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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

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

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

9 Functions with respect to Regulations:

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

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

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

Part One – Bills

SECTION A: COMMENT ON BILLS

1. BAIL AMENDMENT (TERRORISM) ACT 2004

Date Introduced:	3 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The Act amends the *Bail Act 1978* [the Bail Act] to provide a presumption against bail in respect of persons charged with certain terrorism offences under the *Criminal Code 1995* of the Commonwealth.

2. When persons are charged in New South Wales with these Commonwealth terrorist offences, the Bail Act applies to any bail determinations.

Background

3. In the second reading speech the Attorney General gave the following background to the Bill:

> In 2002 Australian States and Territories, including New South Wales, referred power to the Commonwealth for terrorist matters. As a result, the Commonwealth enacted broad-ranging terrorist offences in the Commonwealth Criminal Code Act of 1995. These offences deal with every aspect of terrorist activity, including planning, training, membership, financing, and organisation…
>
> On 13 May the Government announced a whole range of counter-terrorist measures, including the amendment of the Bail Act, to create a presumption against bail for persons charged with Commonwealth terrorist offences. This bill delivers the first stage of the counter-terrorism package and inserts into section 8A of the Bail Act all the offences created under divisions 101, 102 and 103 of the Criminal Code of the Commonwealth. Section 8A currently relates to the most serious of Commonwealth and State drug offences, which carry heavy penalties of 20 years imprisonment to life imprisonment. The Act will commence on assent and the presumption against bail will relate not only to any person charged with a terrorist offence after commencement but also to any review of bail under part 6 of the Bail Act.[1]

4. On 3 June 2004 the Bail Amendment (Terrorism) Bill 2004 passed all stages in the Legislative Assembly and the Legislative Council. On 4 June 2004 it received the Royal Assent. Pursuant to s 8A(2) of the Legislation Review Act 1987, the Committee is not precluded from reporting on a Bill because it has become an Act.

[1] Hon R J Debus MP, Attorney General, *Legislative Assembly Hansard*, 3 June 2004.

The Bill

5. The Bail Act provides generally for a presumption *in favour* of bail for persons charged with offences [s 8]. The Act also provides for exceptions for particular offences [s 8A].

6. The Bill amends s 8A, which removes the presumption in favour of bail for certain offences[2] and provides that bail is not to be granted in respect of those offences, unless the accused person satisfies the officer or court hearing the bail application that bail should not be refused.

7. The Bill extends the application of s 8A to offences under Divisions 101[3],102[4] and 103[5] of the *Criminal Code 1995* of the Commonwealth.

8. The Bill extends the operation of the amendments to offences *committed before the amendments commenced*, whether or not the person was charged before that commencement, including in connection with a review of any prior bail decision [see Sch 1 of the Bail Act as amended].

9. The Bill commenced on assent.

Issues Considered by the Committee

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

Presumption against bail: Sch 1 [2]

10. Bail is defined as "the authorisation to be at liberty under the Act instead of being in custody".[6] The granting of bail is linked to the common law presumption that a person is innocent until proved guilty, ie, this presumed innocence leads to an entitlement

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[2] The presumption against bail in s 8A of the *Bail Act 1978* previously applied only to:

(a) the following offences under the *Drug Misuse and Trafficking Act 1985*:

(i) an offence under s 23 (2), 24 (2) or 25 (2) of that Act,

(ii) an offence under s 26 of that Act of conspiring to commit an offence referred to in subparagraph (i);

(iii) an offence under s 27 of that Act of aiding, abetting, counselling, procuring, soliciting or inciting the commission of an offence referred to in subparagraph (i);

(iv) an offence under s 28 of that Act of conspiring to commit, or of aiding, abetting, counselling or procuring the commission of, an offence under the provisions of a law in force outside New South Wales which corresponds to s 23 (2), 24 (2) or 25 (2) of that Act; and

(b) an offence under s 231 (1), 233A or 233B of the *Customs Act 1901* of the Commonwealth, or an offence under Division 11 of Part 2.4 of the *Criminal Code* of the Commonwealth where that offence relates to s 233B of the *Customs Act 1901*, but only if the goods concerned are alleged to be of a nature and quantity required for an offence referred to in paragraph (a).

[3] Division 101 consists of the following offences: Terrorist Acts; Providing or receiving training connected with terrorist acts; Possessing things connected with terrorist acts; Collecting or making documents likely to facilitate terrorist acts; Other things done in preparation for, or planning, terrorist acts.

[4] Division 102 consists of various offences relating to terrorist organisations.

[5] Division 103 is the offence of financing terrorism.

[6] *Bail Act 1978*, s 4(1).

that the person may be at liberty, subject to agreeing to attend at court on a specified day to answer the charge.

11. This is not an absolute right. Quite apart from the specific exemptions contained in s 8A – and also in s 9A, 9B, 9C and 9D of the Bail Act – s 32 of the Bail Act contains an exhaustive list of matters which are to be considered by a court or authorised officer when deciding whether or not to grant bail.

These include matters such as the protection of any person against whom it is alleged that the offence concerned was committed, and the protection and welfare of the community.[7]

12. The Committee notes the importance of the bail process in the criminal justice system to the right of an accused to be presumed innocent until proven guilty.

13. The Committee notes that the relevant provisions of the *Criminal Code 1995* of the Commonwealth aim to provide a response to the threat to public safety from terrorist organisations.

14. The Committee also notes that the Bill provides for a presumption *against* bail, rather than a refusal of bail.

15. The Committee also notes that the presumption is rebuttable, and the officer or court will have regard to s 32 of the Bail Act in making a determination.

16. The Committee considers that, having regard to the aims of the Bill, the type of offences to which it relates, and the existing public safety criteria in granting bail applications, the presumption against bail is not an undue trespass on personal rights and liberties of an accused person.

Retrospectivity: Sch 1 [3]

17. As noted above, the Act extends the operation of the amendments to offences *committed before the amendments commenced*, whether or not the person was charged before that commencement.

18. This retrospectivity extends to a review of any prior bail decision.

19. The Committee will always be concerned with retrospective application of laws.

20. However, given that the retrospective provision of the Bill only changes the presumption regarding bail, the aims of the Bill, and the application of s 32 of the Bail Act itself, the Committee does not consider that the retrospective operation of the Bill unduly trespasses on personal rights and liberties.

The Committee makes no further comment on this Bill.

[7] *Bail Act 1978*, s 32(1)(b1)(i) and s 32(1)(c). For the purposes of s 32, the authorised officer or court may take into account any evidence or information which the officer or court considers credible or trustworthy in the circumstances and, in that regard, is not bound by the principles or rules of law governing the admission of evidence: s 32(3) of the *Bail Act 1978*.

2. CHILD PROTECTION (OFFENDERS PROHIBITION ORDERS) BILL 2004

Date Introduced:	3 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Watkins MP
Portfolio:	Police

Purpose and Description

1. The Bill's objects are:

- to provide for child protection prohibition orders (prohibiting certain conduct) to be made against certain offenders who pose a risk to the lives or sexual safety of children;
- to provide for the enforcement of such orders; and
- to enact other consequential provisions, including amendments to other legislation, namely:-
  - the *Child Protection (Offenders Registration) Act 2000*;
  - the *Commission for Children and Young People Act 1998;*
  - the *Evidence (Children) Act 1997;* and
  - the *Local Courts Act 1982* [Sch 1].

Background

2. According to the second reading speech:

> [p]reparation of the bill has been a collaborative effort between the Attorney General and Police portfolios, and will be jointly administered by the Minister for Police and the Attorney. The bill will enable police to apply to the Local Court to prohibit a "registrable person", under the Child Protection (Offenders Registration) Act 2000, from engaging in specific behaviour when, on the balance of probabilities, there is a reasonable cause to believe that the person poses a risk to the sexual safety or the life of a child, or to children generally.[8]

The Bill

3. The Bill enables the Commissioner of Police [the Commissioner] to apply to a Local Court for a child protection prohibition order [CPPO] prohibiting a registrable person from engaging in specified conduct [cl 4]:

> If police have reason to believe, based on their intelligence about a registrable person and their knowledge of that person's previous offending behaviour, that the person may be engaging in conduct that is likely to pose a risk to a child or children

[8] Hon J A Watkins MP, Minister for Police, *Legislative Assembly Hansard*, 3 June 2004.

generally, they will be able to apply to the Local Court for a order prohibiting that person from specific kinds of behaviour.[9]

4. In doing so, the Commissioner may, by notice in writing served on a government agency, direct that agency to provide to the Commissioner any information that is relevant to the assessment of the risk posed by a registrable person to the lives or sexual safety of one or more children, or children generally [cl 16(1)].

5. A government agency is required to provide information so requested to the Commissioner of Police [cl 16(2)].

6. Under the *Child Protection (Offenders Registration) Act 2000* [the 2000 Act][10], a ***registrable person*** is a person whom a court has at any time found guilty and sentenced in respect of a *registrable offence*, but ***does not*** include:

   (a) a person in respect of whom a court has made an order under s 10 of the *Crimes (Sentencing Procedure) Act 1999*[11] or s 33(1)(a) of the *Children (Criminal Proceedings) Act* 1987[12] in respect of the offence;

   (b) a person on whom a sentence has been imposed in respect of a single Class 2 offence,[13] where the sentence did not include:

      (i) a term of imprisonment, including a term of imprisonment the subject of a periodic detention order or home detention order;

      (ii) a community service order; or

      (iii) a bond under which the person was required to submit to strict supervision;

      where a reference to a single offence includes a reference to more than one offence of the same kind arising from the same incident; or

   (c) a person whose conviction or finding of guilt has been quashed or set aside by a court;

   (d) a child who has been found guilty of:

      (i) a single offence involving an act of indecency; or

      (ii) a single offence under s 578B or 578C (2A) of the *Crimes Act 1900*,

      where a reference to a single offence includes a reference to more than one offence of the same kind arising from the same incident; or

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[9] Hon J A Watkins MP, Minister for Police, *Legislative Assembly Hansard*, 3 June 2004.

[10] The *Child Protection (Offenders Registration) Act 2000* was introduced as a result of recommendations from the Wood Royal Commission in 1997.

[11] Section 10 of the *Crimes (Sentencing Procedure) Act 1999* provides for the dismissal of charges and conditional discharge of offender without proceeding to conviction.

[12] Section 33(1)(a) of the *Children (Criminal Proceedings) Act 1987* provides that if the Children's Court finds a young person guilty of an offence it may make an order dismissing the charge, or it may make an order dismissing the charge and administer a caution to the person.

[13] A ***class 2 offence*** generally includes offences that involves acts of indecency with a child but does not include offences of the most serious nature, such as murdering or having sexual intercourse with a child [s 3 Child Protection (Offenders Registration) Act 2000].

(e) a person whom a court has found guilty of a registrable offence before the commencement of s 3 of the 2000 Act unless the person is an existing controlled person;[14]

whether under the laws of New South Wales or (in whatever terms expressed) under the laws of a foreign jurisdiction [s 3 of the 2000 Act].[15]

7. A ***registrable offence*** is defined extensively in s 3 of the 2000 Act, but can be summarised as a serious offence of a violent or sexual nature relating to a child.

Examples of registrable offences include murder of a child, sexual intercourse with a child, an act of indecency against a child, kidnapping a child, promoting or engaging in act of child prostitution and filming a child for indecent purposes.

8. The Bill also amends the 2000 Act to apply the reporting obligations under that Act to persons subject to a CPPO.

Any existing reporting obligations under the 2000 Act recommence or continue to apply to the registrable person for the term of a CPPO, despite any other provision of the 2000 Act [proposed s 20A of the 2000 Act].

9. A court may make a CPPO prohibiting a person from engaging in conduct specified in the order if it is satisfied that the person is a registrable person and that, on the *balance of probabilities*:

(a) there is reasonable cause to believe, having regard to the nature and pattern of conduct of the person, that the person poses a risk to the lives or sexual safety of one or more children, or children generally; and

(b) the making of the order will reduce that risk [cl 5(1)].[16]

10. Under the Bill, a person poses a *risk to the lives or sexual safety of one or more children or children generally* if there is a risk that the person will engage in conduct that may constitute a registrable offence against or in respect of a child or children [cl 3].

11. In deciding whether there is a risk, the court is to have regard to:

- the seriousness of each offence with respect to which the person is a registrable person;
- the period of time since those offences were committed;

[14] An existing controlled person is defined extensively in s 3 of the *Child Protection (Offenders Registration) Act 2000*, but may be summarised as a person who prior to the commencement of that Act had been convicted of an offence, which by operation of the 2000 Act became a registrable offence.

[15] In the second reading speech, the Minister noted that, as at the end of May 2004, a total of 1,500 offenders had been placed on the register, of whom 971 are currently in the community and 56 are absent from New South Wales: Hon J A Watkins MP, Minister for Police, *Legislative Assembly Hansard*, 3 June 2004.

[16] A court that makes a prohibition order must ensure that all reasonable steps are taken to explain to the registrable person (in language that the registrable person can readily understand): (a) the person's obligations under the order; and (b) the consequences that may follow if the person fails to comply with those obligations. However, an order is not invalidated by a failure to comply with this proposed section: cl 9 of the *Child Protection (Offenders Prohibition Orders) Bill 2004*.

- the age of the person when those offences were committed;
- the age of each victim of the offences when they were committed;
- the difference in age between the person and each such victim;
- the person's present age;
- the seriousness of the person's total criminal record;
- the effect of the order sought on the person in comparison with the level of the risk that a further registrable offence may be committed by the person;
- the extent that they relate to the conduct sought to be prohibited, the circumstances of the person, including the person's accommodation, employment needs and integration into the community;
- in the case of a young registrable person, the educational needs of the person;[17] and
- any other matters it thinks relevant [cl 5(3)].[18]

12. In assessing the risk under cl 5, the court *need not be satisfied* that the person is likely to pose a risk to a particular child or children or a particular class of children [cl 5(4)].

13. Also, the Commissioner of Police may not delegate the function of making an application for a prohibition order against a young registrable person, or to vary or revoke any such prohibition order, to a person other than a member of NSW Police of the rank of inspector or above having responsibility for child protection matters [cl 17]

14. Proceedings relating to prohibition orders must be heard in the absence of the public, unless the court hearing the proceedings considers it appropriate that persons who are *not* parties to the proceedings, or their representatives, be present during the hearing of the proceedings [cl 14].[19]

Prohibition Orders

15. A prohibition order may prohibit conduct of the following kind:

- associating with, or other contact with, specified persons or kinds of persons;

[17] A court may make an order under cl 5 against a young registrable person only if, in addition to the matters set out in cl 5(1), it is satisfied that all other reasonably appropriate means of managing the conduct of the person have been considered before the order was sought: cl 5(2) of the *Child Protection (Offenders Prohibition Orders) Bill 2004*.

[18] If a registrable person against whom an order is sought is already subject to a prohibition order and no application has been made to revoke the existing order, the Local Court must, if it decides to make the order:
(a) revoke the existing order and replace it with a new order (which may contain matters relating to the existing order); or
(b) vary the existing order to include the matters with respect to which it has decided to make the order [s 5(5) of the *Child Protection (Offenders Prohibition Orders) Bill 2004*].

[19] This is consistent with Article 14(1) of the *International Convention of Civil and Political Rights* which provides that the press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

- being in specified locations or kinds of locations;
- engaging in specified behaviour; and
- being in specified employment or employment of a specified kind [cl 8(1)].[20]

16. The Committee notes that a registrable person is already specifically subject to the employment restrictions set out in the *Child Protection (Prohibited Employment) Act 1998*, pursuant to s 5 of that Act.

17. Clause 5(1) does not *limit* the kinds of conduct that may be prohibited by a prohibition order.

18. The court must specify the *term* of a prohibition order (other than an interim prohibition order – see below) being a term of not more than 5 years or, in the case of a young registrable person, not more than 2 years, after it is made [cl 6].

19. The Bill provides that Regulations may be made for or with respect to the recognition of orders made by a court of a jurisdiction other than New South Wales - including jurisdictions outside Australia – which are similar in nature to prohibition orders. These are known as *corresponding prohibition orders* [cl 19].

Interim prohibition orders

20. A court may make an interim child protection prohibition order [IPO] prohibiting a registrable person from engaging in specified conduct, if it appears to the court that it is necessary to do so to prevent an immediate risk to the lives or sexual safety of one or more children, or children generally [cl 7(1)].[21]

21. An IPO may be made by a court *whether or not*:

- the registrable person is present at the proceedings; or
- the registrable person has been given notice of the proceedings.

22. If an IPO is made by a court, the court must issue a court attendance notice requiring the registrable person to attend the court for a further hearing of the matter as soon as practicable after the IPO is made, at which time the court may confirm the prohibition order (with or without variation), or revoke it [cl 7(4) & (5)].

Consent orders

23. A court may make an order - other than an IPO - without being satisfied as to the matters referred to in cl 5 (above), if the applicant and the registrable person consent to the making of the order [cl 10(1)].

[20] See also Sch 1 1.2 to the *Child Protection (Offenders Prohibition Orders) Bill 2004* - amendments to the *Commission for Children and Young People Act 1998*.

[21] The Court is not required to be satisfied that the person is likely to pose a risk to a particular child or children or a particular class of children: cl 7(3) of the *Child Protection (Offenders Prohibition Orders) Bill 2004*.

24. The court may make an IPO, without being satisfied as to the matters referred to in cl 7 (above), if the applicant and the registrable person consent to the making of the order [cl 10(2)].

    The court[22] is not required to conduct a hearing before making a consent order, unless it is of the opinion that it is in the interests of justice to conduct the hearing.

25. In determining whether it is in the interests of justice to conduct such a hearing, the court may have regard to:

    (a) whether the registrable person has obtained legal advice in relation to the order concerned; and

    (b) whether the person:

        (i) has impaired intellectual functioning;

        (ii) is subject to a guardianship order (within the meaning of the *Guardianship Act 1987*);

        (iii) is illiterate, or is not literate in the English language; or

        (iv) is subject to some other condition that may prevent the person from understanding the effect of giving consent to the order [cl 10(4)].

Variation or revocation of orders

26. The Bill enables both the Commissioner of Police and the registrable person (by leave only) to apply to the court for the variation or revocation of a prohibition order [cl 11(1)]. It also enables the court to vary or revoke a prohibition order if an application is made [cl 11(4)].

Contravention of orders

27. A person who is subject to a prohibition order must not, without reasonable excuse, contravene the prohibition order.

    The maximum penalty is $11,000, imprisonment for 2 years, or both [cl 13(1)].

28. A police officer may, without a warrant, arrest a person if the police officer suspects on reasonable grounds that the person has committed an offence under cl 13, and must then, as soon as is reasonably practicable, take the person before an authorised person[23] to be dealt with according to law [cl 13(2) & (3)].

Restriction on publication

29. A person must not publish in relation to any proceedings relating to an order under this Act:

[22] The registrar of a Local Court may *not* exercise the functions of a Local Court in respect of making consent orders under proposed s 10: cl 10(5) of the *Child Protection (Offenders Prohibition Orders) Bill 2004*.

[23] The *Criminal Procedure Act 1986* defines ***authorised person*** as any of the following: (a) a Judge; (b) a justice of the peace who is a registrar of a Local Court or the Drug Court; or (c) a justice of the peace who is an employee of the Attorney General's Department authorised in writing by the Attorney General to be an authorised person for the purposes of this section.

(a) information that identifies or is reasonably likely to enable the identification of a person as the person against whom the order is sought or any such order is made;

(b) the name of any victim of a registrable offence committed by a registrable person;

(c) the name of any particular person referred to as a person at risk because of the conduct proposed to be prohibited; or

(d) any matter reasonably likely to enable a person referred to in paragraph (b) or (c) to be identified.

The maximum penalty is $11,000 or imprisonment for 2 years, or both [cl 18(1)].

This prohibition does not apply in relation to the publication of any matter with the authority of the Court to which the application was made or any publication by a person of his or her name [cl 18(2)].

30. The prohibition does not apply in relation to the publication of any matter *to* any of the following persons:

- the registrable person;
- any other person or class of persons specified in the order concerned;
- any member of NSW Police or a member of a law enforcement agency of the Commonwealth or another State or Territory (including CrimTrac) in their official capacity;
- any person involved in the administration of the order;
- any member of staff of a government agency involved in the assessment and management of a registrable person;
- any person for the purpose of an investigation of an alleged breach of an order or to any person involved in proceedings for any such breach; or
- any other person to whom it is required or permitted to be disclosed pursuant to any other Act or law [cl 18(3)].

31. The Minister must report to Parliament on a review of the Act within six years from the date of assent to the Bill [cl 24].

Issues Considered by the Committee

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

Making of a child protection prohibition order: Clause 5(1)

32. As noted above, on the application of the Commissioner of Police, a court may make a CPPO which prohibits a person from engaging in conduct specified in the order if it is satisfied that the person is a registrable person and that, on the *balance of probabilities*:

(a) there is reasonable cause to believe, having regard to the nature and pattern of conduct of the person, that the person poses a risk to the lives or sexual safety of one or more children, or children generally; and

(b) the making of the order will reduce that risk [cl 5(1)].

33. Under the Bill, a person poses a *risk to the lives or sexual safety of one or more children or children generally* if there is a risk that the person will engage in conduct that may constitute a registrable offence against or in respect of a child or children [cl 3].

34. The Bill does not limit the ambit of a prohibition order, but notes that it may make reference to prohibiting:

- associating with, or other contact with, specified persons or kinds of persons;
- being in specified locations or kinds of locations;
- engaging in specified behaviour; and
- being in specified employment or employment of a specified kind [cl 8(1)].

"Penalty" without crime

35. By prohibiting a registrable person from undertaking certain conduct that is normally lawful, a CCPO deprives the registrable person of rights and liberties enjoyed by the general population.

36. This differs significantly from the usual regulation of behaviour by the State in a liberal democracy as it deprives a particular individual of certain rights and liberties on the basis of an assessment of risk of harm that that individual may perpetrate.

37. This deprivation of rights and liberties is also not in the form of punishment for a crime of which they have been convicted. Those subject to a CCPO may have completed their sentences. Any further punishment for offences for which they have already been sentenced would be a serious trespass on their fundamental rights.

38. While the intention behind a CCPO is not to punish the registrable person, a CCPO has the effect of penalising the person as it deprives the person of certain rights and liberties that are enjoyed by the rest of the community.

39. While the State depriving a specific individual of his or her rights apart from any allegation or criminal conduct is unusual, it is not novel.[24] The *Mental Health Act 1990* allows significant deprivation of rights and liberties of mentally ill and mentally disordered persons on the basis of an assessment of the risk of harm they pose to themselves or others. Also, the *Child Protection (Offenders Registration)* and *Child*

[24] See, eg, R Merkel (now Justice Merkel of the Federal Court), "Dangerous persons: to be gaoled for what they are, or for what they may do, Not for what they have done", *Serious violent offenders: sentencing, psychiatry and law reform*, Australian Institute of Criminology, www.aic.government.au/publications/proceedings/19/merkel.html

Protection (Prohibited Employment) Acts trespass on the rights and liberties of registrable persons and serious sex offenders after their sentences have been served.[25]

Trespass on rights and liberties

40. On one view, the making of a CPPO may be regarded as trespassing on the rights and liberties of the person subject to the order.

These rights and liberties must however, be weighed against the risk to children — who also have rights and liberties.

41. Before a CPPO may be made, a court must be satisfied of the matters set out in proposed s 5(1)(a) and (b) , namely, that:

(a) there is reasonable cause to believe, having regard to the nature and pattern of conduct of the person, that the person poses a risk to the lives or sexual safety of one or more children, or children generally; and

(b) the making of the order will reduce that risk.

A magistrate must be satisfied that there is *reasonable cause* for making the CPPO, and that the CPPO will actually reduce the risk.

42. The *onus of proof* remains on the Commissioner on the balance of probabilities.

The "balance of probabilities" is the standard of proof applicable to civil cases brought before the courts. It is also the standard of proof applied by magistrates in applications for apprehended violence orders under Part 15A of the *Crimes Act 1900*.

43. In deciding whether to make an order the court *must* have regard to all of the matters listed in proposed s 5(3), including:

(h) the effect of the order sought on the person in comparison with the level of the risk that a further registrable offence may be committed by the person.

Proposed s 5(3)(k) also provides the court with a discretion to take into account "any matters it thinks relevant."

44. A person against whom a protection prohibition order is made can appeal to District Court against the making of such an order [s 64 of the *Local Courts Act 1982*].

45. The proposed legislation provides restrictions as to the publication of information that identifies the person against whom an order is sought or made [cl 18].

[25] Apprehended Domestic Violence Orders and Apprehended Personal Violence Orders also allow the court to restrict a person's rights and liberties. However, while this limitation on rights does not directly arise from illegal conduct, the requirement that the person seeking an order must have reasonable grounds for fear of violence, harassment, intimidation or stalking in practical terms usually requires the subject of the order to have engaged in illegal conduct.

46. Having regard to the object of the Bill, the matters of which a magistrate must be satisfied before making an order, the onus of proof, appeal rights and restrictions on publication, the Committee is of the opinion that the Bill does not unduly trespass on personal rights and liberties.

Issue: Clause 7 Interim prohibition orders

47. As noted above, when a court considers that it is necessary to prevent an immediate risk to the lives or sexual safety of one or more children, or children generally,[26] it may make an IPO, *whether or not* the registrable person:

(a) is present at the proceedings; or

(b) has been given notice of the proceedings.

48. It is central to natural justice that a person be given a fair hearing when his or her rights are being affected by a proceeding. At the same time, it is acknowledged that it may not always be practicable to provide a person with notice of a proceeding in matters of great urgency.

49. The Committee notes that, if a court makes an IPO, the court must issue a court attendance notice requiring the registrable person to attend the court for a further hearing of the matter as soon as practicable after the IPO is made.

50. The Committee notes that making an interim protection order without the person the subject of the order being given notice of the proceedings trespasses upon the person's right to be heard in proceedings affecting them.

51. The Committee notes that the aim of an interim protection order is to prevent an immediate risk to the lives or sexual safety of one or more children, or children generally.

52. Given that the Court must arrange a further hearing of the matter as soon as practicable after an IPO is made in the absence of the registrable person, the Committee does not consider that this provision trespasses unduly on personal rights and liberties.

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

Commencement by proclamation: Clause 2

53. The Bill is to commence on a day or days to be appointed by proclamation.

54. The Committee notes that providing for an Act to 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, or parts of the Act, at all.

While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

[26] The court is, nonetheless, not required to be satisfied that the person is likely to pose a risk to a particular child or children or a particular class of children: cl 7(3) of the *Child Protection (Offenders Prohibition Orders) Bill 2004*.

55. The Committee has written to the Minister's office seeking his advice as to why the Act is to commence on proclamation.

The Committee makes no further comment on this Bill.

3. COMMERCIAL AGENTS AND PRIVATE INQUIRY AGENTS BILL 2004

Date Introduced:	3 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Watkins MP
Portfolio:	Police

Purpose and Description

1. The Bill amends the *Police Act 1990*:
   (a) to protect the public in relation to commercial agent and private inquiry agent activities (that is, process serving, debt collection, repossession of goods, surveillance of persons and investigation of persons);
   (b) to provide for the licensing of persons who engage in commercial agent and private inquiry agent activities[27];
   (c) to establish standards to be observed by licensees in relation to commercial agent and private inquiry agent activities; and
   (d) to ensure that licensees are accountable for their acts and omissions in relation to commercial agent and private inquiry agent activities.
2. The Bill also repeals the *Commercial Agents and Private Inquiry Agents Act 1963*.

Background

3. In his second reading speech, the Minister said:

> This Bill is based on the National Competition Policy Review Final Report into the *Commercial Agents and Private Inquiry Agents Act 1963*, which was released in November 2003. The report made significant recommendations, many of which have been included in this bill. ...
>
> The *Commercial Agents and Private Inquiry Agents Act 1963* commenced operation on 1 July 1963. The Act establishes the regulatory framework for commercial agents and private inquiry agents. Prior to 1963 only private inquiry agents were subject to a licensing regime. In 1985 the *Commercial Agents and Private Inquiry Agents Act 1963* was amended to remove security agents from the definition of "private inquiry agent" and place them under separate legislation. This legislation has remained substantially unchanged since 1985.
>
> Licences for commercial and private inquiry agents have previously been issued by the Local Court after consulting with police. This will no longer be the case. Police will now administer the licensing of commercial and private inquiry agents. In New South Wales approximately 3,000 licences are issued to agents and subagents.[28]

[27] "*Commercial agent activity*" is defined in clause 4 as debt collection, process serving or repossession of goods. "*Private inquiry activity*" is defined in clause 4 as investigation of persons or surveillance of persons.

[28] The Hon John Watkins MP, Minister for Police, Legislative Assembly Hansard, 3 June 2004.

The Bill

Commencement

4. The Bill commences on a day or days to be appointed by proclamation, except for Schedule 3.1 and 3.3 which are to commence on the commencement of Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

Licensing

5. The Bill provides for master and operator licences and makes it an offence to carry on or carry out business in relation to commercial agent activities or private inquiry agent activities without the appropriate licence (see below).

Master licenses of persons for commercial and private inquiry activities

6. It is an offence to carry on business in relation to commercial agent activities or private inquiry agent activities without a *master licence* [cl 5].

   Maximum penalty: 1,000 penalty units (currently $110,000) (in case of a corporation) or 500 penalty units (currently $55,000) or 12 months imprisonment, or both (in case of an individual).

7. The Commissioner of Police (the Commissioner) may grant master licences for process serving, debt collection, repossession of goods, surveillance of persons, and investigations of persons [cl 6].

8. A master licence is valid for 5 years [cl 7].

9. A master licence *must* be refused if the applicant is a disqualified individual or corporation. "Disqualified individual" and "disqualified corporation" are defined in clause 4.

   A **disqualified individual** means an individual who:

   (a) does not have the qualifications, training or experience required by the regulations with respect to the activities to which the individual's licence or application for a licence relates;

   (b) not being an Australian citizen, is prohibited from engaging in employment to carry out commercial agent activities or private inquiry agent activities;

   (c) in the opinion of the Commissioner, is not a fit and proper person to hold a licence;

   (d) has been convicted or found guilty of a major offence;[29] or

[29] A "major offence" is defined in clause 4 as:
   (a) an offence involving violence, fraud, dishonesty or theft, being an offence punishable by imprisonment;
   (b) an offence involving the unlawful possession or use of a firearm or other weapon;
   (c) an offence involving the unlawful possession or use of a drug;
   (d) an offence under Part 2 of the *Listening Devices Act 1984*, or under corresponding provisions of the law of the Commonwealth or of another State or Territory;
   (e) an offence under the *Telecommunications (Interception) Act 1979* of the Commonwealth; or

(e) in relation to a master licence or an application for a master licence:

(i) does not comply with the requirements of the regulations with respect to membership of an approved industry association with respect to the activities to which such a licence relates; or

(ii) is an undischarged bankrupt, or the subject of a deed of arrangement, under the *Bankruptcy Act 1966* of the Commonwealth; or

(f) is a director of a disqualified corporation or is concerned in the management of a disqualified corporation.

A **disqualified corporation** means a corporation:

(a) that has been convicted or found guilty of a major offence, or

(b) that has a disqualified individual as one of its directors or one of the persons concerned in its management. [30]

10. In addition, a master licence *may* be refused if the applicant has been convicted of a minor offence[31] or if the Commissioner is of the opinion that the grant of the licence would be contrary to the public interest [cl 7(2)].

11. Under clause 10, the Commissioner *must* cancel a licence if the licensee becomes a disqualified individual or corporation.

The Commissioner *may* cancel a licence if the licensee:

- contravenes a condition of the licence; or
- is convicted or found guilty of a minor offence.

The Commissioner may also suspend a master licence for up to 35 days while considering whether to take action to cancel it [cl 10(4)].

Operator licences

12. The Bill provides that it is an offence to carry out any commercial agent activity or private inquiry activity unless licensed to do so under an operator licence or in the course of employment with the holder of a master licence [cl 11].

The maximum penalty is 500 penalty units (currently $55,000) or 12 months imprisonment, or both.

13. The Commissioner of Police may grant operator licences for process serving, debt collection, repossession of goods, surveillance of persons, and investigations of persons [cl 12].

(f) any other offence declared by the regulations to be a major offence for the purposes of this Act.

[30] Clause 4.

[31] A "minor offence" is defined in clause 4 as:
(a) an offence under section 55 of the *Fair Trading Act 1987*, or under a corresponding provision of a law of the Commonwealth or another State or Territory;
(b) an offence under this Act or the regulations; or
(c) any other offence declared by the regulations to be a minor offence for the purposes of this Act.

14. An operator licence is valid for 1 or 5 years [cl 14].

15. An operator licence *must* be refused if the applicant is a disqualified individual.

    The Commissioner *may* refuse to grant an operator licence if the applicant has been convicted of a minor offence or if the Commissioner is of the opinion that the grant of the licence would be contrary to the public interest [cl 13(2)].

16. Clause 16 provides that a person's first operator licence is a probationary licence, in effect for 1 year.

17. The Commissioner *must* cancel an operator licence of the licensee becomes a disqualified individual or corporation.

    The Commissioner *may* cancel an operator licence if the licensee:

    - contravenes a condition of the licence; or
    - is convicted or found guilty of a minor offence.

    The Commissioner may also suspend a master licence for up to 35 days while considering whether to take action to cancel it [cl 10(4)].

Review by the Administrative Decisions Tribunal

18. A licensee may apply to the Tribunal for review of a decision of the Commissioner to cancel, suspend or refuse to grant licence [cl 20].

Register of licensees

19. The Commissioner must establish and maintain a *Register of Licensees* and must ensure that it is made available to the public on payment of such fee as the regulations may prescribe [cl 21].

General Offences

20. A holder of a master licence must not employ a person to carry out any commercial agent or private inquiry activity unless the person holds an operator licence for that activity.
    Maximum penalty 200 penalty units (currently $22,000).

    In addition, a master licence holder must not employ a disqualified person in any capacity.
    Maximum penalty 200 penalty units (currently $22,000).

    It is a defence to these offences if the defendant establishes that they used all due diligence to ensure that the employee concerned was not an unlicensed or disqualified person [cl 24].

21. It is also an offence for a licensee to do certain things that amount to harassment, such as visit any premises or communicate with the occupant of any premises with unreasonable frequency or at unreasonable times [cl 25(1)(c)].

The penalty for this offence is a maximum of 200 penalty units (currently $22,000) in the case of a corporation, and 100 penalty units ((currently $11,000) or 6 months imprisonment or both, for an individual.

22. Other offences include failing to produce a licence for inspection [cl 26] and obstructing authorised inspectors [cl 27].

23. It is also an offence to fail to give the Commissioner such information or documents relating to the licensee's activities under their licence as the Commissioner may request [cl 30].

A licensee is *not excused* from giving the information or documents requested on the ground that to do so might incriminate the licensee.

However, any information or document so provided is not admissible in evidence against the licensee in any criminal proceedings other than proceedings relating to the giving of false information under Division 3 of Part 5 of the *Crimes Act 1900*.

Authorised inspectors

24. The Commissioner may appoint authorised inspectors from classes of persons prescribed by regulation [cl 35].

25. Among other things, authorised inspectors are empowered to enter any premises from which business is carried out under a master licence, other than any part of premises used for residential purposes [cl 31].

Exemptions from licensing

26. Schedule 1 lists persons that are not required to be licensed, including police officers, officers or employees of the Public Service of NSW, the Commonwealth or any other State or Territory, legal practitioners and their clerks and any registered insurance company and persons carrying on the business of an insurance loss adjuster on the company's behalf.

Debt collectors

27. Proposed subsection 19(1) provides that a holder of a debt collection licence *must not* request, demand or collect from a debtor any payment for the costs or expenses incurred by the licensee in connection with the collection from that person of money due under a debt.
Maximum penalty: 100 penalty units (currently $11,000).

In addition, any money received from the debtor by a licensee in contravention of proposed subsection 19(1) may be recovered by the debtor from the licensee, as a debt, in any court of competent jurisdiction.

This provision does not limit any right that the creditor may have at law with respect to the recovery from the debtor of the creditor's costs in recovering the debt.

Trust accounts, records and receivership in relation to debt collection

28. Schedule 2 applies to any person who is the holder of a master licence for debt collection and any money held by the holder of such a licence. The proposed Schedule is in 3 Parts.

    Part 1 contains provisions with respect to *trust accounts*, modelled on Part 7 of the *Property, Stock and Business Agents Act 2002*.

    This Part provides, among other things, that any money received for or on behalf of a person by a licensee is to be held by the licensee exclusively for that person and is to be paid or disbursed as the person directs [schedule 2[2]].

    Part 2 contains provisions with respect to *record keeping*, modelled on Part 8 of the *Property, Stock and Business Agents Act 2002*.

    This Part provides, among other things, that licensees must make records containing full particulars of all transactions by or with the licensee. These records must be kept for at least 3 years.

    Part 3 contains provisions with respect to the *appointment and functions of receivers*, modelled on Part 9 of the *Property, Stock and Business Agents Act 2002*.

Issues Considered by the Committee

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

Issue: Clause 30 – Self Incrimination

29. Under clause 30, the Commissioner can require a licensee to furnish such information and to produce such documents as the licensee possesses in connection with their activities under the licence.

    The Commissioner must do so by notice in writing and specify a time frame for compliance. Failure to comply attracts a maximum penalty of 100 penalty units (currently $11,000) [cl 30(2)].

30. Subclause 30(3) states that a licensee is not excused from giving the information or documents requested on the ground that to do so might incriminate the licensee.

    However, any information or document so provided is *not* admissible in evidence against the licensee in any criminal proceedings *other than* proceedings relating to the giving of false information under Division 3 of Part 5 of the *Crimes Act 1900*.

31. Division 3, Part 5 of the *Crimes Act* involves offences of dishonesty, namely making false or misleading applications (s 307A), giving false or misleading information (s 307B) or producing false or misleading documents (s 307C). The maximum penalty for each offence is 2 years imprisonment, 200 penalty units (currently $22,000) or both.

Each offence requires knowledge on the part of the accused that the application, statement or document (as the case may be) is false or misleading in a material way.

Certain statutory defences are available to the accused, as well as certain common law defences, such as reasonable or honest mistake of fact.

32. It is clear that the *only criminal proceedings* for which a licensee can be liable as a result of providing the information or documents sought by the Commissioner under that clause are proceedings for the offences set out in sections 307A, 307B and 307C of the Crimes Act.

33. On one view, clause 30(3) removes the privilege against self-incrimination for offences against Part 5 Division 3 of the Crimes Act. The Committee has previously noted the significant importance the privilege against self-incrimination has within our legal system, and under international human rights law.[32]

This view only has merit if clause 30(3) is read as applying to *any* false or misleading information or documents, which have knowingly been made or produced by the licensee at *any* time and to *any* person and not necessarily under clause 30.

34. A second, more compelling view is that, reading the Act as a whole, and taking its objects into account, the purpose of the clause is to ensure that licensees do not provide false and misleading information, statements or documents to the Commissioner in relation to their activities under the licence. This reasoning is as follows:

- The combined effect of clauses 30(2) and 30(3) is to encourage licensees to provide information or documents openly and honestly. Clearly, it is appropriate that the provision of false information or documentation should be subject to relevant criminal sanctions.

  There is no basis for allowing the provision of false information to be privileged.

- The information or documents requested by the Commissioner is limited to that which "the licensee possesses in connection with the licensee's activities under the license".

  In short, there must be a connection between the licensee's business and the information before the licensee is required to comply with the Commissioner's request.

- The objects of the Bill include the protection of the public, the establishment of standards to be observed by licensees and ensuring that licensees are accountable.

- The Bill also establishes a licensing regime, which excludes those convicted of major offences (including those under Div 3, Part 5 of the Crimes Act).

  On this view, the exception to the privilege against self-incrimination under Division 3 of Part 5 of the *Crimes Act* is to protect the public from dishonest

[32] Most recently, Legislation Review Committee, Legislation Review Digest No. 8 of 2004, Report on *Mine Health and Safety Act 2004*, at 27-29.

licensees and unscrupulous practices and so is justified as being in the public interest.

35. The Committee notes that the proposed clause 30 contains no privilege against civil proceedings that might arise from compliance with the Commissioner's requirements.

36. The Committee refers to Parliament the question whether the removal of the self-incrimination in clause 30 of the Bill unduly trespassed on personal rights.

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

Issue: Clause 2 – Commencement by proclamation

37. The Bill is to commence on a day or days to be appointed by proclamation, except for Schedule 3.1 and 3.3 which are to commence on the commencement of Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

38. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act, or part of the Act, on whatever day it choses, or not to commence the Act at all.

39. The Committee also notes that the *Law Enforcement (Powers and Responsibilities) Act 2002*[33] has yet to be proclaimed.

40. The Committee has written to the Minister for advice as to the reasons for commencing the Bill (except for schedules 3.1 and 3.3) on proclamation and the likely timeframe within which it is expected the Bill will commence.

41. The Committee has also sought the Minister's advice as to the likely commencement date of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

The Committee makes no further comment on this Bill.

[33] This Act consolidates and restates the law relating to police and other law enforcement officers' powers and responsibilities and sets out the safeguards applicable in respect of persons being investigated for offences.

4. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT BILL 2004

Date Introduced:	4 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Hatsiztergos MLC
Portfolio:	Justice

Purpose and Description

1. The Bill amends the *Crimes (Administration of Sentences) Act 1999* [the Act] to provide for a more severe penalty to be imposed on a correctional centre inmate found with a mobile phone, and with respect to other matters, including:

- the types of samples that may be taken for the purpose of testing for the presence of prohibited drugs;
- the conduct of correctional center disciplinary proceedings;
- the revocation of periodic detention orders; and
- the extension of sentences.

Background

2. According to the second reading speech:

> On 21 April 2004 the Premier announced a range of measures to combat the threat of terrorism. Included in those measures was the proposal for new penalties for possessing a mobile phone in a correctional centre. This bill introduces the new penalties as outlined by the Premier. It is foreseeable that, over the course of time, the State's correctional centres may be required to accommodate a growing number of alleged terrorist inmates…A mobile phone that is smuggled into a correctional centre is a possible threat not only to those people in and associated with the correctional system but also to those in the broader community.[34]

The Bill

Drug testing

3. An offender sentenced to full-time imprisonment, periodic detention, home detention and community service can be tested to determine whether the offender has used alcohol or prohibited drugs.[35]

4. Currently, the Department of Corrective Services uses urine testing to check for prohibited drugs.

[34] Mr N J Newell, Parliamentary Secretary, *Legislative Assembly Hansard*, 4 June 2004.
[35] This is provided for in cl 148 and cl 149 of the *Crimes (Administration of Sentences) Regulation 2001*.

5. The Bill expands the Department's testing capabilities by inserting into s 3(1) of the Act a definition of "non-invasive sample".

Non-invasive sample is defined to mean any of the following samples of human biological material:

(a) a sample of breath, taken by breath test, breath analysis or otherwise;

(b) a sample of urine;

(c) a sample of faeces;

(d) a sample of saliva taken by buccal swab;

(e) a sample of nail;

(f) a sample of hair other than pubic hair;

(g) a sample of sweat taken by swab or washing from any external part of the body other than:

(i) the genital or anal area or the buttocks, or

(ii) the breasts of a female or a transgender person who identifies as a female [proposed amended s 3(1)]. [36]

Correctional centre offences

6. Under the Act, a ***correctional centre offence*** is any act or omission by an inmate which:

(a) occurs while the inmate is within a correctional centre or correctional complex or is taken to be in the custody of the governor of a correctional centre; and

(b) is declared by the regulations to be a correctional centre offence for the purposes of Part 2, Division 6 of the Act [s 51].

7. Correctional centre offences are currently divided into major[37] and minor[38] offences. The Bill removes this distinction.

Visiting magistrates

8. At present, the governor of a correctional centre must refer to a visiting magistrate a major offence, or a minor offence where the governor considers that due to its seriousness it should be so referred [s 54].

9. The Bill amends s 54 to make the referral to a visiting magistrate discretionary rather than mandatory.

10. In the second reading speech, the Parliamentary Secretary noted the following:

[36] Subsequent amendments replace references to a sample of a particular biological material throughout the *Crimes (Administration of Sentences) Act 1999* with the defined term "non-invasive sample".

[37] Major offences consist of conceal for purpose of escape; participate, or inciting other inmates to participate in, riot; possess drug; administer drug; and bribery: Sch 2 *Crimes (Administration of Sentences) Regulation 2001*.

[38] Minor offences are a wide range of offences, including supply false or misleading particulars; fail to surrender property on reception; fail to clean yards; enter other cells: Sch 2 *Crimes (Administration of Sentences) Regulation 2001*.

> The mandatory referral of all so-called major offences to a visiting magistrate cannot be justified. The circumstances surrounding a so-called major offence may not warrant the referral of the matter to a visiting magistrate, with all the associated costs and administrative requirements. In some cases the referral of a matter will be a poor use of limited resources. Further, in some cases the referral of a matter to a visiting magistrate may be inefficient in terms of inmate discipline. For instance, it generally takes longer for a correctional centre offence matter to be finalised through the visiting magistrate process than it does if the governor of a correctional centre hears the matter. Under the current system, it is possible that an inmate who is on remand or an inmate who is serving a short sentence may be released from custody prior to the finalisation of the visiting magistrate hearing process. An occurrence such as this is clearly not in the public interest.[39]

11. Currently, any hearing of charges by a Visiting Magistrate must be held in the correctional centre for which the Visiting Magistrate is appointed [s 55(5)].

12. The Bill amends s 55 to provide that, if the Visiting Magistrate is satisfied that it is in the interests of the administration of justice for it to be held elsewhere, the hearing may instead be held at any other place appointed by the Visiting Magistrate (an ***appointed place***) [new s 55(5)(b)].

13. If a Visiting Magistrate appoints an appointed place for the holding of any hearing in the proceedings, the Visiting Magistrate may direct any of the following:

    (a) that the inmate appears before the Visiting Magistrate by way of audiovisual link from the correctional centre at which he or she is in custody;

    (b) that any other inmate who gives evidence or makes a submission in the hearing does so by way of audiovisual link from the correctional centre at which that inmate is in custody; and

    (c) that any person other than an inmate who gives evidence or makes a submission does so by way of audiovisual link from any place within New South Wales nominated by the Visiting Magistrate [proposed s 55(5A)].[40]

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[39] Mr N J Newell MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 4 June 2004.

[40] (5B) The Visiting Magistrate must ***not*** make a direction referred to in subsection (5A) if:
(a) the necessary audio visual facilities are unavailable or cannot reasonably be made available, or
(b) the Visiting Magistrate is satisfied that the direction would be unfair to a party to the proceedings.
(5C) Facilities are to be made available for private communication between an inmate appearing by way of audio visual link under this section and the inmate's representative in the proceedings if the inmate's representative attends the hearing at the appointed place.
(5D) Any place at which a person appears, gives evidence or makes a submission by way of audiovisual link under this section is taken to be part of the appointed place.
(5E) Subsection (5D) has effect, for example, for the purposes of the laws relating to evidence, procedure, contempt of court or perjury.
(5F) Subsection (5D) also has the effect that any offence committed at the place at which a person appears, gives evidence or makes a submission under this section by way of audiovisual link is to be taken to have been committed at the appointed place.
(5G) Sections 5D, 20A, 20B and 20D–20F of the *Evidence (Audio and Audio Visual Links) Act 1998* apply, with such modifications as the Visiting Magistrate may direct, to proceedings in which a person appears, gives evidence or makes a submission by way of audio visual link under this section as they apply to the appearance, giving evidence or making of a submission by way of audio visual link in a proceeding before a NSW court under that Act.
(5H) Nothing in this section prevents a direction under section 5BB (1) of the *Evidence (Audio and Audio Visual Links) Act 1998* being made in the proceedings.

14. The Department of Corrective Services currently has audiovisual links at nine correctional centres. Inmates at those nine correctional centres already appear before courts, the Parole Board, and the Serious Offenders Review Council by way of audiovisual link.[41]

Penalties

15. Currently, the governor of a correctional centre may impose one (but not more than one) of the following penalties, in respect of a minor offence:

    (a) reprimand and caution;

    (b) deprivation, for up to 28 days, of such withdrawable privileges as the governor may determine;

    (c) confinement to a cell for up to 3 days, with or without deprivation of withdrawable privileges; or

    (d) cancellation of any right to receive payments under s 7 for up to 14 days, but to the extent only to which those payments are additional to the payments made at the base rate to inmates generally or to inmates of a class to which the inmate belongs [s 53(1)].[42]

16. The Bill increases the penalties available under s 53(1)(b) and (c) to 56, and 7 days, respectively.

17. Section 56 of the Act sets out the penalties which a Visiting Magistrate may impose in respect of a correction centre offence. The Bill amends s 56 to:

    (a) increase from 56 to 90 days, the deprivation of such withdrawable privileges as the Visiting Magistrate may determine [proposed s 56(1)(b)];

    (b) increase from 28 days to 6 months the extension of:

        (i) the term of the inmate's sentence; and

        (ii) in the case of an offence occurring during a non-parole period of the inmate's sentence, the non-parole period of the sentence [proposed s 56(1)(e)]; and

    (c) impose a sentence of imprisonment for a period not exceeding 6 months [proposed s 56(1)(f)][43]

[41] Mr N J Newell MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 4 June 2004

[42] If, however, the governor is of the opinion that a penalty should not be imposed, the governor may:
(a) dismiss the charge; or
(b) defer imposing a penalty on condition that the inmate be of good behaviour for a specified period (not exceeding 2 months) and, if the condition is complied with, dismiss the charge after the end of that period: s 53(2) of the *Crimes (Administration of Sentences) Act 1999*.

[43] A Visiting Magistrate making an order referred to in s 56(1)(f) is a person exercising criminal jurisdiction for the purposes of the definition of ***court*** in s 3 (1) of the *Crimes (Sentencing Procedure) Act 1999*. Schedule 1 [18] amends s 62 of that Act to confer a right of appeal to the District Court in respect of a sentence of imprisonment imposed under proposed s 56(1)(f).

Mobile phones

18. The Bill provides for a governor or Visiting Magistrate dealing with a charge relating to the new correctional centre offence in respect of an inmate found with:

- a mobile phone or any part of it;
- a mobile phone SIM card or any part of it; or
- a mobile phone charger or any part of it

to order an inmate guilty of the offence to be deprived, for up to 6 months, of such withdrawable privileges as the governor or Visiting Magistrate may determine [proposed s 56A].[44]

Compensation

19. The Bill increases, from $100 to $500, the maximum amount of compensation that the governor of a correctional centre may order an inmate to pay for loss of or damage to property as a result of the inmate committing a correctional centre offence [proposed s 59].

Periodic detention

20. Currently, the Parole Board must revoke an offender's periodic detention order on the application of the Commissioner, if it is satisfied that:

(a) the offender has failed to report for 3 or more detention periods, whether during the same sentence of imprisonment, or during different sentences of imprisonment being served consecutively (or partly consecutively); and

(b) the failures to report occurred otherwise than on leave of absence, and are not the subject of an exemption under s 90 [s 163(2)].[45]

21. Such an application must be made if the Commissioner is satisfied that the offender:

(a) has failed to report for 3 or more consecutive detention periods; and

(b) has failed to apply for, or been refused, leave of absence with respect to each of those detention periods.

22. The Bill amends s 163 to require the revocation of an offender's periodic detention order for failing to report for a *single* detention period, if the same offender has already had a periodic detention order reinstated previously, following revocation for failure to report for 3 or more detention periods [proposed s 163].

[44] If a penalty is imposed under this section in respect of a correctional centre offence, a governor or Visiting Magistrate must not also impose a penalty referred to in s 53 or s 56, as the case may be, in respect of the same correctional centre offence: proposed s 56A(2) of the *Crimes Administration of Sentences) Act 1999*. Possession of a mobile phone or associated articles is made a correctional centre offence by Schedule 3.1 [5] to the Bill.

[45] Pursuant to s 90 of the *Crimes (Administration of Sentences) Act 1999*, the Commissioner may make an order exempting an offender with respect to any one or more of the detention periods for which the offender has failed to report or has reported late.

It also makes it clear that, for the purposes of s 163(2)(a), it is immaterial whether a relevant failure to report occurred before, or after, a reinstatement of the relevant periodic detention order.[46]

Miscellaneous

23. The Bill also:

- clarifies that the definition of a *person in custody* includes persons refused bail or granted bail but not released under s 20 of the *Bail Act 1978*, and persons arrested or apprehended under s 50 of the *Bail Act 1978* [proposed s 249(2)];
- clarifies that a correctional officer into whose keeping a person in custody has been given can convey the person in custody to a court [proposed s 250];
- provides for the effect of the extension of a sentence on a sentence to be served partly consecutively with the extended sentence [proposed s 255];
- amends the *Criminal Appeal Act 1912* to give effect to provisions with respect to certain time not being counted as part of a term of imprisonment under a person's sentence [proposed s 28A of the *Criminal Appeal Act 1912*]. This amendment commences on assent.

Crimes (Administration of Sentences) Regulation 2001

24. The Bill makes a number of amendments to the *Crimes (Administration of Sentences) Regulation 2001* [the Regulation].

25. The Bill makes it an offence against the Regulation for an inmate to have in his or her possession a mobile phone or any part of it, a mobile phone SIM card or any part of it, or a mobile phone charger or any part of it [Sch 3.1[1]].

26. In the second reading speech, the Parliamentary Secretary noted that:

> [t]he Summary Offences Act 1988 provides a disincentive to persons bringing or attempting to bring anything into a place of detention. A person found guilty of attempting to smuggle a mobile phone into a place of detention could conceivably receive a maximum penalty of two years imprisonment, or 20 penalty units, or both. Paradoxically, a similar sanction cannot be imposed on an inmate who receives and uses a mobile phone. This legislation amends this anomaly.[47]

27. Accordingly, the Bill also amends the *Summary Offences Act 1988* [SOA], to make it an offence against that Act for an inmate, without reasonable excuse (proof of which lies on the inmate), to have in his or her possession in a place of detention a mobile phone or any part of it, a mobile phone SIM card or any part of it, or a mobile phone charger or any part of it [proposed s 27DA of the SOA].

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[46] The Bill amends Sch 5 to the *Crimes (Administration of Sentences) Act 1999* to provide that proposed s 163(2) and (2A) apply to a failure to report for a detention period that occurred *before* the commencement of the relevant provision (being one of a series of detention periods occurring during consecutive, or partly consecutive, sentences of imprisonment) only if it is one of a series of failures to report of which the most recent occurred *after* the relevant commencement: Sch 1 [31] to the *Crimes (Administration of Sentences) Bill 2004*.

[47] Mr N J Newell MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 4 June 2004.

28. The maximum penalty for this offence is imprisonment for 2 years or $5,500, or both.

Issues Considered by the Committee

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

Issue: Schedule 3.1[1]: Onus of proof

29. As noted above, the Bill makes it an offence against the both the Regulation and the SOA for an inmate to have in his or her possession a mobile phone or any part of it, a mobile phone SIM card or any part of it, or a mobile phone charger or any part of it.

30. The offence of an inmate possessing a mobile phone or related item that the Bill adds to the Regulation is one of strict liability. There is *no* requirement that the prosecution prove the defendant had any intent or knowledge of the possession, and there is no defence of having a reasonable excuse for possessing the phone or item.

31. As a correctional centre offence to which proposed s 56A applies, the penalty for this offence is being deprived, for up to 6 months, of such withdrawable privileges as the governor or Visiting Magistrate may determine.

32. The equivalent offence that the Bill adds to the SOA includes the element of "without reasonable excuse (proof of which lies on the inmate)".

    While the absence of a reasonable excuse is included as an element of the offence with a reversed onus of proof, this operates to provide a defence of reasonable excuse to the offence to be proved by the inmate.

33. The maximum penalty for the offence under the SOA is imprisonment for 2 years or 50 penalty units ($5,500) or both.

34. The onus for proving all the elements of an offence against an accused person is traditionally borne by the prosecutor, consistent with the presumption of innocence. These principles are fundamental to the protection of human rights.[48] Undermining or eroding these principles will only be justifiable if there are clear and compelling public interest reasons for doing so.

35. The fact that an accused person is already in detention is no reason to derogate from the right to the presumption of innocence.[49]

36. It has been accepted that, in some instances, the reversal of the onus of proof may be justified. These are where the element of an offence concerned is peculiarly in the knowledge of the person accused;[50] or if proof of the element beyond reasonable

[48] See, eg, the UN *International Covenant on Civil and Political Rights*, Article 14(2) and the *Universal Declaration of Human Rights*, Article 11.

[49] See, eg, Principle 3 of the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*: There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

[50] See, eg, Senate Standing Committee on Constitutional and legal Affairs, *The Burden of Proof in Criminal Proceedings*, (Canberra: 1982), p.14.

doubt, given the nature of the element and relative lack of gravity of the offence, is considered to be too onerous.[51]

37. The Committee notes that the offence regarding possessing a mobile phone to be inserted into the Regulation is one of absolute liability.

38. Given that this offence is directed at the internal regulation of a correctional centre and the maximum penalty for the offence is to deprive the inmate of withdrawable privileges for up to 6 months, the Committee does not consider that this offence trespasses unduly on personal rights and liberties.

39. The Committee notes also that the proposed offence under the *Summary Offences Act 1988*, while not one of strict liability, nonetheless places an evidentiary burden on an inmate.

40. The Committee notes that the right to be presumption of innocence is a fundamental common law right and that lessening the prosecution's onus of proof is a trespass on an inmate's right to be presumed innocent.

41. However, having regard to the exceptions justifying the reversal of the onus of proof, the Committee considers that the provisions of proposed s 27DA of the *Summary Offences Act 1988* do not constitute an undue trespass on personal rights and liberties.

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

Issue: Clause 2

42. This Act commences on a day or days to be appointed by proclamation, except for as follows:

- the amendments made by Sch 2 commence on the commencement of Sch 1 [14] to the *Crimes (Administration of Sentences) Further Amendment Act 2002*. These relate to non-invasive testing of correctional centre staff for alcohol and prohibited drugs.
- the amendments made by Sch 3.2 to the *Criminal Appeal Act 1912* commence on the date of assent.

43. 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, or part of the Act, at all.

44. The Committee is advised by the Minister's office that the delay in commencing the Bill's provisions is due to the need to develop guidelines to effectively implement the new procedures for the use of audiovisual technology for Visiting Magistrates. It is also

[51] Queensland Scrutiny of Legislation Committee, *Alert Digest* No. 2 of 1997, at pp.12-13: "In considering whether there is justification for a reversal of onus of proof in a provision of a Bill, the Committee takes into account whether the matter the subject of proof by the defendant is a matter peculiarly in the knowledge of the defendant or, whether it would require considerable expenditure on the part of the crown and would be extremely difficult to establish."

necessary to ensure that all Correctional Centre Governors are properly educated as to their responsibilities under the amended Act.

45. With respect to the testing of correctional centre staff for alcohol and prohibited drugs, the delay is due to the need to develop regulations which provide consistency with testing conducted by other government agencies.

46. The Minister's office further advised that it is expected that the Bill's provisions will commence within a matter of months.

47. The Committee considers that the developing of guidelines, the education and training of correctional centre staff, and the drafting of consistent Regulations are appropriate reasons to delay the Bill's commencement.

The Committee makes no further comment on this Bill.

5. CRIMES (INTERSTATE TRANSFER OF COMMUNITY BASED SENTENCES) BILL 2004

Date Introduced:	4 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Hatzistergos MLC
Portfolio:	Corrective Services

Purpose and Description

1. The Bill's object is to establish a scheme for the formal transfer and enforcement of community based sentences between Australian jurisdictions.

2. Under the scheme, an offender with a community-based sentence in NSW will be able to transfer the supervision and administration of the sentence to a new jurisdiction on a voluntary basis, provided the requirements of the proposed Act are satisfied.

   The offender will then be managed in the new jurisdiction as if a court of the new jurisdiction had imposed the original sentence — except for purposes of appeal or review (which remains the responsibility of the originating jurisdiction).

Background

3. The second reading speech noted the following background to the Bill:

> At present all Australian jurisdictions have arrangements in place for transferring the administration of good behaviour bonds. However, no arrangement exists for the bond itself to be transferred. There is also no arrangement for the transfer of other types of community-based sentences.
>
> ...
>
> The project of developing legislation suitable for the formal reciprocal transfer and enforcement of community-based sentences between jurisdictions has been ongoing since 1996. Since that time, the Department of Corrective Services has worked in close consultation with members of a working group comprising representatives from each Australian State and Territory, relevant agencies, and the Parliamentary Counsels Committee on the development of a suitable legislative model.
>
> In 2000 Australian Capital Territory Corrective Services was given the task of drafting initial legislation for this purpose, and the *Community Based Sentences (Transfer) Act 2003* was passed by the Australian Capital Territory Legislative Assembly on 20 February 2003. This Act provides model legislation for implementation in all Australian States and Territories.
>
> The Bill mirrors the scheme provided by the Australian Capital Territory *Community Based Sentences (Transfer) Act 2003*. It will be trialled between New South Wales and the Australian Capital Territory in order to establish suitable administrative processes for the efficient running of the scheme. Following an evaluation of the

scheme and subsequent discussion and agreement by the jurisdictions, similar legislation will be enacted in each Australian State and Territory.[52]

The Bill

4. The Bill provides for the transfer of certain community-based sentences between jurisdictions [cl 7]. The sentences that may be transferred under the scheme are:

   - community service orders;
   - home detention orders;
   - periodic detention orders; and
   - good behaviour bonds.

   Parole orders, fines and reparation orders are excluded from the scope of the proposed Act, as are sentences imposed on juveniles[53] [cl 4].

5. The Bill provides that each jurisdiction is to designate an authority to administer the Act [cl 11].

   The Commissioner of Corrective Services has been designated to be the "local authority" in NSW [cl 12]. .

   The Commissioner will be responsible for processing requests for transfer of community-based sentences into and out of NSW [clauses 12 and 25 respectively].[54]

6. The local authority may register an interstate sentence in NSW at the request of an interstate authority in which the sentence is in force [cl 15].

   In deciding whether to register a sentence that has been imposed in another jurisdiction, the local authority must be satisfied that the following criteria have been met:

   (a) the offender has consented to the order and has not withdrawn that consent;

   (b) there is a sentence in the local jurisdiction that corresponds to the sentence imposed in the interstate jurisdiction;

   (c) the offender can comply with the sentence in the local jurisdiction; and

   (d) the sentence can be safely, efficiently and effectively administered in the local jurisdiction [cl 19].

7. The local authority may impose preconditions for registration [cl 21] or may decide not to register the interstate sentence even if these criteria are met [cl 20(3)].

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[52] Mr G J West MP, Parliamentary Secretary, Second Reading Speech, *Legislative Assembly Hansard*, 4 June 2004.

[53] According to the second reading speech, this is because many jurisdictions - including New South Wales - have separate legislative, administrative and judicial regimes for adults and juveniles and providing for a single piece of legislation to cover both distinct regimes would be administratively inefficient: Mr G J West MP, Parliamentary Secretary, Second Reading Speech, *Legislative Assembly Hansard*, 4 June 2004.

[54] Details of the transferred orders will be recorded and maintained on a register: cl 14 of the *Crimes (Interstate Transfer of Community Based Sentences) Bill 2004*.

According to the second reading speech:

> This will be particularly relevant in a case where the local authority becomes aware of concerns expressed by an individual for his or her safety if the offender were to reside in the local jurisdiction.
>
> The authority's discretion may also be exercised in a case where the offender poses an unacceptable administrative burden to the local jurisdiction because the offender has a history of not complying with directions issued by a supervising officer. [55]

8. If the local authority decides to accept a request for transfer, the offender will be supervised and administered by the local authority as though the sentence had been made in the local jurisdiction [cl 24(1)].

   The administration of the sentence includes administering a breach of the sentence. If the offender does not comply with the conditions of the transfer order, he or she will be re-sentenced by a court of the local jurisdiction according to the laws of the local jurisdiction [cl 24(1)(g)].

9. If the offender seeks an appeal or review of the conviction or the sentence relating to the conviction, the appeal will be made to the original jurisdiction and not to the jurisdiction supervising and administering the transferred sentence [cl 24(3)].

   If that appeal or request for review is successful, the amended sentence will be administered and supervised in the jurisdiction to which the original sentence had been transferred as if it had been made by a court of the local jurisdiction [cl 24(4)].

10. Part 5 of the Bill establishes that the local authority may request an interstate authority to register a community-based sentence in the interstate jurisdiction [cl 25]. This enables NSW community based sentences to be registered interstate.

    Once registered by the interstate authority, the community-based sentence ceases to be in force in NSW and is in force in the interstate jurisdiction [cl 27].

Issues Considered by the Committee

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

Issue: Clause 2 – Commencement by proclamation

11. The Bill commences on a day or days to be appointed by proclamation. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it choses, or not to commence the Act at all.

12. The Minister's Office advised the Committee that the delay in commencement is necessary to allow time for procedural matters between NSW and the ACT to be formalised, and for those who will administer the Act to be trained.

[55] Mr G J West MP, Parliamentary Secretary, Second Reading Speech, *Legislative Assembly Hansard*, 4 June 2004.

13. The Minister's office further advised that it is expected that the Bill will commence by the end of this year.

The Committee makes no further comment on this Bill.

6. FINES AMENDMENT BILL 2004

Date Introduced:	2 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Egan MLC
Portfolio:	Treasurer

Purpose and Description

1. This Bill amends the *Fines Act 1996* with respect to the enforcement of penalty notices, fine enforcement order procedures and the review, withdrawal and annulment of fine enforcement orders and fine enforcement action.

Background

2. In the second reading speech, the Parliamentary Secretary stated that:

> In 2002 the Fines Act was the subject of a statutory review to determine whether the policy objectives of the Act remained valid and whether the terms of the Act remained appropriate for securing those objectives. While the review confirmed the validity and appropriateness of the Act, a number of issues were raised in submissions to the review. Those issues primarily related to the role of the State Debt Recovery Office [SDRO] as the co-ordinating body in the fine enforcement system and concerns about the efficiency and fairness of review processes.
>
> One concern was the inconsistency of procedures between the SDRO and the Infringement Processing Bureau [IPB], including a lack of procedures for review of matters once they had been referred from the IPB to the SDRO. The IPB is the source of approximately 80 per cent of fines administered by the SDRO. This concern has been addressed in part by the transfer on 1 October 2003 of the IPB from NSW Police to become a part of the SDRO.[56]

The Bill

Fine enforcement orders

3. The Bill amends the review mechanisms for fine enforcement under the Act. In particular, the amendments include a new requirement for the "SDRO to specify in the notice given to a fine defaulter the review processes that are available if the defaulter wishes to challenge the liability for the fine, is unable to pay the fine, or has concerns about the fairness of the enforcement process"[57] [sch 1 [28] amending section 60].

[56] Mr Graham West MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 2 June 2004.
[57] Mr Graham West MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 2 June 2004.

Withdrawal and annulment of fine enforcement orders

4. The bill amends the circumstances in which a penalty notice enforcement order[58] may be withdrawn.

   Currently, subsection 46(1) provides that the SDRO may, on application or on its own initiative, withdraw a penalty notice enforcement order if satisfied that the order was made in error.

   Proposed subsection 46(1) provides for additional grounds to withdraw such an order, including where a car that is the subject of a fine is sold prior to the fine being incurred, the fine is a duplicate or the wrong person has been identified in the order [sch 1 [15]].

5. The Minister's power to apply for annulment of a penalty notice enforcement order in the case of a question or doubt as to the person's liability for the penalty is removed [sch 1 [17]].

   However, the amendments to section 49 provide that the SDRO, in dealing with an application for annulment on this ground, must grant the application and annul the penalty notice enforcement order if satisfied that this ground is met [cl 20].

   If the SDRO annuls an enforcement order, it must refer the matter to a Local Court unless the fine is paid [s 49(3)].

6. Proposed section 49A provides that, before it annuls a penalty notice enforcement order on this ground, the SDRO must refer the matter back to the person or body who issued the penalty notice or on whose behalf a penalty notice was issued (the "prosecuting authority").

   The prosecuting authority is to review the matter to determine whether the penalty notice should be withdrawn. If the authority determines that the notice should be withdrawn, the notice ceases to have effect and any enforcement action is to cease or be reversed.

   If on review the prosecuting authority does not withdraw the notice or does not make a decision within 42 days after the referral, the SDRO is to proceed to annul the penalty notice enforcement order [sch 1 [22], proposed subsection 49A(6)].

Fine enforcement action

7. Currently under section 60, action to enforce a fine cannot be taken if the person fined was under 18 years of age and was not, and never had been, the holder of a driver licence.

   Section 60 is amended to provide that no action to enforce a fine can be taken if the person fined is under 18 years of age and the offence is not a traffic offence [cl 30].[59]

[58] Under section 40 of the Act, *a penalty notice enforcement order* is an order made by the SDRO for the enforcement of the amount payable under a penalty notice.

[59] Schedule 1[32] of the Bill defines the offences that are traffic offences.

8. The SDRO is required to waive enforcement costs, other than the fee for the issue of the fine enforcement order, for persons who commit offences while under the age of 18 years [cl 50].

9. Current section 65 provides when enforcement action can be taken in relation to orders for driver licence or vehicle registration suspension or cancellation. Subsection 65(4) provides that the Roads and Traffic Authority (RTA) is to cease enforcement action when directed to do so by the SDRO.

10. The Bill proposes new subsections 4A and 4B to section 65. These provide that the SDRO must direct the RTA to cease enforcement action against a fine defaulter who has been granted a first extension of time to pay a fine and who completes 6 instalments in accordance with the extension of time.

    The SDRO may direct the RTA to recommence enforcement action if the fine defaulter later defaults [cl 31].

Writing off of fines

11. Currently, section 101 enables the SDRO to write off fines if the defaulters do not have the means to pay the fine or sufficient property for civil enforcement and who are not suitable to undertake work under a community service order.

12. Under the proposals in this bill, the SDRO may write off an unpaid fine if satisfied of certain matters relating to the financial, medical or personal circumstances of the fine defaulter. These matters include:

    (i) that the fine defaulter is unable, and is not likely to be able, to pay the fine;
    (ii) enforcement action has not been, and is unlikely to be, successful in satisfying the fine; and
    (iii) the defaulter is not suitable to be subject to a community service order [cl 47].

    The SDRO *must* write off an unpaid fine if directed to do so by the Hardship Review Board.

13. Within 5 years after an unpaid fine has been written off under these provisions, the SDRO may reinstate it and recommence enforcement action if a further fine enforcement order is made against the defaulter or if the SDRO is satisfied that:

    (i) the defaulter has sufficient means to pay the fine;
    (ii) enforcement action is likely to be successful in satisfying the fine; or
    (iii) the defaulter is suitable to be subject to a community service order.

Hardship Review Board

14. Proposed sections 101A-101C establish a Hardship Review Board, consisting of the Chief Commissioner of State Revenue, the Secretary of the Treasury and the Director-General of the Attorney General's Department.

15. Proposed section 101B confers on the Board the function of reviewing, on the application of fine defaulters, decisions by the SDRO to refuse applications for time to pay fines or to have fines written off.

This function may be exercised in respect of decisions of the SDRO made before the commencement of the bill [sch 1 [56], proposed Part 4, Schedule 3[17]].

16. Proposed section 101C enables the Board, a member of the Board or a person otherwise engaged in the administration of section 101A, 101B or 101C, to disclose information, including personal information, it obtains in the administration of those proposed sections to the Director or a member of staff of the SDRO.

Disclosure of personal information by State Debt Recovery Office

17. The SDRO is authorised to disclose personal information in relation to a fine defaulter to a prosecuting authority or government authority that issued a penalty notice or to the Hardship Review Board. However, the SDRO may make such disclosure *only* if the disclosure is reasonably necessary to monitor the status of outstanding fines [cl 54, proposed section 117A].

Regulations

18. The bill incorporates a number of provisions of the Fines Regulation into the Act with no substantive change. These provisions are technical in nature and include provisions setting out the matters to be specified in a penalty notice enforcement order [cl 14].

According to the second reading speech, the remaining provisions of the Fines Regulation will be remade in a new regulation.[60]

Issues Considered by the Committee

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

Issue: Clause 2 – Commencement by proclamation

19. The ensuing Act commences on a day or days to be appointed by proclamation.

20. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it choses, or not to commence the Act at all.

21. The Treasurer's office has advised the Committee that it is expected that the bill will be fully commenced by 1 September 2004 by which time the regulations to be incorporated into the Act will be repealed and new regulations made.

22. The Treasurer's office has further advised that the delay in commencement is necessary to enable consultation with various agencies on the new regulations, constitute the Hardship Review Board and allow time for prosecuting authorities to put into place the new processes proposed by the Bill.

The Committee makes no further comment on this Bill.

[60] Mr Graham West MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 2 June 2004.

7. LEGAL PROFESSION AMENDMENT BILL 2004

Date Introduced:	2 June 2004
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 make a number of amendments to the *Legal Profession Act 1987* (the Act) principally in relation to the discipline of the legal profession.

Background

2. In his second reading speech, the Attorney General said that the amendments in this Bill are part of a larger review of the *Legal Profession Act,* which is currently being rewritten. The Attorney General said a new *Legal Profession Act* would be introduced into the spring session of Parliament.[61]

According to the Attorney General:

> This rewrite will incorporate the national legal profession model laws that were recently released by the Standing Committee of Attorneys-General. It will also amend the complaints and discipline provisions to reflect the recommendations of the New South Wales Law Reform Commission's Report No. 99, "Complaints against Lawyers: an interim report", and the recommendations in my department's report entitled "Further Review of Complaints Against Lawyers".[62]

3. In explaining the need for this Bill, the Attorney General said:

> In the meantime, the regulatory authorities have alerted me to a number of minor amendments that will provide immediate benefits by improving the ease with which disciplinary matters against misbehaving lawyers may be prosecuted. These should not be delayed just because more time is needed for the larger project that I have just described. I draw attention in particular to the provisions of this bill that will reduce the ability of practitioners to delay or thwart disciplinary proceedings against them.[63]

[61] The Hon Bob Debus MP, Attorney General, Second Reading Speech, *Legislative Assembly Hansard*, 2 June 2004.

[62] The Hon Bob Debus MP, Attorney General, Second Reading Speech, *Legislative Assembly Hansard*, 2 June 2004.

[63] The Hon Bob Debus MP, Attorney General, Second Reading Speech, *Legislative Assembly Hansard*, 2 June 2004.

The Bill

Pre-admission events—powers relating to bankrupt or convicted applicants for and holders of practising certificates

4. Under the Bill, the Bar Council or the Law Society Council (Council) may exercise powers to refuse to issue, or to cancel or suspend, a practising certificate on a number of grounds.

   One of those grounds is the failure to explain specified conduct that the Council considers may indicate that an applicant or holder is not a fit and proper person to hold a practising certificate [s 37(1)(a)].

5. The Bill extends section 37(1)(a) to pre-admission events [sch 1[3]], to be defined in section 3 as an act of bankruptcy committed, or finding of guilt for an indictable or tax offence, occurring before a person's admission as a legal practitioner [schedule 1[1]].

   The Bar or Law Society Council may decide to take no action in connection with a pre-admission event if satisfied that it is appropriate to do so given the passage of time and other circumstances the Council considers relevant.

   Transitional provisions validate past actions taken by Councils [schedule 1 [22] amending schedule 8].

   The legislation requires the reporting of such events whether they occurred before or after the commencement of this amendment [proposed subsection 30(5), schedule 1[5]].

Notices requiring assistance by legal practitioners

6. Schedule 1, clauses 4 and 5 amend section 152 in relation to a notice requiring a legal practitioner to provide information, documents or other assistance to the Legal Services Commissioner (Commissioner) or a Council when investigating a complaint against a legal practitioner.

   Under the proposed section, the notice will be able to be served by posting it to the legal practitioner's place of practice, business or residence last notified to a Council (as well as by personal service).

   These amendments respond to Law Reform Commission Report No 99, Recommendation 13.[64]

[64] Law Reform Commission, New South Wales, *Report No 99 (2001) Complaints against Lawyers (Interim Report)*. Recommendation 13 provides: Part 10 of the Legal Profession Act 1987 (NSW) should be amended to provide that a notice requiring co-operation by a practitioner with an investigation can be served either personally, at the practitioner's last place of business or residence as recorded with the Law Society or Bar Association or in a manner that is reasonably calculated to bring the notice to the attention of the practitioner and that is approved by the Tribunal.

Reprimands administered to legal practitioners by Commissioner or Council

7. Current section 155 of the Act sets out the procedure that a Council or Commissioner who has completed an investigation into a complaint against a legal practitioner must follow.

   The Council or Commissioner must institute proceedings in the Administrative Decisions Tribunal if satisfied that there is a reasonable likelihood that the legal practitioner will be found guilty by the Tribunal of unsatisfactory professional conduct[65] or professional misconduct.[66]

   However, if the Council or the Commissioner is satisfied that there is a reasonable likelihood that the legal practitioner will be found guilty by the Tribunal of unsatisfactory professional conduct (but not professional misconduct), the Council or the Commissioner may instead:

   (a) reprimand the legal practitioner if the legal practitioner consents to the reprimand; or
   (b) dismiss the complaint if satisfied that the legal practitioner is generally competent and diligent and that no other material complaints have been made against the legal practitioner.

8. Section 155 is amended to remove the requirement that a reprimand can be administered to a legal practitioner *only* with the practitioner's consent [schedule 1[6]].

9. Schedule 1 [8] amends section 160 to remove a similar requirement when the Commissioner is reviewing a decision of a Council.

   The amendments to sections 155 and 160 confer a right of appeal to the Tribunal against a decision to reprimand a legal practitioner if the practitioner does not consent to the reprimand.[67]

   These amendments implement Recommendation 17 of the Law Reform Commission Report No. 99.[68]

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[65] Under subsection 127(2) of the *Legal Profession Act 1987,* ***unsatisfactory professional conduct*** includes conduct (whether consisting of an act or omission) occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

[66] Under section 127(1) of the *Legal Profession Act 1987,* ***professional misconduct*** includes:

- conduct involving a substantial or consistent failure to reach reasonable standards of competence and diligence;
- conduct occurring otherwise than in connection with the practice of law which if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners;
- conduct that is declared to be professional misconduct by any provision of the Act;
- a contravention of a provision of the Act or the regulations, being a contravention that is declared by the regulations to be professional misconduct.

In addition conduct involving acts of bankruptcy or that gave rise to a finding of guilt of the commission of an indictable offence or a tax offence, is professional misconduct if the conduct would justify a finding that the legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners.

[67] Proposed section 171N provides for the hearing and determination by the Tribunal of such an appeal.

Time for instituting proceedings in the Tribunal

10. Proceedings on a complaint against a legal practitioner may be instituted in the Tribunal at any time within 6 months after the Commissioner or a Council decides that proceedings be instituted [proposed section 167AA].

    The Tribunal is empowered to extend that time after consideration of matters mentioned in the proposed section.

    The proposed section will prevail over section 44 of the *Administrative Decisions Tribunal Act 1997*[69] and any rules or regulations under that Act.

Power to disregard procedural lapses

11. Proposed section 171 allows the Tribunal to order that a failure to observe a procedural requirement in relation to a complaint against a legal practitioner is to be disregarded if satisfied that the parties have not been prejudiced by the failure.

12. According to the Attorney General in his second reading speech:

> Giving the tribunal power to rectify technical errors made by the regulatory authorities is sensible and pragmatic, particularly when the only consequence has been that the practitioner has been able to practise for longer than they would have otherwise.[70]

13. This amendment is taken from the national model laws.[71]

Reprimands administered to legal practitioners by Tribunal

14. Amendments to section 171C ensure that when the Tribunal orders a public reprimand of a legal practitioner, both the order and the reasons for the reprimand are published. [72]

15. According to the Attorney General:

> A recent decision in the Administrative Decisions Tribunal decided that when a disciplinary hearing had been held in private it was not appropriate to publish the tribunal's decision. [The Attorney's] ... view is that proceedings are held in private to protect practitioners if the allegations against them are not upheld. Once the tribunal has made a finding against a practitioner there is no further justification for keeping the matter private.[73]

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[68] Recommendation 17: when the Legal Services Commission or relevant Council is satisfied that there is a reasonable likelihood that a practitioner will be found guilty of unsatisfactory professional conduct (but not professional misconduct) they should be able to impose a reprimand without the practitioner's consent.

[69] Section 44 of the *Administrative Decisions Tribunal Act 1977* deals with applications to the Tribunal that are made out of time.

[70] The Hon Bob Debus MP, Attorney General, Second Reading Speech, *Legislative Assembly Hansard*, 2 June 2004.

[71] The Hon Bob Debus MP, Attorney General, Second Reading Speech, *Legislative Assembly Hansard*, 2 June 2004.

[72] Under the Bill the Tribunal remains able to privately reprimand a practitioner in special circumstances, but must notify the appropriate Council and the Commissioner of the reprimand.

[73] The Hon Bob Debus MP, Attorney General, Second Reading Speech, *Legislative Assembly Hansard*, 2 June 2004.

Appeals from Tribunal to Supreme Court

16. Under the current section 171F, certain appeals from decisions of the Tribunal lie to an Appeals Panel of the Tribunal and others lie to the Supreme Court, depending how the Tribunal was constituted at first instance.

    Under the proposed section 171F, all appeals from the Tribunal at first instance will lie to the Supreme Court *only* and not to the Appeals Panel of the Tribunal.

    This amendment implements Recommendation 36 of Law Reform Commission Report No 99.

Undertakings

17. The Law Reform Commission recommended that a breach of an undertaking given by a legal practitioner to the Commissioner or a Council in the course of investigating or dealing with a complaint or in the course of a mediation should be capable of being unsatisfactory professional conduct or professional misconduct. [74]

    Proposed section 171U implements this recommendation.

Commencement of proceedings without reasonable prospect of success

18. Current section 198L provides that a solicitor or barrister cannot file "originating process or a defence on a claim for damages" unless the solicitor or barrister certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or defence has reasonable prospects of success.

    This section is amended to extend the kind of documents that may not be filed to "court documentation on a claim or defence of a claim".

19. According to the Attorney General, this amendment is made:

> to clarify that practitioners must not file any documents during proceedings relating to a claim for damages unless the practitioner certifies that the claims or defences made have reasonable prospects of success. The new definitions will ensure that all filings, including further and amended pleadings, are caught by this requirement.[75]

Issues Considered by the Committee

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

Issue: Clause 2 – Commencement by proclamation

20. The ensuing Act commences on a day or days to be appointed by proclamation.

[74] See Recommendation 20, Law Reform Commission, New South Wales, *Report No 99.*

[75] The Hon Bob Debus MP, Attorney General, Second Reading Speech, *Legislative Assembly Hansard*, 2 June 2004.

21. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it choses, or not to commence the Act, or part of the Act, at all.

22. The Attorney General's office advised the Committee that it is intended for the Bill to commence within 2 weeks after assent.

    The Attorney General's office further advised that the delay in commencement had been requested by the Bar Association and the Law Society to allow them time to inform their members of the changes to the law.

The Committee makes no further comment on this Bill.

8. LIQUOR AMENDMENT (RACING CLUBS) BILL 2004

Date Introduced:	4 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Grant McBride MP
Portfolio:	Gaming and Racing

Purpose and Description

1. The object of this Bill is to amend the *Liquor Act 1982*:

   (a) to allow a Governor's licence[76] to be issued to authorise the sale of liquor on premises occupied by a greyhound racing club; and

   (b) to make it clear that the prohibition under section 133 of the Act on selling or supplying liquor on the premises of an unregistered club (ie a club that is not registered under the *Registered Clubs Act 1976*) does not apply in relation to the premises of an unregistered racing club that is authorised by a licence under the Act to sell liquor; and

   (c) to provide that the exercising of certain powers under search warrant in relation to an unregistered club does not apply in relation to an unregistered racing club that is licensed to sell liquor.

Background

2. According to the second reading speech:

> A decision by the Licensing Court has identified an anomaly within the current liquor laws whereby racing clubs may apply for, and be granted, a Governor's license (sic) but it is an offence for them to serve alcohol under this category of licence. This anomaly exists because an offence is committed where liquor is sold by an unregistered club. The Liquor Act defines an unregistered club as one that is not registered under the Registered Clubs Act. Currently, an exemption from the offence of selling liquor in an unregistered club applies only where it holds a function or university licence under the Liquor Act. While many racing clubs sell liquor under a function licence, and are therefore protected by this exemption, a growing number of racing clubs have relinquished their function licence in favour of a Governor's licence.[77]

[76] A ***Governor's licence*** is a license issued pursuant to s 19 of the *Liquor Act 1982,* which provides that the Governor may, on the recommendation of the Minister and subject to such conditions as the Minister may impose, authorise the court to issue a licence authorising the sale of liquor at, among other places, premises occupied by a body (whether incorporated or unincorporated) registered as a racing club by the NSW Thoroughbred Racing Board or Harness Racing New South Wales. For further information of Governor's licences, refer to the Department of Gaming and Racing's Fact Sheet 15: *Governor's Licences* available at: http://www.dgr.nsw.gov.au/IMAGES/PUBLICATIONS/Liquor%20%26%20Gaming/Fact%20Sheets/15_governor.pdf.

[77] Mr Graham West MP, Parliamentary Secretary, *Legislative Assembly Hansard,* 4 June 2004.

3. The second reading speech identifies an additional purpose of the Bill as allowing Greyhound Racing Clubs the same opportunities to apply for a Governor's licence as horse racing or harness racing clubs to ensure consistency across the racing codes.[78]

The Bill

4. The Bill amends the *Liquor Act 1982* so that a Governor's licence may authorize the sale of liquor on "premises occupied by a racing club."

5. Under s 133 of the Act, it is an offence to sell or supply liquor on the premises of an unregistered club.

   The Bill amends s 133 and 134 to ensure that references to the premises of an "unregistered club" exclude a reference to the licensed premises of a racing club.

6. The Bill also amends s 151 to ensure that that exercising of certain powers under a search warrant does not apply to the licensed premises of a racing club.

7. The Bill commences on assent [cl 2].

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

[78] Mr Graham West MP, Parliamentary Secretary, *Legislative Assembly Hansard,* 4 June 2004.

9. LOCAL GOVERNMENT AMENDMENT (DISCIPLINE) BILL 2004

Date Introduced:	3 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Tony Kelly MLC
Portfolio:	Local Government

Purpose and Description

1. This Bill amends the *Local Government Act 1993* to amend arrangements regarding the discipline of councillors, council staff and council delegates, including matters connected with codes of conduct, formal censure of councillors, suspension of councillors or their remuneration and surcharges.

2. It also makes amendments in relation to:

   - the independence of council staff from direction in certain circumstances;
   - preliminary enquiries into alleged misbehaviour of a councillor; and
   - changes the name of the Local Government Pecuniary Interest Tribunal to the Local Government Pecuniary Interest and Disciplinary Tribunal (the Tribunal).

3. The Bill also amends the *Independent Commission Against Corruption Act 1988* with regard to the jurisdiction of the Independent Commission Against Corruption (ICAC) to deal with conduct that could constitute or involve a substantial breach of a code of conduct applying to a council.

Background

4. In the second reading speech, the Parliamentary Secretary stated:

> This bill addresses council misbehaviour in local government. It brings forward the provisions contained in schedule 2 of the *Local Government Amendment Bill 2003*, which received its second reading in this House but did not further proceed…
>
> The bill … introduc[es] a comprehensive code of conduct that all councils will be required to adopt and apply.
>
> …
>
> A model code of conduct is being drawn up with input from the peak industry bodies for local government in New South Wales, council representatives, the Independent Commission Against Corruption, the Ombudsman, and the Department of Local Government.[79]

[79] Ms Alison Megarrity MP, Parliamentary Secretary, Second Reading Speech, *Legislative Assembly Hansard,* 3 June 2004.

The Bill

Code of Conduct

5. The proposed section 440 provides that the regulations may prescribe a model code of conduct and indicates what may be included in it [schedule 1[3]].

6. A council is required to adopt the model code. Councils may add supplementary provisions, including provisions that are more stringent, to the model code to take account of circumstances particular to local conditions.

7. The code adopted by a council has no effect to the extent that it is inconsistent with the model code.

8. Within 12 months after each ordinary election, councils must review their adopted code and make any necessary adjustments.

Misbehaviour by councillors and staff of councils

9. Schedule 1[4] inserts proposed Division 3 which defines "misbehaviour" for the purposes of the Act, sets out the process by which a person may be found to have misbehaved and provide for the consequences of such conduct.

10. Proposed section 440F defines "misbehaviour" as a contravention of the *Local Government Act 1993* or the regulations under that Act, a failure to comply with a relevant code of conduct, or an act of disorder at a council or committee meeting.

Censure motions and suspension from civic office for misbehaviour

11. The bill permits councils to pass a resolution formally censuring a councillor for misbehaviour [proposed section 440G].

12. Where the censure does not resolve the matter, proposed sections 440H–440Q provide a system for the Director General to suspend a councillor from civic office for misbehaviour.

Grounds for suspension

13. Proposed section 440I specifies the grounds on which a councillor can be suspended:

> The grounds on which a councillor may be suspended from civic office under this Division are that:
>
> (a) the councillor's behaviour has:
>
> (i) been disruptive over a period, and
> (ii) involved more than one incident of misbehaviour during that period,
>
> and the pattern of behaviour during that period is of such a sufficiently serious nature as to warrant the councillor's suspension, or

(b) the councillor's behaviour has involved one incident of misbehaviour that is of such a sufficiently serious nature as to warrant the councillor's suspension.[80]

Suspension by Director-General

14. Proposed section 440K authorises the Director-General to suspend a councillor for a period of up to one month after consideration of a departmental report or following a report of the ICAC or the Ombudsman.

    Once suspended under this section, a councillor cannot exercise any of the functions of civic office and is not entitled to any fee or other remuneration to which he or she would otherwise be entitled as a holder of that office [proposed s 440K(3)].

15. Proposed section 440H provides that the process of suspension can be initiated by the council concerned, by a request by the Director-General for a report or by a report of the Independent Commission Against Corruption or the Ombudsman.

16. A council cannot request the Director-General to suspend a councillor from civic office unless it has already formally censured the councillor or expelled the councillor from a meeting because of misbehaviour [proposed s 440I(2)].

17. Proposed section 440J provides for departmental investigations and reports after the process of suspension has been initiated. The preparation of a departmental report is a prerequisite to a decision by the Director-General to suspend the councillor from office.

    However, a departmental report is not necessary if the ICAC or Ombudsman states in a report that they are satisfied that grounds exist that warrant the councillor's suspension.

18. Suspension commences 7 days after notice is given to the councillor of the decision to suspend him or her [proposed s 440L].

Referral to Tribunal

19. Proposed section 440N enables the Director-General to refer a matter that is the subject of a report or request from a council to the Pecuniary Interest and Disciplinary Tribunal instead of suspending the councillor concerned.

    However, a matter that is the subject of a request by a council may not be referred to the Tribunal unless the councillor concerned has previously been suspended for misbehaviour under Chapter 13 of the *Local Government Act*.

Alternatives to suspension

20. Proposed section 440O allows the Director-General in appropriate cases to take no further action regarding suspension, or to refer a case back to the council concerned with appropriate recommendations.

[80] Proposed subsection 440I(1).

21. The Director-General must give reasons for suspending a councillor or taking other action [proposed s 440Q].

Appeal of suspension order

22. A councillor who has been suspended by order of the Director-General may appeal to the Tribunal against that suspension [proposed s 440M]. The appeal must be made within 28 days of being served with the order for suspension.

    The Tribunal may stay the order of suspension until it has determined the appeal.

    Once it has heard the appeal, the Tribunal may confirm, quash or amend the order.

Costs of suspension process

23. Under the bill, the council concerned is to bear the expenses of a suspension process it initiated [proposed s 440P].

    A council can seek a review of such expenses by the Administrative Decisions Tribunal if the council considers them unreasonable.

Pecuniary Interest and Disciplinary Tribunal

24. Schedule 1[6] inserts a new Division 3 in Part 3 of Chapter 14 which enables the Tribunal to decide whether to conduct proceedings into a misbehaviour matter referred to it by the Director-General[81] [proposed s 470A].

25. The Tribunal may, if it finds a complaint against a councillor proved:

    (a) suspend the councillor's right to be paid any fee or remuneration the councillor would otherwise be entitled to as the holder of civic office for up to 6 months [schedule 1[12]];
    (b) in case of a matter referred by the General-General:
        (i) counsel or reprimand the councillor; or
        (ii) suspend the councillor for up to 6 months [schedule 1[13] proposed s 482A]

26. The Tribunal has the power to direct that the name and address of any witness, of the councillor concerned, certain evidence and the subject matter of the matter it is considering not be published [schedule 1[10]].

27. A council must not at any time pay any fee or other remuneration to a councillor in respect of a period during which the councillor is suspended from office or the councillor's right to be paid such fee or remuneration has been suspended [schedule 1[1], proposed 2 248A].

Amendment to the *ICAC Act 1988*

28. The bill makes a consequential amendment to section 9 of the *Independent Commission Against Corruption Act.*

[81] If the Tribunal decides *not* to conduct proceedings it must give written reasons for its decision. See proposed section 470A.

Schedule 4 provides that a reference to a disciplinary offence in that Act extends to a substantial breach of an applicable requirement of a code of conduct applying to a council.

The result is that the ICAC will be able to deal with conduct that is corrupt conduct (as defined in section 8 of that Act) and that could constitute or involve a substantial breach of a code of conduct.

Issues Considered by the Committee

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

Issue: Clause 2 – Commencement by proclamation

29. The Bill commences on a day or days to be appointed by proclamation.

The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it choses, or not to commence the Act at all.

The Minister's office has advised the Committee that the intention is to commence the bill as soon as possible. However, the mandatory model code of conduct for councillors must be drafted and put in place before commencement. Consultations with stakeholders on the model code have not concluded.

The Minister's office further advised that it is anticipated that the Bill will commence in September.

The Committee makes no further comment on this Bill.

10. LOCAL GOVERNMENT AMENDMENT (MAYORAL ELECTIONS) BILL 2004

Date Introduced:	2 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Tony Kelly MLC
Portfolio:	Local Government

Purpose and Description

1. The Bill's object is to amend the *Local Government Act 1993* [LGA] to provide that the term of office of the mayors elected by councillors following elections held on or after 27 March 2004, but before September 2004, is extended to September 2005 (when the election of their successors is to take place).

Background

2. The LGA provides that, subject to any of its other provisions, a mayor elected by councillors has a term of office of 1 year, whereas a popularly elected mayor has a term of office of 4 years [s 230].

3. The LGA also provides that the election of the mayor by councillors is to be held:

   (a) if it is the first election after an ordinary election of councilors - within 3 weeks after the ordinary election; or

   (b) if it is not that first election or an election to fill a casual vacancy - during the month of September [s 290].

4. The *Local Government Amendment (Elections) Act 2003* amended the LGA to provide that the ordinary elections of councillors for local government areas which were due in September 2003 would be postponed until 27 March 2004.[82]

   As a result, local government areas with mayors elected by councillors within the 3 weeks after an ordinary election held on 27 March 2004 are currently required to hold another election for mayor by the councillors in September 2004.

5. Moreover, a number of further elections of councillors must be held as a consequence of recent amalgamations of certain councils. Some councils will elect mayors by councillors after those elections. By the operation of s 290 of the LGA, those councils must hold a *further* election for mayor in September 2004.

6. In the second reading speech, the Parliamentary Secretary noted that:

> [w]ithout this bill, mayors elected by the councillors between March and August 2004 will have to be elected again in September 2004. The bill will provide for a one-off 12-month extension of the term of office for those mayors, with the effect that their term will expire in September 2005 rather than in September 2004. Such an

[82] Subsequent ordinary elections would be held every 4 years on the fourth Saturday in September.

extension will allow those mayors sufficient time to negotiate and implement their policy programs consistent with the business of council. A number of councils have expressed concerns about the need to conduct two mayoral elections by the councillors this year within such a short period of time. The peak industry bodies, including the Local Government and Shires Associations and the Country Mayors Association, have also supported the bill.[83]

7. On 2 June 2004 the Bill passed all stages in the Legislative Assembly.

Pursuant to s 8A(2) of the *Legislation Review Act 1987*, the Committee is not precluded from reporting on a Bill because it has passed a House of Parliament.

The Bill

8. The Bill inserts proposed cl 76A into Sch 8 to the LGA to give effect to the object set out above [Sch 1].

9. Proposed cl 76A provides as follows:

(1) This clause applies to a mayor elected by councillors at the first election for mayor after an election of councillors held on or after Saturday 27 March 2004 but before September 2004.

(2) Despite sections 230 and 290 [of the LGA]:

(a) the election of a successor of a mayor to which this clause applies is to be held during the month of September 2005, and

(b) the term of office of a mayor to which this clause applies is extended to the day on which that mayor's successor is declared to be elected to the office of mayor.

10. The Bill commences on assent [cl 2]

Issues Considered by the Committee

11. The Committee did not identify any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

[83] Mr N J Newell MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 2 June 2004.

11. NATIONAL PARKS AND WILDLIFE AMENDMENT (JENOLAN CAVES RESERVE TRUST) BILL 2004

Date Introduced:	4 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Environment

Purpose and Description

1. The Bill amends the *National Parks and Wildlife Act 1974* to enable the Director-General of the Department of the Environment and Conservation to manage the affairs of the Jenolan Caves Reserve Trust established under that Act if no members of the board of the Trust are appointed for the time being.

Background

2. In his second reading speech, the Minister stated that currently the Jenolan Caves Reserve Trust facilitates the management of the Jenolan, Wombeyan, Borenore and Abercrombie karst[84] reserves.

3. According to the second reading speech:

> [t]he Jenolan Caves Reserve Trust was established in 1989 as a self-financing and independent entity relying on income from visitor charges as well as lease revenue from Caves House, which is operated under a 99-year lease. In recent years, however, the trust has only been able to meet its financial resource requirements by deferring capital works and relying on government grants to carry out some essential works. Supplementation was required from the Government in 2003-04. Consequently, the trust board expressed concern to me about the long-term financial sustainability of the trust under its existing business model. Last July the Government commissioned the Council on the Cost and Quality of Government to carry out a special review of the trust.
>
> The review found that although the trust had performed well within the constraints of its existing financial arrangements, the financial structure itself could not be sustained indefinitely.[1]

4. The Minister further stated that:

> The Council on the Cost and Quality of Government recommended that the four karst conservation reserves should be transferred from the Jenolan Caves Reserve Trust to the Department of Environment and Conservation to address the cross-subsidisation issues.[86]

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[84] ***Karst:*** a limestone region with underground drainage and many cavities caused by the dissolution of the rock. *The Australian Concise Oxford Dictionary*, Third Edition, Oxford University Press, 1997.

[85] The Hon Bob Debus MP, Minister for the Environment, *Legislative Assembly Hansard*, 4 June 2004.

[86] The Hon Bob Debus MP, Minister for the Environment, *Legislative Assembly Hansard*, 4 June 2004.

5. A subsequent review of the financial and structural arrangements of the Trust by an administrator appointed in January 2004 confirmed the recommendations of the Council.

6. The Bill has been introduced to facilitate the Government's karst reserve management restructure by transferring management of the Jenolan Caves Reserve Trust to the Department of Environment and Conservation.

The Bill

7. The Bill proposes minor amendments to sections 8 and 58ZA of the *National Parks and Wildlife Act* to allow the Minister to appoint the Director-General of the Department of Environment and Conservation as an alternate to the Jenolan Caves Reserve Trust Board.

Issues Considered by the Committee

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

Retrospectivity

8. The Bill is to commence, or to be taken to have commenced, on 1 July 2004. It will therefore have retrospective operation if assented to after that date.

9. However, as the Bill makes amendments of an administrative nature, which do not adversely affect any person, such a retrospective effect does not, in the Committee's view, trespass unduly on personal rights and liberties.

The Committee makes no further comment on this Bill.

12. POLICE AMENDMENT (SENIOR EXECUTIVE TRANSFERS) BILL 2004

Date Introduced:	3 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Watkins MP
Portfolio:	Police

Purpose and Description

1. This Bill amends the *Police Act 1990* with respect to the transfer of executive officers from and within NSW Police.

Background

2. In his second reading speech, the Minister said:

> The Commissioner of Police has far less flexibility than other public sector chief executive officers [CEOs] in permanently transferring senior executive officers to other positions. CEOs from most public sector agencies have authority under the *Public Sector Employment and Management Act 2002* to permanently transfer an appropriately qualified officer to "another position or other employment within the agency", following consultation with the officer. The transfer may be to a position or employment with lower remuneration, if the officer consents.
>
> The commissioner can transfer a senior executive service officer from one executive position to another with the same remuneration, if the transfer is considered to be in the interests of NSW Police. However, the commissioner cannot transfer the senior executive service officer to a lower remunerated position, even with the officer's consent. Similarly, the commissioner cannot transfer an unattached senior executive service officer. Existing transfer provisions allow transfers only between positions and unattached officers do not occupy positions.
>
> Further, when the commissioner removes an officer from a senior executive position, he cannot return that officer to another position within NSW Police, unless the officer was appointed to a PSES position before 1 December 1996 and has maintained a right of return.
>
> Again, the commissioner cannot provide alternative employment for officers who, for personal reasons, may wish to leave a senior executive position or take up a lower remunerated senior executive position.
>
> A police officer who ceases to be a senior executive officer cannot apply to return at a senior non-executive level. The officer can only apply to return at constable rank and return to a higher non-executive position through the merit-based promotion process. This differs from arrangements for former senior executive service officers in the public sector who can apply and compete for any available public sector position.
>
> Policing is highly specialised and police in senior executive positions have in the past enjoyed lifetime careers with NSW Police. By the very nature of a specialised career in policing, it is harder for these officers to take up other employment in the public sector.

> At the moment officers who join the senior executive service may no longer have a policing career if they cease to be a senior executive service officer for any reason. This may be a disincentive for qualified applicants. Under the existing arrangements, NSW Police lose [sic] the valuable experience of officers who are unable to return to another policing position.
>
> The bill will remove the current provisions of section 60 of the Police Act, which restrict the transfer powers of the commissioner. With the restriction gone, the provisions of section 87 of the Public Sector Employment and Management Act will automatically apply to the permanent transfer of senior executive service officers.[87]

The Bill

Removal of executive officers from office

3. Section 51 of the *Police Act* is amended to put it beyond doubt that an unattached executive officer is to be regarded as holding an equivalent (though notional) executive position in NSW Police to that from which he or she was removed for the purposes of section 87 of the *Public Sector Employment and Management Act 2002.*

   This amendment is consistent with section 77(3)(c) of *Public Sector Employment and Management Act*.

Executive officer mobility

4. Part 3.2 of the *Public Sector Employment and Management Act 2002* contains provisions relating to the movement of staff across the public sector (which includes NSW Police) on a permanent basis.

   Part 3.2 includes provisions that enable the Commissioner of Police to transfer a member of the NSW Police Senior Executive Service to another position in NSW Police or other employment in NSW Police or to the service of another public sector agency.

   Section 60 of the *Police Act* currently has the effect of limiting the flexibility of the arrangements under Part 3.2 for the internal transfer of staff by preventing the transfer of an executive officer to a non-executive position or a position at lower remuneration than an officer's existing level of remuneration.

5. The Bill replaces section 60 of the *Police Act* with a new section that enables a member of the NSW Police Senior Executive Service to be transferred to a non-executive position or, if they consent, to a position at a lower level of remuneration.

   Proposed section 60 also provides that Division 3 of Part 5 of the *Police Act* does not apply to such a transfer. This Division provides for appointment of senior executives, including the requirement for appointment based on merit for positions that are advertised.

[87] The Hon John Watkins MP, Minister for Police, Legislative Assembly Hansard, 3 June 2004.

As a result of this amendment, section 39 of the *Police Act* will clearly not apply to the transfer of a member of the NSW Police Senior Executive Service to another position in NSW Police.

Section 39 requires appointments to vacant positions to be made on merit and for certain integrity checks to be carried out before a person is appointed to a vacant executive position.

6. According to the Minister in his second reading speech:

> The merit appointment provisions of section 39 of the Act will not apply to these transfers as transfers are a distinct form of appointment. Similarly, the integrity checking requirements of that section will not apply to SES officers who have already gone through that process and are simply being transferred to another SES position in NSW Police.[88]

Compensation

7. Currently, section 53 provides for the payment of compensation in some circumstances to executive police officers who are removed from office but who have no right to return to the public sector.

Subsection 53(6) provides that an executive officer who is removed from office or not re-appointed is not entitled to compensation under section 53 if they are appointed to another executive position, and if the new remuneration package for the new position *is not less than* the remuneration package for the former position.

8. The amendments to section 53 provide that no compensation will be payable to an executive officer who consents to a transfer to a position at a lower level of remuneration [schedule 1[2]].

This amendment is consistent with section 78 of the *Public Sector Employment and Management Act 2002.*

9. Clause 67 is inserted into Schedule 4 to the *Police Act* to make it clear that the amendments extend to positions vacant at the commencement of the amendments.

Issues Considered by the Committee

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

Issue: Clause 2 – Commencement by proclamation

10. The ensuing Act commences on a day or days to be appointed by proclamation.

11. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it choses, or not to commence the Act at all.

[88] The Hon John Watkins MP, Minister for Police, Legislative Assembly Hansard, 3 June 2004.

12. The Committee has written to the Minister for advice as to the reasons for commencement by proclamation and the likely timeframe within which it is expected the Bill will commence.

The Committee makes no further comment on this Bill.

13. RESIDENTIAL TENANCIES AMENDMENT (PUBLIC HOUSING) BILL 2004

Date Introduced:	3 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Carl Scully MP
Portfolio:	Housing

Purpose and Description

1. The object of this Bill is to amend the *Residential Tenancies Act 1987* (the Principal Act) to make provision for the following:

   (a) to enable the New South Wales Land and Housing Corporation to declare that a public housing tenancy agreement[89] is subject to a specified fixed term;
   (b) to enable the Corporation to request a public housing tenant to give an undertaking not to engage in anti-social behaviour (referred to as an acceptable behaviour agreement);
   (c) to provide for the termination of the tenant's public housing tenancy agreement if the tenant refuses to enter into, or seriously or persistently breaches, an acceptable behaviour agreement; and
   (d) to provide for the termination of a public housing tenancy agreement if the tenant severely or persistently threatens or abuses, or intimidates or harasses, any member of staff of the Department of Housing.

Background

2. According to the second reading speech, there are currently 129,000 public housing tenancies in New South Wales.[90] The second reading speech also stated that:

> Stable, affordable housing is a fundamental requirement for all members of our community. Without housing, it is impossible to hold down a job, stay healthy, get an education or maintain family and community relationships.
>
> … The Department of Housing works with other agencies such as police and mental health teams to resolve neighbourhood disputes among public housing tenants. The effectiveness of their efforts is greatly reduced by antisocial behaviour.
>
> The sort of behaviour we are concerned about includes dumping cars, petty vandalism, graffiti, noise nuisance, throwing firecrackers, rocks on the roof, and abuse. It also includes more serious criminal behaviour: assault and burglary. Antisocial behaviour does not include people going about their legitimate business. A child playing in the street, or adults using power tools at the proper times is not of itself antisocial behaviour. The measures outlined in this bill are not aimed at curtailing people's daily activities. Nor are we intending to persecute people who are already vulnerable. We recognise that public housing tenants are some of the most disadvantaged members of the community, otherwise they would not be in public housing.

[89] A "'*public housing tenancy agreement*' means a residential tenancy agreement under which residential premises are let by the New South Wales Land and Housing Corporation …" [Schedule 1[1]].

[90] Ms Alison Megarrity MP, Parliamentary Secretary, Legislative Assembly Hansard, 3 June 2004.

The Bill

Fixed term tenancy agreements

3. Schedule 1[2] inserts proposed section 14A which enables the NSW Land and Housing Corporation (the Corporation) to declare, by notice given to a tenant under a public housing tenancy agreement, that the agreement is for a fixed term".

Acceptable behaviour agreements

4. Proposed section 35A enables the Corporation to request a public housing tenant to enter into an acceptable behaviour agreement under which the tenant undertakes not to engage in specified anti-social behaviour.

5. According to the second reading speech, the Government does not intend to require tenants who are unable to form an acceptable behaviour agreement due to mental illness, intellectual disability or some other reason to enter into such an agreement.[91]

6. An undertaking not to engage in anti-social behaviour extends to the behaviour of other lawful occupiers of the premises to which the applicable public housing tenancy agreement relates. The effect of this is that if a lawful occupier of the premises, other than the tenant, engages in anti-social behaviour that is specified in the agreement, the tenant is taken to have engaged in that behaviour and breached the agreement.

7. The Corporation may only request a tenant to enter into an acceptable behaviour agreement if the Corporation is of the opinion that, because of the history of the tenant's behaviour under the current or a previous public housing tenancy, the tenant or other lawful occupier of the premises is likely to engage in anti-social behaviour on those premises or on adjoining or adjacent premises.

8. To be effective, the Corporation must give notice to the tenant of the consequences of refusing to enter into, or breaching, an acceptable behaviour agreement, including the termination of their lease.

9. Proposed subsection 35A(6) provides that:

> ...a reference to anti-social behaviour includes a reference to emission of excessive noise, littering, dumping of cars, vandalism and defacing of property.

Failure or refusal to enter, or breach of, an acceptable behaviour order

10. If a tenant fails or refuses to enter into an acceptable behaviour agreement, the Corporation may, by notice, terminate the tenancy agreement (see proposed section 57A, schedule 1[4]).

    A notice to terminate must specify the grounds for the notice, namely that:

    (a) the tenant has failed or refused to enter into an acceptable behaviour agreement as requested by the Corporation;

[91] Ms Alison Megarrity MP, Parliamentary Secretary, Legislative Assembly Hansard, 3 June 2004.

(b) the tenant has seriously or persistently breached the terms of an acceptable behaviour agreement.[92]

A notice to terminate must also give the tenant a minimum of 14 days notice before the day on which vacant possession of the premises is to be delivered up to the Corporation.

Referral to the Consumer, Trader and Tenancy Tribunal

11. The Corporation may also apply to the Consumer, Trader and Tenancy Tribunal for an order terminating the agreement on the grounds specified in proposed subsection 57A(1) (failing or refusing to enter, or breaching, an acceptable behaviour agreement).

12. Current section 64 of the Act enables the Consumer, Trader and Tenancy Tribunal to terminate a public housing agreement on the application of the Corporation on certain grounds, such as that the tenant has seriously or persistently breached the residential tenancy agreement [s 64(2)(b)].

The Bill amends section 64, adding another ground on which the Consumer, Trader and Tenancy Tribunal can terminate a public housing agreement on the application of the Corporation.

Proposed subsection 64(2A) provides that the Tribunal can terminate an agreement is satisfied that the tenant has either failed or refused to enter into an acceptable behaviour agreement or that the tenant has failed to satisfy the Tribunal that the tenant has not seriously or persistently breached the terms of that agreement [proposed subsection 64(2A), schedule 1[5]].

13. Current section 64 also provides for the factors the Tribunal is to take into account when considering the Corporation's application for an order to terminate a public housing agreement.

In addition to having regard to the circumstances of the tenant and other circumstances of the case, the Tribunal is also to have regard to, for example:

- any serious adverse effects the tenancy has had on neighbouring residents or other person;
- whether the breach of the residential tenancy agreement was a serious one;
- whether a failure to terminate the agreement would subject, or continue to subject, neighbouring residents or any persons or property to unreasonable risk; and
- the history of the tenancy concerned.[93]

14. The Bill proposes to amend section 64(4) by adding another factor for the Tribunal to consider.

Schedule 1[6] amends paragraph 64(4)(e) to require the Tribunal to consider the history of the tenancy concerned "including, if the tenant is a tenant under a public

[92] See proposed subsection 57A(1), inserted into the Act by Schedule 1[4].
[93] See current subsection 64(4).

housing agreement, any prior tenancy of the tenant arising under any such agreement".

15. Under the bill, the Tribunal also may, on application by the Corporation under a public housing tenancy agreement, make an order terminating the agreement if it is satisfied that the tenant has:

(a) seriously or persistently threatened or abused any member of staff of the Department of Housing; or

(b) intentionally engaged in conduct in relation to any such member of staff that would be reasonably likely to cause the member of staff to be intimidated or harassed (whether or not any abusive language or threat has been directed towards the member of staff) [proposed s 68A, schedule 1[8]].

Issues Considered by the Committee

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

Right to Housing, Forced evictions: Clause 3, Proposed section 35A

16. The Committee is of the view that the right to adequate housing for all without discrimination is a fundamental human right. This right is recognised in a number of international human rights instruments, most notably in Article 11 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).

17. Article 11(1) provides that:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.[94]

18. In commenting on the scope of this right, the United Nations Committee on Economic, Social and Cultural Rights (UN ESCR Committee) has said that:

> … article 11 (1) must be read as referring not just to housing but to adequate housing.
>
> …the concept of adequacy … serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute "adequate housing" for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is … possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:
>
> (a) Legal security of tenure. Tenure takes a variety of forms… Notwithstanding the type of tenure, *all persons should possess a degree of security of tenure which*

[94] *International Covenant on Economic, Social and Cultural Rights* 1966. Australia is a party to this treaty.

> *guarantees legal protection against forced eviction,* harassment and other threats (emphasis added).[95]

19. The UN ESCR Committee concluded that: "instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law".[96]

20. The Committee agrees with these views of the UN ESCR Committee and notes that forced evictions from public housing in particular should only take place in exceptional circumstances.

21. In addressing the exceptional circumstances in which forced evictions will *not* be incompatible with the ICESCR, the UN ESCR Committee has said that:

> Whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected.[97]

22. The UN ESCR Committee also said that:

> In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality…
>
> Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights.[98]

23. The UN ESCR Committee considered that the procedural protections which should be applied in relation to forced evictions include:

- an opportunity for genuine consultation with those affected;
- adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- provision of legal remedies; and
- provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.[99]

The UN ESCR Committee also said that:

> Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its

[95] Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing (Art.11(1)), General Comments,* 13 December 1991 (Sixth session, 1991), at paragraphs 7 & 8.

[96] Ibid at paragraph 18.

[97] Committee on Economic, Social and Cultural Rights, *General Comment No. 7: The Right to Adequate Housing (Art.11(1)): Forced Evictions,* 20 May 1997, (Sixteenth Session, 1997) at paragraph 11.

[98] Ibid, at paragraphs 14 & 15. "The International Covenants on Human Right" refers to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

[99] Committee on Economic, Social and Cultural Rights, *General Comment No. 7: The Right to Adequate Housing (Art.11(1)): Forced Evictions,* 20 May 1997, (Sixteenth Session, 1997) at paragraph 15.

> available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.[100]

24. The Committee is of the view that, while the amendments provide for forced evictions from public housing in certain circumstances, there are a number of elements in the legislation that mitigate this potential infringement of the right to housing.

In particular, the amendments allow for forced evictions only in exceptional circumstances when there is a history or strong likelihood of disruptive, destructive or violent behaviour.

25. The Committee agrees with the comment of the UN ESCR Committee that:

> [T]he right to housing should not be interpreted in a narrow or restrictive sense, which equates it with, for example, the shelter provided by merely having a roof over one's head… Rather it should be seen as the right to live somewhere in security, peace and dignity". [101]

The Committee is of the view that the kind of behaviour with which this bill is concerned has the potential to significantly inhibit the ability of others to fully enjoy their right to live in their homes in "security, peace and dignity".

26. The Committee notes that the amendments provide for an opportunity for genuine consultation with those affected and for reasonable notice to be given.

Tenants facing eviction under this bill retain their right to seek review of a decision of the Corporation or Tribunal to evict them for failure to sign, or breach of, an acceptable behaviour agreement. On this point, the Parliamentary Secretary stated that:

> [Tenants] can apply to have their case reheard in the Tribunal in the event that the Tribunals decision was not fair and equitable or was against the weight of evidence, or where there is no evidence. Tenants also have recourse to the Supreme Court if they believe that the tribunal has made an error of law.[102]

27. The Committee also notes that the Parliamentary Secretary has indicated that a person who is evicted because of a failure to sign, or a breach of, an acceptable behaviour agreement will continue to be supported by the department:

> In the event of a tenant actually being evicted, the department will continue to provide support. For example, the department may make RentStart available to give the tenant the best possible chance of securing private rental accommodation.[103]

28. The Committee is of the view that forced evictions generally conflict with the fundamental right of a person to adequate housing.

[100] Ibid at paragraph 16.
[101] Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing (Art.11(1)), General Comments,* 13 December 1991 (Sixth session, 1991), at paragraph 6.
[102] Ms Alison Megarrity MP, Parliamentary Secretary, Legislative Assembly Hansard, 3 June 2004.
[103] Ms Alison Megarrity MP, Parliamentary Secretary, Legislative Assembly Hansard, 3 June 2004.

29. However, the Committee is also of the view that, while the amendments provide for forced evictions, they do so only in exceptional and justifiable circumstances where the behaviour of the evicted tenant prevents others from fully enjoying their fundamental right to adequate housing.

30. In addition, the process by which a person can be evicted under this bill is reasonable and includes adequate review rights of a decision to evict and adequate notice of an order to evict. The Committee notes that the grounds on which a person may be evicted under the Bill are clearly set out in the legislation.

31. Given the Parliamentary Secretary's comment that the Department of Housing will continue to support those evicted under the amendments, the Committee is of the view that the bill does not unduly trespass on a person's right to adequate housing.

Reversal of onus of proof in civil proceedings: Clause 1[5], proposed s 64(2A):

32. Proposed subsection 64(2A) provides that the Tribunal can terminate a tenancy agreement if satisfied that the tenant has either failed or refused to enter into an acceptable behaviour agreement or *the tenant has failed to satisfy* the Tribunal that the tenant has not seriously or persistently breached the terms of that agreement [schedule 1[5]].

33. Requiring the tenant to satisfy the Tribunal that he or she has not seriously or persistently breached the terms of an acceptable behaviour agreement puts the onus on the tenant to prove they did not breach their agreement.

34. According to the second reading speech:

> This reversal of the onus for antisocial tenants is necessary because there is a history of cases in which tenants have provided evidence against their antisocial neighbours, only to find themselves further victimised if the courts decide anything less than an eviction is warranted.
>
> [The] reversal of onus only applies before the tribunal where the tenant has seriously or persistently breached an acceptable behaviour agreement. It does not apply to other matters before the tribunal.[104]

35. The Committee notes that proposed subsection 64(2A) reverses the onus of proof.

36. The Committee also notes that a tenant will only be required to enter an acceptable behaviour agreement when they have a history of, or a strong likelihood of engaging in, antisocial behaviour.

37. In addition, the legislation provides for an opportunity for genuine consultation with those affected, for reasonable notice to be given, for a right to be heard and for the right to seek review or appeal of a decision to evict.

38. The Committee is of the view that the reversal of onus in proposed section 64(2A) does not unduly trespass on individual rights.

[104] Ms Alison Megarrity MP, Parliamentary Secretary, Legislative Assembly Hansard, 3 June 2004.

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

Issue: Clause 2- Commencement by proclamation

39. The Bill commences on a day or days to be appointed by proclamation.

40. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it choses, or not to commence the Act, or a part of it, at all.

    On seeking advice from the Minister's office, the Committee was advised that the bill would commence in stages. This will allow time for implementation of the proposals for acceptable behaviour agreements and for the training of the Department, especially customer service officers.

    Proposed section 14A cannot be commenced until the Renewable Tenancy Policy has been prepared and gazetted. It is expected that this will take approximately 3 months.

41. The Committee was further advised that the amendment to section 64A and proposed section 68A will commence as soon as possible and that the remainder of the Bill is expected to commence by September if it is passed this session, or on 1 January 2005 if it is not passed this session.

The Committee makes no further comment on this Bill.

14. ROAD TRANSPORT (GENERAL) AMENDMENT (LICENCE SUSPENSION) BILL 2004

Date Introduced:	2 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Carl Scully MP
Portfolio:	Roads

Purpose and Description

1. The Bill's objects are to:

- expand the range of driving related offences under the *Road Transport (General) Act 1999* [the Act] in relation to which a police officer is able to suspend a person's driver licence to certain major offences involving death or grievous bodily harm;
- enable a police officer to suspend a person's driver licence if the person is caught exceeding the applicable speed limit by more than 45 kilometres per hour; and
- make provision with respect to statutory declarations for ascertaining the driver of a vehicle involved in a parking offence or camera recorded offences.

Background

2. In the second reading speech, the Parliamentary Secretary noted that speeding is a causal factor in 44% of all fatal crashes in New South Wales. He also stated that:

> [g]iving NSW Police further powers to immediately suspend the licence of those who commit such serious driving offences will send a clear message to the community that this type of behaviour is unacceptable and dangerous to all road users. The proposed changes are based on the recommendations of an interdepartmental working group that was established to review the processes for the immediate suspension of a drivers licence. The working group comprised officers from the Roads and Traffic Authority [RTA], NSW Police, and the Attorney General's Department.[105]

3. On 3 June 2004 the Bill passed all stages in the Legislative Assembly. Pursuant to s 8A(2) of the *Legislation Review Act 1987*, the Committee is not precluded from reporting on a Bill because it has passed a House of Parliament.

[105] Mr A P Stewart MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 2 June 2004.

The Bill

Suspension Notices

4. The Bill expands the range of offences contained in s 34(1)[106] of the Act in relation to which a police officer may suspend a person's driver licence when that person is charged with such an offence [proposed s 34(1)].

5. The expanded range of offences involve the death of, or grievous bodily harm to, another person caused by the use of a motor vehicle, where the offence consists of:

   - murder or manslaughter;
   - maliciously causing grievous bodily harm with intent to do so [s 33 of the *Crimes Act 1900* [the Crimes Act]];
   - maliciously inflicting grievous bodily harm [s 35(1)(b) of the Crimes Act];
   - aggravated or dangerous driving occasioning death or grievous bodily harm [s 52A(1), (2), (3) or (4) of the Crimes Act]; or
   - causing grievous bodily harm by any unlawful or negligent act or omission [s 54 of the Crimes Act].[107]

Penalty Notices

6. The Bill enables a police officer to suspend a person's driver licence if the person is charged with, or served with a penalty notice for, an offence under the *Road Transport (Safety and Traffic Management) Act 1999* [RTSTM Act] of exceeding a speed limit by more than 45 kilometres per hour [proposed s 34(1A)].

7. However, the Bill specifically *excludes* from the ambit of proposed s 34(1) camera recorded offences within the meaning of s 43 of the Act.[108]

8. The Bill recreates the existing s 34(2) of the Act, which specifies the particulars to be contained in a suspension notice given under the section.

   It further provides that, if a person is served with a penalty notice for exceeding a speed limit by more than 45 kilometres per hour, the suspension notice must inform

[106] Currently, under s 34(1) of the Act, a person may receive a suspension notice at any time within 48 hours after being charged with an offence under the following sections:
- s 9(3) or (4) – presence of middle or high range prescribed concentration of alcohol;
- s 15(4) – refusing or failing to submit to a breath analysis;
- s 16 - wilfully altering the concentration of alcohol in a person's blood following request for breath test or blood analysis; or
- s 22(2) - hindering or obstructing health professional taking blood sample.

[107] The Bill also provides for this expansion of the application of suspension notices to *authorised visiting drivers*, ie a driver who is not the holder of a New South Wales licence, and who, being the holder of a licence or permit issued in a place outside New South Wales, has the benefit of any provision of the road transport legislation conferring authority to drive in this State: proposed s 35(1) of the *Road Transport (General) Act 1999*.

[108] The relevant offence for the purposes of proposed s 34 is a speeding offence in respect of which the penalty notice or the summons indicates that the offence was detected by an approved speed measuring device and recorded by an approved camera recording device: s 43(11) of the *Road Transport (General) Act 1999*.

the person that the driver licence is suspended for 6 months or until the matter is determined by a court (or withdrawn).

Statutory declarations

9. Currently under s 43(7) of the Act, a person who is served with a penalty notice or a summons in respect of a camera recorded offence is not guilty of that offence if the person satisfies the authorised officer (in the case of a notice) or the court (in the case of a summons) that he or she did not know, and could not with reasonable diligence have ascertained, the name and address of the person who was in charge of the vehicle at the time the offence occurred.

10. The Bill clarifies that if a person is served with a penalty notice or summons in relation to a parking offence or camera recorded offence, a statutory declaration may be considered in determining whether the person did not know - and could not with reasonable diligence have ascertained - the name and address of the driver at the time of the offence [proposed s 43(7A)].[109]

Road Transport (Driver Licensing) Act 1998

11. The *Road Transport (Driver Licensing) Act 1998* currently provides that if a person's driver licence expires after being suspended under that Act, that person:

- cannot apply for another driver licence during any unexpired portion of the suspension period; and
- remains potentially liable, during that period, for any offence in relation to driving a vehicle while a driver licence is suspended [s 33A].

12. The Bill amends s 33A to extend its application to the suspension of a licence by a police officer under the *Road Transport (General) Act 1999*.

Issues Considered by the Committee

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

Suspension notices: Proposed s 34(1)(a)

13. To the extent to which this provision allows a person's licence to be suspended as a punishment for an alleged offence before the person has been tried and convicted for the offence, it allows a most serious trespass to a person's fundamental right to be presumed innocent.

14. However, while from the point of view of a person charged a licence suspension acts as a penalty imposed without any conviction, this power of suspension is perhaps better characterised as giving police an administrative discretion to suspend a licence on the basis of a failure to meet the requirements of the licence, demonstrated by the apparent offence.

[109] Proposed s 43(7B) of the *Road Transport (General) Act* 1999 enables the regulations to prescribe matters that must be included in any such statutory declaration.

15. The Committee is of the view that a person does not have a right to hold a licence in NSW, but a person does have a right for the licensing laws to be administered fairly and not arbitrarily.

16. The Committee further notes that, in many circumstances, suspending a person's licence will cause significant inconvenience to, or hardship for, the person affected. It is therefore important that any administrative power to limit a person's authority to drive is adequately defined and sufficiently subject to review.

17. The Committee notes that any suspension of a person's licence prior to conviction by way of a penalty can be regarded as a serious breach of the person's fundamental right to the presumption of innocence.

18. The Committee is of the view, however, that the primary elements of the offences prescribed in the Bill provide a reasonable basis for suspending a person's licence in order to protect the community from dangerous driving.

19. The Committee is further of the view that, given the significant impact a driving licence suspension may have on a person, the power to suspend a licence must be subject to sufficient controls and review.

20. Subject to there being sufficient control and review mechanisms (discussed below), the Committee does not consider that the power to suspend a person's drivers licence under the Bill trespasses unduly on personal rights and liberties.

Insufficiently defined administrative powers [s 8A(1)(b)(ii) *LRA*]

Guidelines for discretion to issue or enforce a suspension notice: Proposed s 34(2)(b)

21. The suspension notice provisions in the Bill are not mandatory. As such, a police officer charging a person under proposed s 34(1)(2)(b) may exercise a discretion having regard to the surrounding circumstances.

22. If a person is served with a penalty notice for speeding in excess of 45 km over the prescribed limit, any suspension notice operates from a date specified in the suspension notice, or (if the notice so specifies) immediately on receipt of the notice, until whichever of the following happens first:

    (i) a period of 6 months elapses after the date on which the offence is alleged to have been committed;

    (ii) if the person elects to have the matter determined by a court in accordance with Part 3 of the *Fines Act 1996* - the matter is heard and determined by a court or a decision is made not to take or continue proceedings against the person; or

    (iii) a decision is made not to enforce the penalty notice.[110]

23. The Bill also provides that for the purposes of amended s 34:

[110] A person who is given a suspension notice must surrender his or her driver licence in compliance with the notice. A maximum penalty of $2,200 applies: s 34(5) of the *Road Transport (General) Act 1999*.

a decision is made not to enforce a penalty notice in relation to a person when the person is notified in writing of that fact by:

(i) a police officer; or

(ii) an appropriate officer for the penalty notice within the meaning of Part 3 of the *Fines Act 1996*;[111] or

(iii) a member of staff of the State Debt Recovery Office [proposed s 34(7)(e)]

24. Although, as noted above, the issuing of a suspension notice is not mandatory, the Bill and Act do not appear to provide for guidelines for the use of the discretion, nor any means of making representations as to the issue of a suspension notice (in addition to the penalty notice) in individual cases. Nor is there provision for guidelines as to the use of the power under s 34(2)(b)(iii) *not* to enforce the penalty notice.

25. A number of references to the potential for an unjust application of the Bill's provisions were made during the second reading debate:

> Fifty per cent of roads that the NRMA surveyed in the metropolitan area did not comply with the speed limit guidelines set by the RTA, or they were inconsistent. If the zones are not appropriate to reflect what is a safe speed - and we are introducing legislation that provides for a licence to be suspended if someone travels more than 45 kilometres above those speed zones - then it is conceivable that a person could unreasonably lose their licence in the circumstances where the speed zone is, in fact, inappropriate for that particular area of the road.[112]

26. The Committee notes that the power to issue and enforce suspension notices pursuant to proposed s 34(2)(b) of the *Road Transport (General) Act 1999* can have a significant impact on individuals and should therefore be subject to strict control by the law.

27. The Committee has written to the Minister seeking his advice regarding what will guide the discretion of police officers and officials when deciding whether to issue or enforce a suspension notice.

28. The Committee refers to Parliament the question as to whether these discretions make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers.

Non-reviewable decisions [s 8A(1)(b)(iii) *LRA*]

Limitations on the ADT's powers to review a licence suspension

29. A person aggrieved by a decision of a police officer under s 34 to suspend the person's driver licence may apply to the Administrative Decisions Tribunal for a review of the decision under s 48 *Road Transport (General) Act 1999*.

[111] For the purposes of Part 6 of the *Fines Act 1999*, the following are ***appropriate officers*** for a penalty notice:
(a) a person so authorised to issue that kind of penalty notice,
(b) a person employed in the Office of State Revenue in the Treasury and authorised by the Chief Commissioner of State Revenue for the purposes of this Part,
(c) a person, or a member of a specified class of persons, specified in the regulations for that kind of penalty notice or for all penalty notices: s 22(2) of the *Fines Act 1996*.

[112] Mr D L Page MP, *Legislative Assembly Hansard*, 3 June 2004.

30. However, the Administrative Decision Tribunal's jurisdiction is limited by s 48(3), which provides that, in determining an application for a review of such a decision, the Tribunal:

(a) is not to vary or set aside a decision to suspend a driver licence or authority to drive unless it is satisfied that there are exceptional circumstances justifying a lifting or variation of the suspension, and

(b) is not, for the purposes of any such application, to take into account the circumstances of the offence with which the person making the application is charged.

31. The Tribunal has held that this limitation is based on two considerations:

> "Firstly, it is not appropriate for the Tribunal to assess the likelihood of success of the proceedings pending in the Local Court based on what can only be incomplete and untested evidence. Secondly, this provision is designed to ensure that the public safety considerations inherent in a police officer's powers to suspend a licence are not easily displaced"[113]

32. The Committee refers to Parliament the question of whether these limitations on the review of the licence suspension powers introduced by the Bill makes rights, liberties or obligations unduly dependent on non-reviewable decisions.

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

Issue: Clause 2 Commencement by proclamation

33. The ensuing Act is to commence on a day or days to be appointed by proclamation.

34. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it choses, or not to commence the Act, or part of the Act, at all.

35. The Committee has written to the Minister for advice as to the reasons for commencement by proclamation and the likely timeframe within which it is expected the Bill will commence.

The Committee makes no further comment on this Bill.

[113] Coleman v Commissioner of Police, New South Wales Police Service [2000] NSWADT 15 (21 February 2000) per Hennessy DP.

15. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2004

Date Introduced:	2 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Carr MP
Portfolio:	Premier

Purpose and Description

1. The objects of this Bill are to repeal certain Acts, provisions of Acts and an instrument, to amend certain other Acts and instruments in various respects and for the purpose of effecting statute law revision, and to make certain savings.

Background

2. According to the second reading speech:

> The form of the bill is similar to that of previous bills in the statute law revision program. Schedule 1 makes policy changes of a minor and non-controversial nature... Schedule 2 deals with matters of pure statute law revision... Schedule 3 repeals a number of Acts and provisions of Acts and a regulation... Schedule 4 contains provisions dealing with the effect of amendments on amending provisions, savings clauses for the repealed Acts and a power to make regulations for savings and transitional matters, if necessary.[114]

The Bill

3. Schedule 1 makes amendments to 40 Acts and five statutory rules.

4. Schedule 2 amends 26 Acts and 19 instruments for the purpose of effecting statute law revision. A number of other amendments are made relating to formal drafting matters and minor corrections.

5. Schedule 3 repeals 59 Acts and provisions of 18 Acts and a Regulation. The Schedule repeals amending Acts enacted in 2003 or earlier that contain no substantive provisions that need to be retained. It also repeals certain provisions that merely effect amendments to other legislation or have expired or ceased to have effect.

6. Schedule 4 contains savings, transitional and other provisions of a more general effect than those set out in Schedule 1.

[114] Mr Tony Stewart MP, Parliamentary Secretary, *Legislative Debates Hansard,* Legislative Assembly, 2 June 2004.

Issues Considered by the Committee

7. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1989.*

The Committee makes no further comment on this Bill.

16. WORKERS COMPENSATION AMENDMENT BILL 2004

Date Introduced:	3 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Della Bosca MLC
Portfolio:	Commerce

Purpose and Description

1. The Bill amends:

   (a) the *Workers Compensation Act 1987* (the 1987 Act);

   (b) the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act); and

   (c) the *Sporting Injuries Insurance Act 1978* (Sporting Injuries Act)

   in relation to:

   - payment of compensation to an injured worker for domestic assistance;
   - enabling a Presidential member of the Workers Compensation Commission to remit a matter back to an arbitrator for determination;
   - creation of a Workers Compensation Insurance Fund Investment Board;
   - the applicability of insurance policies under the 1987 Act to liability which arises after the currency of the policy from injury suffered during the policy;
   - enabling the Treasury Corporation to provide guarantees for security for the performance of a self-insurer's obligations to State owned corporations; and
   - the assessment of the degree of permanent loss suffered as a result of a sporting injury.

Background

2. The Bill introduces a number of reforms to workers compensation legislation.

3. In the second reading speech, the Parliamentary Secretary noted the input of a range of stakeholders in the course of drafting the Bill:

> On 11 May the bill was circulated to members of WorkCover's Advisory Council, which includes representatives of the Labor Council and employer bodies. The bill was also circulated to the Insurance Council of Australia, the Law Society and the Bar Association. Comments made by stakeholders have been carefully considered and taken into account in settling the final terms of the bill.[115]

[115] Ms A P Megarrity MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 3 June 2004.

The Bill

Domestic assistance

4. The *Workers Compensation Legislation Further Amendment Act 2001* [2001 Act] introduced a new entitlement to statutory compensation for domestic assistance considered reasonably necessary to be provided to a worker as a direct result of an injury [s 60AA of the 1987 Act].

   The entitlement applies where the permanent impairment of the worker is 15% or more [s 60AA(1)(c)], with exceptions for short term special needs [s 60AA(2)].[116]

5. Currently, WorkCover may make guidelines, requiring gratuitous domestic assistance to be provided in accordance with a care plan set out in WorkCover guidelines [s 60AA(3)].[117]

   However, s 60AA of the 1987 Act does not make similar provision in relation to domestic assistance provided by *professional* carers, even though the criteria and prerequisites for the provision of all domestic services to workers are the same.

   The second reading speech noted that this "appears to be an oversight", which is remedied by the Bill [proposed s 60AA(1)(d)].[118]

6. The amendment to s 60AA of the 1987 does not apply to domestic assistance which was actually *provided* before the commencement of the amendment.

   However, it will apply to assistance subsequently provided where the injury was received before the commencement of the amendment [Sch 6 Part 18H[3] to the 1987 Act].

Workers Compensation Commission

7. Currently under the 1998 Act, the powers of presidential members of the Workers Compensation Commission [the Commission] on hearing reviews of arbitrators are limited to confirming the decision, or revoking it and substituting a new decision [s 352(7) of the 1998 Act].

8. However, in some cases, such as when a presidential member hears an appeal on a preliminary decision, it is more appropriate to remit the matter back to the original decision maker.[119]

9. The Bill amends the 1998 Act to give presidential members of the Commission an additional power on appeal to remit the matter to the arbitrator for determination, in

[116] The provision of this benefit was intended to ensure that the long term care needs of the most seriously injured workers were met by the statutory scheme: Ms A P Megarrity MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 3 June 2004.

[117] "Gratuitous domestic insurance" is defined as domestic assistance provided to an injured worker for which the injured worker has not paid and is not liable to pay: s 60AA of the *Workers Compensation Act 1987*.

[118] Ms A P Megarrity MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 3 June 2004.

[119] This proposal is consistent with powers in other tribunals, such as the Administrative Decisions Tribunal.

accordance with any directions or recommendations of the presidential member [proposed amended s 352(7)].

10. The Bill provides that the amendment to s 352 of the 1998 Act extends to an appeal made under that section *before* the commencement of the amendment [Sch 6 Part 18H[2] to the 1987 Act].

Workers Compensation Insurance Fund Investment Board

11. The *Workers Compensation Amendment (Insurance Reform) Act 2003* [the 2003 Act] provided for the transfer of the six existing separate managed funds held by each of the licensed insurers into a single fund [new s 154D of the 1987 Act], to be known as the Workers Compensation Insurance Fund [the Fund].[120]

    The relevant provisions of the 2003 Act are not yet in force.

12. The Bill establishes the *Workers Compensation Insurance Fund Investment Board* (Investment Board) to determine the investment policies of the Fund, and to advise the Minister on the investment performance of the Fund [proposed s 19A(4)].[121]

13. An existing provision in the 1998 Act that protects the Authority, the Board of Directors and the Council and their members from personal liability for acts in good faith is extended to the proposed Investment Board, and to committees of that Board, or the Board of Directors of the WorkCover Authority of New South Wales [proposed amended s 240 of the 1998 Act].

Insurance coverage

14. The Bill addresses the Court of Appeal decision of *Orica Limited v CGU Insurance Limited*[122], in which the court held that common law liability arises *only* at the time at which time a worker has suffered damage.

    In the case of dust diseases, damage may occur many years after the injury was initially sustained. Pursuant to the decision, these claims would not be covered by

[120] The assets of the Fund will be held on trust and will comprise premiums, investment income and other money related to the WorkCover Scheme. They will be used to meet claims costs and the expenses of the Scheme. Employers are entitled to participate in the distribution of the Fund's assets and are liable to contribute to any deficit in the Fund, as provided in the 1987 Act: WorkCover Scheme Design, May 2004, http://www.workcover.nsw.gov.au/NR/rdonlyres/BE0432C7-8036-432F-B039-5DE175C16121/0/scheme_infopaper_4451.pdf
The Committee reported on the *Workers Compensation Amendment (Insurance Reform) Act 2003* in its *Digest* No.6 of 2003.

[121] The Board will consist of WorkCover's chief executive officer and five other members, specifically chosen for their business, investment or other relevant qualifications. Members of the Board will be jointly appointed by the Minister and the Treasurer: proposed Sch 3A to the *Workplace Injury Management and Workers Compensation Act 1998*.

[122] *[2003] NSWCA 331* per Spigelman CJ and Mason P. Note however, the dissent of Santow JA at [98], [161], [171]: "The policy is triggered by injury and an accrued or accruing liability; though the latter is yet to crystallise in the form of damage constituting a completed cause of action. Requiring both injury and damage to occur in the same year of a policy for indemnity to arise would produce a substantial gap in the statutory insurance cover and would be contrary to the commercial purpose of the policy in its statutory context to cover diseases of gradual onset, with unreasonable results."

insurance, as they would fall outside the policy period. An employer would therefore be solely liable for the claim.

15. The Bill amends the 1987 Act to ensure that insurance policies affected by the decision - those issued prior to the adoption of the new form of policy in 1995[123] - operate in respect of a common law liability of the employer for an injury to a worker *as if the liability arose when the injury was received* (ie, during the term of the policy concerned) [proposed s 151AAA of the 1987 Act].

16. The Bill also corrects an anomaly that prevented the 1987 Act applying in a case where a single insurer was on risk for the period in question [proposed s 151AB].

17. The amendments are to remove doubt and extend to existing liabilities, but without affecting court decisions, compromises or settlements already made, except for the purposes of an appeal against a court decision already made [Sch 6 Part 18H[4(1)] to the 1987 Act].

State-owned corporations

18. The Bill amends the 1987 Act to ensure that licensed self-insurers who are State-owned corporations are not disadvantaged because they use Treasury Corporation (T-Corp) for financial services.

19. Generally, licensed self-insurers are required to deposit an amount of money with WorkCover as security [s 213 of the 1987 Act]. Alternatively, they may provide a guarantee from a bank, building society or credit union [s 215A].

20. However, because T-Corp is not a bank, building society or credit union, it cannot provide such a guarantee. State-owned corporations are therefore required to obtain a guarantee from another institution, thereby losing the benefit of the pre-existing relationship with T-Corp.

21. In order to rectify this inconsistency, T-Corp will be one of the entities that can provide guarantees to State-owned corporations [proposed s 215A(1)].

Sporting Injuries Insurance Act 1978

22. The *Sporting Injuries Insurance Act 1978* [Sporting Injuries Act], establishes a scheme providing insurance cover for the members of any sporting organisation that has elected to join [s 11].[124]

    Any injury resulting in the permanent loss of a prescribed faculty or use of some prescribed part of the body is covered by the scheme.

23. Section 24(4) of the Sporting injuries Act provides as follows:

[123] On 1 September 1995 the *Workers Compensation (General) Regulation 1995* came into effect, adopting a new form of workers compensation insurance policy that made it clear that the policy covered a common law liability of the employer for an injury to a worker received during the term of the policy, even if liability in respect of the injury arose after the period for which the policy was in force.

[124] The scheme is administered by the Sporting Injuries Committee, which consists of seven members, most of whom are involved in sport: s 7 of the *Sporting Injuries Insurance Fund Act 1978*.

> When an applicant for a benefit under this Act makes himself or herself available for examination by a medical panel or referee to which or whom his or her application has been referred under subsection (1), the medical panel or referee shall:
>
> (a) make an assessment that specifies:
>
> (i) the nature of the injury in respect of which the application was made; and
>
> (ii) where the injury is described in Table A of Schedule 1 by reference to a prescribed percentage or is described in Part 1 of Table B of that Schedule—the degree, having regard to subsection (5), of the permanent loss, expressed in terms of a percentage, of any use or other capacity, referred to in that Schedule, suffered by the applicant as a consequence of the injury; and
>
> (b) forward the assessment to the Committee.

24. The Bill amends the Sporting Injuries Act to provide that if a person *unreasonably refuses* medical treatment, the medical panel or referee may assess that person's permanent injury on the assumption that the person's injury was improved by such treatment [proposed s 24(5A)].

25. According to the second reading speech:

> [t]he proposed amendment is required to deter applicants from attempting to be assessed for permanent loss before corrective surgery has been undertaken. This is particularly relevant for anterior cruciate ligament damage, which is a very common knee injury in sport...Corrective surgery can reduce [anterior cruciate ligament] damage from between 35 and 45 per cent to between 5 and 15 per cent.
>
> This is below the threshold required to receive payment for permanent loss of the use of a leg. Clearly, delaying surgery until after an assessment is conducted undermines the scheme and will render the scheme unviable in its current form, because it does not have sufficient resources to compensate for injuries where it is unnecessary.[125]

Issues Considered by the Committee

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

Retrospectivity: Clause 2

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

27. The exceptions are:

(a) the amendments to the 1987 Act to ensure that insurance policies affected by the decision in *Orica Ltd v CGU Insurance Ltd*; and

(b) the transitional provisions, namely:

(i) the amendment to s 352 of the 1998 Act [extends to an appeal made under that section before the commencement of the amendment];

[125] Ms A P Megarrity MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 3 June 2004.

(ii) the amendment to s 60AA of the 1987 Act [applies in respect of an injury received before the commencement of the amendment]; and

(iii) the amendments inserting s 151AAA and amending s 151AB of the 1987 Act [extend to liabilities arising before the commencement of the amendments],

which are taken to have commenced on the date of introduction into Parliament of the Bill.

28. The Senate Scrutiny of Bills Committee has held that legislation of this nature places the Parliament in the "invidious position" of simply agreeing to the legislation without significant amendment, or of overturning arrangements made by members of the public in reliance on the Bill as introduced.[126]

29. As noted by the Senate Committee:

> publishing an intention to process a bill through Parliament does not convert its provisions into law; only Parliament can do that.[127]

30. The Committee will always be concerned where legislation is taken to have commenced on the date when it was introduced into Parliament, rather than on or after the date of assent.

31. However, the Committee notes that in each instance the retrospectivity operates to the benefit of person seeking compensation under the various pieces of workers compensation legislation.

32. Accordingly, the Committee does not consider that the retrospective clauses of the *Workers Compensation Bill 2004* trespass upon personal rights and liberties.

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

Limit to compensation: Schedule 3 [1]

33. Schedule 3 [1] amends the Sporting Injuries Act to provide that where a person has refused medical treatment, an assessment of that person's sporting injuries may be made on the assumption that the likely improvement from such treatment refused *has in fact occurred* [proposed s 24(5A)]

34. This has the practical effect of infringing upon a person's right to refuse medical treatment, and the associated right to personal integrity.[128]

35. However, this *apparent* infringement is mitigated on a number of public policy grounds, namely that:

- a person does not have an obligation to make a claim under the Sporting Injuries Act — once such a claim *is* made, it is only reasonable that such a person will submit to the processes required to consider his or her claim;

[126] See Senate Scrutiny of Bills Committee, *Annual Report 1986-87*, pp.12-13.
[127] Senate Scrutiny of Bills Committee, *The Work of the Committee during the 37th Parliament*, p.21.
[128] See the High Court in *Secretary, Department of Health and Community Services v JWB and SMB* ("Marion's case") (1992) 175 CLR 218.

- the medical treatment refused must be considered by the medical panel or referee as *likely* to result in an improvement in the applicant's condition; and
- the medical panel or referee must be satisfied that the applicant's refusal of the treatment is *unreasonable*.

36. The Committee notes that the assumption of improvement contained in proposed s 24(5A) of the *Sporting Injuries Act 1978* may in practice limit the amount of compensation payable to an applicant under that Act.

37. However, having regard to the aims of the Act, and the requirement of an *unreasonable* refusal to undergo treatment, the Committee does not consider that this constitutes an undue trespass on personal rights and liberties.

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

Commencement: Clause 2

38. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation, other than as outlined above.

39. The Committee notes that providing for an Act to 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, or parts of the Act, at all.

While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

40. The Committee is advised by the Minister's office that the delay in commencing the Bill is due to the processes required to constitute the Workers Compensation Insurance Fund Investment Board. The Investment Board may not be operative until 1 July 2005, partly due to the fact that it may not have any funds to administer until the consolidation of existing funds is effected.

41. The Minister's office further advised that it is anticipated that all the other provisions of the Bill would be commenced as soon as possible after the Royal Assent.

The Committee makes no further comment on this Bill.

SECTION B: MINISTERIAL CORRESPONDENCE — BILLS PREVIOUSLY CONSIDERED

17. GREYHOUND AND HARNESS RACING ADMINISTRATION BILL 2004

Date Introduced:	7 May 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Grant McBride MP
Portfolio:	Gaming and Racing

Background

1. The Committee reported on this Bill in Legislation Review Digest No 7 of 2004.

2. The Committee noted that clause 24 of the Bill gives the Greyhound and Harness Racing Regulatory Authority (the Authority) power to conduct a special inquiry into a matter decided by the Greyhound and Harness Racing Appeals Tribunal (the Tribunal) on appeal if the Authority receives new information that was not previously available.

   Under clause 24, the decision of the Authority replaces the Tribunal's decision and cannot be appealed to the Tribunal.

   The Committee noted the importance of review for protecting individuals' rights against oppressive administrative action.

3. The Department advised the Committee that clause 24 has been carried forward from previous legislation.

4. On 11 May 2004, the Committee wrote to the Minister for advice as to the reasons for excluding appeal to the Tribunal of a decision of the Authority made under its special inquiry powers. The Committee also expressed its view that the fact that clause 24 had been carried forward from previous legislation is not, in itself, sufficient justification for failing to provide an appeal right.

Minister's Reply

5. In a letter dated 31 May 2004 (attached) the Minister advised the Committee that under the preceding legislation the special inquiry provision had only been used twice, and in both instances the aggrieved parties had been exonerated.

6. The Minister further advised that subclause 24(2) of the Bill:

   > is an important means by which the Authority can inquire into matters which come to attention because of subsequently available information.

It should be noted that a special inquiry occurs after a matter has been to the Appeals Tribunal, and only if new evidence is available to justify the Authority conducting a special inquiry.

The availability of that process should not, however, be confused with the ability of the Authority or its Stewards to reopen a 'disciplinary' inquiry, a process which is subject to the appeal mechanisms available under the Act.

Committee's Response

7. The Committee thanks the Minister for his reply.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

11 May 2004

Our Ref: LRC723

The Hon Grant McBride MP
Minister for Gaming and Racing
Level 13, 55 Hunter Street
Sydney NSW 2000

Dear Minister

Greyhound and Harness Racing Administration Bill 2004

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 7 of 2004*.

The Committee resolved to write to you in relation to subclause 24(2) of the Bill. In particular, the Committee is concerned that this subclause may make individual rights subject to non-reviewable decisions by excluding appeal of a decision of the Authority made under its special inquiry power.

The Committee understands from your Department that this provision has been carried forward from the *Harness Racing Act 2002* and its predecessor, the *Harness Racing New South Wales Act 1977*.
The Committee also understands from your Department that the special inquiry provisions are intended to sit alongside the normal disciplinary mechanisms as a safeguard to enable the Authority to keep in touch with the detection of new drugs in racing.

The Committee is of the view that there is a need for an effective mechanism to enable the racing industry regulators to deal with developments both in the type of performance affecting drugs available and the tests used to screen for them. However, the Committee also notes the importance of review for protecting individuals' rights against oppressive administrative action.

Further, it is not apparent to the Committee why a person aggrieved by a decision of the Authority, made after conducting a special inquiry under clause 24, should not be able to appeal that decision to the Tribunal. The mere fact that clause 24 has been carried forward from previous legislation

does not, of itself, provide justification for making the Authority's decision non-reviewable by the Tribunal.

The Committee seeks your advice as to the reasons for failing to provide for appeal to the Tribunal of a decision of the Authority under its special inquiry power.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

New South Wales

Minister for Gaming and Racing

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2 JUN 2004
LEGISLATION REVIEW COMMITTEE

Mr B Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
SYDNEY NSW 2000

31 MAY 2004

Dear Mr Collier Barry

Thank you for your letter dated 11 May 2004 in which you raise the matter of whether subclause 24(2) of the *Greyhound and Harness Racing Administration Bill 2004* may make individual rights subject to non-reviewable decisions by excluding appeal of a decision of the Authority made under its special inquiry power.

As you are aware, the provision has been carried forward from earlier legislation which provided for the greyhound and harness racing industry regulatory bodies in their previous form, that is, before they were amalgamated.

The 'special inquiry' provision is intended to operate alongside the normal disciplinary mechanisms and is largely a safeguard to enable the Authority to deal with situations where new evidence becomes available.

The provision has been used only twice and on both occasions at the request of an aggrieved harness racing participant wishing to bring to attention new evidence relating to drug detection issues. There have been no greyhound related instances.

The first instance involved a positive test to the presence of morphine in the system of a horse. The aggrieved trainer made representations to the Authority on the matter. The Authority found that that the horse had ingested poppy seeds which had resulted in the positive test. The trainer was exhonerated.

The second instance also involved a positive test to a drug but after enquiry it was found that the utensils had not been properly cleaned and that the positive result occurred from the residue of a previously tested animal. That trainer was also exhonerated.

Accordingly, the provision is an important means by which the Authority can inquire into matters which come to attention because of subsequently available information.

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It should be noted that a special inquiry occurs after a matter has been to the Appeals Tribunal, and only if new evidence is available to justify the Authority conducting a special inquiry.

The availability of that process should not, however, be confused with the ability of the Authority or its Stewards to reopen a 'disciplinary' inquiry, a process which is subject to the appeal mechanisms available under the Act.

I trust that the above advice assists the Committee with its inquiries in relation to the *Thoroughbred Racing Legislation Amendment Bill 2004.*

Yours sincerely

Grant McBride MP
Minister for Gaming and Racing

18. MINE HEALTH AND SAFETY ACT 2004

Date Introduced:	7 May 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Kerry Hickey MP
Portfolio:	Mineral Resources

Background

1. The Committee reported on the *Mine Health and Safety Bill 2004* in Legislation Review Digest No 8 of 31 May 2004.

2. Under the Bill, a Board of Inquiry may be constituted to conduct a special inquiry into an event, occurrence, practice or matter. The Bill also provides that an agent, including a legal practitioner, may represent a person appearing before the Board of Inquiry.

3. The Committee wrote to the Minister expressing concern that as the Bill excludes the privilege of self-incrimination from the special inquiry process, does not provide for an appeal from the findings of an inquiry and allows the findings of an inquiry to be published, it may trespass on the personal rights of a person giving evidence to a Board of Inquiry.

4. The Committee also sought clarification from the Minister as to the role of a representative of a person appearing before a Board of Inquiry in light of the concerns the Committee raised.

Minister's Reply

5. In his response (attached) the Minister advised the Committee that:

> A Board of Inquiry's ultimate function is to report to the Minister. A Board cannot make finding of guilt, or make decisions resulting in sanctions on individuals. For this reason it is made clear that there is no avenue of appeal. In many respects they are an inquisitorial arrangements seminal in nature to the Coroner's Court… The publication of a Board of Inquiry report is at the discretion of the Minister, who is, in turn answerable to the Parliament.
>
> A Board of Inquiry would also be required to follow procedural fairness and natural justice in the general law. This means that where a Board intended to make an adverse observation against an individual then they would be afforded an opportunity to know the nature of the observation and be given an opportunity to respond.
>
> The protection of these general law rights would be an important role of an agent (including a legal practitioner) representing someone at a Board of Inquiry.

Committee's Response

6. The Committee thanks the Minster for his reply.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

28 May 2004

Our Ref: LRC724

The Hon Kerry Hickey MP
Minister for Mineral Resources
Level 17
157 Liverpool Street
Sydney NSW 2000

Dear Minister

Mine Health and Safety Bill 2004

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 8 of 2004*.

The Committee notes that, under the Bill, a Board of Inquiry may be constituted to conduct a special enquiry into an event, occurrence, practice or matter.

The Committee also notes that the Bill excludes from the processes of such an Inquiry the traditional privilege against self-incrimination.

The Committee also notes that there is no appeal from the findings of an Inquiry, and that any findings of an Inquiry may be published. Such publications may include adverse comment in respect of individuals required to give evidence.

The Committee is concerned - particularly in the absence of a privilege against self-incrimination - that the absence of appeal rights and the possibility of adverse findings being made public trespasses on the personal rights of a person giving evidence to a Board of Inquiry.

The Committee notes, however, that there is provision in the Bill for an agent, including a legal practitioner, to represent a person or body at the Inquiry.

The Committee seeks clarification as to the role of such a representative at a Board of Inquiry in the light of its concerns outlined above.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

New South Wales

The Hon. Kerry Hickey MP
Minister for Mineral Resources

MC04/139
M03/0078

- 9 JUN 2004

Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Collier

Thank you for your letter of 28 May 2004 seeking clarification of the role of representatives of parties at a Board of Inquiry that may be constituted under the Mine Health and Safety Bill 2004.

The Board of Inquiry provisions need to be considered in the context of recent developments in the occupational health and safety legislation applying to mines in New South Wales.

The Mine Health and Safety Bill 2004 (the Bill) carries forward a number of arrangements found in legislation currently in force. One of these is the provision for Boards of Inquiry which were introduced to the *Mines Inspection Act 1901* (MI Act) by the *Mines Legislation Amendment (Mines Safety) Act 1998* (MLA Act). This Act was, in large part, a response to the Gretley Inquiry resulting from the deaths of four miners at the Gretley colliery, near Newcastle, in November 1996.

As outlined in the second reading speech, Boards of Inquiry were introduced to provide a "middle way" to conduct a public inquiry into incidents at mines, between a special report by an inspector and a full judicial inquiry. The Gretley Inquiry was a judicial inquiry conducted in the Court of Coal Mines Regulation. This Court also has a coercive power to require answers to questions.

The Board of Inquiry provisions were introduced into both the *Coal Mines Regulation Act 1982* (CMRA, in response to Gretley) and the MI Act (as a matter of consistency across the mining jurisdiction). A feature of the provisions was that a Board of Inquiry was given the functions of an inspector including, subject to certain conditions, a power to require answers to questions (see MI Act section 47N).

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An inspector's power to require answers to questions is contained in section 36A of the MI Act, which provides, in sub-section 2:

An answer given by a person in pursuance of a requirement imposed under subsection (1) (a) is not admissible in evidence against the person in any proceedings except proceedings for an offence under section 36C (e).

Section 36C(e) creates offences concerning false statements.

Therefore, the general arrangement is that a Board of Inquiry is given an inspector's powers to require answers to questions, but, inherent in that is a protection against self incrimination.

This general arrangement has been carried forward in the Bill. It has also already been carried forward in the *Coal Mine Health and Safety Act 2002*.

The difference between the recent legislation and that already in force concerns the origin of powers of inspectors. The ongoing arrangement is to have inspectors powers for the mining jurisdiction, for the most part, the same as powers for WorkCover inspectors under the *Occupational Health and Safety Act 2000* (OHS Act). In fact 'mining' inspectors are, in effect, to be inspectors under the OHS Act but constrained to the mining jurisdiction. This seems sensible since the OHS Act creates broad duties applicable to all places of work in the State.

The Bill has not been drafted, as has previous legislation, to say a Board of Inquiry has the relevant powers of an inspector. Rather, the relevant provisions of the OHS Act (section 59(e) and section 65) have been reproduced in the Bill (clause 96 (7), (8) and (9)) with the intention of having the same effect. The end result is that a person required to answer questions by a Board of Inquiry has the same rights as a person being asked questions by a WorkCover (or mining) inspector. This includes an equivalent right against self incrimination.

As indicated earlier the Board of Inquiry provisions contained in the Bill are intended to carry forward, as close as possible, current provisions under the MI Act. The legislative intent as outlined in the second reading speech to the MLA Act remains relevant:

The procedure at Boards of inquiry is intended to be as informal as possible. A Board will not be bound by rules of evidence, and it will have discretion as to whether or not parties may have their legal representative present. It goes without saying, though, that the Board will treat people fairly, and observe the principles of natural justice.

These initiatives are intended to cut through the delays inherent in formal legal proceedings and cut the cost, both to government and to parties to the inquiry. They also have the advantage of being less threatening to witnesses, thus encouraging them to speak more frankly. The Minister who calls a Board of Inquiry into being can stipulate that it must report within a given time. Due to the broad range of issues that can be dealt with by a Board of Inquiry, the Minister can also give more specific terms of reference. This is intended to speed up the business of the inquiry, and encourage the Board to report as quickly as possible. (emphasis added)

A Board of Inquiry's ultimate function is to make a report to the Minister. A Board cannot make findings of guilt, or make decisions resulting in sanctions on individuals. For this reason it is made clear that there is no avenue of appeal. In many respects they are an inquisitorial arrangement similar in nature to the Coroner's Court which may also, where warranted, be critical of individuals. The publication of a Board of Inquiry report is at the discretion of the Minister, who is, in turn answerable to the Parliament.

A Board of Inquiry would also be required to follow procedural fairness and natural justice in the general law. This means that where a Board intended to make an adverse observation against an individual then they would be afforded an opportunity to know the nature of the observation and be given an opportunity to respond.

The protection of these general law rights would be an important role of an agent (including a legal practitioner) representing someone at a Board of Inquiry. It would also be incumbent on a Board to allow such representation if these rights may fall into question.

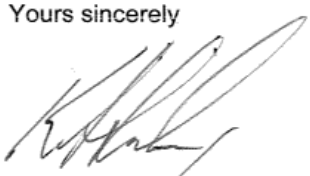
Also, if a Board appointed a legal practitioner to assist it, and if that assistance extended to the examination of witnesses, common, ordinary rules of procedural fairness demand that every party to the inquiry be granted legal representation.

The retention of the Board of Inquiry provisions in the Bill reflects mining community expectation that adequate arrangements are available to allow the truth to be quickly and efficiently discovered when lives are taken at work or serious issues of safety emerge.

Thank you for your valuable comments on the Bill.

If you require further information on this matter, please contact Ms Siobhan Barry, Policy Adviser, in my office on (02) 9475 7600.

Yours sincerely



Kerry Hickey
MINISTER

19. PASSENGER TRANSPORT (BUS REFORM) BILL 2004

Date Introduced:	12 May 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Costa MLC
Portfolio:	Transport Services

Background

1. The Committee reported on the *Passenger Transport (Bus Reform) Bill 2004* in Legislation Review Digest No 8 of 31 May 2004.

2. Under the Bill [proposed Sch 3 cl 35 to the *Passenger Transport Act 1990*] any function of the Director-General of Transport which has been exercised under proposed s 28EA, s 28EB, or proposed part 7, concerning the termination of an existing commercial bus service contract, or the declaration or variation of a bus service contract region or strategic transport corridor before the transitional period expiry day, may not be:

   (a) challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings; or

   (b) restrained, removed or otherwise affected by any proceedings.

3. In addition, the Bill provides that the rules of natural justice do not place on the Director-General any obligation enforceable in a court of law or administrative review body.

4. The Committee wrote to the Minister on 28 May 2004 (attached) expressing its concern that excluding any such decisions of the Director-General from judicial review may trespass on the personal rights of bus service operators to have administrative decisions judicially reviewed.

5. The Committee sought the Minister's advice as to the reasons for excluding judicial review of the decisions of the Director-General, rather than setting out the breadth of the Director-General's powers in the Bill.

Minister's Reply

6. In his reply (attached) the Minister advised the Committee that he proposed to protect certain administrative functions from judicial review only after having weighed up the rights of existing contract holders against:

   - the potential costs of litigation;
   - the potential for lengthy delays to the implementation of reform; and
   - the impact of this on the community and viability of the industry; and the need for certainty for operators entering into new regular bus service contracts.

7. The Minister further advised the Committee that:

> Having made the decision that the provision was justified, I have ensured that the Bill was carefully drafted so the intention of the provisions (and Parliament passing it) was absolutely clear. I have also ensured that the Bill was carefully drafted to that the ambit of the clause is confined to certain decisions (the power to vary or extinguish commercial contracts) and that protection from review of the power to vary contracts is time-limited.

8. In his response, the Minister also questioned the role of the Committee and commented that he did not receive notification from the Committee that the Legislation Review Digest commenting on this Bill had been published.

Committee's Response

9. The Committee thanks the Minster for his reply.

10. The Committee has written to the Minister thanking him for his reply, responding to his comment on the role of the Committee and advising him of the procedures it has adopted in relation to the notification of publication of its Legislation Review Digest (attached).

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

28 May 2004

File Ref: CP4042/LRC730

The Hon Michael Costa MLC
Minister for Transport Services
Level 31 Governor Macquarie Tower
1 Farrer Place
SYDNEY 2000

Dear Minister

Passenger Transport Amendment (Bus Reform) Bill 2004

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 8 of 2004*.

The Committee notes that under proposed Sch 3 cl 35 to the *Passenger Transport Act 1990*, any function of the Director-General of Transport which has been exercised under proposed s 28EA, s 28EB, or proposed part 7, concerning the termination of an existing commercial bus service contract, or the declaration or variation of a bus service contract region or strategic transport corridor before the transitional period expiry day, may not be:

(a) challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings; or

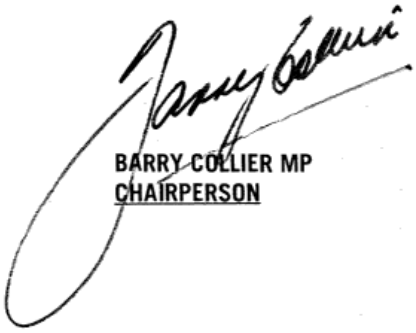
(b) restrained, removed or otherwise affected by any proceedings.

Moreover under the Bill, the rules of natural justice, so far as they apply to the exercise of such functions, do not place on the Director-General any obligation enforceable in a court of law or administrative review body.

The Committee considers that excluding any such decisions of the Director-General from judicial review may trespass on the personal rights of bus service operators to have administrative decisions judicially reviewed.

The Committee seeks your advice as to the reasons for excluding judicial review of the decisions of the Director-General, rather than setting out the breadth of the Director-General's powers in the Bill.

Yours sincerely



BARRY COLLIER MP
CHAIRPERSON

Minister for Transport Services
Minister for the Hunter
Minister Assisting the Minister for Natural Resources (Forests)

ML04/14259

Mr Barry Collier MP
Chairperson, Legislation Review Committee
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

Dear Mr Collier

I refer to your letter dated 28 May 2004 about the *Passenger Transport (Bus Reform) Bill* 2004, and in particular, clause 35 of the proposed amendments to Schedule 3 of the *Passenger Transport Act* 1990.

The NSW Government is committed to reforming bus services in NSW, which is why I commissioned the Hon Barrie Unsworth to undertake the first comprehensive review since 1961. As you know, the Final Report of the Unsworth Review provided a blueprint for achieving reform, which included amending the 1990 Act to overcome statutory obstacles to the design and delivery of an integrated network of services that respond to the needs of the community. In particular, the Unsworth Report proposed a more transparent and accountable contracting regime (which included removing statutory rights of renewal), and recommended that the legislation should allow existing contracts to be extinguished.

Government gave in-principle support to these recommendations in March 2004, and the *Passenger Transport (Bus Reform) Bill* 2004 sets up a new scheme for contracting regular bus services and a mechanism that allows for the smooth transition to the new arrangements.

The Bus Reform Bill passed through the Legislative Council on 2 June 2004.

I note that the Committee's Legislation Digest Number 8, published 31 May 2004, raises concerns about the inclusion of a so-called privative clause in the transitional provisions.

Leaving aside the question of the legality of the proposed provision – which, despite some pedestrian concerns about its 'constitutionality,' is widely accepted to be within the purview of a State Parliament's power – I make the following comments in response:

1. The decision to include in the Bill a provision protecting the exercise of certain administrative functions from judicial review was not one that I made

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lightly. I am very much aware of the implications of such a clause, but as Minister responsible for the Transport Services portfolio, I had to weigh up the rights of existing contract holders against:

- the potential costs of litigation;
- the potential for lengthy delays to the implementation of reform and the impact of this on the community and viability of the industry; and
- the need for certainty for operators entering into new regular bus service contracts.

2. Having made the decision that the provision was justified, I have ensured that the Bill was carefully drafted so the intention of the provision (and Parliament in passing it) was absolutely clear. I have also ensured that the Bill was carefully drafted so that the ambit of the clause is confined to certain decisions (the power to vary or extinguish existing commercial contracts) and that protection from review of the power to vary contracts is time-limited. This was my clear responsibility as the Minister who administers this legislation.

3. Whether the Legislation Review Committee, in commenting on the proposed clause, met its responsibilities is less clear. The Committee's charter is to provide members with advice on whether proposed legislation unduly trespasses on personal rights or makes rights dependant upon non-reviewable decisions. I have no issue with Committee reporting on the Bill or with the Committee quoting such an eminent jurist as Sir Anthony Mason on this question. My objection is that the Committee failed to put forward a balanced view.

4. Other authorities have indicated that so-called privative clauses are not only lawful, but in the public interest. In his June 2003 paper "Privative Clauses and State Constitutions," for example, the NSW Solicitor-General states:

> *...not only does a State legislature have the power to preclude all avenues of judicial review but that there are important policy considerations that should favour judicial deference to legislative intent.*

Others have questioned whether the demands of the rule of law may, indeed, be maintained in the face of a contrary legislative intention, arguing for the primacy of parliamentary sovereignty based upon the foundation of responsible government. In *Introduction to Australian Administrative Law*, Margaret Allars writes:

> *After all, the rule of law requires not only that administrators should abide by legal rules but also the courts. Reciprocity between government and governed in many areas of administration may be promoted by means of informal, inexpensive and final decision making.*

5. The credibility of the Legislation Review Committee requires that it adopt a balanced approach in performing its functions. It is outside the scope of the Committee's charter to take a policy position on an issue before it. I am

concerned that the Digest's failure to put forward arguments that counter Sir Anthony's opinion created preventable confusion about the provision and its ambit. This was reflected in contributions to the debate from members in both places.

6. Finally, I would like to make the point that my Office is yet to receive notification from the Legislation Review Committee that the Legislation Review Digest had been published. Indeed, we owe our knowledge of this fact to the Opposition members who spoke on the Bill during the Second Reading debate in the Legislative Assembly on 1 June.

7. You wrote to me on 28 May, more than two weeks after the Bill had been introduced to Parliament, and the Committee published its Digest on 31 May. The fact that I had yet to respond led some members to infer that the basis of the Bill was flawed. This is clear in comments made by Opposition members and some crossbenchers in the debate in both Houses, and may have jeopardised support for these important reforms.

I seek your assurances that the Committee will, in future, do me the courtesy of ensuring that I am advised of its intentions to publish comment on legislation for which I am responsible.

I also ask that the Committee publish an addendum to Digest 8, outlining my reasons for seeking Parliament's endorsement of the transitional arrangements designed to implement bus reform (including the proposed limitations on the review of certain decisions) and the views of other leading authorities who take a different view from Sir Anthony Mason on the use of privative clauses.

Yours sincerely

MICHAEL COSTA

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

18 June 2004

Our Ref: LRC730
Your Ref:

The Hon Michael Costa MLC
Minister for Transport Services
Level 31 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

PASSENGER TRANSPORT (BUS REFORM) BILL 2004

Thank you for your reply, received 17 June, to my letter of 28 May 2004.

In accordance with established practice, the Committee will publish your response in the next available Digest.

The Committee has also resolved to write to you — responding to your comments on the Committee's role, and advising you again of the procedures it follows for notifying Ministers of both its concerns and of the publication of the Legislation Review Digest.

I reject your suggestions that, in reporting on your Bill, the Legislation Review Committee has failed to meet its responsibilities under the Act and has not adopted a "balanced approach".

The Committee's Functions & Responsibilities

In discharging its functions under the *Legislation Review Act 1987*, the Committee's role is to identify and highlight issues arising under section 8A(1)(b) for the information of Members.

I am satisfied that, in reporting on your bill, the Committee has fulfilled its functions and responsibilities.

1

It is for the sponsor of a bill (whether Minister or Private Member) to explain to the Parliament and satisfy the Parliament as to why any apparent trespass to personal rights or liberties raised by the Committee may be justified.

As the Honourable Paul Whelan stated in the second reading debate on the Legislation Review Amendment Bill 2002:

> The committee is not intended to be a third House of Parliament. It is not intended to debate matters exhaustively. The committee's decisions will not be final or binding on Parliament. Rather, it is intended to provide a timely digest of brief advice to members on the matters within its jurisdiction. It should be flagging issues for members' attention, rather than attempting to duplicate parliamentary debate. Ultimately, whether a bill unduly trespasses on personal rights and liberties is a matter for Parliament and not for the committee.

The Minister further noted:

> The committee should not hold inquiries or invite submissions. ... It would be an impossible workload for any committee.

Clearly, the Committee's responsibility is to identify potential trespasses and bring them to the attention of both Houses of Parliament.

These are the scrutiny and reporting functions of the Legislative Review Committee of the NSW Parliament (see s 8A of the Act) and these have been adhered to in the Report on your Bill (see paragraphs 22 and 41).

Balance

I am satisfied that, in fulfilling its scrutiny and reporting functions, the Committee takes a balanced approach — and has done so with respect to your bill.

Where appropriate, as in the case of your bill, the Committee report provides appropriate *background* and quotations from the second reading speech.

The Committee is non-partisan in raising apparent issues under s 8A(1)(b) and does not seek to advocate or criticise the policy of any given bill.

To date the Committee has considered 143 bills. In all cases, including the report on your bill, the Committee's report was unanimous.

It is not the Committee's role to justify bills which raise issues under section 8A(1)(b). However, to avoid unnecessary controversy, the Committee endeavours to set out such justifications as are apparent from the bill or which are provided in the second reading speech. To this end, I wrote to you and all other Ministers in the following terms on 27 June 2003:

> It will often be the case that a provision which appears to raise concerns can be readily justified to the satisfaction of the Committee. When issues of concern are identified, the Committee will seek clarification from the relevant

> Minister by way of correspondence as to the reasons for the provision. Ideally, this would be done before the Committee reports on the Bill, but the short timeframe for reporting will often preclude such advice being received.
>
> The need for such correspondence can be avoided if provisions likely to raise issues under s 8A(1)(b) of the Act were explained in your second reading speech. This may also avoid the Committee raising concerns in a report to each House on a bill.
> ...
>
> As far as practical, I ask that you address issues which are likely to be raised by the Committee ... in your second reading speeches. Anticipating and speaking to these issues will save time, reduce the need for correspondence with the Committee, and minimise the need for any lengthy debate in reply.

So far as balance is concerned, you will note that the Committee quoted in full the arguments you provided in the second reading speech as justifying the privative or ouster clause [page 47, paragraph 36].

Privative (or Ouster) Clause

As far as your comments on the privative clause is concerned, I note the following:

(i) Contrary to the inference in your letter, the Committee's report correctly pointed out that the State is clearly not precluded from the use of privative clauses. Indeed, the Committee report cited High Court authority to this effect [page 47, paragraphs 34 & 35].

(ii) In discussing the privative clause, the Committee fairly drew the distinction between the position under Federal law and that under State law, and cited appropriate High Court cases.

(iii) It is not unreasonable to suppose that some Members may have doubts about the constitutional validity of privative clauses. The Committee considered that canvassing the broad issues which had been settled by the High Court could highlight some of the significant issues touching the operation of privative clauses, while at the same time alleviate any unnecessary doubts about their validity under State law.

The reference to the Hickman principles was particularly important as it indicated the limits that the High Court has ruled it will give to such clauses. Such limits would reassure Members that, for example, that the restriction on review of the Director-General's action would not apply to action which was not a *bone fide* attempt to exercise the power given in the Bill or did not relate to the subject matter of the legislation. Contrary to your assertion, the Committee's comments on these matters are anything but "pedestrian".

(iv) Should you wish to refer to additional Court cases or other authorities, or sources to support your arguments favouring such clauses, then this

> can be done in either the second reading speech or in the speech in reply. Moreover, it is always open to the Minister to seek to adjourn debate should further research be needed.

Timing of correspondence and digests

I note your inference that my writing to you two weeks after the bill had been introduced left insufficient time for you to respond.

Firstly, I note that the need to respond would have been minimised (or even avoided) had the obvious issues of concern to the Committee been more fully addressed in the second reading speech.

It is readily apparent from your correspondence that you were "very much aware of the implications of a such a (privative) clause...."

Secondly, your concerns highlight the problem of the short time that the New South Wales Parliament has for the consideration of bills.

The Committee can really only consider bills after the second reading speech. Often bills are introduced on a Friday and the NSW Parliament only has a five-day second reading adjournment — unlike practices followed in most other States and in the Federal Parliament.

The Committee meets to consider bills on the Friday before sitting weeks or, in a second consecutive sitting week, on the Tuesday. This allows the Committee to make the most of the limited time it has available to consider bills — on the day your bill was considered the Committee was required to consider 8 bills (comprising 485 pages), together with 18 regulations and 3 proposed postponements of the repeal of regulations.

In this connection, you will also be interested to know that the Committee includes country Members and that Parliament has decided that the Committee is not permitted to form sub-committees [Legislative Council *Hansard* 25/9/02].

Thirdly, the Honourable Paul Whelan stated in the second reading debate on the Legislation Review Amendment Bill 2002:

> members should have the benefit of the committee's report on a bill in time for debate in the week after the bill was introduced

That practice was adhered to in the case of your Bill and nearly all the bills reported on to date.

Addendum to Digest 8

Regarding your request for an addendum to Digest 8, the Committee considers your proposal to be inappropriate given the respective roles of the Committee and the Parliament. The Digest does not provide a final report on the Bill but rather raises issues for Members to debate *in the House*.

Your reasons for seeking the Parliament's endorsement of transitional arrangements could have been more appropriately the dealt with in the second reading speech or in the speech in reply.

Notification of tabling digests

The Committee has consistently followed the practice of writing to the responsible Minister on the day it considers a bill if it wishes to seek further information. An embargoed copy of the Digest is then hand-delivered, either on the morning of the day the Digest is to be tabled (usually the Monday of the sitting week), or as soon as possible after the Committee adopts the Digest if the Digest is to be tabled that particular day.

At 2.19 pm on Friday 28 May 2004, a letter signed by me was faxed to your Ministerial office. In that letter, the Committee:

- raised its concerns with this Bill and sought your response to those concerns; and
- advised that the Committee would be reporting on the Bill in Digest No 8.

On the morning of Monday 31 May 2004, an embargoed copy of the Legislation Review Digest No 8 addressed to you was hand-delivered to the mailroom of Governor Macquarie Tower. In so doing, the Committee followed exactly the same procedure and extended to you exactly the same courtesy as it has done (and will continue to do) to every other Minister.

I trust that this alleviates your concerns. As always, I am happy to personally discuss any concerns you may have with the Committee.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

5

20. STOCK DISEASES AMENDMENT (FALSE INFORMATION) BILL 2004

Date Introduced:	12 March 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Ian Macdonald MLC
Portfolio:	Minister for Primary Industries

Background

1. The Committee reported on the *Stock Diseases (False Information) Bill 2004* in Legislation Review Digest No 4 of 2004.

2. The Bill has since passed through Parliament and been assented to by the Governor.

3. The Committee noted that the offence created by proposed s 20J(2A) under the Bill was one of strict liability. The Committee considered that, while strict liability may be appropriate for some offences, it is generally not appropriate in cases where heavy penalties apply.

4. The Committee also noted that the Bill was to be commenced on proclamation. The Minister's office informed the Committee that the delay in commencement was necessary to allow the Department time to conduct an adequate education campaign about the responsibilities and offence created by the Bill.

5. The Committee wrote to the Minister seeking his advice as to the reasons why the offence created by the Bill is one of strict liability, the likely timeframes within which the education campaign would be conducted and the time within which the Act will commence.

Minister's Reply

6. In a letter dated 28 May 2004 (below) the Minister advised the Committee that section 20J has been a strict liability offence since its inception in 1991.

7. The Minister further advised that in addition to 30 producer forums already conducted across the state, a series of brochures outlining the changes brought about by the amendment Act have been prepared and information is continuing to be broadcast through the print media to ensure the community is informed about the changes brought about by the amendment Act which is due to commence on 1 July 2004.

Committee's Response

8. The Committee thanks the Minster for his reply.

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

16 March 2004

Our Ref: LRC652

The Hon I M Macdonald
Minister for Agriculture and Fisheries
Level 30, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Stock Diseases Amendment (False Information) Bill 2004

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 4 of 2004*.

The Committee notes that the offence created by the proposed s 20J(2A) is one of strict liability. The Committee considers that, while strict liability offences may be appropriate for some offences - mainly offences of a regulatory nature - it is generally not appropriate in the case of offences for which heavy penalties apply. The proposed maximum penalty provided by this section is 200 penalty units (currently $22,000).

The Committee has therefore resolved to seek your advice as to why the offence created by this Bill is one of strict liability.

The Committee also notes that this Bill is to commence on proclamation. The Committee considers that, in general, providing for an Act to commence on proclamation delegates to the government the power to commence the Act on whatever day it choses, or not to commence that Act at all. Whilst there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

The Committee understands from your office that the delay in commencement of the Act is necessary to allow the Department time to conduct an adequate education campaign about the responsibilities and offence created by the Bill, prior to the significant penalties coming into force.

While the Committee considers that this is an appropriate reason to delay the commencement of the Act, it has resolved to seek your advice as to the likely timeframes within which the education campaign will be conducted, and within which the Act will be proclaimed.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

NEW SOUTH WALES

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MINISTER FOR PRIMARY INDUSTRIES

RECEIVED
2 JUN 2004
LEGISLATION REVIEW COMMITTEE

28 MAY 2004

Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear ~~Mr Collier~~ Barry

Thank you for your letter dated 16 March 2004 in which you raise several issues about the *Stock Diseases Amendment (False Information) Bill 2004* which was at the time before Parliament. The Bill has now passed through Parliament and been assented to by the Governor.

In my speech in reply to the Legislative Council on 30 March 2004 I spoke about the issue of strict liability in terms of the amendments proposed in the *Stock Diseases Amendment (False Information) Bill 2004*. You ask why the offence created by the amendment Act is a strict liability offence to which I can advise you that the offence, that is section 20J, has been a strict liability offence since its inception in 1991. The amendment Act does nothing to change the existing nature of the offence under section 20J.

A series of brochures outlining the changes brought about by the amendment Act have now been prepared and NSW Agriculture with the cooperation of Rural Lands Protection Boards and Stock and Station Agents is arranging for public notices about the changes to be posted throughout the State. Information will continue to be broadcast through the print media including The Land newspaper and Agriculture Today. These initiatives are in addition to the 30 producer forums already conducted across the State.

I am confident that by 1 July 2004 when the *Stock Diseases Amendment (False Information) Act 2004* is due to commence every effort will have been made to inform the community about the changes being brought about by the amendment Act.

Yours sincerely

Ian Macdonald

IAN MACDONALD MLC
NSW MINISTER FOR PRIMARY INDUSTRIES

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Part Two – Regulations

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

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003	07/11/03	10369	05/03/04 30/04/04	01/04/04
Inclosed Lands Protection Regulation 2002	06/12/02	10370	29/05/03 12/09/03	29/08/03 11/03/04
Passenger Transport (Drug and Alcohol Testing) Regulation 2004	05/03/04	957	30/04/04	
Road Transport (General) Amendment (Impounding Fee) Regulation 2003	17/10/03	10045	13/02/04	15/06/04
Road Transport (General) Amendment (Interlock Devices) Regulation 2003	29/08/03	8610	13/02/04 01/06/04	13/05/04

SECTION B: COPIES OF CORRESPONDENCE ON REGULATIONS

Regulation & Correspondence	Gazette ref
Consultation on Regulations • Letter to the Premier dated 5 March 2004 • Letter from the Acting Premier dated 15 June 2004	N/A
Environmental Planning and Assessment Amendment (Certifier Accreditation Regulation 2003 • Letter to the Minister Assisting the Minister for Infrastructure and Planning (Planning Administration) dated 30 April 2004 • Letter from the Minister dated 1 June 2004	07/11/2003 p. 10369
Road Transport (General) Amendment (Impounding Fee) Regulation 2003 • Letter to the Minister for Roads dated 13 February 2004 • Letter from the Minister for Roads dated	17/10/2003 p. 10045

1. Consultation on Regulations

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

5 March 2004

The Hon R J Carr MP
Premier and Minister for Citizenship
Level 40 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Premier

The Legislation Review Committee has recently considered the issues of:

i. the adequacy of consultation when making regulations particularly with people of non-English speaking backgrounds;
ii. the use of plain English when drafting regulations; and
iii. where applicable, the publication of regulations in languages other than English.

The Committee resolved to seek your advice as to the guidelines that are presently in place for agencies making regulations to ensure people whose first language is not English are adequately consulted and that consultation documents generally, and the regulations which follow, are in plain English as well as other appropriate languages.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

Premier of New South Wales
Australia

15 JUN 2004

Mr B Collier MP
Chair
Legislative Review Committee
Parliament of New South Wales
Parliament House
SYDNEY NSW 2000

Dear Mr Collier

I refer to your letter concerning the preparation of regulations, particularly with regard to consultation with people from non-English speaking backgrounds.

As you would be aware, the NSW Government introduced the *Community Relations Commission and Principles of Multiculturalism Act* which recognises and values the different linguistic, religious, racial and ethnic backgrounds of residents of New South Wales, and promotes equal rights and responsibilities for all residents of New South Wales.

In addition, agencies are required in each annual report to prepare an Ethnic Affairs Priorities Statement which identifies specific measures that promote the principles of the Act, including consultation initiatives.

The Community Relations Commission has published the *Resource Handbook for Chief Executive Officers and Senior Managers: Ethnic Affairs in the NSW Public Sector*. The Handbook advises Chief Executives that consulting ethnic community groups should form part of an agency's pattern of community consultation.

The Handbook applies equally to consultation on regulatory proposals, as well as other government campaigns. Decisions about targeting particular communities for specific regulatory initiatives are a matter for individual agencies. Such decisions would need to be made after considering the nature of the initiative, the likely impact on particular communities, the resources available and the agency's other priorities for targeting particular groups in the community.

The Community Relations Commission assists agencies on communication strategies and the relaying of information to particular cultural and linguistic

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groups. The Handbook notes that information directed at such groups should be provided in plain language.

You might also note that the Government has directed that agencies ensure that a percentage of campaign advertising is directed to ethnic electronic media.

There are some instances of consultation on regulatory proposals targeting particular cultural and linguistic groups. For example, the Environment Protection Authority in 2002 consulted on the proposed *Pesticides Amendments (User Training) Regulation* by providing summaries of the proposal in six community languages, and specifically indicating that interpreter services were available.

The Department of Fair Trading included ethnic groups in consultation and advertising for the review of the *Fair Trading Act* and the *Associations Incorporation Act*.

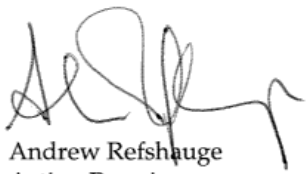
As has been noted by the Community Relations Commission, translation is best suited to information that is of a general nature. Given the specific language used in regulations, and the need for it to convey a precise legal meaning, there can be potential problems with direct translation of legislation and regulations where the meaning of the regulations can be misinterpreted.

Once implemented, there are many examples of information being provided in relevant community languages. Sydney Water, in relation to the introduction of mandatory water restrictions, and the Environment Protection Authority, in relation to its "Don't be a tosser" campaign, provide information about the various measures in eight community languages.

In relation to plain English drafting, I can advise that the Office of Parliamentary Counsel, which prepares all regulations in New South Wales, first made a formal commitment to plain language in 1986 and as such New South Wales was one of the first jurisdictions to do so. The Office has been developing and consolidating its position on plain language since then and will continue to do so as part of the process of ensuring that legislative language is as clear as possible

You may wish to consult the Office's *Manual for the Preparation of Legislation*, which is posted on the Office's website, which sets out in detail the principles to be observed in drafting legislation.

Yours sincerely



Andrew Refshauge
Acting Premier

2. Environmental Planning and Assessment Amendment (Certifier Accreditation Regulation 2003

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

30 April 2004

Our Ref:494

The Hon Diane Beamer MP
Minister Assisting the Minister for Infrastructure and Planning
Level 33 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003

Thank you for your letter of 1 April 2004 in which you responded to the Committee's concern with the breadth of subparagraphs 204(1A)(a) and (b) of this Regulation.

The Committee has considered your response but did not find that the letter fully addressed the concerns it had raised so has resolved to seek further details from you.

The Committee understands the need for accreditation bodies to have regard to relevant past illegal acts of applicants for accreditation or renewal of accreditation. However, the Committee is of the view that contraventions of the law that are irrelevant to determining whether a person is a fit and proper person for the purposes of accreditation should be excluded from consideration by accreditation bodies under the Regulation.

The legislation should prescribe, or at the very least indicate to accreditation bodies, the kinds of contraventions of law or breaches of contractual or statutory duties that are relevant in determining if a person is a fit and proper person for the purposes of accreditation.

The Committee notes your advice that the Department is administering this provision by seeking specific information from accredited certifiers about proven criminal offences and established breaches of the EP & A Act. If this is the case, then the legislation could be amended to reflect the reality and ensure that this administrative approach is consistently applied.

The Committee would like more information about this current practice, specifically:

1. What guidance is provided to accreditation bodies when determining whether a person is fit and proper for the purposes of accreditation?
2. What mechanisms are in place to prevent irrelevant offences, such as parking infringements, from being taken into account under sub-paragraphs 204(1A)(a) and (b) in the making of such determinations?

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

Minister for Juvenile Justice
Minister for Western Sydney
Minister Assisting the Minister for
Infrastructure and Planning (Planning Administration)

D04/2852

Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

- 1 JUN 2004

Dear Mr Collier,

I refer to your letter of 30 April 2004 about clause 204(1A) of the *Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003*.

In the light of your committee's concerns I have asked the Department of Infrastructure Planning and Natural Resources (DIPNR) to reconsider the provision.

As a result of that review DIPNR now propose the following changes to the provision which I believe should assuage the committee's concerns about the breadth of the current provisions. The proposal will replace the current subclauses 204(1A)(a) and (b) with:

- has, during the period of 10 years that last preceded the making of the application, been convicted of, or served any part of a term of imprisonment for, an offence in New South Wales or elsewhere involving fraud or dishonesty, or
- was, at the time of the making of the application, bound in relation to such an offence by a recognizance, or
- was, at the time of the making of the application, the subject of a charge pending in relation to such an offence, or
- has, at any time, been convicted of an offence against this Act or the regulations or any other enactment administered by the Minister, or
- has been refused accreditation under a corresponding Act in another state,
- has contravened any planning or building law or has failed to comply with a statutory or other duty imposed on the person in connection with their functions as an accredited certifier by or in accordance with a planning or building law, whether or not a New South Wales law.

Existing sub clauses (c), (d), and (e) will remain unchanged.

The proposed amendments should address your committee's particular concern that not all contraventions of laws are relevant to determining whether a person is a fit and proper person.

Yours sincerely

The Hon Diane Beamer MP

Level 33, Governor Macquarie Tower,
1 Farrer Place, Sydney NSW 2000
Tel: (02) 9228 4130 Fax: (02) 9228 4131
Email Address: office@beamer.minister.nsw.gov.au

3. Road Transport (General) Amendment (Impounding Fee) Regulation 2003

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

13 February 2004

Our Ref: LRC462

The Hon Carl Scully MP
Minister for Roads
Level 36, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Road Transport (General) Amendment (Impounding Fee) Regulation 2003

The Committee has recently considered the above regulation under section 9 of the Legislation Review Act 1987. The Committee notes that this regulation implements an increase, from $3 to $15, of the daily fee payable for the storage of an impounded vehicle, an increase of 400%.

The Committee would be grateful for your advice as to the reasons for such a large increase.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

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M04/1246

NEW SOUTH WALES

Minister for Roads
Minister for Housing
Leader of the House

Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

15 JUN 2004

Dear Mr Collier

I refer to your letter of 13 February, regarding the increase in the daily fee payable under the Road Transport (General) Regulation for the storage of an impounded vehicle.

Schedule 1 to the Road Transport (General) Act 1999, which is administered by me in my capacity as Minister for Roads, details the administrative regime under which the Commissioner for Police manages the impounded and forfeited vehicle scheme. Those provisions enable the Commissioner to levy prescribed fees for the impounding and storage of vehicles.

The previous Minister for Police wrote to me requesting that the daily impounding fee be increased from $3 to $15 per day. NSW Police were to invite tenders for the provision of holding facilities for the next three years. It was considered that the existing storage fee was far below current market prices for such a service particularly when additional security, access and duty of care requirements were to be considered.

Attached for your information is a copy of the letter sent to the Chief Executive of the Roads and Traffic Authority from the Director General, Ministry of Police, justifying the increase in the daily impounding fee.

Yours sincerely

CARL SCULLY MP
Minister for Roads

Level 36, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000 Tel.: (02) 9228 4455 Fax.: (02) 9228 4633

Ministry for Police

NEW SOUTH WALES

Mr Paul Forward
Chief Executive
Roads and Traffic Authority
PO Box K198
HAYMARKET NSW 1238

(Attention: John Senior)

Dear Mr Forward

I refer to a request from John Senior to this office for information justifying and explaining the reason why the former Minister for Police asked the Minister for Roads to increase the daily impounding fee for vehicles impounded under Road Transport legislation from $3 per day to $10 per day (later amended to $15 per day). I understand this information is required in order to respond to the Legislation Review Committee.

Flemington LAC, which is responsible for the administration of impounded vehicles in Sydney, advised a NSW Police working party on car impounding that although the impounding fee prescribed by regulation was $3 per day, the facility used by NSW Police in Sydney (Cartech) was actually charging $6.00 per day. The difference had to be paid by NSW Police.

At that time a new tender was being prepared for holding yards in Sydney, Newcastle and Wollongong. That tender required that any holding yard must be available to receive vehicles 24 hours a day. It must also offer much greater security than had previously been available because NSW Police had received a number of large claims for vehicles which had been damaged, or parts removed from them, in the Cartech facility. It was recognised that these requirements, together with increases in parking costs generally since the Regulation was first drafted in the mid 1980's, would mean that a significant increase in the daily impounding fee would be required.

The then Minister wrote to the Minister for Roads in November 2002 seeking an amendment to the regulation to increase the fee to $10 per day. The letter also asked for another, consequential, amendment to be made which would make clear the financial responsibility of the owner of the vehicle.

There was a delay before the amendment was made, partly due to Parliamentary Counsel's concerns about the second proposed amendment, which did not eventually proceed.

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During this time, inquiries were undertaken with the Department of Public Works, which was responsible for the tender document. Although the Department could not, for privacy reasons, reveal the specific daily fee nominated by each company tendering for the contract they were able to provide information that NSW Police would probably be charged a fee of between $10 and $15 per day.

Recognising that nearly two years had passed since the issue was first raised, it was agreed with the RTA that the regulation should be amended to a daily fee of $15. This was based on an understanding that it was on a cost-recovery basis and that if NSW Police was charged less than $15, then this was the amount to be recharged. The RTA advised that the regulation could not be amended to say "*a maximum* of $15" which would have been preferable.

When the amendment was passed, NSW Police was advised of the amended charges and reminded that although the Regulation provides for a daily holding fee of $15 per day, the amount recharged to the vehicle's owner should be on a cost-recovery basis only.

The costs of impounding vehicles in various areas of NSW and the fees being charged, are currently being reviewed by NSW Police.

I hope that this information will assist you.

Yours sincerely

Les Tree
Director-General

tw/70994

Appendix 1: Index of Bills Reported on in 2004

	Digest Number
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	2
Appropriation (Budget Variations) Bill 2004	5
Bail Amendment (Terrorism) Bill 2004	9
Botany Bay National Park (Helicopter Base Relocation) Bill 2004	5
Child Protection (Offenders Prohibition Orders) Bill 2004	9
Children (Detention Centres) Amendment Bill 2004	4
Civil Liability Amendment (Offender Damages) Bill 2004	5,7
Commercial Agents and Private Inquiry Agents Bill 2004	9
Community Protection (Closure of Illegal Brothels) Bill 2003*	1
Compulsory Drug Treatment Correctional Centre Bill 2004	8
Constitutional Amendment (Pledge of Loyalty) Bill 2004*	7
Courts Legislation Amendment Bill 2004	7
Crimes Amendment (Child Neglect) Bill 2004	7
Crimes Legislation Amendment Bill 2004	3
Crimes (Administration of Sentences) Bill 2004	9
Crimes (Interstate Transfer of Community Based Sentences) Bill 2004	9
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003	1
Criminal Procedure (Sexual Offence Evidence) Bill 2004	8
Cross-Border Commission Bill 2004	3
Education Amendment (Non-Government Schools Registration) Bill 2004	2
Electricity (Consumer Safety) Bill 2003	1,2
Fair Trading Amendment Bill 2004	4
Filming Approval Bill 2004	7,8
Fines Amendment Bill 2004	9
Fisheries Management Amendment Bill 2004	6
Food Legislation Amendment Bill 2004	3
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	2
Greyhound and Harness Racing Administration Bill 2004	7,9
Health Care Complaints Amendment (Special Commission of Inquiry) Bill 2004	6
Health Legislation Amendment Bill 2004	6

	Digest Number
Institute of Teachers Bill 2004	8
Legal Profession Amendment Bill 2004	9
Legal Profession Legislation Amendment (Advertising) Bill 2003	1
Liquor Amendment (Parliament House) Bill 2004	6
Liquor Amendment (Parliamentary Precincts) Bill 2004	8
Liquor Amendment (Racing Clubs) Bill 2004	9
Local Government Amendment (Council and Employee Security) Bill 2004	5
Local Government Amendment (Discipline) Bill 2004	9
Local Government Amendment (Mayoral Elections) Bill 2004	9
Mine Health and Safety Bill 2004	8,9
Mining Amendment (Miscellaneous Provisions) Bill 2004	6,8
National Competition Policy Amendment (Commonwealth Financial Penalties) Bill 2004	2
National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Bill 2004	7
National Competition Policy Liquor Amendment (Commonwealth Financial Penalties) Bill 2004	7
National Parks and Wildlife Amendment (Jenolan Caves Reserve Trust) Bill 2004	9
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	1
Parliamentary Electorates and Elections Amendment (Prohibition on Voting by Criminals) Bill 2004*	5
Partnership Amendment (Venture Capital Funds) Bill 2004	3
Passenger Transport Amendment (Bus Reform) Bill 2004	8,9
Police Amendment (Crime Reduction and Reporting) Bill 2004	3
Police Amendment (Senior Executive Transfers) Bill 2004	9
Prevention of Cruelty to Animals (Tail Docking) Bill 2004	4,6
Public Lotteries Legislation Amendment Bill 2004	2
Regional Development Bill 2004	7
Residential Tenancies (Public Housing) Bill 2004	9
Retirement Villages Amendment Bill 2004	3
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	1
Road Transport (General) Amendment (Licence Suspension) Bill 2004	9
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	1,7
Snowy Mountains Cloud Seeding Trial Bill 2004	5
State Revenue Legislation Amendment Bill 2004	7

	Digest Number
State Water Corporation Bill 2004	8
Statute Law (Miscellaneous Provisions) Bill 2004	9
Stock Diseases Amendment (Artificial Breeding) Bill 2004	6,8
Stock Diseases Amendment (False Information) Bill 2004	4,9
Strata Schemes Management Amendment Bill 2003	1,3
Superannuation Administration Amendment Bill 2003	1
The Synod of Eastern Australia Property Amendment Bill 2004	2
Thoroughbred Racing Legislation Amendment Bill 2004	4,6
Transport Administration Amendment (New South Wales and Commonwealth Rail Agreement) Bill 2004	6
Wool, Hide and Skin Dealers Bill 2004	2
Workers Compensation Legislation Amendment Bill 2004	9

Appendix 2: Index of Ministerial Correspondence on Bills in 2004

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Civil Liability Amendment Bill 2003	Minister for Health	28/11/03	22/12/03	7	1
Civil Liability Amendment (Offender Damages) Bill 2004	Minister for Justice	26/03/04	13/04/04		5,7
Commercial Agents and Private Inquiry Agents Bill 2004	Minister for Police	18/06/04			9
Crimes Legislation Further Amendment Bill 2003	Attorney General	28/11/03	16/12/03	7	1
Electricity (Consumer Safety) Bill 2003	Minister for Fair Trading	13/02/04	18/02/04		1,2
Environmental Planning and Assessment (Development Consents) Bill 2003	Minister for Infrastructure and Planning	24/10/03	19/03/04	4	5
Environmental Planning and Assessment Amendment (Planning Agreements) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	28/11/03	19/03/04	7	5
Environmental Planning and Assessment (Quality of Construction) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	18/11/03	19/03/04	6	5
Filming Approval Bill 2004	Minister for the Environment	11/05/04	12/03/04		7,8
Greyhound and Harness Racing Administration Bill 2004	Minister for Gaming and Racing	11/05/04	31/05/04		7,9
Legal Profession Legislation Amendment (Advertising) Bill 2003	Attorney General	13/02/04	23/03/04		1,5
Mine Health and Safety Bill 2004	Minister for Mineral Resources	28/05/04	09/06/04		8,9
Mining Amendment (Miscellaneous Provisions) Bill 2004	Minister for Mineral Resources	30/04/04	17/05/03		6,8
Motor Accidents Legislation Amendment Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1
National Parks and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003	Minister for the Environment	07/11/03	08/12/03	5	1
Partnership Amendment (Venture Capital Funds) Bill 2004	Attorney General	05/03/04	23/03/04		3,5
Passenger Transport Amendment (Bus Reform) Bill 2004	Minister for Transport Services	28/05/04 18/06/04	17/06/04		8,9

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Police Amendment (Senior Executive Transfers) Bill 2004	Minister for Police	18/06/04			9
Police Legislation Amendment (Civil Liability) Bill 2003	Minister for Police	18/11/03	24/12/03	6	1
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004	Minister for Agriculture and Fisheries	16/03/04	05/04/04		4,6
Privacy and Personal Information Protection Amendment Bill 2003	Attorney General	24/10/03	25/02/04	4	3
Registered Clubs Amendment Bill 2003	Minister for Gaming and Racing	28/11/03	25/02/04	7	3
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	Minister for Roads	13/02/04	23/03/04		1,5
Road Transport (General) Amendment (Licence Suspension) Bill 2004	Minister for Roads	18/06/04			9
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	Minister for Roads	13/02/04	05/05/04		1,7
State Revenue Legislation Further Amendment Bill 2003	Treasurer	28/11/03	15/12/03	7	1
Stock Diseases Amendment (Artificial Breeding) Bill 2004	Minister for Agriculture and Fisheries	30/04/04	21/05/04		6,8
Stock Diseases Amendment (False Information) Bill 2004	Minister for Agriculture and Fisheries	16/03/04	28/05/04		4,9
Strata Schemes Management Amendment Bill 2003	Minister for Fair Trading	13/02/04	27/02/04		1,3
Superannuation Administration Amendment Bill 2003	Treasurer	13/02/04	18/03/04		1,5
Thoroughbred Racing Legislation Amendment Bill 2004	Minister for Gaming Racing	16/03/04	07/04/04		4,6
Veterinary Practice Bill 2003	Minister for Agriculture and Fisheries	07/11/03	03/11/03	5	1
Water Management Amendment Bill 2004	Minister for Natural Resources	28/05/04			8
Workers Compensation Amendment (Insurance Reforms) Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2004

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	N				
Bail Amendment (Terrorism) Act 2004	N				
Botany Bay National Park (Helicopter Base Relocation) Bill 2004				N	
Child Protection (Offenders Prohibition Orders) Bill 2004	N			C	
Civil Liability Amendment (Offender Damages) Bill 2004	R			C	
Commercial Agents and Private Inquiry Agents Bill 2004	R			C	
Community Protection (Closure of Illegal Brothels) Bill 2003	R				
Compulsory Drug Treatment Correctional Centre Bill 2004	N			N	
Courts Legislation Amendment Bill 2004				N	
Crimes Amendment (Child Neglect) Bill 2004				N	
Crimes (Administration of Sentences) Bill 2004	N			N	
Crimes (Interstate Transfer of Community Based Sentences) Bill 2004				N	
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003				N	
Criminal Procedure (Sexual Offence Evidence) Bill 2004	N				
Education Amendment (Non-Government Schools Registration) Bill 2004				N	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Electricity (Consumer Safety) Bill 2003	N, R				C
Fair Trading Amendment Bill 2004				N	
Filming Approval Bill 2004				C	
Fines Amendment Bill 2004				N	
Fisheries Management Amendment Bill 2004				N	
Food Legislation Amendment Bill 2004				N	
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	N			N	
Greyhound and Harness Racing Administration Bill 2004			R, C	N	
Health Care Complaints Amendment (Special Commission of Inquiry) Bill 2004	N		R		
Health Legislation Amendment Bill 2004	N			N	
Institute of Teacher Bill 2004				N	
Legal Profession Legislation Amendment (Advertising) Bill 2003	C, R		C, R	N	
Liquor Amendment (Parliamentary Precincts) Bill 2004				N	
Local Government Amendment (Council and Employee Security) Bill 2004	N			N	
Local Government Amendment (Discipline) Bill 2004				N	
Mine Health and Safety Bill 2004	N, R	N	C	N, R	
Mining Amendment (Miscellaneous Provisions) Bill 2004	C, R			N	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
National Parks and Wildlife Amendment (Jenolan Caves Reserve Trust) Bill 2004	N				
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	N				
Parliamentary Electorates and Elections Amendment (Prohibition on Voting Rights by Criminals) Bill 2004*	R				
Partnership Amendment (Venture Capital Funds) Bill 2004	C			C	
Passenger Transport Amendment (Bus Reform) Bill 2004	N, R		N, C, R	N	
Police Amendment (Senior Executive Transfers) Bill 2004				C	
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004				C	
Public Lotteries Legislation Amendment Bill 2004				N	
Regional Development Bill 2004				N	
Residential Tenancies (Public Housing) Bill 2004	N			N	
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	N, C				
Road Transport (General) Amendment (Licence Suspension) Bill 2004	N	C	R		
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003				C	
Snowy Mountains Cloud Seeding Trial Bill 2004				N	
State Water Corporation Bill 2004				N	
Stock Diseases Amendment (Artificial Breeding) Bill 2004	C, R			N	N
Stock Diseases Amendment (False Information) Bill 2004	C			C	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Strata Schemes Management Amendment Bill 2003				N,C	
Superannuation Administration Amendment Bill 2003	N			C	
Thoroughbred Racing Legislation Amendment Bill 2004				C	
Transport Administration Amendment (New South Wales and Commonwealth Rail Agreement) Bill 2004	R			N	
Wool, Hide and Skin Dealers Bill 2004				N	
Workers Compensation Legislation Amendment Bill 2004	N			N	

Key

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

Appendix 4: Index of correspondence on regulations reported on in 2004

Regulation	Minister/Correspondent	Letter sent	Reply	Digest Number
Children and Young Persons (Savings and Transitional) Amendment (Out-of-Home Care) Regulation 2003 & Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003	Minister for Community Services	13/02/04	21/04/04	1,7
Consultation on Regulations	Premier/Acting Premier	05/03/04	15/06/04	9
Crimes (Forensic Procedures) Amendment (DNA Database Systems) Regulation 2003	Attorney General	07/11/03	03/12/03	1
Determination of Regulatory Fee Increases	Premier	24/10/03	18/03/04	5
Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003	Minister Assisting the Minister for Infrastructure and Planning (Planning Administration)	05/03/04 30/04/04	01/04/04 01/06/04	6,9
Landlord and Tenant (Rental Bonds) Regulation 2003	Minister for Fair Trading	24/10/03 18/11/03 23/12/03	05/11/03 10/02/04	1
Occupational Health and Safety Amendment (Accreditation and Certification) Regulation 2003	Minister for Commerce	26/03/04 30/04/04	15/04/04 05/05/04	6,7
Pawnbrokers and Second-hand Dealers Regulation 2003	Minister for Fair Trading	24/10/03 18/11/03 23/12/03	05/11/03 10/02/04	1
Radiation Control Regulation 2003	Minister for the Environment	24/10/03	23/01/04	1
Road Transport (General) Amendment (Impounding Fee) Regulation 2003	Minister for Roads	13/02/04	15/06/04	9
Road Transport (General) (Penalty Notice Offences) Amendment (Interlock Devices) Regulation 2003 and Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003	Privacy Commissioner	24/10/03	27/11/03	1
Road Transport (General) (Penalty Notice Offences) Amendment (Interlock Devices) Regulation 2003 and Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003	Minister for Roads	13/02/04 01/06/04	20/05/04	1,8