PARLIAMENT OF NEW SOUTH WALES

Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 3 of 2003

14 October 2003

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

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

Legislation Review Digest, Legislation Review Committee, parliament NSW Legislative Assembly. [Sydney, NSW] : The Committee, 2003, 38 p; 30cm

Chair: Barry Collier MP

14 October 2003

ISSN 1448-6954

1. Legislation Review Committee—New South Wales

2. Legislation Review Digest No 3

I Title.

II Series: New South Wales. Parliament. Legislative Assembly. Legislation Review Committee Report; no. 3

TABLE OF CONTENTS

*** Denotes Private Members Bill**

Membership & Staff

Chairman	Barry Collier MP, Member for Miranda
Vice Chairman	Marianne Saliba MP, Member for Illawara
Members	Peter Breen MLC Shelley Hancock MP, Member for South Coast Don Harwin MLC Virginia Judge MP, Member for Strathfield Peter Primrose MLC Russell Turner MP, Member for Orange
Staff	Russell Keith, Committee Manager Indira Rosenthal, Project Officer Mel Keenan, Project Officer Rachel Dart, Committee Officer Vanessa Pop, Assistant Committee Officer
Contact Details	Legislation Review Committee Legislative Assembly Parliament House Macquarie Street Sydney NSW 2000
Telephone	02 9230 3418
Facsimile	02 9230 3052
Email	legislation.review@parliament.nsw.gov.au
URL	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) makers 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.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. COMMUNITY RELATIONS COMMISSION AND PRINCIPLES OF MULTICULTURALISM AMENDMENT BILL 2003

Introduced: 19 September 2003
House: Legislative Assembly
Minister: The Hon B Carr MP
Portfolio: Citizenship

Matters for comment raised by the Bill

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny

Purpose and Description

1. The object of this Bill is to amend the Community Relations Commission and Principles of Multiculturalism Act 2000 as follows:

   (a) to increase from nine to 11 the maximum number of commissioners that may constitute the Community Relations Commission of New South Wales.

   (b) to provide that two persons are to be appointed as representatives of youth in New South Wales and who are not less than 18, and not more than 24, years of age at the time of their appointment.

   (c) to clarify that the function of the Commission to provide interpreter or other services approved by the Minister of Citizenship extends to the Commission's provision of such services outside New South Wales.

Background

2. The Community Relations Commission (CRC) was established in March 2001, replacing the Ethnic Affairs Commission.

3. The objectives of the CRC, as set out in section 13 of the *Community Relations Commission and Principles of Multiculturalism Act 2000*, are as follows:

   (a) participation of the people of New South Wales in community life and the public decision-making process so that they can exercise their rights and fulfil their obligations;

   (b) access to government and community services that is equitable and that has regard to the linguistic, religious, racial and ethnic diversity of the people of New South Wales;

(c) the promotion of a cohesive and harmonious multicultural society with mutual respect for and understanding of cultural diversity;

(d) the enrichment of all sections of society through the benefits of cultural diversity;

(e) the promotion of the principles of multiculturalism and the advantages of a multicultural society; and

(f) the promotion of social justice, community development and community initiatives for ethnic communities in New South Wales.

4. In his second reading speech, the Parliamentary Secretary stated that the Bill "honours a pre-election commitment by the Carr Government to designate a Commissioner of the Community Relations Commission as a representative of youth from New South Wales' culturally diverse communities."[1]

Issues Arising Under s8A(1)(b)

Clause 2, Commencement

5. The Committee notes that this Act is to commence on assent.

The Committee makes no further comment on this Bill.

[1] Mr B J Gaudry MP, Parliamentary Secretary, NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 September 2003.

2. DEFAMATION AMENDMENT (COSTS) BILL 2003*

Introduced: 18 September 2003
House: Legislative Assembly
Member: Mr David Barr MP
Portfolio: Private Member

Matters for comment raised by the Bill

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓				

Purpose and Description

1. This Bill amends the *Defamation Act 1974* to remove the discretion of a court to make orders for the payment of a plaintiff's costs where the plaintiff is awarded $25,000 or less in damages for defamation.

2. This applies to the District and Supreme Courts, both of which have jurisdiction in defamation cases.[2]

Background

Costs

3. Courts generally have a discretion over which party pays the costs of proceedings. There are two main types of costs:

   - party and party costs; and
   - solicitor and client (or "indemnity") costs.

4. **"Party and party costs"** are the costs that are payable if the court makes an order for one party to pay the costs of another party. "Party and party costs are the costs the successful party must necessarily incur to obtain justice, they must be reasonable and not incurred because of over-caution."[3]

   A party who is ordered by the court to pay the other party's costs on this basis will be required to pay those costs that were *necessary or proper* for the other party to incur in order to enforce or defend a right. "Necessary and proper costs are items of cost a party actually incurs that were necessary for the attainment of justice or for maintaining or defending rights in the particular case."[4] Any difference between these costs and the actual costs incurred will be paid for by the client him or herself.

5. A party who is ordered by a court to pay costs on a "**solicitor and client**" or "**indemnity**" basis, will pay all the costs of the other party that are *of and incidental to the proceedings* and that are *reasonably incurred* by the other party to those proceedings. This means that all the costs of the other party must be paid for unless they are unreasonably incurred or of an unreasonable amount. Costs that are extravagant (e.g.

[2] The Local Court is excluded from having jurisdiction in action for or in the nature of defamation under s 19 of the Local Courts (Civil Claims) Act 1970.
[3] BC Cairns, *Australian Civil Procedure*, Fifth Ed. 2002, LBC, p. 507.
[4] BC Cairns, *Australian Civil Procedure*, Fifth Ed. 2002, LBC, p. 514.

briefing several senior counsel where one junior counsel would be sufficient) will be excluded as unreasonable.[5]

Supreme Court Rules

6. Until 19 September 2003, Part 52A, rule 33 of the *Supreme Court Rules 1970* applied to proceedings for defamation. The rule provides, among other things, that a plaintiff who commences proceedings for defamation in the Supreme Court is not entitled to payment of his or her costs of the proceedings if the plaintiff recovers $225,000 or less in damages. An exception is provided if it appears to the Court that the plaintiff had sufficient reason to commence or continue the proceedings. Sub-rule (3) gives an example of a "sufficient reason": the "plaintiff had reasonable grounds at the relevant time for expecting that he would recover an amount in excess of the amount prescribed".

7. However, Part 52A, rule 33 was amended on 19 September 2003 to explicitly exclude proceedings for defamation from its operation.[6] The new rule, 33(1)(b)(v), is currently in the disallowance period.

8. Prior to the amendment of this rule, the Supreme Court often ordered costs against defendants in cases where the plaintiff was awarded less than the threshold amount, including cases in which the damages awarded were far below the threshold (eg, $13,000 in one case).[7]

9. The amendment to this Supreme Court Rule arose out of discussions in the Supreme Court after the recent decision of Simpson J in a defamation case, *West & Anor. v Nationwide News P/L*[8]. In that case, the two plaintiffs were awarded $20,000 and $30,000 in damages respectively for defamation. They then sought an order for costs notwithstanding rule 33.

10. The judge, Simpson J, said that the purpose of rule 33 was to discourage the commencement of small or non-complex claims in the Supreme Court. However, she accepted that "a pattern has emerged in the [Supreme] Court of making an award for costs in full, notwithstanding the quantum of the verdict".

11. Simpson J also considered the scope of the Court's discretion under the unamended rule 33 to award costs in defamation cases regardless of the quantum of damages won. She said that the inherent complexity of defamation actions makes it very difficult for a plaintiff to assess, when commencing proceedings, the amount of damages they might win and whether it would exceed the threshold limit. She referred to the particularly wide range of defences available to a defendant in a defamation action, and the fact that a plaintiff cannot know in advance which of these defences will be raised. This makes it very difficult for the Court to assess whether a plaintiff had reasonable grounds for expecting that they would recover more than the

[5] BC Cairns, *Australian Civil Procedure*, Fifth Ed. 2002, LBC, p. 516.
[6] *Supreme Court Rules (Amendment No 380) 2003*.
[7] See *West & Anor v Nationwide Press P/L (Trading as Cumberland Newspaper Group)* [2003] NSWSC 767 (21 August 2003)
[8] *West & Anor v Nationwide News P/L (Trading as Cumberland Newspaper Group)* [2003] NSWSC 767 (21 August 2003).

threshold amount and thus whether it is appropriate for the Court to exercise its discretion to award costs to the plaintiff.

12. Simpson J awarded the plaintiffs costs on the basis of fairness. She said: "[i]t would be unjust for the plaintiffs to be deprived of any costs of their successful litigation".

13. The Supreme Court decided to amend the rule to get around the difficulties in defamation cases that Simpson J had identified.

District Court Rules

14. The District Court can order damages up to $750,000. It has its own rules relating to costs, which are aimed at encouraging the early settlement of claims through offers of compromise. In this jurisdiction, costs are used as a penalty against parties that reject reasonable settlement offers.

15. The *District Court Rules 1973* provide that each party is to pay its own costs unless there is a rule or an order of the Court to the contrary (Part 39A, rule 10). Exceptions to this rule are set out in Part 39A, rule 25, which provides for situations in which one party makes an offer of settlement that is rejected by the other party.

16. Generally, if a plaintiff makes an offer that is rejected by the defendant and the Court subsequently awards the plaintiff a judgement that is *at least as favourable* to the plaintiff as the offer made, then the District Court must order the defendant to pay the plaintiff's costs on a solicitor and client basis (unless the offer was made less than 28 days before the hearing, in which case costs are to be assessed on a party and party basis up to the day of the offer and on a solicitor and client basis thereafter).

17. If a defendant makes an offer that is rejected by the plaintiff, who then obtains a judgement that is *not more favourable* to the plaintiff than the offer made, the plaintiff is to pay the defendant's costs from the time of the offer on a party and party basis. The plaintiff is entitled to costs on a party and party basis up to the time of the offer.

18. If an offer of compromise is accepted, the defendant pays the plaintiff's costs, unless the Court makes a contrary order.

19. Part 39A, rule 25, sub-rule (1A), explicitly states that the objectives of this rule are:

    (a) to introduce an element of risk to promote early settlement of actions without hearing:

    (b) to compel the parties, under threat of possible penalties in costs, to arrive at an early assessment of the amount of damages, if any, recoverable by the plaintiff;

    (c) to encourage the making and acceptance of reasonable offers of compromise;

    (d) to impart as much certainty as possible to the imposition of costs penalties; and

    (e) to give the Court discretion to relieve a party from the imposition of a costs penalty which is to be exercised only in exceptional cases to avoid substantial injustice.

Section 48A Defamation Act 1974

20. Section 48A sets out the matters a court may consider in awarding costs. These include the way in which the parties have conducted their cases, "including any misuse of a party's superior financial position to hinder the early resolution of the proceedings". The court can also consider whether the costs in the proceedings may exceed the amount of damages to be awarded.

21. Subsection (2) provides that if the plaintiff is successful and costs are awarded to them, the court must order costs to be assessed on an "indemnity basis" if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to one proposed by the plaintiff.

22. Similarly, if the plaintiff is unsuccessful in their defamation action, and costs are awarded to the defendant, the court must order costs to be assessed on an indemnity basis if it is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.

The Bill

23. Clause 3 of the Bill adds a section (48B) to the Defamation Act, providing that "a court" is not to make an order for costs in favour of a plaintiff in defamation proceedings unless the plaintiff has been awarded more than $25,000 in damages.

24. It also provides that in determining those damages, a court is not to have regard to the effect of this new section. The new section does not operate retrospectively.

25. The effect of these amendments would be to remove a court's discretion in any circumstances to order costs in favour of a plaintiff who is awarded $25,000 or less in damages for defamation.

26. The Committee understands from the Member introducing the Bill that its purpose is to provide a disincentive to potential plaintiffs bringing actions based on a trivial injury to reputation or which do not have reasonably strong chances of success. This is particularly aimed at reducing the incidence of wealthy plaintiffs using defamation to suppress free comment and the significant costs with which defamation actions can burden defendants even in the absence of a significant injury or a meritorious case.

Issues arising under section 8A(1)(b)

27. The right to protection of the law against unlawful attacks on one's reputation has long been recognised under the common law and is included in the International Covenant on Civil and Political Rights, Article 17:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

28. Maintenance of this right is dependent on all persons having access to the courts when their reputation is attacked.

29. The costs of litigation can be a major barrier to accessing the protection provided by the courts. The courts' discretion to award costs helps to mitigate the effects of that costs barrier by giving plaintiffs and defendants confidence to incur the costs of litigation when they are sure of the strength of their case.

30. The laws and rules relating to costs modify the court's discretion to award costs to achieve certain policy objectives, such as encouraging early settlement, and to achieve what is considered to be a fairer allocation of the costs concerned in particular circumstances.

31. The Bill, if enacted, could be a significant barrier to some persons who consider their reputation has been unlawfully impugned from seeking the protection of the courts. Those persons include those less able to bear the costs of litigation and those who are not well known in the community at large. In these circumstances, the bill may effectively mean unequal access to the justice system.

32. The inherent complexity of defamation actions and the inability of the plaintiff to know in advance the defences likely to raised makes it very difficult for any plaintiff to predict the likely amount of damages at the outset. This uncertainty – given the restriction on costs in the Bill – may prevent otherwise successful plaintiffs from pursuing their rights to protect their reputation.

33. The Bill may also limit the ability of those whose award of damages is not more than $25,000 from obtaining a fair outcome by leaving successful plaintiffs with costs which may not even be covered by the damages awarded. This may make it impractical to seek the protection of the courts for unlawful attacks on reputation where damages awarded are not likely to be more than $25,000.

34. The effects of the Bill on equal access to justice and the right to defend one's reputation are to be balanced against the objectives of the Bill. According to the Member, these objectives include reducing the abuse of defamation actions in "chilling" free speech, and preventing defendants from unfairly incurring substantial costs orders arising from a relatively trivial action.

35. The Committee notes that the Bill may limit the ability of some to seek the protection of the courts for allegedly unlawful attacks on their reputation and the injustice that may arise as a result. It further notes that the Bill makes any court an impractical avenue for protecting one's reputation when the damages that may be awarded are unlikely exceed $25,000.

36. These adverse impacts on equal access to the law and the right to protect one's reputation need to be balanced against the aims of discouraging the "chilling" of free speech through trivial defamation actions and preventing defendants liable for minor injuries to a plaintiff's reputation from incurring substantial orders for costs.

37. The Committee refers to Parliament the question of whether the provisions of the Bill amount to an undue trespass on individual rights.

The Committee makes no further comment on the Bill.

3. EVIDENCE LEGISLATION AMENDMENT (ACCUSED CHILD DETAINEES) BILL 2003

Introduced: 19 September 2003
House: Legislative Assembly
Minister: The Hon B Debus MP
Portfolio: Attorney General

Matters for comment raised by the Bill

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓			✓	

Purpose and Description

1. The Evidence Legislation Amendment (Accused Child Detainees) Bill 2003 (the Bill) amends the Evidence (Audio and Visual Links) Act 1998 (the Act).

2. The Act facilitates the giving and receiving of evidence and the making of submissions, in proceedings in New South Wales courts, by audio and audiovisual links from places other than places where the court is sitting.

3. The Act also makes provisions with respect to appearances in such proceedings by persons by audio and audiovisual links from such other places.

4. The Bill amends the Act:

   - to require an accused child who is in custody in a correctional centre, detention centre, police station or other place of detention, to appear physically before the court in certain preliminary and other criminal proceedings concerning the proceedings for which the child is in custody *unless* the court directs otherwise if satisfied that it is in the interests of justice that the child appear by audio visual link before the court
   - to enable rules of court to specify factors that the court must take into account before giving such a direction.

5. The Bill also makes consequential amendments to the *Evidence (Children) Act 1997*, to make it clear that the Bill *does not* limit the application of that Act.[9]

Background

6. In July 1997, the Standing Committee of Attorneys-General (SCAG) approved a model bill that provided arrangements between participating States with respect to the taking of evidence by audio and audiovisual links interstate. The Act, as passed in

[9] Schedule 2 of the Bill amends s 11 (Child entitled to give evidence in chief in form of recording) and s19 (Accused children may be allowed to give evidence by closed circuit television) of the *Evidence (Children) Act 1997* to make it clear that those sections are not limited by proposed s 5BBA of the Act.

October 1998, substantially reflects the provisions of the model bill as approved by SCAG and considered by the NSW Evidence Act monitoring Committee.[10]

7. The Act was amended in 2001 by the *Evidence (Audio and Audio Visual Links) Amendment Act 2001.* The aim of these amendments was to ensure the effective use of technological developments, [11] by way of:

- the establishment of a presumption in favour of using audiovisual links in preliminary criminal proceedings;[12] and
- the establishment of a presumption in favour of physical attendance at court for substantive criminal proceedings, referred to as "relevant criminal proceedings".[13]

8. However, neither presumption overrides the court's inherent jurisdiction to generally control proceedings, and protect the right of the accused or defendant to a fair trial. Either presumption may be rebutted if the court is satisfied that it is in the interests of justice to do so.[14]

The Bill

9. Key amendments made to the Act by the Bill include:

- a definition of accused child detainee and, and a new definition of accused detainee: s 3;
- a presumption in favour of physical attendance before a New South Wales Court for an accused child detainee in any preliminary or relevant criminal proceedings concerning the offence for which the accused child detainee is in custody: s 5BBA(1);
- the circumstances in which an accused child detainee may give evidence or make a submission by audiovisual link and in which a court may direct the accused child detainee to do so: s 5BBA(2)-(5); and

[10] The NSW Evidence Act Monitoring Committee was established following the enactment of the Uniform *Evidence Act 1995* to advise the Attorney General on the need for legislative reform of the *Evidence Act 1995* as required.

[11] See Hon P F Whelan, Minister for Police, NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 May 2001.

[12] Section 3 of the Act defines ***preliminary criminal proceedings*** to include: proceedings relating to bail (other than a proceeding defined as a "relevant criminal proceeding"), where a person has previously been remanded in custody, subsequent proceedings with respect to the remand of the person for the same offence, interlocutory proceedings held in connection with any criminal proceeding, applications for an adjournment, any arraignment on a day other than the day appointed for the trial of a person.

[13] Section 3 of the Act defines ***relevant criminal proceedings*** to include: committal proceedings, inquiries into a person's unfitness to be tried for an offence, trials or hearings of charges, sentencing hearings, hearings of an appeal arising out of a trial or hearing, proceedings relating to bail: before a Magistrate or justice in respect of the period between a person being charged with an offence and the person's first appearance before a court in relation to the offence, or on a person's first appearance before a court in relation to an offence.

[14] Section 5(2) of the *Evidence (Audio and Audio Visual Links) Act 1998* provides that, unless a contrary intention is shown, nothing in the Act limits or otherwise affects any discretion that a New South Wales court or a "recognised court" has with respect to the conduct of a proceeding.

- the making of regulations and rules of court as to the factors which may be taken into account in determining whether an accused child detainee should appear before a court by audiovisual link: s 22(5).

10. Pursuant to the amended s 3 of the Act, the term "accused detainee" includes a person held in custody whether at a correctional centre, detention centre, police station or other place of detention – and includes a defendant in proceedings for a summary offence. The term "accused child detainee" means an accused child held in custody.

11. The Act as amended covers offences dealt with in a Local, District or Supreme Court and the Children's Court. Previously the Children's Court had been specifically exempted from the application of the 2001 amendments to the Act.[15]

12. Pursuant to the new s 5BBA, the physical presence at court of an accused child detainee in relevant criminal proceedings *is not* required if:

    (a) the accused child detainee chooses to give evidence, or make a submission, by way of audiovisual link, and all parties consent; or

    (b) the court gives a direction to this effect, either on its own motion, or on application of any party to the proceedings: s 5BBA(3).

13. The court may only make such a direction if satisfied that it is in the interest of justice to do so, having regard to the relevant factors set out in the rules of court made under the Act, and all the circumstances of the case.

14. The Bill permits the making of regulations and rules of court with respect to the factors that may be taken into account by a court when determining whether an accused child detainee should appear by way of audiovisual link.

Issues Arising Under s 8A(1)(b)

Clause 2 – Commencement

15. Clause 2 of the Bill provides that the ensuing Act will commence "on a day or days to be appointed by proclamation".

16. The Committee has been advised by the Minister's office that the delayed commencement is due to the need to consult with the Children's Court magistrates in drafting the Rules necessary to give effect to the changes brought about by the Bill. It is anticipated that the Act will commence by the end of 2003.

17. The Committee notes that providing the Act to commence on proclamation delegates to the Government the power to commence an Act on whatever day it chooses after assent or not to commence the Act at all. The Committee considers that allowing time to prepare the necessary rules is an appropriate reason to delay the commencement for a brief period.

[15] Section 5(6) of the *Evidence (Audio and Audio Visual Links) Act 1998* provided that s 27 of the *Children (Criminal Proceedings) Act 1987* did not apply Part 1B of the Act (to the extent that it relates to the functions of the Local Courts, Magistrates or justices in criminal proceedings) to the Children's Court or any proceedings before the Children's Court.

Schedule 1[5] – Retrospectivity

18. Schedule 1[5] inserts s 5(5A) into the Act to provide for the proposed amendments to extend to any proceedings pending in a court after the commencement of s 5(5), i.e., 5 March 1999. Consequently, the Bill has a retrospective effect, in that the rules applicable to any pending proceedings would change at the time the enacted Bill commenced.

19. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights. However, given that the provisions of the Bill are essentially for the benefit of the accused child detainee, the court's duty to ensure the fairness of proceedings and its discretion to take into account the relevant circumstances of each case, the Committee is of the opinion that the retrospectivity is unlikely to adversely affect the personal rights of accused child detainees.

Schedule 1[9] – Evidence by audiovisual link

20. The Bill's Second Reading Speech noted that, while the amendments extend the application of the Act to Children's Court proceedings, they continue to recognise the special needs of children in obtaining legal advice and representation. It was specifically stated that the Bill seeks to:

> Fulfil the United Nations Convention on the Rights of the Child and [is] consistent with the general principles underpinning the exercise of the criminal jurisdiction in relation to children set out in the *Children (Criminal Proceedings) Act 1987.*[16]

21. Article 12 of the *UN Convention on the Rights of the Child* deals with the child's right to participate in the legal process:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

22. This principle has previously found expression in New South Wales in s 6(a) of the *Children (Criminal Proceedings Act) 1987.* Under that section, a court, in exercising criminal jurisdiction with respect to a child, is to have regard to the principle that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them.

23. The Bill aims to maintain these rights to be heard and participate by amending s 5BA of the Act to continue to exclude accused child detainees from the presumption in favour of appearance by audiovisual link, rather than appear in person. Pursuant to

[16] Mr B J Gaudry MP, Parliamentary Secretary, NSW *Parliamentary Debates (Hansard)* Legislative Assembly, 19 September 2003.

proposed s 5BBA(2)(a), the accused child detainee may choose (with the consent of all parties) to give evidence or make any submission by audiovisual link, rather than appear in person.

24. The fairness of the proceedings – which must accommodate the interests of both the accused and the Crown[17] – is maintained by the provision in proposed s 5BBA(4) that a court must be satisfied that it is in the interests of justice in a particular proceeding that the accused child detainee appear by way of audio visual link up.

25. The Committee considers that the provision for child detainees to appear by way of audiovisual link up does not impinge upon the fairness of proceedings and does not unduly trespass on individual rights and liberties.

The Committee makes no further comment on this Bill.

[17] See, e.g. *Dietrich v R* (1992) 177 CLR 292 at 300 (Mason CJ and McHugh J) and 353 (Toohey J).

4. GAMING MACHINES AMENDMENT (MISCELLANEOUS) BILL 2003

Introduced: 19 September 2003
House: Legislative Assembly
Minister: The Hon Grant McBride MP
Portfolio: Gaming and Racing

Matters for comment raised by the Bill

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓			✓	

Purpose and Description

1. This Bill makes a number of amendments to the *Gaming Machines Act 2001,* which introduced a wide range of reform measures relating to gaming machines in clubs and hotels.

2. The object of this Bill is to amend the *Gaming Machines Act 2001* as follows:

   (a) to prevent any increase in the number of gaming machines that may be kept on the premises of a large-scale club[18],

   (b) to clarify that certain special arrangements in relation to large-scale clubs apply only until such time as the club complies with the existing requirement to reduce its allocated number of poker machine entitlements,

   (c) to allow the transfer, through a class 1 social impact assessment, of any number of poker machine entitlements between different premises of a registered club if the premises are situated in a non-metropolitan area and are within 50 kilometres of each other,

   (d) to make a number of other miscellaneous amendments to enhance or clarify the operation of the Act.

3. The amendments in this Bill tighten many of the controls established by the Act that govern the numbers of gaming machines in NSW clubs and hotels.

4. In his Second Reading Speech, the Minister said that these amendments were "identified as necessary to the proper functioning of the Act, as experience is gained in the administrative and operational side of administering [the Act]". He also said that, "while many of the amendments are minor, they are worthwhile and achieve a greater clarity for the operation of the Act as a whole".

The Bill

5. Under the Act, large-scale clubs must reduce the number of poker machine entitlements they hold by 10%, or to 450 entitlements, over a five-year period commencing in 2002. The Bill provides that the number of gaming machines that may be kept on premises of a large-scale club may not be increased during this 5-year

[18] Under section 4 of the *Gaming Machines Act 2001*, ***"large-scale club"*** means a registered club that was, immediately before the commencement of Part 2, authorised under the *Registered Clubs Act 1976* to keep more than 450 approved gaming machines on any of the club's premises.

period. The Bill also provides that once the club has complied with the requirement to reduce the number of poker machines it holds, it cannot increase its holding. Clubs will be subject to a cap, known as the "*individual venue cap*", of 450 poker machine entitlements or the number held after the 10% reduction, as the case may be.

6. Schedule 1, clause 5 of the Bill provides that if a large-scale club has not reduced the number of poker machines it holds as required under the Act by 2 July 2007, any 'extra' machines will be forfeited to the Liquor Administration Board.

7. Clause 9 requires a class 2 social impact assessment to be made if a large-scale club transfers "more than 4 poker machine entitlements" to another of its premises. Under the Act, an assessment was required if a club transferred "4 or more" entitlements.

Under clause 33 of the *Gaming Machines Regulation 2002* (the Regulation), a social impact assessment (either class 1 or class 2) is required for each application for authorisation to keep gaming machines. The assessment must be published so that the public may comment on the application and the Liquor Administration Board must approve it.

A ***class 1 social impact assessment*** must be provided with an application for authorisation to keep approved gaming machines after the removal of a hotelier's licence or registered club to other premises situated within 1 kilometre of the previous premises, or for application for registration of poker machine entitlements transferred from one hotel or club premises to another.

Clause 34 of the Regulation prescribes the information that must be provided in a class 1 social impact assessment. This includes the details of the measures that the hotelier or registered club has taken, or proposes to take, to ensure that gambling activities in the hotel or club will be conducted in a responsible manner. It must also include the internal floor space of the hotel or the premises of the club. If the application is for a new hotel or new club, the assessment must include a list of the schools, places of public worship and hospitals that may reasonably be considered to be in the immediate vicinity of the hotel or club premises, including a map showing the location of the hotel or club premises and the location of those schools, places of public worship and hospitals.

Clause 33 of the Regulation states that a ***class 2 social impact assessment*** is necessary for any application to which Division 1 of Part 4 of the Gaming Machines Act applies. That Division governs social impact assessments of gaming machines as a measure to minimise the harm of gambling.

The requirements for a class 2 social impact assessment are set out in clauses 34 and 35 of the Regulation. Such an assessment must include the same information required for a class 1 social impact assessment plus information about the total number of gaming machines that are authorised to be kept for the time being in all hotels and registered clubs in the relevant local government area, an estimate of the median individual wage and salary income for the area and the unemployment level for that area.

8. Schedule 1, clause 10 of the Bill inserts a new subsection 22(1B) to make it clear that the pooling by hoteliers of approved amusement devices (AADs) in the course of exchanging a certain number of AADs for one poker machine entitlement (allowed under section 22 of the Act) only applies to remnant AADs. The effect of this amendment is that a hotelier who surrenders AADs in combination with another hotelier cannot be allocated a poker machine entitlement if either of the hoteliers has 3 or more AADs (if a metropolitan hotel) or 2 or more AADs (if a country hotel).

9. Clause 36 allows a complaint to be made to the Licensing Court that an hotelier or registered club has not paid the gaming machine tax, or a penalty or interest due for late payment of the tax, under the Act. Clause 37 provides that the disciplinary action that the Court may impose in relation to such a complaint may include cancelling the hotelier's or club's authorisation or approval to keep gaming machines.

10. Clause 39 is a savings and transitional provision necessary because of the amendment inserting sub-clause 22(1B) into the Act. Clause 39 provides that the new provision applies to any applications to exchange AADs for poker machine entitlements under section 22(1) of the Act made before or on the day that this Bill is introduced into the Legislative Assembly.

Issues arising under s8A(1)(b)

Clause 2, Commencement

11. The Act is to commence by proclamation.

12. The Committee notes that providing that an Act commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all. The Committee recognises that there may be good reasons why such a discretion may be required. It also considers that, in some circumstances, such discretion can give rise to an inappropriate delegation of legislative power.

13. The Committee has written to the Minister seeking his advice as to the reasons for commencement by proclamation and the likely commencement date of the Act.

Schedule 1 [39] – Retrospective application

14. Clause 39 of the schedule provides that the new sub-clause 22(1B) will apply to any applications to exchange AADs for poker machine entitlements under section 22(1) of the Act made before or on the day that this Bill is introduced into the Legislative Assembly. It therefore has a retrospective effect on applications made after that time until the commencement of the enacted Bill.

15. Except in exceptional circumstances, the Committee considers it to be an inappropriate trespass on personal rights for an Act to retrospectively have an adverse effect on a person's right.

16. In this instance, there are two issues mitigating any adverse retrospective effect of this provision.

First, the provision, if enacted, is only to have effect from the day notice was publicly given of an intention to make the amendment by introducing the Bill into the Legislative Assembly. This provides a basis for arguing that the Bill would not remove any reasonable expectation of enjoying any right affected by the provision. This is particularly relevant if those affected are consulted in the preparation of the retrospective provisions.

Against this argument, it could be noted that a person has a right to rely on the law which is in force, not as foreshadowed. In the absence of extensive consultation, it would be unreasonable to expect individuals to be cognisant of what Bills are before the Parliament.

Secondly, the explanatory note characterises the provision as a clarification of the existing law rather than a substantial amendment. If the amendment merely makes clear the interpretation of s 22 of the Act that the Board has always justifiably applied when exercising its discretion, then the provision arguably does not adversely affect any right but informs applicants more precisely of what rights they may already have.

17. The Committee notes the retrospective effect of schedule 1, clause 10. Given that the provision merely clarifies the existing law, the Committee does not consider that this provision unduly trespasses on personal rights.

The Committee makes no further comment on this Bill.

5. LOCAL GOVERNMENT AMENDMENT (NO FORCED AMALGAMATIONS) BILL 2003*

Introduced: 17 September 2003
House: Legislative Council
Member: The Hon D Gay MLC
Portfolio: Private Member's Bill

Matters for comment raised by the Bill

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny

Purpose and Description

1. The object of this Bill is to require the Local Government Boundaries Commission to poll the residents and ratepayers affected by the proposed amalgamation of two or more local government areas, or by a substantial change to the boundaries of a local government area, so as to ascertain their attitude to the proposal.

Background

2. The Committee notes that this Bill is identical to the Bill of the same name introduced into the Legislative Assembly by Mr Andrew Fraser MP on 4 September 2003 and reported on in *Legislation Review Digest 2 of 2003* on 16 September 2003.

Issues Arising Under s8A(1)(b)

3. As with Mr Fraser's Bill, the Committee did not identify any issues arising under s8A(1)(b) of the *Legislation Review Act 1987.*

The Committee makes no further comment on this Bill.

6. PREVENTION OF CRUELTY TO ANIMALS AMENDMENT (PENALTIES) BILL 2003

Introduced: 19 September 2003
House: Legislative Assembly
Minister: The Hon I McDonald MLC
Portfolio: Agriculture and Fisheries

Matters for comment raised by the Bill

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny

Purpose and Description

1. The objects of this Bill is to amend the *Prevention of Cruelty to Animals Act 1979* (the Act):

   - to increase the maximum penalties for certain offences under that Act; and
   - to enable the recovery of the increased penalties in proceedings in the Local Court.

Background

2. The *Prevention of Cruelty to Animals Act 1979* is the principal Act in relation to a broad range of animal welfare matters.

3. The most serious offences under the Act are those of:-

   - aggravated cruelty to animals;
   - administration of poison to a domestic animal; and
   - involvement in coursing or any other activity where an animal is chased, caught or confined by a dog.

4. The Parliamentary Secretary's second reading speech indicated that the Bill proposes to increase the maximum penalties for these offences because: "Despite the current level of penalty, offenders continue to treat animals with cruelty."[19]

5. This Bill ensures that uniform penalties are provided under comparable legislation such as the *Companions Animal Act 1998,* which already provides for maximum penalties of $22,000 for the most serious offences under that Act.

6. The Parliamentary Secretary also noted that the Bill is part of the implementation of the Government's "Better Care for Pets and Wildlife Policy" statement.

[19] Mr B J Gaudry MP, Parliamentary Secretary, NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 September 2003.

The Bill

7. The Bill increases the maximum penalties that may be imposed for offences under the Act as follows:

Offence	Amended Section of Act	Individual		Corporation	
		Current maximum penalty	Proposed maximum penalty	Current maximum penalty	Proposed maximum penalty
Aggravated cruelty to animals[20]	6	100 penalty units (currently $11,000) or imprisonment for 2 years, or both	200 penalty units (currently $22,000) or imprisonment for 2 years, or both	500 penalty units (currently $55,000)	1,000 penalty units (currently $110,000)
Administering poison to a domestic animal, or possessing poison with intent to kill or injure a domestic animal	15	100 penalty units (currently $11,000) or imprisonment for 2 years, or both	200 penalty units (currently $22,000) or imprisonment for 2 years, or both	100 penalty units (currently $11,000)	1,000 penalty units (currently $110,000)
Coursing and related activities[21]	21	100 penalty units (currently $11,000) or imprisonment for 2 years, or both	200 penalty units (currently $22,000) or imprisonment for 2 years, or both	500 penalty units (currently $55,000)	1,000 penalty units (currently $110,000)

8. Section 34 of the Act provides that proceedings for an offence under the Act, or its regulations, may be dealt with:

   (a) summarily before a Local Court constituted by a Magistrate sitting alone, or

   (b) by the Supreme Court in its summary jurisdiction.

9. This Bill amends the Act to provide that where proceedings are brought before the Local Court, the maximum pecuniary penalty that a magistrate may impose for the offence is 200 penalty units (currently $22,000), rather than the 100 penalty units (currently $11,000), as is presently the case.

[20] "Aggravated cruelty" is an act of cruelty (defined in s 5) upon the animal which results in:
   (a) the death, deformity or serious disablement of the animal, or
   (b) the animal being so severely injured, so diseased or in such a physical condition that it is cruel to keep it alive.

[21] A person commits this offence if they:
   (a) cause, procure, permit or encourage an activity in which an animal is used for the purpose of being chased, caught or confined by a dog, or
   (b) advertise the intention to conduct such an activity, or
   (c) promote, organise or attends such an activity, or
   (d) use an animal as a lure or kill for the purpose of blooding greyhounds or in connection with the trialing, training or racing of any coursing dog, or
   (e) keep or are in charge of an animal for use as a lure or kill for the purpose of blooding greyhounds or in connection with the trialing, training or racing of any coursing dog.

Issues Arising Under s8A(1)(b)

Clause 2, Commencement

10. The Committee notes that the Act is to commence on the date of assent.

The Committee makes no further comment on this Bill.

7. ROAD TRANSPORT EFFICENCY BILL 2003*

Introduced: 18 September 2003
House: Legislative Assembly
Member: G R Torbay MP
Portfolio: Private Member's Bill

Matters for comment raised by the Bill

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
			✓	✓

Purpose and Description

1. The object of this Bill is to provide for the establishment of schemes enabling certain vehicles to exceed current mass limits, on a restricted and conditional basis, where the vehicles are carrying livestock or grain or have road friendly suspension systems. The schemes correspond to arrangements operating elsewhere in Australia.

Background

2. The Bill was introduced by the Member for Northern Tablelands. In the Member's second reading speech, he stated that the proposals in the Bill were endorsed in a series of consultations conducted in rural New South Wales by the rural trucking industry.[22]

The Bill

3. The Bill provides for the establishment of a number of schemes of accreditation for various types of vehicles under which those vehicles would be exempt from the provisions of the *Road Transport (Mass, Loading and Access) Regulation 1996* (the Regulation). The Regulation is made under the *Roads Act 1993*.[23]

4. The vehicles specified in the Bill are:

   - vehicles for livestock loading (Part 2);
   - vehicles for grain harvest loading (Part 3); and
   - vehicles with "road friendly suspension" (Part 4).

5. Under the proposed schemes, such vehicles may exceed the mass limits to travel on roads in New South Wales currently prescribed by the Regulation, if they comply with:

   - mass and dimension limits; and
   - conditions (including conditions relating to the protection of road infrastructure).

[22] Mr G R Torbay MP, NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 September 2003.
[23] The relevant sections are s 264 (General regulation power) and s 108 (Power to impose weight restriction by regulation) of the *Roads Act 1993*.

6. These limits and conditions are to be specified in a notice or an authorisation made under the relevant scheme set out in the Bill.

Issues Arising Under s8A(1)(b)

Clause 3, Definitions - Delegation of Legislative Power: Henry VIII clause

7. Clause 3(1) of the Bill states that:

> Terms used in this Act have the same meanings as in the *Road Transport (Mass, Loading and Access) Regulation 1996*, except in so far as they are defined in subsection (2).

8. The terms referred to are contained in a dictionary appended to the Regulation. The dictionary is a list of applicable definitions under the Regulation, consisting of some 11 pages.

9. The effect of cl 3 of the Bill would be to allow the ensuing Act to be amended by a simple change to the definitions in the Regulation's dictionary. It is noteworthy that the Bill does not list which terms in the Act are defined in the Regulation or state what class of terms may be so defined. This leaves open the possibility that any term in the Bill which would have its ordinary meaning when passed, could later be given a particular meaning by the Regulation.

10. Providing for a regulation to amend an Act in this way significantly reduces parliamentary oversight of the legislative process. Such provisions have come to be referred to as *Henry VIII clauses*. Because such provisions derogate from the legislative authority of the Parliament, the Committee considers that they should be used as sparingly as possible. The Committee acknowledges, however, that there are circumstances where the use of such provisions is appropriate.

11. The Queensland Scrutiny of Legislation Committee, in a report examining Henry VIII clauses, considered that enabling an Act to be amended by subordinate legislation may be appropriate when:

- facilitating the effective application of innovative legislation;
- facilitating transitional arrangements;
- facilitating the application of national schemes of legislation; and
- circumstances warrant immediate Executive action.[24]

12. It was said in the Second Reading Speech that the Bill would bring New South Wales into line with other States by providing for grain harvest truck and livestock loading arrangements and by allowing "higher productivity trucks" to operate on New South Wales roads.[25] To this extent, it is arguable that enabling the ensuing Act to be amended by subordinate legislation would provide the necessary flexibility to facilitate a national approach to transport issues. It would therefore be a permissible use of a Henry VIII clause.

[24] Legislative Assembly of Queensland, Scrutiny of Legislation Committee, *The use of "Henry VIII clauses" in Queensland legislation*, Brisbane, January 1997 at 38-55.

[25] Mr G R Torbay MP, NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 September 2003.

13. However, the Committee also notes that the Bill deals with matters that could more appropriately be dealt with by regulation, and that there may already be authority for the making of regulations under the *Roads Act 1993* to effect the provisions of the Bill.

14. The Committee also acknowledges that the introduction of a Bill is the only way in which a Private Member may propose legislative change to the Parliament. As a result, Private Members are limited to proposing by way of primary legislation matters that might otherwise have been dealt with by way of regulation.

15. The Committee notes the broad legislative power that clause 3 delegates to define terms in the Bill by regulation. The Committee considers that the power to define terms in an Act should only be allowed by regulation in exceptional circumstances. Further, that when such power is delegated, it should be as specific as possible rather than have general effect. However, the Committee notes that the Bill deals with matters that may be more appropriately dealt with by regulation.

16. The Committee refers to Parliament the question of whether providing for the definitions in the Act to be amended by the Regulation is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

8. VOLUNTARY EUTHANASIA TRIAL (REFERENDUM) BILL 2003*

Introduced: 17 September 2003
House: Legislative Council
Member: The Hon I Cohen MLC
Portfolio: Private Member's Bill

Matters for comment raised by the Bill

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
			✓	✓

Purpose and Description

1. The object of this Bill is to require the holding of a referendum to determine whether the people of New South Wales approve of the enactment of legislation permitting a legally and medically supervised trial of voluntary euthanasia for a period of 18 months.

The Bill

2. This Bill requires that the vote for the referendum be held in conjunction with the next ordinary elections of local government councillors (clause 5(1)).

3. Section 287(1) of the *Local Government Act 1993* provides that the next ordinary election of local councillors is to be held on Saturday 27 March 2004, unless the Minister for Local Government appoints a subsequent Saturday, not later than 28 days thereafter, for the election to be held.

4. Those entitled to vote at the referendum are the electors who are qualified to vote at that election[26] (clause 5(2)).

5. Clause 6(1) stipulates that the referendum is to be taken under and in accordance with the *Constitutional Further Amendment (Referendum) Act 1930* (*Referendum Act*). This is subject to any such modifications as are necessary to enable the referendum to be held (clause 6(2)(c)).

6. The *Referendum Act* provides for the conduct of any referendum upon a Bill authorised or directed by law to be submitted to a referendum.

[26] Section 266 of the *Local Government Act 1993* provides that a person who is entitled to vote at an election of members of the Legislative Assembly or an election of members of the Commonwealth House of Representatives is entitled to be enrolled as an elector for a ward in a Local Government election if:

(a) he or she is a resident of the ward, or
(b) he or she is not a resident of the ward but is an owner of rateable land in the ward, or
(c) he or she is an occupier, or rate paying lessee, of rateable land in a ward.

A person who is disqualified from voting by section 21 of the *Parliamentary Electorates and Elections Act 1912* is subject to the same disqualification in relation to a roll under the *Local Government Act 1993.*

7. Clause 4 states that the question to be submitted to voters in the referendum is:

> Are you in favour of the Parliament of New South Wales passing legislation that provides for a legally and medically supervised trial of voluntary euthanasia for a period of 18 months?

8. Clause 7 provides for approved cases for and against the question to be published by the Electoral Commissioner.

9. The approved case arguing in favour of an affirmative answer to the referendum question must be authorised by a majority of those members of Parliament who voted for the Bill and desire to forward such an argument. The approved case arguing against an affirmative answer must be authorised by a majority of those members of Parliament who voted against the Bill and desire to forward such an argument.

10. If an approved case is forwarded within four weeks after the enacted Bill is commenced, the Electoral Commissioner must ensure that a copy of that document is published in at least two newspapers circulating in New South Wales on each day of the 14 days (or within any such time prescribed by regulation) immediately preceding the date of the referendum.

Issues Arising Under s 8A(1)(b)

Clause 6(2)(d): How vote taken – Delegation of legislative power: Henry VIII Clause

11. Clause 6(2)(d) provides that any modifications to the application of the *Referendum Act* prescribed by regulation have effect. The effect of this clause is to allow the rules determining how the vote is to be taken set out in the *Referendum Act* to be changed by a regulation.

12. Clause 6(1) provides that the application of the *Referendum Act* is "subject to this Act" (ie, the Bill when enacted). Consequently, clause 6(2)(d) does not allow for modification of the provisions of the Bill when enacted.

13. Providing for a regulation to amend the application of an Act significantly reduces parliamentary oversight of the legislative process. Such provisions have come to be referred to as Henry VIII clauses. Because such provisions derogate from the legislative authority of the Parliament, the Committee considers that they should be used as sparingly as possible. It acknowledges, however, that there are circumstances where the use of such provisions is appropriate.

14. The Queensland Scrutiny of Legislation Committee, in a report examining Henry VIII clauses, considered that enabling an Act to be amended by subordinate legislation may be appropriate when:

- facilitating the effective application of innovative legislation;
- facilitating transitional arrangements;
- facilitating the application of national schemes of legislation; and circumstances warrant immediate Executive action.[27]

[27] Legislative Assembly of Queensland, Scrutiny of Legislation Committee, *The use of "Henry VIII clauses" in Queensland legislation*, Brisbane, January 1997 at 38-55.

15. The delegation of legislative power in clause 6(2)(d) effectively allows for rules on how the referendum is to be conducted to be prescribed by regulation, subject to the provisions of the Bill, with the provisions of the *Referendum Act* applying where relevant modifications have not been so prescribed. Issues dealt with in the *Referendum Act* include:

- the issue and handling of writs;
- procedures for voting, including polling places, the number of votes an elector may cast, and the procedure and form of ballot papers;
- procedures after the close of poll, including scrutiny of the count, informality and recounts;
- disputed returns; and
- offences.

16. An issue relevant to whether such a delegation is appropriate is the opportunity Parliament will have to examine and disallow any such regulations if made. It should be noted, however, that Parliament can only disallow a regulation while it is sitting. It is possible that regulations could be made and the referendum held without there being any opportunity for Parliament to sit to consider the regulation.

17. The Committee notes that clause 6(2)(d) enables rules vital to the fair conduct of the referendum to be modified by regulation. The Committee further notes that the ability of Parliament to effectively scrutinise these rules is dependent on Parliament sitting between the making of the rules and the holding of the referendum.

18. The Committee refers to Parliament the question of whether clause 6(2)(d) is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

Part Two – Regulations

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

Regulation	Gazette reference		Information sought
	Date	Page	
Aboriginal Land Rights Amendment (Rate Exemptions) Regulation 2003	04/07/03	6805	20/08/03
Child and Young Persons (Savings and Transitional) Amendment (Out-of-Home Care) Regulation 2003 and Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003	11/07/03	7021 7054	20/08/03
Inclosed Lands Protection Regulation 2002	06/12/02	10370	29/05/03 16/09/03

Appendix 1: Index of Bills Reported on in 2003

	Digest Number
Child Protection Legislation Amendment Bill 2003	2
Commonwealth Powers (De Facto Relationships) Bill 2003	2
Community Relations Commission and Principles of Multiculturalism Amendment Bill 2003	3
Crimes Amendment (Protection of Innocent Accused) Bill 2003	2
Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003	1
Defamation Amendment (Costs) Bill 2003	3
Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2003	2
Education Amendment (Computing Skills) Bill 2003	2
Evidence Legislation Amendment (Accused Child Detainees) Bill 2003	3
Gaming Machines Amendment (Miscellaneous) Bill 2003	3
Local Government Amendment (No Forced Amalgamations) Bill 2003	2,3
Powers of Attorney Bill 2003	2
Prevention of Cruelty to Animals (Penalties) Bill 2003	3
Quarantine Station Preservation Trust Bill 2003	2
Road Transport Efficiency Bill 2003	3
Sporting Venues (Pitch Invasion) Bill 2003	2
Voluntary Euthanasia Trial (Referendum) Bill 2003	3

Appendix 2: Index of Ministerial Correspondence on Bills from September 2003

Bill	Minister/Member	Letter sent	Reply	Digests
Child Protection Legislation Amendment Bill 2003	Minister for Community Services	12/09/03		2
Gaming Machines Amendment (Miscellaneous) Bill 2003	Minister for Gaming and Racing	10/10/03		3
Powers of Attorney Bill 2003	Attorney General	12/09/03		2

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2003

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Child Protection Legislation Amendment Bill 2003	N			C	
Commonwealth Powers (De Facto Relationships) Bill 2003				N	
Crimes Amendment (Protection of Innocent Accused) Bill 2003	R				
Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003	N				
Defamation Amendment (Costs) Bill 2003	R				
Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2003	N		N		
Evidence Legislation Amendment (Accused Child Detainees) Bill 2003	N			N	
Gaming Machine Amendment (Miscellaneous) Bill 2003	N			C	
Powers of Attorney Bill 2003	N			C	
Quarantine Station Preservation Trust Bill 2003		R			
Road Transport Efficiency Bill 2003				R	N
Sporting Venues (Pitch Invasion) Bill 2003	R				
Voluntary Euthanasia Trial (Referendum) Bill 2003				R	N

Key

R Issue referred to or brought to the attention of Parliament
C Correspondence with Minister/Member
N Issue Notes