evidence. The proposed majority verdict amendments will also apply to offences carrying life imprisonment, such as murder.[18]

3. Also:

> Majority verdicts are not new. Indeed, they are common to many Australian states, and have been for a considerable time. Only the Commonwealth, Queensland, the Australian Capital Territory and New South Wales do not presently have them. Majority verdicts were introduced to Tasmania in 1936, Western Australian in 1960, the Northern Territory in 1963 and Victoria in 1994... Majority verdicts were also introduced in England and Wales in 1967.[19]

The Bill

4. The Bill provides for the decision of 11 out of 12 jurors, or 10 out of 11 jurors, to be returned as a majority verdict if all of the jurors are unable to agree on a verdict after deliberating for a reasonable time (being not less than 8 hours), and the court is satisfied that it is unlikely that the jurors will reach a unanimous verdict after further deliberation [proposed s 55F].

5. The Bill also makes provision for the discharge of an 11 or 12 person jury by the court, if the court finds that the jurors are unlikely to agree on a unanimous or majority verdict [proposed s 56].

[18] Hon R J Debus MP, Attorney General, Legislative Assembly *Hansard*, 5 April 2006. The Attorney General noted that the Bill's provisions are contrary to the recommendations of the 2005 NSW Law Reform Commission Report No.111 *Majority Verdicts*.

[19] Hon R J Debus MP, Attorney General, Legislative Assembly *Hansard*, 5 April 2006.

Issues Considered by the Committee

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

Majority verdicts - right to fair trial: proposed s 55F

6. It has been argued that the requirement that a jury be made up of no less than twelve members is extremely important from a human rights perspective, in that this number ensures that the jury is truly representative of a cross-section of the community, and therefore capable of reaching a fair and unbiased decision.[20]

7. It is arguable that allowing for majority verdicts in criminal cases undermines the right to be presumed innocent until proved guilty by the prosecution beyond reasonable doubt. On the other hand, there are a number of arguments advanced in favour of majority verdicts. These include avoiding an individual juror preventing a verdict for reasons other than a reasonable assessment of guilt on the basis of the evidence, and reducing the possibility of hung juries and the need for retrials, which can have a detrimental effect on the accused and victims and are very costly.

Constitutional right to trial by jury

8. The right to a trial by jury for criminal offences is a central plank of Australia's fair trial guarantees. At the Commonwealth level, this right is guaranteed by s 80 of the Constitution.[21]

9. In *Cheatle*, the High Court considered s 22(a)(i) of the Act, which provides for the reduction of a jury to a number not below ten in criminal trials.[22] According to the High Court, unanimous verdicts in criminal trials are an essential feature of trial by jury as required by the Constitution. The High Court explained this in part by stating that:

> [T]he common law's insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that person accused of a crime should be given the benefit of any reasonable doubt... [A] verdict returned by a majority of the jurors, over the dissent of others, *objectively suggests the existence of reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict*.[23]

The NSW Law Reform Commission

10. In its Report 111, tabled in the Legislative Assembly on 9 November 2005, the NSW Law Reform Commission noted that the current research suggests that juries required

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[20] See the Supreme Court of Canada in *R v Biddle* [1995] 1 SCR 761, 788:
> Representativeness is a characteristic which furthers the perception of impartiality even if not fully ensuring it. While representativeness is not an essential quality of a jury, it is one to be sought after. The surest guarantee of jury impartiality consists in the combination of the representativeness with the requirement of a unanimous verdict.

[21] Section 80 of the *Australian Constitution* provides that:
> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed.

[22] The section further permits reduction below that number if there is consent from the accused and the prosecution, or to a number not below eight if the trial has been in progress for at least two months.

[23] *Cheatle & Anor. v R* (1993) 177 CLR 541. Emphasis added.

to make unanimous decisions considered the evidence more carefully and thoroughly than juries operating a majority verdict system.[24]

11. The Commission also pointed out the irony surrounding the adoption of majority verdicts:

> On the one hand, its aim is ostensibly to overcome the biggest perceived weakness of the current jury system: namely, that verdicts cannot be delivered when one or two jurors do not agree with their fellow panel members. However, allowing the views of one or two jurors to be disregarded, and the majority view to carry the day, potentially strikes at the very strength of the jury system: being the fact that all jurors can discuss, assess and reconcile their differing views to reach a common conclusion beyond reasonable doubt. ...Where one or two of those views can be ignored because they differ from the rest, then the true significance of the jury as an instrument of peer judgment is lost.[25]

12. On the question of "hung juries", the Commission made the following point:

> ...it is easy to lose perspective and view all deadlocked juries as necessarily bad. Disagreement among jurors can force the evidence to be viewed from different perspectives, and leads to more thorough investigation of the issues. In some circumstances, those disagreements can be resolved and a verdict can be delivered. In others, no agreement can be reached and the jury hangs. Where a jury hangs because of confusion or misunderstanding about the evidence and the law, there are measures to assist juror comprehension that can, and should, be introduced, which would hopefully avoid a deadlock in these cases.[26]

13. Ultimately, the Commission recommended that:

- the system of unanimity should be retained; and
- empirical studies should be conducted into the adequacy, and possible improvement, of strategies designed to assist the process of jury comprehension and deliberation.[27]

14. In response to these recommendations the Attorney General noted that:

> [m]y reading of the Law Reform Commission's report is that its arguments were evenly balanced, although the commission favoured retaining the status quo...The Government has now been persuaded that, provided it is clear that a unanimous verdict is unlikely to be forthcoming, a majority verdict may be returned if the jury has had a reasonable time to consider its verdict.[28]

15. The Committee notes that trial by jury is a central feature of the Australian criminal justice system, which helps to protect the rights of accused persons. The Committee further notes that the High Court has consistently maintained that unanimity is an essential feature of the right to trial by jury for criminal offences under the Commonwealth Constitution.

[24] NSW Law Reform Commission Report No.111 (2005) *Majority Verdicts*, paragraph 2.47.
[25] NSW Law Reform Commission Report No.111 (2005) *Majority Verdicts*, paragraph 3.48.
[26] NSW Law Reform Commission Report No.111 (2005) *Majority Verdicts*, paragraph 3.44.
[27] NSW Law Reform Commission Report No.111 (2005) *Majority Verdicts*, Recommendations.
[28] Hon R J Debus MP, Attorney General, Legislative Assembly *Hansard*, 5 April 2006.

16. The Committee also notes that the right to be presumed innocent until proved guilty beyond reasonable doubt is a fundamental personal right. The Committee further notes that a dissenting juror objectively suggests the existence of reasonable doubt regarding a person's guilt and allowing a conviction in such circumstances increases the risk of convicting the innocent.

17. The Committee notes the assertion that majority verdicts should reduce the incidence of retrials.

18. The Committee also notes that the Bill purports to mitigate any adverse impact on personal rights by requiring that a majority verdict be made by 11 of 12 jurors and only after a minimum of 8 hours of deliberation during which it has not been possible to reach a unanimous verdict.

19. The Committee brings to Parliament's attention the opinion of the High Court which stated, inter alia, that "*a verdict returned by a majority of jurors, over the dissent of others, objectively suggests the existence of a reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict*." The Committee refers to Parliament the question of whether majority verdicts unduly trespass on the right to be presumed innocent until proved guilty beyond reasonable doubt.

The Committee makes no further comment on this Bill.

5. LEGAL PROFESSION AMENDMENT BILL 2006

Date Introduced:	5 April 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The Bill amends the *Legal Profession Act 2004* in relation to the prohibition on engaging in unqualified legal practice, the grant of practising certificates, the penalties for, and the investigation and prosecution of, advertising offences, compensation orders, costs disclosures, costs agreements, costs assessments, foreign lawyers, and in other respects. It also amends other Acts and the *Legal Profession Regulation 2005* to make consequential and other amendments.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

6. WATER MANAGEMENT AMENDMENT (WATER PROPERTY RIGHTS COMPENSATION) BILL 2006*

Date Introduced:	6 April 2006
House Introduced:	Legislative Assembly
Member Responsible:	Mr Peter Draper MP
Portfolio:	Natural Resources

Purpose and Description

1. This Bill amends the *Water Management Act 2000* to provide for compensation under the *Land Acquisition (Just Terms Compensation) Act 1991* (the Land Acquisition Act) for the compulsory acquisition of water access licences and for the reduction in water allocations for the holders of those licenses as a consequence of certain variations of bulk access regimes.

Background

Current Compensation System

2. Currently, a licence holder whose licence is compulsorily acquired can apply to the State for compensation for the market value of the licence as at the time it was compulsorily acquired.[29] The amount of compensation payable is to be determined by agreement between the Minister and the person entitled to compensation or, if agreement cannot be reached, is determined by the Valuer-General.[30]

3. A holder of an access licence (other than a supplementary water access licence) whose water allocations are reduced as a consequence of the variation of a bulk access regime may claim compensation for loss suffered by the holder as a consequence of that reduction.[31] The Minister, on advice from the Valuer-General, may determine whether or not compensation should be paid and, if so, the amount of any such compensation and the manner and timing of any such payments.[32]

4. A person who is dissatisfied with the amount of compensation offered to the person under section 79 or section 87, or with any delay in the payment of compensation, may appeal to the Land and Environment Court.[33]

[29] *Water Management Act 2000*, s 79(2).
[30] *Water Management Act 2000*, s 79(3).
[31] *Water Management Act 2000*, s 87(1).
[32] *Water Management Act 2000*, ss 87(4)-(5). In formulating advice for the Minister, the Valuer-General is to have regard to the market value of the water foregone to the claimant for compensation as a consequence of the variation of the bulk access regime – s87(6).
[33] *Water Management Act 2000*, ss 79(4) and 87(7).

The Bill

5. Under the Bill, compensation will instead be available under the *Land Acquisition Act*.

6. Schedule 2 of the Bill amends definitions in the Land Acquisition Act so that:

   (a) an 'interest in land' includes an access licence registered under the *Water Management Act 2000*, and

   (b) a variation of a bulk access regime for which compensation is payable under section 87 of that Act is taken to be a compulsory acquirement of an interest in land.

7. Under section 37 of the *Land Acquisition Act:*

   > An owner of an interest in land which is divested, extinguished or diminished by an acquisition notice is entitled to be paid compensation in accordance with this Part by the authority of the State which acquired the land.

8. The Valuer-General is to determine the amount of compensation to be offered to a person under this Part.[34]

9. Under the proposed system, where a licence is compulsorily acquired, compensation will be determined by the Valuer-General, as opposed to the current system where compensation is determined by agreement between the Minister and the person entitled to compensation, with the Valuer-General assuming responsibility only where agreement cannot be reached.

10. The proposed system also has the effect of removing the Ministerial discretion currently available to the responsible Minister to determine whether compensation is payable, and the appropriate amount payable, where the water allocation of a holder of an access licence (other than a supplementary water access licence) is reduced as a consequence of the variation of a bulk access regime.

11. The Bill also introduces broader grounds for compensation than those currently available under the *Water Management Act 2000*.[35]

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.

[34] Section 47 *Land Acquisition (Just Terms Compensation) Act 1991*

[35] Under Section 79 the *Water Management Act 2000* compensation is available for the market value of the water licences, while Section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991* provides that the Valuer General must take account of the following when determining compensation: the market value of the land on the date of its acquisition, any special value of the land to the person on the date of its acquisition, any loss attributable to severance, any loss attributable to disturbance, solatium, any decrease in the value of any other land of the person at the date of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

SECTION B: MINISTERIAL CORRESPONDENCE — BILLS PREVIOUSLY CONSIDERED

7. CRIMES (SENTENCING PROCEDURE) AMENDMENT (EXISTING LIFE SENTENCES) ACT 2005

Date Introduced:	4 May 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Background

1. The Committee reported on the *Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005* in the Legislation Review Digest 6 of 2005.

2. This Bill was introduced on 4 May 2005 and passed by both Houses of Parliament two days after it was introduced and before the Committee had opportunity to report.

3. The Committee wrote to the Attorney General regarding this Act on 23 May 2005, and noted that the only person to whom much of the Act applied was Bronson Blessington, and that the Act ensures that there is negligible possibility he will ever be released for a crime he committed when 14 years of age.

4. The Committee also noted that Article 37(a) of the UN Convention on the Rights of the Child, to which Australia is a party, requires that life imprisonment without the possibility of release shall not be imposed for offences committed by persons below 18 years of age.

5. The Committee asked for advice as to whether the Act contravenes Australia's obligations under the UN Convention on the Rights of the Child, and if so, the justification for that contravention.

Minister's Reply

6. In a letter dated 12 April 2006, the Attorney advised the Committee that:

> The sentencing judge recommended that none of [the persons who abducted, sexually assaulted and murdered Ms Janine Balding] should ever be released…
>
> Since 1997 the Parliament has passed a number of pieces of legislation that have made it perfectly clear that, notwithstanding the provisions of the 1989 "truth in sentencing" legislation, in the case of the very small number of offenders where the courts have previously recommended that an offender should never be released, that recommendation should be enforced.

The above Act ensured that the present regime, as it applied to non-release offenders, extends to all non-release offenders, including Bronson Blessington.

Committee's Response

7. The Attorney has explained the policy reasons behind the Act.

8. The Committee notes that the Attorney General has not answered the question as to whether the Act contravenes Australia's obligations under the UN Convention on the Rights of the Child, and if so, the justification for that contravention.

9. The Committee thanks the Attorney for his reply.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

23 May 2005

File ref: LRC1240

The Hon R J Debus MP
Attorney General
Level 36 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Attorney

Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005

The Committee has considered this Act under s 8A of the *Legislation Review Act 1987*.

The Committee notes that the Act is to amend the *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999* so that the current regime for redetermination of existing life sentences of "never to be released" offenders:

- extends to all of those offenders whose original sentences have not yet been redetermined; and
- applies to those offenders even if the original non-release recommendations are now appealed.

The Committee notes that the only person to whom much of the Act will apply is Bronson Blessington. The Act ensures that there is negligible prospect of Blessington ever being released for a crime he committed when 14 years of age.

The Committee notes that Art 37(a) of the UN Convention on the Rights of the Child, to which Australia is a party, requires that life imprisonment without the possibility of release shall not be imposed for offences committed by persons below eighteen years of age.

The Committee considers that, in providing that there is a negligible chance that Blessington will be released, the Act is contrary to the spirit of the Convention on the Rights of the Child.

The Committee seeks your advice as to whether the Act contravenes Australia's obligations under that Convention, and if so, the justification for that contravention.

Yours sincerely

Peter Primrose MLC
Chairman

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NEW SOUTH WALES

ATTORNEY GENERAL

Allan Shearan MP
Chairman
Legislative Review Committee
Parliament of NSW
Parliament House
SYDNEY NSW 2000

12 APR 2006

Dear Mr Shearan

Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005

I refer to the Committee's report on the above Act

Mr Bronson Blessington was one of five persons who abducted, sexually assaulted and murdered Ms Janine Balding in September 1988.

The sentencing judge recommended that none of these persons should ever be released.

When sentencing juveniles Bronson Blessington, Matthew Elliot and Stephen Jamieson for the crimes against Janine Balding Justice Newman remarked:

> *"To sentence people so young to a long term of imprisonment is of course a heavy task. However, the facts surrounding the commission of these crimes are so barbaric that I believe I have no alternative other than to impose upon [these] young prisoners, even despite their age, a life sentence. So grave is the nature of this case that I recommend that none of the prisoners in the matter should ever be released."*

Since 1997 the Parliament has passed a number of pieces of legislation that have made it perfectly clear that, notwithstanding the provisions of the 1989 "truth in sentencing" legislation, in the case of the very small number of offenders where the courts have previously recommended that an offender should never be released, that recommendation should be enforced.

The above Act ensured that the present regime, as it applies to non-release offenders, extends to all non-release offenders, including Bronson Blessington.

Yours sincerely

BOB DEBUS

Level 36, Governor Macquarie Tower,
1 Farrer Place, Sydney NSW 2000
Telephone: (02) 9228 3071

Postal: PO Box A290, Sydney South NSW 1232

Facsimile: (02) 9228 3166

8. MOTOR ACCIDENTS COMPENSATION AMENDMENT BILL 2006 AND THE MOTOR ACCIDENTS (LIFETIME CARE AND SUPPORT) BILL 2006

Date Introduced:	9 March 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Della Bosca MLC
Portfolio:	Commerce

Background

1. The Committee reported on the *Motor Accidents Compensation Amendment Bill 2006* and the *Motor Accidents (Lifetime Care and Support) Bill 2006* in the Legislation Review *Digest* 3 of 2006.

2. The Committee wrote to the Minister for advice as to whether the deeming of fault under clause 7B may have legal consequences for the blameless driver.

3. The Committee also asked the Minister for his advice as to why there is no requirement that panels dealing with disputes regarding eligibility and treatment and care needs must include a person with suitable legal expertise.

Minister's Reply

4. In his letter dated 21 April 2006 (attached), the Minister advised the Committee that in the *Motor Accidents Compensation Amendment Bill 2006,*

> [T]he accident is deemed to be the fault of the owner or driver of a vehicle for the limited purpose of creating entitlement to claim for damages in respect of the new no-fault benefits introduced by the Bill…
>
> [T]here are no other legal consequences resulting from the deeming of fault under clause 7B, which operates solely under the MAC Act [*Motor Accidents Compensation Amendment Act 2006*], for the limited purposes outlined.

5. The Minister also advised that:

> Disputes about whether the injury is a motor accident injury clearly raise legal issues and for this reason the Bill proposes that such disputes be dealt with by a panel of three claims assessors appointed under the MAC Act. All claims assessors appointed under that Act are legally qualified senior practitioners with extensive experience in motor accident injury claims.
>
> The assessment of injury severity and resulting functional impairment and the assessment of treatment and care needs are assessments involving the consideration of medical, rehabilitation, care and support issues. Accordingly, the Bill provides that

the panels conducting those assessment comprise medical practitioners, health professionals and other suitably qualified persons.

The dispute resolution processes included in the Bill make provision for the appointment of assessment panels comprising the appropriate expertise to deal with the issues relevant to the type of dispute in question.

Committee's Response

6. The Committee thanks the Minister for his reply.

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

Our Ref: LRC 1321

The Hon John Della Bosca MLC
Minister for Commerce
Level 30 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister John

Motor Accidents (Lifetime Care and Support) &
Motor Accidents Compensation Amendment Bills 2006

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No. 3 of 2006*.

The Committee resolved to write to you for advice and clarification on the following matters.

Deeming fault: clause 7b Motor Accidents Compensation Amendment Bill

In considering the provisions of the Motor Accidents Compensation Amendment Bill deeming a "blameless driver" to have been "at fault" for an accident, it was not apparent to the Committee whether such deeming might have any consequences other than engaging relevant provisions for the payment of compensation, such as affecting a driver's no-claim bonus. The Committee therefore seeks your advice as to whether the deeming of fault under clause 7B may have any legal consequences for the blameless driver.

Assessors: Parts 3 & 4, Motor Accidents (Lifetime Care and Support) Bill

The Committee notes that the Bill does not require that assessor panels for disputes regarding eligibility or treatment and care needs include a person with legal expertise. This contrasts, for example, with s 328 of the *Workplace Injury Management & Workers Compensation Act 1998*, which establishes a review panel constituted by a legally qualified person and two approved medical specialists.

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The Committee notes that resolving disputes over eligibility and treatment and care needs may involve difficult questions regarding both the facts of a person's health condition and the law of whether such health conditions or proposed treatment and care fall within the guidelines and the Act. This may include considering questions of causation or whether a particular condition meets a threshold set in the guidelines.

The Committee therefore seeks your advice as to why there is no requirement that panels dealing with disputes regarding eligibility and treatment and care needs must include a person with suitable legal expertise.

Yours sincerely

Allan Shearan

Allan Shearan MP
Chairman

Special Minister of State
Minister for Commerce
Minister for Industrial Relations
Minister for Ageing
Minister for Disability Services
Assistant Treasurer
Vice President of the Executive Council

Ref: 05/814-02

21 APR 2006

Mr Allan Shearan MP
Chair
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

RECEIVED
26 APR 2006
LEGISLATION REVIEW COMMITTEE

Dear Mr Shearan

I refer to your correspondence concerning Legislation Review Digest 3 of 2006, which reports on the *Motor Accidents Compensation Amendment Bill 2006* and the *Motor Accidents (Lifetime Care and Support) Bill 2006.*

I note that there are two issues that the Committee has referred for my advice. Firstly, the deeming of fault under clause 7B of the *Motor Accidents Compensation Amendment Bill 2006* and secondly, the requirements relating to appointment of assessors in Parts 3 and 4 of the *Motor Accidents (Lifetime Care and Support) Bill 2006.*

Deeming fault on the part of a vehicle owner/driver preserves the fundamental basis of the modified common law third party motor accidents scheme. In the limited circumstances detailed in the Bill, the accident is deemed to be the fault of the owner or driver of a vehicle for the limited purpose of creating an entitlement to claim for damages in respect of the new no-fault benefits introduced by the Bill.

The language of clause 7B is necessary to invoke the coverage of the statutory Compulsory Third Party policy and other provisions of the *Motor Accidents Compensation Act 1999* (MAC Act). Section 10 of the MAC Act details the terms of the third party policy and provides that the insurer insures the owner of the motor vehicle and any other person who at any time drives the vehicle against liability in respect of death or injury to a person caused by the fault of the owner or driver of the vehicle.

I am advised that there are no other legal consequences resulting from the deeming of fault under clause 7B, which operates solely under the MAC Act, for the limited purposes outlined.

I note that the Committee has also sought advice as to why there is no requirement that panels dealing with disputes regarding eligibility and treatment and care needs under the *Motor Accidents (Lifetime Care and Support) Bill 2006* must include a person with suitable legal expertise.

Level 30 Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000, Australia
Tel: (02) 9228-4777 Fax: (02) 9228-4392 E-Mail: office@smos.nsw.gov.au

The dispute resolution procedures in the Bill deal with two distinct aspects of the scheme. Firstly, the determination of eligibility to participate in the scheme and secondly, the assessment of the treatment and care needs of scheme participants.

Scheme eligibility is dependent upon both the severity of the injury sustained and its impact on the person's functional capacity and the requirement that the injury result from a motor vehicle accident.

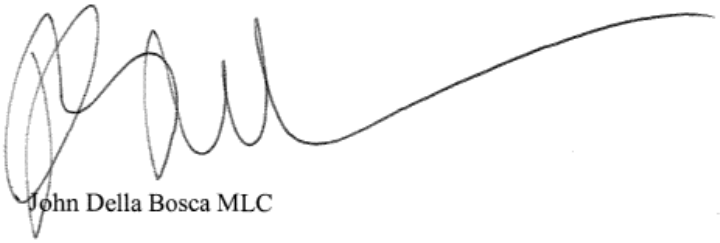
Disputes about whether the injury is a motor accident injury clearly raise legal issues and for this reason the Bill proposes that such disputes be dealt with by a panel of three claims assessors appointed under the MAC Act. All claims assessors appointed under that Act are legally qualified senior practitioners with extensive experience in motor accident injury claims.

The assessment of injury severity and resulting functional impairment and the assessment of treatment and care needs are assessments involving the consideration of medical, rehabilitation, care and support issues. Accordingly, the Bill provides that the panels conducting those assessment comprise medical practitioners, health professionals and other suitably qualified persons.

The dispute resolution processes included in the Bill make provision for the appointment of assessment panels comprising the appropriate expertise to deal with the issues relevant to the type of dispute in question.

I trust this information clarifies the issues raised by the Committee.

Yours sincerely



John Della Bosca MLC

2

9. TRANSPORT ADMINISTRATION AMENDMENT (PUBLIC TRANSPORT TICKETING CORPORATION) BILL 2005

Date Introduced:	16 November 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Watkins MP
Portfolio:	Transport

Background

1. The Committee reported on the *Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005* in the Legislation Review Digest No 15 of 2005.

2. The Committee wrote to the Minister on 25 November 2005 regarding the privacy safeguards to be observed by the proposed Public Transport Ticketing Corporation (PTTC).

3. The Committee observed that while the PTTC would be subject to the *Privacy and Personal Information Protection Act 1998* as a statutory authority, it would not be governed by such privacy safeguards once it becomes a State-owned corporation.

4. The Committee noted that the Deputy Premier's office had advised that the PTTC will establish policies and procedures for the ongoing protection of personal information prior to it becoming a state-owned corporation. However, the Committee also noted that administrative protections offer more limited protection than statutory based protections.

5. The Committee asked for advice as to why administrative protections are preferable to statutory protections such as making the PTTC subject to NSW privacy law in the Bill itself or prescribing PTTC as an authority to be opted into the *Federal Privacy Act 1998*.

6. The Committee also advised that it had received correspondence from the Acting Privacy Commissioner on this matter.

Minister's Reply

7. In a letter dated 23 March 2006 the Deputy Premier advised the Committee he will:

> insure that prior to the PTTC transitioning to a State Owned Corporation (SOC), policies and procedures will be put in place for the on-going protection of personal information.

8. The Committee was also advised that:

the PTTC will only collect and retain personal information necessary to carry out ticketing functions and services. It will respect the rights of every person about whom it collects or retains information and ensure their personal information is treated in accordance with the law.

Committee's Response

9. The Committee thanks the Minister for his reply.

10. The Committee has again written to the Minister for further advice as to why administrative protections are preferable to statutory protections such as making the PTTC subject to NSW privacy law in the Bill itself or prescribing PTTC as an authority to be opted into the *Federal Privacy Act 1998*.

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

25 November 2005

Our Ref: LRC 1637

The Hon John Watkins MP
Deputy Premier, Minister for Transport
and Minister for State Development
Level 34 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Deputy Premier

Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005

At its meeting of 25 November 2005, the Legislation Review Committee considered the above Bill. It resolved to write to you regarding the privacy safeguards to be observed by the proposed Public Transport Ticketing Corporation (PTTC).

The Bill appears to envisage that the PTTC will collect and handle personal information, including information about individual transport users who wish to register for the proposed T-card or who are entitled to concessions. The Bill's terms also envisage the PTTC's collection and handling of criminal records information about employees, contractors or contractors' employees subject to checks.

While the PTTC will be subject to the *Privacy and Personal Information Protection Act 1998* as a statutory authority, it appears that it will not be governed by such privacy safeguards once it becomes a State-owned corporation. The only provision in the Bill relating to information privacy is the proposed information disclosure offence in s 35Z of Schedule 11.

The Committee notes that your office has advised that the PTTC will establish policies and procedures for the ongoing protection of personal information prior to it becoming a State-owned corporation.

The Committee notes, however, that administrative protections offer more limited protection than statutory-based protections. Accordingly, your advice is sought as to why administrative protections are preferable to statutory protections such as making the PTTC subject to NSW privacy law in the Bill itself or prescribing the PTTC as an authority to be opted into the Federal *Privacy Act 1998*.

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The Committee has received correspondence from the Acting Privacy Commissioner on this matter, which I have enclosed for your information.

Yours sincerely

Allan Shearan MP
Chairman

privacynsw

Office of the NSW Privacy Commissioner

Mr Allen Shearman MP
The Chairman
Legislative Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000.

Enquiries: Philippa O'Dowd
Tel: (02) 9228-8561
Our ref: A05/347
Your ref:

23 November 2005

BY FAX: 9230 3052

Dear Mr Shearman

Re: the Transport Administration Amendment (Public Transport Ticketing Corporation) Bill

I refer to the conversation between Ms Philippa O'Dowd of our office and Ms Rachel White of your committee in relation to the above Bill, which was recently introduced into the Parliament.

First of all, I would like to thank your Committee for informing me of the contents of the Bill. Unfortunately the Minister did not provide it to me for comment and I will be writing to him to that effect.

Secondly, I would like to express to your Committee my concerns about the Bill. Although it is not clear from the wording of the Bill whether the proposed Public Transport Ticketing Corporation will be handling personal information (in fact, there is no definition at all of the sort of information discussed in the bill, for example at 35ZG) it seems to me highly likely that personal information about the financial matters of users of public transport will, at the very least, be handled by the Corporation. The wording of section 35ZG and its quite inadequate privacy safeguards suggest as much.

Accordingly, I am concerned how the Corporation will handle that personal information. Because the Corporation is a statutory one, it will be largely exempt from the provisions of the two pieces of New South Wales legislation, which I administer: *the Privacy and Personal Information Protection Act* (the PIPP Act) and the *Health Records and Information Privacy Act* (the HRIP Act). This will occur, because State owned corporations are exempt from the definition of "public sector agency" in both acts and, as a result, they do not have to comply with the privacy protection principles and other important provisions of the legislation. In addition, there would appear to be few privacy safeguards to cover the transfer of personal information from existing New South Wales public sector agencies to the new Corporation.

05347le1

mail: GPO Box 6 Sydney NSW 2001
office: Goodsell Building, 8-12 Chifley Square Sydney NSW 2000
phone: (02) 9228 8585
fax: (02) 9228 8577
DX: 1227

I would, therefore, ask that you pass on my concerns to the Committee. I will, of course, be repeating these concerns in my letter to the Minister. I would also ask that you pass on the following positive suggestions as to how the situation could be remedied.

Firstly, the Ticketing Corporation could be made subject to the provisions of PIPP and HRIP Acts by stating as much in the amended bill. This might be achieved by an amendment to, say, clause 35T(1), which would, then read:

" The principal functions of the public transport ticketing corporation are:

(a) to establish and manage a ticketing and fare payment system from public transport passengers and participating public transport operators in the State, and

(b) to control and manage any funds within the ticketing in their payment system that represents a new prepaid fares and

(c) to comply with the provisions of the Privacy and Personal Information Protection Act and the Health Records and Information Privacy Act as if it were a public sector agency "(my suggested amendment is in italics).

In the alternative, an amendment could be made to clause 35ZG but it must be an amendment incorporating all the provisions of the two New South Wales privacy acts. This is in contrast to the present wording of that clause which merely covers disclosure of information (not collection, storage, access etc) and which virtually negates the requirements for consent in clause 35ZG (a) by the extremely wide terms of subclause (b).

Another way of incorporating privacy principles into the functioning of the proposed corporation would be to prescribe that it must opt into the regime prescribed by regulations under section 6F of the *Privacy Act, 1988 (Commonwealth)*.

These remarks are of course based on the assumption that there is no other legislation or proposed Bill which would require the Public Transport Ticketing Corporation to comply with privacy legislation generally. In the short time I have been able to research this matter, no such legislation or proposed Bill has come to my attention.

Thank you again for providing me with the opportunity of commenting on the Bill and raising these concerns.

Yours sincerely

John Dickie
Acting Privacy Commissioner

Deputy Premier
Minister for Transport

RML 74404

Mr Allan Shearan MP
Chairman
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan,

I refer to your letter received by me on 28 November 2005 regarding the *Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005* and the privacy safeguards to be observed by the Public Transport Ticketing Corporation (PTTC) once it is established. I apologise for the delay in responding.

As you have stated in your letter, the Bill provides for the PTTC to have two governance models. The first will see the organisation established as a Statutory Authority, before transitioning to become a State Owned Corporation (SOC) at a time to be determined by the Governor.

As a Statutory Authority, the PTTC will be subject to the provisions of the *Privacy and Personal Information Protection Act 1998 (PPIPA)*. However, as you correctly point out, once the governance model for the PTTC transitions to that of a SOC this Act will no longer apply. This is because Corporations, which are subject to the *State Owned Corporations Act 1989*, are not covered by the *PPIPA*.

However, I do appreciate the need to ensure privacy issues are addressed by the PTTC and, as already stated, I will ensure that prior to the PTTC transitioning to a SOC, policies and procedures will be put in place for the ongoing protection of personal information.

In this regard, the PTTC will only collect and retain personal information necessary to carry out ticketing functions and services. It will respect the rights of every person about whom it collects or retains information and ensure their personal information is treated in accordance with the law.

Level 30, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000 Telephone: (02) 9228 4866 Facsimile: (02) 9228 4855

I trust this assurance addresses your concerns. If you have any further queries, please do not hesitate to contact my office.

Yours sincerely

John Watkins MP
Deputy Premier
Minister for Transport

2 3 MAR 2006

ML05/13543

Part Two – Regulations

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

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Electricity (Consumer Safety) Regulation 2006	03/02/06	537	28/04/06	
Health Records and Information Privacy Regulation 2006	10/03/06	1160	28/04/06	
Motor Accidents Compensation Regulation 2005	26/08/05	5609	28/04/06	
Photo Card Regulation 2005	09/12/05	10042	28/04/06	

Appendix 1: Index of Bills Reported on in 2006

	Digest Number
Air Transport Amendment Bill 2006	2
Careel Bay Protection Bill 2006*	2
Child Protection (International Measures) Bill 2006	2
Crimes and Courts Legislation Amendment Bill 2005	1
Crimes Amendment (Organised Car and Boat theft) Bill 2006	4
Crimes (Serious Sex Offenders) Bill 2006	5
Crimes (Sentencing Procedure) Amendment Bill 2006	5
Crimes (Sentencing Procedure) Amendment (Gang Leaders) Bill 2006*	3
Courts Legislation Amendment Bill 2006	4
Environmental Planning and Assessment Amendment Bill 2006	2
Environmental Planning and Assessment Amendment (Reserved Land Acquisition) Bill 2006	4
Fines Amendment (Payment of Victims Compensation Levies) Bill 2006	2
Firearms Amendment (Good Behaviour Bonds) Bill 2006*	2
Fisheries Management Amendment Bill 2006	2
Freedom of Information Amendment (Open Government-Disclosure of Contracts) Bill 2005	1
Independent Commission Against Corruption Amendment (Operations Review Committee) Bill 2006	5
Industrial Relations Amendment Bill 2006	3
James Hardie (Civil Liability) Bill 2005	1
James Hardie (Civil Penalty Compensation Release) Bill 2005	1
James Hardie Former Subsidiaries (Winding up and Administration) Bill 2005	1
Jury Amendment (Verdicts) Bill 2006	5
Land Tax Management Amendment (Tax Threshold) Bill 2006	2
Law Enforcement (Controlled Operations) Amendment Bill 2006	3
Law Enforcement Legislation Amendment (Public Safety) Bill 2005	1
Legal Profession Amendment Bill 2006	5
Motor Accidents Compensation Amendment Bill 2006	3
Motor Accidents (Lifetime Care and Support) Bill 2006	3
Motor Vehicle Repairs (Anti-steering) Bill 2006*	4
National Parks and Wildlife (Adjustment of Areas) Bill 2006	2

	Digest Number
Police Amendment (Death and Disability) Bill 2005	1
Protection of the Environment Operations Amendment (Waste Reduction) Bill 2006	3
Public Sector Employment Legislation Amendment Bill 2006	3
Royal Rehabilitation Centre Sydney Site Protection Bill 2006*	3
Smoke-free Environment Amendment (Removal of Exemptions) Bill 2006*	4
Water Management Amendment (Water Property Rights Compensation) Bill 2006	5
Workers Compensation Legislation Amendment Bill 2006	4
Workers Compensation Legislation Amendment (Miscellaneous Provisions) Bill 2005	1

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2005	Digest 2006
Commission for Children and Young People Amendment Bill 2005	Minister for Community Services	25/11/05		15	
Companion Animals Amendment Bill 2005	Minister for Local Government	25/11/05	15/12/05		1
Confiscation of Proceeds of Crime Amendment Bill 2005	Attorney General	10/10/05	23/11/05	11	1
Crimes Amendment (Road Accidents) Bill 2005	Attorney General	10/10/05	12/12/05	11	1
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	Attorney General	23/05/05	19/04/06	6	5
Crimes (Serious Sex Offenders) Bill 2006	Minister for Justice	28/04/06			5
Motor Accidents Compensation Amendment Bill 2006 and Motor Accidents (Lifetime Care and Support) Bill 2006	Minister for Commerce	24/03/06	26/04/06		3,5
Smoke-free Environment Amendment Bill 2004	Minister for Health	05/11/05	12/01/06		2
State Revenue Legislation Amendment Bill 2005	Treasurer	20/06/05	03/01/05	8	1
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005	Attorney General	25/11/05		15	
Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005	Minister for Transport	25/11/05 28/04/06	05/04/06	15	5
Vocational Education and Training Bill 2005	Minister for Education and Training	04/11/05	28/11/05	13	1
Water Management Amendment Bill 2005	Minister for Natural Resources	25/11/05		15	

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

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Careel Bay Protection Bill 2006*	R				
Crimes (Sentencing Procedure) Amendment Bill 2006	R				
Crimes (Serious Sex Offenders) Bill 2006	R, C				
Environmental Planning and Assessment Amendment Bill 2006	R				
Fines Amendment (Payment of Victims Compensation Levies) Bill 2006	N				
Fisheries Management Amendment Bill 2006	R				
Jury Amendment (Verdicts) Bill 2006	R				
Law Enforcement (Controlled Operations) Amendment Bill 2006	R				
Law Enforcement Legislation Amendment (Public Safety) Bill 2005	R				
Motor Accidents (Lifetime Care and Support) Bill 2006	R, C		R, C	R	R
Motor Accidents Compensation Amendment Bill 2006	R, C		R, C		
Motor Vehicles Repairs (Anti-steering) Bill 2006	R				
Royal Rehabilitation Centre Sydney Site Protection Bill 2006*	R				

Key

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

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

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2006
Centennial Park and Moore Park Trust Regulation 2004	Minister for Tourism and Sport and Recreation	29/04/05	19/01/06	1
Companion Animals Amendment (Penalty Notices) Regulation 2005	Minister for Local Government	12/09/05	21/12/05	1
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005	Minister for Planning	12/09/05	24/12/06	3
Hunter Water (General) Regulation 2005	Minister for Utilities	04/11/05	09/01/06	1
Protection of the Environment Operations (Waste) Regulation 2005	Minister for the Environment	04/11/05	29/11/05	1
Stock Diseases (General) Amendment Regulation 2005	Minister for Primary Industries	12/09/05	07/02/06	1
Workers Compensation Amendment (Advertising) Regulation 2005	Minister for Commerce	12/09/05	28/11/05	1