



Legislation Review Committee

LEGISLATION REVIEW DIGEST

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The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

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Membership

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Functions of the 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.

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

Guide to the Digest

COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

Ministerial Correspondence – Bills previously considered

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

COMMENT ON REGULATIONS

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

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

APPENDIX 1: INDEX OF MINISTERIAL CORRESPONDENCE ON BILLS

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

APPENDIX 2: INDEX OF CORRESPONDENCE ON REGULATIONS REPORTED ON

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

Conclusions

PART ONE - BILLS

1. CHILDREN (DETENTION CENTRES) AMENDMENT (SERIOUS YOUNG OFFENDERS REVIEW PANEL) BILL 2011

The Committee makes no comment on the Bill in respect of issues set out in s81A(1) of the *Legislation Review Act 1987*.

2. COURTS AND CRIMES LEGISLATION AMENDMENT BILL 2011

Inappropriately trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Protected confidence

The Committee notes that whilst the effect of the amendments to Part 5 of the Act is to clarify the court's capacity to view counselling documents that contain protected disclosures, the Committee considers that section 299B(3) sufficiently safeguards against the court making a protected disclosure available to a party.

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Retrospectivity

The Committee will always be concerned to identify where legislation is taken to have commenced on the date it was introduced into Parliament, rather than on or after the date of assent.

However, the Committee does not make an adverse comment in relation to the retrospective provisions in this Bill as the effect of the provisions is not to the disadvantage of those persons affected.

3. CRIMINAL CASE CONFERENCING TRIAL REPEAL BILL 2011

The Committee makes no comment on the Bill in respect of issues set out in s81A(1) of the *Legislation Review Act 1987*.

4. CRIMINAL PROCEDURE AMENDMENT (SUMMARY PROCEEDINGS CASE MANAGEMENT) BILL 2011

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Right to a Fair Trial

It is the Committee's view that there are sufficient safeguards to ensure that this Bill does not present risks that would render it a trespass on individual rights and liberties.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by Proclamation

The Committee recognises that the Bill will commence operation by proclamation due to the administrative arrangements that are required to take place. However, the Committee is also aware that defendants would also require sufficient notice about the changes to procedure

that affect them, and commencing the Act by proclamation may not provide defendant's with that notice.

5. DIRECTOR OF PUBLIC PROSECUTIONS AMENDMENT (DISCLOSURES) BILL 2011

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Administration of criminal justice

In the circumstances, and given the public interest at stake, the Committee does not consider there to be an undue trespass on personal rights and liberties arising from the provisions of this Bill. The Committee recognises that this Bill restores the practice of information-sharing between the police and the DPP to the position as it was prior to the decision in *R v Lipton* which recognised ongoing public interests, such as the protection of police informants, as a reason for police withholding – in part – information from the DPP.

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Lack of certainty

The Committee acknowledges that the sunset clause will permit the Director of Public Prosecutions time to analyse the consequences of subsection 15A prior to making a decision regarding its permanence.

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Retrospectivity

Although the Committee often comments on retrospective provisions in legislation, the Committee notes that the retrospective aspects of this Bill should not adversely affect any persons as amendments codify the standard police procedure as it was prior to decision in *R v Lipton*.

6. GOVERNMENT INFORMATION (PUBLIC ACCESS) AMENDMENT BILL 2011

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Retrospectivity

Whilst the Committee will always be concerned with the creation of legislation which acts retrospectively, the Committee also notes that the affect of these amendments should strengthen privacy protections for those whose personal information is contained in information held by government agencies.

7. MARINE POLLUTION BILL 2011

The Committee makes no comment on the Bill in respect of the issues set out in s 8A(1) of the *Legislation Review Act 1987*.

8. MENTAL HEALTH COMMISSION BILL 2011

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by proclamation

The Committee will always be concerned where the commencement of an Act is delegated to the Executive, once passed by the Legislature. However, the Committee notes the

administrative arrangements necessary when establishing a body such as the Mental Health Commission and the Committee acknowledges that commencing the Act by proclamation will assist in ensuring that the Commission is appropriately established. Accordingly, in these circumstances, the Committee does not consider there to be an inappropriate delegation of legislative powers.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s 8A(1)(b)(v) of the LRA

Matters in regulation which should be included in legislation

The Committee notes that the Bill enables further functions of the Commission to be prescribed by the regulations. The Committee refers to Parliament whether this constitutes insufficiently subjecting the exercise of legislative power to parliamentary scrutiny.

9. RESIDENTIAL TENANCIES AMENDMENT (OCCUPANCY AGREEMENTS) BILL 2011*

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Commencement by Proclamation / Retrospectivity

The Committee notes that the possible commencement by proclamation may be a concern for both grantors, who have new obligations under the Act, and occupants, who may be subject to removal by grantors who do not wish to continue to provide accommodation upon commencement of the Act.

In addition, as the Bill states that applications relating to breaches of occupancy agreements or occupancy principles that occurred prior to the commencement of the Act must be made within 28 days after the commencement of the Act, the Committee is of the opinion that advance notice of the Act's commencement date would provide affected individuals with sufficient time to seek a judicial review of a potential breach.

The Committee refers to Parliament whether commencement by proclamation is appropriate in these circumstances.

10. VALUATION OF LAND AMENDMENT BILL 2011

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Retrospectivity

It is incumbent on the Committee to identify those provisions in legislation that are to commence retrospectively as it is generally the Committee's view that Bills should commence on assent or on a specified date after the date of assent. This enables all affected individuals to be made aware of changes to their rights and responsibilities before they occur.

However, as the retrospective provisions do not apply to matters currently before the courts, and no valuations made within the specified period raise the issue that is the subject of the retrospective provisions, the Committee makes no adverse comments on this Act in respect of retrospectivity.

PART TWO – REGULATIONS

1. PROPOSED POSTPONEMENT OF THE REPEAL OF THE CRIMINAL RECORDS REGULATION 2004

That the Committee writes to the Attorney General to advise that it does not have any concerns with the postponement of the repeal of the regulation.

2. PROPOSED POSTPONEMENT OF THE REPEAL OF THE LEGAL PROFESSION REGULATION 2005

That the Committee writes to the Attorney General to advise that it does not have any concerns with the postponement of the repeal of the regulation.

3. PROPOSED POSTPONEMENT OF THE REPEAL OF THE PRIVACY AND PERSONAL INFORMATION PROTECTION REGULATION 2005

That the Committee writes to the Attorney General to advise that it does not have any concerns with the postponement of the repeal of the regulation.

4. PROPOSED POSTPONEMENT OF THE REPEAL OF THE PROTECTION OF THE ENVIRONMENT (WASTE) REGULATION 2005

That the Committee writes to the Minister for the Environment to advise that it does not have any concerns with the postponement of the repeal of the regulation.

5. WORK HEALTH AND SAFETY (SAVINGS AND TRANSITIONAL) REGULATION 2011

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Fair trial

PROPOSED COURSE OF ACTION

The Committee resolves to write to the Minister seeking clarification of whether the Minister envisages detrimental effects for parties whose proceedings for an OHS offence have commenced in the Industrial Court and are yet to be determined which will be dismissed by the Regulation and will have these proceedings then dealt summarily by the District Court.

Part One - Bills

1. Children (Detention Centres) Amendment (Serious Young Offenders Review Panel) Bill 2011

Date introduced	24 November 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Greg Smith MP
Portfolio	Attorney General and Minister for Justice

PURPOSE AND DESCRIPTION

1. The object of this Bill is to constitute the Serious Young Offenders Review Panel to provide advice and to make recommendations with respect to serious young offenders and certain other detainees under the *Children (Detention Centres) Act 1987*.

BACKGROUND

2. The Serious Young Offenders Review Panel provides advice and recommendations to the Director-General with respect of the classification of serious young offenders who have been referred to the Review Panel.
3. The Serious Young Offenders Review Panel has been in operation since 1998 when the panel began as a 12-month trial.
4. The Attorney stated in his Agreement in Principle speech that the Bill, "will amend the *Children (Detention Centres) Act 1987* to enshrine the constitution, functions, and powers of the Serious Young Offenders Review Panel."
5. The Bill will bring the Review Panel in line with the Corrective Services' Serious Offenders Review Council, which provides similar services in respect of adult serious offenders.

OUTLINE OF PROVISIONS

6. Clause 1 sets out the name (also called the short title) of the proposed Act.
7. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act other than an amendment to the Jury Act 1977, which is to amend an uncommenced amendment to that Act.

Schedule 1 Amendment of *Children (Detention Centres) Act 1987* No 57

8. Schedule 1 [4] inserts proposed Part 4B into the *Children (Detention Centres) Act 1987* (the Principal Act). The proposed Part constitutes the Serious Young Offenders Review Panel.

9. Proposed section 37N defines the terms Director-General (the Chief Executive, Juvenile Justice in the Department of Attorney General and Justice or if there is no such position in that Department—the Director-General of that Department) and serious young offender (a detainee who has been convicted of a serious children’s indictable offence within the meaning of the *Children (Criminal Proceedings) Act 1987*) for the purposes of proposed Part 4B.
10. Proposed section 37O provides for the Serious Young Offenders Review Panel (the Review Panel) to be constituted of between 3 and 6 members appointed by the Minister for Justice (the Minister) of whom one is to be a Magistrate, acting Magistrate or retired Magistrate who is to be the Chairperson.
11. Proposed section 37P sets out the functions of the Review Panel which include providing advice and making recommendations to the Director-General with respect to the classification of serious young offenders who are referred to the Review Panel by the Director-General. The Review Panel is also to provide advice and make recommendations to the Minister or the Director-General with respect to any matter relating to a detainee (including a serious young offender) that is referred to the Review Panel by the Minister or the Director-General.
12. Proposed section 37Q provides for the matters that the Review Panel must take into consideration when exercising functions with respect to a person who is a serious young offender or other detainee.
13. Proposed section 37R provides for a report of the Review Panel’s activities to be included in the annual report of the Department of Attorney General and Justice.
14. Proposed section 37S provides for the security of information in circumstances where the provision of the information may adversely affect the security, discipline or good order of a detention centre, endanger a person, jeopardise an investigation or prejudice the public interest.
15. Schedule 1 [7] permits regulations to be made for or with respect to the constitution, functions and procedures of the Review Panel. Schedule 1 [5] and [6] make consequential amendments.
16. Schedule 1 [9] inserts a new Schedule 1A into the Principal Act that contains provisions relating to the members of the Review Panel and the procedure of the Review Panel.
17. Schedule 1 [1]–[3] update provisions of the Principal Act as a consequence of the abolition of the Department of Juvenile Justice.
18. Schedule 1 [8] and [10] omit redundant provisions.
19. Schedule 1 [11] authorises the making of savings and transitional regulations.

Schedule 2 Amendment of *Jury Act 1977* No 18

20. Schedule 2 amends the *Jury Act 1977* to provide that a member of the Review Panel is excluded from jury *service while* being such a member and for 3 years afterwards.

ISSUES CONSIDERED BY COMMITTEE

The Committee makes no comment on the Bill in respect of issues set out in s81A(1) of the *Legislation Review Act 1987*.

2. Courts and Crimes Legislation Amendment Bill 2011

Date introduced	24 November 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Greg Smith MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Bill is:

(a) to amend the *Criminal Procedure Act 1986* and the *Criminal Procedure Regulation 2010*:

- (i) to provide a uniform limit on the maximum term of imprisonment that may be imposed by the Local Court when dealing summarily with an indictable offence (other than in relation to certain offences under the *Drug Misuse and Trafficking Act 1985*);
- (ii) to increase the maximum amount of fine that may be imposed by the Local Court when dealing summarily with certain indictable offences under the *Crimes Act 1900*;
- (iii) to include certain indictable fraud offences under the *Conveyancers Licensing Act 2003* and the *Property, Stock and Business Agents Act 2002* as offences that may be dealt with summarily by the Local Court;
- (iv) to change the requirements for the use of random samples of child abuse material in proceedings for offences relating to use of children in the production of child abuse material and the production, dissemination and possession of such material;
- (v) to clarify certain matters in relation to the provisions dealing with the protection of communications made in confidence to counsellors by the victims of sexual assault and to alter the regulation-making powers in relation to certain subpoenas; and,

(b) to amend the *Director of Public Prosecutions Act 1986* to ensure that a person who holds the office of the Director of Public Prosecutions and to whom the *Judges' Pensions Act 1953* applies is entitled to receive a pension under that Act if the person retires on account of ill-health and that the spouse of such a person who dies while holding that office is entitled to receive such a pension; and

- (c) to amend the *Fines Act 1996* to make it clear that an automated computer system may be used to refer overdue court imposed fines to the State Debt Recovery Office for the making of a court fine enforcement order.

BACKGROUND

2. When introducing the *Courts and Crimes Legislation Amendment Bill 2011*, the Attorney General stated that: "the purpose of the Bill is to make miscellaneous amendments to courts and crimes-related legislation, as part of the Government's regular legislative review and monitoring program. The Bill will amend a number of Acts to improve the efficiency and operation of the State's courts and tribunals and criminal laws."
3. The Attorney General has put before the House a Bill that amends the *Criminal Procedure Act 1986* to allow a uniform maximum jurisdictional limit in the Local Court of two years imprisonment where the court is dealing with indictable offences summarily. The Attorney General anticipated by increasing the jurisdictional limit this would allow adequate sentencing powers for such offences and would improve the efficiency and operation of the court system.
4. The Attorney General has identified that sections 289A and 289B of the *Criminal Procedure Act* require amendment to insert training requirements for "authorised classifiers" and to make new provisions for the random sample of material that is reviewed in child abuse matters.
5. The Bill also makes changes to the production of counselling communications, which according to the Minister, is necessary to clarify that courts may consider inspecting documents which could contain a protected confidence.
6. The pension of a person holding office as Director of Public Prosecutions is subject to amendment in this Bill. According to the Attorney General, the amendments contained in the Bill "will ensure that the Director of Public Prosecutions is treated in the same way as any judge who is medically retired or dies whilst in office."
7. The *Fines Act 1996* requires court registrars to refer unpaid court fines to the State Debt Recovery Office for the making of court fine enforcement orders. The introduction of the electronic court document lodgement system JusticeLink in courts allows for the automatic referral of unpaid fines making the inclusion of the registrar in the process redundant and the Bill amends the *Fines Act 1996* to reflect this.

OUTLINE OF PROVISIONS

8. Clause 1 sets out the name (also called the short title) of the proposed Act.
9. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of legislation

Schedule 1.1 Criminal Procedure Act 1986 No 209

Amendments relating to indictable offences dealt with summarily

10. Schedule 1.1 [1]–[4] provide for a uniform limit on the term of imprisonment that may be imposed in relation to an indictable offence that is dealt with summarily by the Local Court of 2 years or the maximum term provided by law for the offence, whichever is the shorter term (other than in relation to certain offences under the *Drug Misuse and Trafficking Act 1985*).
11. The maximum fine that may be imposed by the Local Court when dealing summarily with offences under sections 56, 61 and 61N of the Crimes Act 1900 (being offences dealing with certain assaults and acts of indecency) is increased from 20 penalty units to 50 penalty units.
12. Schedule 1.1 [14] and [15] include offences under sections 152 and 153 of the *Conveyancers Licensing Act 2003* and sections 211 and 212 of the *Property, Stock and Business Agents Act 2002* (relating to certain fraudulent conduct) in the list of indictable offences that may be dealt with summarily before the Local Court unless the prosecutor or the person charged with the offence elects to have the offence dealt with on indictment, but only in circumstances where the offence involves an amount exceeding \$5,000.
13. Schedule 1.1 [16] includes offences under sections 152 and 153 of the *Conveyancers Licensing Act 2003* and sections 211 and 212 of the *Property, Stock and Business Agents Act 2002* in the list of indictable offences that may be dealt with summarily before the Local Court unless the prosecutor elects to have the offence dealt with on indictment, but only in circumstances where the offence does not involve an amount exceeding \$5,000.
14. Schedule 1.1 [17] and [18] contain provisions of a savings or transitional nature.

Amendments relating to use of random sample evidence in child abuse material proceedings

15. Schedule 1.1 [5] and [6] change the provisions relating to the examination of a random sample of material in proceedings relating to child abuse material offences (that is, certain offences under the *Crimes Act 1900* relating to the production, dissemination or possession of child abuse material). Those provisions are intended to facilitate proceedings where a large quantity of material is being considered by investigating police officers and allows for evidence of the classification of a random sample of that material to be presented to the court. Currently, an analyst authorised by the Attorney General or the Director of Public Prosecutions may examine a random sample of child abuse material in proceedings and the findings of the analyst as to the nature and content of the sample are admissible as evidence of the nature and content of the whole of the material from which the sample is taken. The amendments will instead allow a person prescribed by the regulations as an authorised classifier to conduct those examinations. Schedule 1.2 makes a consequential amendment to the *Criminal Procedure Regulation 2010*.
16. Schedule 1.1 [6]–[10] remove the requirement that such a random sample must be taken from child abuse material that is the subject of the proceedings (which would require the child abuse material to be extracted firstly from all the material) to enable the sample to be taken from material in the possession of the police some of which is alleged child abuse material the subject of the proceedings. A random sample is only

admissible as evidence if the accused person has been given an opportunity to view all of the material from which the sample was taken.

Amendments relating to protected counselling communications by victims of sexual assault

17. Schedule 1.1 [11] clarifies that the limitations imposed by sections 297 and 298 of the Act in relation to the production and disclosure of certain communications made to counsellors in confidence by victims or alleged victims of sexual assault do not affect the court's powers in circumstances where a question arises that requires the court's consideration of a document or evidence.
18. Schedule 1.1 [12] and [13] change the provision that enables regulations to be made in relation to subpoenas in specified sexual assault proceedings. Instead, regulations will be able to be made in relation to subpoenas in connection with any criminal proceedings, but only subpoenas that require the production of documents recording certain communications made to counsellors in confidence.

Schedule 1.2 Criminal Procedure Regulation 2010

19. Schedule 1.2 prescribes as authorised classifiers, for the purposes of the random sample evidence provisions of the *Criminal Procedure Act 1986* referred to above, members of the NSW Police Force who have undertaken training in the classification of child abuse material that is conducted or arranged by the NSW Police Force.

Schedule 1.3 Director of Public Prosecutions Act 1986 No 207

20. Schedule 1.3 [3] amends the provisions that apply the *Judges' Pensions Act 1953* to a person holding office as Director of Public Prosecutions so as to enable such a person to receive a pension under that Act on retirement on grounds of ill-health, or to enable the spouse of such a person to receive a pension under that Act if the person dies in office, even though the person could not have received a normal retirement pension under that Act because the person would have been too young to qualify when his or her 10 year fixed and non-renewable term of office as Director expired.
21. Schedule 1.3 [1] extends those amendments to the person holding the position of Director of Public Prosecutions immediately before the introduction of this Bill into Parliament.
22. Schedule 1.3 [2] and [4] make related amendments.

Schedule 1.4 Fines Act 1996 No 99

23. Schedule 1.4 removes the requirement for the registrar of a court to refer unpaid court imposed fines to the State Debt Recovery Office for the making of a court fine enforcement order in circumstances where the court uses an automated electronic system for such referrals.

ISSUES CONSIDERED BY COMMITTEE

Inappropriately trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Protected confidence

24. The Bill clarifies that the Court's ability to review a document under section 299B of the Act is not fettered by the restrictions outlined in sections 297 and 298. Section 297 prevents the production of a protected confidence in preliminary criminal proceedings. Section 298 requires the leave of the court to compel the production of a protected confidence during criminal proceedings. As such, the Bill clarifies that a court may review a counselling document to determine whether it is a protected disclosure. Prior to this amendment, the court's ability to review a protected disclosure was not clear.
25. Whilst this amendment has the effect of enabling a judge to view counselling documents that potentially contain protected disclosures, the Committee notes that the court must not make available or disclose such documents unless the court is satisfied that those documents do not record protected disclosures. The Committee considers that this is a sufficient safeguard in relation to an individual's right to privacy with respect to protected disclosures under Part 5 of the Act.

The Committee notes that whilst the effect of the amendments to Part 5 of the Act is to clarify the court's capacity to view counselling documents that contain protected disclosures, the Committee considers that section 299B(3) sufficiently safeguards against the court making a protected disclosure available to a party.

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Retrospectivity

26. The Committee notes that Clause 18 of *Courts and Crimes Legislation Amendment Bill 2011* amends the *Criminal Procedure Act 1986* to include several provisions which apply the changes in respect of Schedule 1 offences in respect of offences committed prior to the commencement of the amendment.
27. The Committee understands that the amendments will result in a fairer process for defendants charged with Schedule 1 offences and defendants charged with child abuse material.
28. Clause 1.3 [1] amends the *Director of Public Prosecutions Act 1986* to allow for the amendments made by the Bill to apply retrospectively so as to permit the person holding "the office of Director immediately before the day on which the Bill for the *Courts and Crimes Legislation Amendment Act 2011* was first introduced into Parliament" to receive the benefits provided by the amendment.

The Committee will always be concerned to identify where legislation is taken to have commenced on the date it was introduced into Parliament, rather than on or after the date of assent.

However, the Committee does not make an adverse comment in relation to the retrospective provisions in this Bill as the effect of the provisions is not to the disadvantage of those persons affected.

3. Criminal Case Conferencing Trial Repeal Bill 2011

Date introduced	24 November 2011
House introduced	Legislative Council
Minister responsible	The Hon. Greg Smith MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
 - (a) to discontinue the trial criminal case conferencing scheme established under the Act (and, accordingly, to repeal the *Criminal Case Conferencing Trial Act 2008* and the *Criminal Case Conferencing Trial Regulation 2008*) on the date of assent to the proposed Act (the repeal date);
 - (b) to preserve any entitlement under the scheme to a 25% discount on sentence for a guilty plea entered before committal;
 - (c) to provide for the continued application of a discount under the scheme to any offender who (before the repeal date) had pleaded guilty to an offence at any time after being committed for trial; and
 - (d) to continue the application of certain procedural protections under the Act.

BACKGROUND

2. The *Criminal Case Conferencing Trial Act 2008* established a 12 month trial scheme, which commenced on 1 May 2008, for participation in cases conferences for certain indictable offences.
3. The trial was created in response to an increasing trend in late pleas of guilty and late termination of proceedings. The scheme sought to encourage early plea negotiations in certain criminal cases prior to committal for trial through the provision of an entitlement to a discount on a sentence in exchange for a guilty plea.
4. The scheme sought to improve co-operation between the Office of the Director of Public Prosecutions and the Police to ensure that offenders were being charged with appropriate offences.
5. The Bill will formally discontinue this scheme, as the scheme was effectively ended by the *Criminal Case Conferencing Trial Amendment Regulation 2011*, which provided for the operation of the scheme to be finalised on 8 October 2011.

6. Through amendments to the *Crimes (Sentencing Procedure) Act 1999*, the Bill maintains the sentence discount entitlements provided under the *Criminal Case Conferencing Trial Act* for a guilty plea entered before committal to trial.

OUTLINE OF PROVISIONS

7. Clause 1 sets out the name (also called the short title) of the proposed Act.
8. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
9. Clause 3 repeals the *Criminal Case Conferencing Trial Act 2008* and the *Criminal Case Conferencing Trial Regulation 2008*.

Schedule 1 Amendment of Crimes (Sentencing Procedure) Act 1999 No 92

10. Schedule 1 [1] enables regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act.
11. Schedule 1 [2] provides for various matters of a savings or transitional nature (as referred to in the objects of the Bill set out above) as a consequence of the repeal of the *Criminal Case Conferencing Trial Act 2008*.

ISSUES CONSIDERED BY COMMITTEE

The Committee makes no comment on the Bill in respect of issues set out in s81A(1) of the *Legislation Review Act 1987*.

4. Criminal Procedure Amendment (Summary Proceedings Case Management) Bill 2011

Date introduced	24 November 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Greg Smith MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Criminal Procedure Act 1986* to make provision for case management procedures to reduce delays in trial and sentencing proceedings before the Supreme Court and the Land and Environment Court in their summary jurisdiction. This is achieved by granting those courts the discretion to make orders requiring that certain disclosures be made by the prosecution and the defence before a trial or sentencing hearing. The Bill also provides for pre-hearing mechanisms (for example, preliminary hearings and preliminary conferences) which are aimed at achieving a more efficient management and conduct of the proceedings.

BACKGROUND

2. In 2009, prompted by concerns about the increasing length of criminal trials, especially trials by jury, the previous Government reformed the case management process for indictable criminal offences.
3. The then Government was concerned that, apart from the financial implications, unduly lengthy trials impose hardships on defendants and witnesses and could adversely affect the public's perception of the justice system.
4. The Act that gave effect to these reforms – the *Criminal Procedure Amendment (Case Management) Act 2009* – was based on the work of the Trial Efficiency Working Group, which comprised members of the judiciary and senior representatives of the legal profession from both government and non-government bodies.
5. The purpose of this Bill is to extend the 2009 reforms to apply to proceedings beyond indictable offences. In particular, the reforms aim to apply to summary criminal matters in the higher courts, including sentencing proceedings.
6. As with the 2009 reforms, this Bill aims to encourage or require parties to a proceeding to disclose aspects of its case to the other before the hearing and to indicate, for example, which facts are agreed. The Bill creates several mechanisms for this to occur. In effect, this Bill largely mirrors the 2009 reforms, with some appropriate adjustments to tailor it to the context of summary proceedings.

OUTLINE OF PROVISIONS

7. **Clause 1** sets out the name (also called the short title) of the proposed Act.
8. **Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Case management in proceedings before the court in its summary jurisdiction

9. Currently, the principal Act only provides for case management procedures in respect of proceedings on indictment. This Bill introduces similar provisions for the case management of trial and sentencing proceedings before each relevant court in its summary jurisdiction.
10. **Schedule 1 [3]** introduces the new Division setting out the scheme for pre-hearing case management procedures.
11. **Proposed sections 247A–247C** specify the proceedings to which the Division applies, state the purpose of the proposed Division (which is principally to reduce delays in trial and sentencing proceedings before the court in its summary jurisdiction) and set out relevant definitions.
12. **Proposed sections 247D–247F** require the court to give directions as to the conduct of proceedings and specify the notices required to be given by the prosecution of its case and the defence of its response.
13. **Proposed section 247G** enables the court to order the prosecutor and the defendant to attend one or more preliminary hearings. The court may make various orders and rulings during those hearings (for example, as to the admissibility of evidence or on questions of law that might arise at the trial or sentencing proceedings) that will be binding on the presiding Judge except in certain circumstances. The proposed section also prevents certain matters being raised at a trial or sentencing hearing without the leave of the court if those matters were not raised at the preliminary hearing or were dealt with at the preliminary hearing.
14. **Proposed section 247H** enables the court to order that the prosecutor and the defendant's legal representative attend a preliminary conference for the purpose of reaching agreement regarding the evidence to be admitted at a hearing. The court may make such an order only if the defendant is represented by an Australian legal practitioner.
15. **Proposed sections 247I–247L** make provision relating to further disclosures that the court may order under **proposed section 247I**. **Proposed sections 247J–247L** set out the requirements for the contents of disclosure notices.
16. **Proposed section 247M** enables the court to dispense with formal proof of certain matters in proceedings where the matters were not disputed in the course of making preliminary disclosures.
17. **Proposed section 247N** provides for sanctions for any failure to comply with preliminary disclosure requirements, such as the exclusion of evidence (including expert evidence)

where that evidence has not been disclosed in accordance with preliminary disclosure requirements. The regulations may make further provision for sanctions under the proposed section.

18. **Proposed section 247O** provides that the obligation to make preliminary disclosures continues for the duration of the relevant trial proceedings or until the defendant is acquitted of or sentenced for the offence. **Proposed section 247P** allows the court to waive any of the requirements that apply under the proposed Division as it thinks fit.
19. **Proposed sections 247Q–247U** make provision relating to notices given under the proposed Division, including setting out the matters or documents that are required to accompany the notices.
20. **Proposed section 247V** generally empowers the court to make such orders, determinations, findings, directions or rulings as it thinks appropriate for the efficient management and conduct of the trial, including ordering any of the parties to proceedings to make disclosures that were, or could have been, required to be disclosed before the commencement of the relevant hearing.
21. **Proposed section 247W** provides that a preliminary order made in proceedings by a presiding Judge is binding on another presiding Judge. Accordingly, if a new hearing is ordered or the proceedings are discontinued, the orders of the original presiding Judge will bind the Judge presiding at the fresh hearing.
22. **Proposed section 247X** contains miscellaneous provisions in relation to the proposed Division, including provisions giving the court power to resolve disputes arising from the matters dealt with under the proposed Division and stating the relationship of the proposed Division to other Acts and laws.
23. **Proposed section 247Y** provides for a review of the proposed Division to be undertaken by the Attorney General as soon as possible after the period of 2 years from the commencement of proposed section 247A.

Other amendments

24. **Schedule 1 [1], [2] and [4]** make consequential amendments. **Schedule 1 [5]** enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act. **Schedule 1 [6]** contains a transitional provision.

ISSUES CONSIDERED BY COMMITTEE

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Right to a Fair Trial

25. Clause 247K sets out the court-ordered pre-trial disclosures required of the defendant. This includes the obligation for defence statements identifying whether the defence intends to agree with or dispute the facts provided by the prosecution, notices as to whether the defendant proposes to dispute the admissibility of any proposed evidence disclosed by the prosecution, and notices as to whether the defendant proposes to adduce expert evidence.

26. Clause 247M enables the court to dispense with formal proof of certain matters in proceedings where the matters were not in dispute during the course of pre-trial disclosure.
27. Clause 247N outlines the sanctions for non-compliance with pre-trial disclosure requirements. In particular, clause 247N(1) and (2) allow the court to refuse evidence, including evidence from an expert witness, in circumstances where there was a failure by any party, which would include the defendant, to follow pre-trial disclosure requirements.

It is the Committee's view that there are sufficient safeguards to ensure that this Bill does not present risks that would render it a trespass on individual rights and liberties.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by Proclamation

28. This Act is to commence operation on a day or day to be appointed by proclamation. The Committee notes that because the Bill foreshadows a change in disclosure requirements and the conduct of preliminary trial procedures, administrative arrangements need to take place before the Act can commence operation.

The Committee recognises that the Bill will commence operation by proclamation due to the administrative arrangements that are required to take place. However, the Committee is also aware that defendants would also require sufficient notice about the changes to procedure that affect them, and commencing the Act by proclamation may not provide defendant's with that notice.

5. Director of Public Prosecutions Amendment (Disclosures) Bill 2011

Date introduced	24 November 2011
House introduced	Legislative Council
Minister responsible	The Hon. Greg Smith MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Director of Public Prosecutions Act 1986* to ensure that police officers investigating alleged indictable offences are not required to disclose to the Director of Public Prosecutions information, documents or other things obtained during the investigation that are the subject of a bona fide claim of privilege, public interest immunity or statutory immunity. In such a case, police officers will only have a duty to inform the Director of Public Prosecutions that they have obtained information, documents or other things of that kind.
2. The Bill temporarily suspends the effect of the decision of the Court of Criminal Appeal in *R v Lipton* [2011] NSWCCA 247 to enable the continuation of the current practice while a review of the proper scope of the duty of disclosure is carried out. Accordingly, the amendment ceases to have effect on 1 January 2013.

BACKGROUND

3. The Bill seeks to clarify that Police are entitled to withhold material from public prosecutors if such material is subject to a claim of privilege, public interest immunity or statutory immunity.
4. The amendment was drafted with urgency as the Court of Criminal Appeal decision in *R v Lipton* [2011] removed the right of police officers to withhold material from prosecutors which would allow such material to be available for inspection for defence counsel.

OUTLINE OF PROVISIONS

5. Clause 1 sets out the name (also called the short title) of the proposed Act.
6. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Director of Public Prosecutions Act 1986 No 207

7. Schedule 1 [1] makes the amendment described in the Purpose and Description.
8. Schedule 1 [2] provides that the amendment extends to proceedings for indictable offences commenced before the amendment. It also validates things done or omitted to be done by police officers, the Director of Public Prosecutions and others who have

functions with respect to the prosecution of indictable offences that would have been validly done or omitted to be done if the amendment had been in force.

ISSUES CONSIDERED BY COMMITTEE

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Administration of criminal justice

9. The Committee notes that the Bill enables police officers to determine whether material is subject to a bona fide claim of privilege, public interest immunity or statutory immunity.
10. Whilst the Committee notes that the effect of the amendment will fetter a defendant's ability to access information which could assist in their defence, the Committee also recognises that the purpose of the amendment is to restore the practice of information-sharing between the police and the Director of Public Prosecutions (DPP) to the position as it was prior to the decision in *R v Lipton*. This earlier process recognised ongoing public interests, such as the protection of police informants, as a reason for police withholding – in part – information from the DPP.

In the circumstances, and given the public interest at stake, the Committee does not consider there to be an undue trespass on personal rights and liberties arising from the provisions of this Bill. The Committee recognises that this Bill restores the practice of information-sharing between the police and the DPP to the position as it was prior to the decision in *R v Lipton* which recognised ongoing public interests, such as the protection of police informants, as a reason for police withholding – in part – information from the DPP.

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Lack of certainty

11. The Committee notes the potential lack of certainty caused by the sunset clause attached to the subsection which is set to expire on 1 January 2013. Such uncertainty could be problematic for both police and the legal community in preparing cases.
12. However, the Committee understands that the amendment was drafted in urgency, as the obligation placed on police by the decision in *R v Lipton* would have affected approximately 6,000 prosecutions across the state.
13. The Committee acknowledges that the sunset clause will permit the Director of Public Prosecutions time to analyse the consequences of subsection 15A prior to making a decision regarding its permanence.

The Committee acknowledges that the sunset clause will permit the Director of Public Prosecutions time to analyse the consequences of subsection 15A prior to making a decision regarding its permanence.

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Retrospectivity

14. The Committee notes that amendments extend to proceedings for indictable offences commenced prior to the introduction of the Bill.
15. The Committee notes that the retrospective aspects to the Bill should not adversely affect any persons as amendments codify the standard police procedure as it was prior to the decision in *R v Lipton*.

Although the Committee often comments on retrospective provisions in legislation, the Committee notes that the retrospective aspects of this Bill should not adversely affect any persons as amendments codify the standard police procedure as it was prior to decision in *R v Lipton*.

6. Government Information (Public Access) Amendment bill 2011

Date introduced	24 November 2011
House introduced	Legislative Council
Minister responsible	The Hon. Greg Smith MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

(a) to amend the *Government Information (Public Access) Act 2009* (the principal Act):

- (i) to clarify the timing for the recording of information in the disclosure logs of agencies and what can be included in such logs and to enable affected persons who are not access applicants to object to certain information about them being included in such logs;
- (ii) to enable parts of agencies to be treated as separate agencies for the purposes of the principal Act;
- (iii) to confirm that access to open access information is to be provided in a manner that has due regard to copyright issues;
- (iv) to enable an agency to refuse to provide access to government information if the access applicant has already been provided with the information;
- (v) to remove the current requirement to pay a fee for an internal review by an agency following a recommendation by the Information Commissioner;
- (vi) to confirm that an agency may require proof of identity from an access applicant before providing access to government information if the access application involves certain personal factors about the applicant;
- (vii) to provide that there is no conclusive presumption of overriding public interest against disclosure of a spent conviction to the person convicted;
- (viii) to clarify when an agency is required to consider whether to waive legal professional privilege in connection with an access application; and
- (ix) to make certain other minor amendments, amendments in the nature of statute law revision and amendments that provide for savings and transitional matters;

(b) to amend the *Criminal Records Act 1991* to provide that it is not an offence for a public authority or other government agency that has a record of a spent conviction

(or its authorised officers) to make information about the conviction available to the person who was convicted;

- (c) to amend the *Privacy and Personal Information Protection Act 1998* to enable the regulations to make provision for a public sector agency to be treated as part of another public sector agency, or for a part of a public sector agency to be treated as a separate agency, for the purposes of that Act;
- (d) to make amendments in the nature of statute law revision to the *Commission for Children and Young People Act 1998* and the *Privacy Code of Practice (General) 2003*.

BACKGROUND

- 2. The *Government Information (Public Access) Act 2009* commenced operation in July 2010 and made changes to procedures for how the public accessed government information.
- 3. Since the Act commenced, various government agencies, including the Office of the Information Commissioner, have identified minor and technical problems with the Act, which this Bill seeks to address.
- 4. A statutory review will occur after July 2014, during which any proposals for more significant policy changes will be considered.

OUTLINE OF PROVISIONS

- 5. Clause 1 sets out the name (also called the short title) of the proposed Act.
- 6. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Government Information (Public Access) Act 2009 No 52

- 7. Schedule 1 [1] confirms that the obligation imposed on agencies to provide access to their open access information does not require or permit the agencies to make such information available in a manner that would constitute an infringement of copyright.
- 8. Schedule 1 [2]–[4] rename the publication guides that agencies are required to prepare as agency information guides to better reflect the content of such guides.
- 9. Schedule 1 [5] provides for the time when an agency is required to include details in its disclosure log about an access application made to it by reference to whether an objection has been made to the inclusion of information in the log.
- 10. Schedule 1 [6] provides that an agency is not required to include information in its disclosure log about any application for certain personal information about any individual (whether or not the individual is the applicant).
- 11. Schedule 1 [7], [20], [24], [26] and [27] standardise time frames for the taking of certain action under the principal Act by reference to working days instead of days or weeks.

12. Schedule 1 [8] enables an access application to be made by a person even if the person does not have an Australian postal address.
13. Schedule 1 [10] clarifies the effect of the waiver, reduction or refund of an application fee on the making and determination of an access application. Schedule 1 [9], [11] and [31] make consequential amendments.
14. Schedule 1 [13] confirms that an agency may require an access applicant to provide proof of identity as a precondition to providing access to the government information that is being sought if the access application involves certain personal factors about the applicant.
15. Schedule 1 [14]–[18] enable a person whose private information might be disclosed to object to the inclusion of that information in an agency’s disclosure log even if the person is not the access applicant. Schedule 1 [12] provides for information that must be given by an agency about such objection rights, while Schedule 1 [21] and [36] make consequential amendments.
16. Schedule 1 [19] enables an agency to refuse to provide access to government information if the access applicant has already been provided with the information under the principal Act or the former *Freedom of Information Act 1989*.
17. Schedule 1 [22] confirms that an internal review is not available in relation to a reviewable decision of a member of a Minister’s personal staff.
18. Schedule 1 [23] recognises that an internal review by an agency is not required before the Information Commissioner can review a reviewable decision if an internal review by the agency is not available to the aggrieved person.
19. Schedule 1 [25] provides that no fee is payable for a reconsideration by an agency of a decision (including by way of internal review) pursuant to a recommendation of the Information Commissioner. Currently, a fee is payable for an internal review by an agency carried out pursuant to a recommendation of the Information Commissioner.
20. Schedule 1 [28] and [29] update references to reflect the fact that the principal Act is now administered by the Attorney General rather than the Premier.
21. Schedule 1 [30] enables notices or notifications that an agency gives under the principal Act to be given by post or such other method as may be agreed with the person concerned.
22. Schedule 1 [32] provides that there is no conclusive presumption of overriding public interest in relation to the disclosure of a spent conviction (within the meaning of the *Criminal Records Act 1991*) to the person who was convicted. See also the amendment made to the *Criminal Records Act 1991* by Schedule 2.2.
23. Schedule 1 [33] confirms that the requirement for an agency to consider whether to waive legal professional privilege in relation to government information sought under an access application is limited to situations where the application is made to the agency that has the privilege.

24. Schedule 1 [34] enables the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.
25. Schedule 1 [35] enacts certain savings and transitional provisions consequent on the enactment of the proposed Act.
26. Schedule 1 [37] enables the regulations to declare that a part of an agency is for the purposes of the principal Act to be treated as a separate agency from the agency of which it forms part. Schedule 1 [38] makes a consequential amendment.

Schedule 2 Amendment of other legislation

2.1 Commission for Children and Young People Act 1998 No 146

27. Schedule 2.1 updates an outdated reference to a provision of the *Privacy and Personal Information Protection Act 1998*.

2.2 Criminal Records Act 1991 No 8

28. Schedule 2.2 provides that it is not an offence for a public authority or other government agency that has a record of a spent conviction (or an authorised officer of the authority or agency) to make information about the conviction available to the person who was convicted.

2.3 Privacy and Personal Information Protection Act 1998 No 133

29. Schedule 2.3 [2] enables the regulations under the *Privacy and Personal Information Protection Act 1998* to declare that:
 - (a) a specified public sector agency is not to be regarded as a separate public sector agency and instead is to be regarded for the purposes of that Act as part of and included in another specified public sector agency, or
 - (b) a specified office, branch or other part of a public sector agency is for the purposes of that Act to be regarded as being a separate public sector agency to the public sector agency of which it forms part in respect of specified functions that it exercises. Schedule 2.3 [1] makes a consequential amendment.

2.4 Privacy Code of Practice (General) 2003

30. Schedule 2.4 corrects an inconsistent use of language.

ISSUES CONSIDERED BY COMMITTEE

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Retrospectivity

31. The Committee notes that the Bill contains provisions in the inserted Part 3 which apply retrospectively to applications lodged prior to the enactment of the amendments. Whilst the Committee will always be concerned with the creation of legislation which acts retrospectively, the Committee also notes that the effect of these amendments should strengthen privacy protections for those whose personal information is contained in information held by government agencies.

Whilst the Committee will always be concerned with the creation of legislation which acts retrospectively, the Committee also notes that the affect of these amendments should strengthen privacy protections for those whose personal information is contained in information held by government agencies.

7. Marine Pollution Bill 2011

Date introduced	23 November 2011
House introduced	Legislative Council
Minister responsible	The Hon. Duncan Gay MLC
Portfolio	Minister for Roads and Ports

PURPOSE AND DESCRIPTION

1. The object of this Bill is to protect the State's marine and coastal environment from pollution by oil and other marine pollutants discharged from ships:
 - (a) by repealing and re-enacting the *Marine Pollution Act 1987*, which currently prohibits discharges of oil and noxious liquid substances; and,
 - (b) by implementing additional provisions of the *International Convention for the Prevention of Pollution from Ships 1973* (known as MARPOL), so as to also prohibit discharges of harmful substances in packaged form and discharges of sewage and garbage.

BACKGROUND

2. In recent years there has been many significant oil spills created by container ships, oil rigs and platforms, including the Deepwater Horizon in Gulf of Mexico and the V Rena in Tauranga, New Zealand, as well as the running aground of the Pasha Bulker which sparked fears of a spill at Nobbys Beach on the New South Wales Coast. The ecological devastation and human casualties caused by such events, together with the high level of media coverage, has led to public demands for further protections to be enacted.
3. Significant press coverage and parliamentary debate has occurred over chemical leaks at Orica's manufacturing plants at Port Kembla and Kooragang Island, which led to changes to the *Protection of the Environment Operations Act 1997* regarding incident response management plan requirements – requirements that are mirrored in this Bill.
4. The *Marine Pollution Act 1987* was enacted to adopt Annexes I and II of the *International Convention for the Prevention of Pollution from Ships 1973* (known as MARPOL). In 2007, the International Maritime Organisation's revisions of these annexes came into force.
5. Since the introduction of the *Marine Pollution Act 1987*, three additional annexes have come into force both internationally and in Australia. These annexes have been incorporated into Commonwealth legislation, which has force in New South Wales' waters until State legislation is enacted.
6. The Bill incorporates both the revised and additional annexes.

OUTLINE OF PROVISIONS

Part 1 Preliminary

7. Clause 1 sets out the name (also called the short title) of the proposed Act.
8. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
9. Clause 3 defines words and phrases used in the proposed Act.
10. Clause 4 provides that words used in the proposed Act that are also used in MARPOL have the same meaning as they have in MARPOL.
11. Clause 5 provides for the meaning of the term “responsible” where used in the proposed Act.
12. Clause 6 provides for the calculation of the time when a ship is taken to be proceeding on a voyage.
13. Clause 7 provides for the meaning of references to tonnage.
14. Clause 8 provides that notes in the proposed Act do not form part of the Act.

Part 2 Application of Act

15. Clause 9 provides that the proposed Act is to be read and construed as being in addition to, and not in derogation of, any other law of the State.
16. Clause 10 provides that the proposed Act is subject to the Ports and Maritime Administration Act 1995.
17. Clause 11 excludes certain matters from the operation of a Commonwealth Act that would otherwise allow a security holder to seize a ship detained under the proposed Act.
18. Clause 12 provides how the proposed Act applies to mixtures.
19. Clause 13 provides that, under the proposed Act, a discharge outside State waters that enters State waters is taken to be a discharge into State waters.
20. Clause 14 specifies the discharges to which the proposed Act does not apply.

Part 3 Prevention of pollution by oil

21. The proposed Part implements Annex I of MARPOL, which deals with pollution by oil and oil residues.

Division 1 Offences relating to discharge of oil

22. Clause 15 provides that the master and owner of a ship are each guilty of an offence if any oil is discharged from the ship into State waters.

23. Clause 16 provides that a crew member, or a person involved in the operation or maintenance of a ship, is guilty of an offence if the crew member's or person's act causes any oil to be discharged from the ship into State waters.
24. Clause 17 provides that if any oil is discharged from a ship into State waters, each person responsible for the discharge is guilty of an offence.

Division 2 Defences

25. Clause 18 provides that it is a defence to a prosecution under proposed Division 1 if the oil escaped from the ship as a consequence of unavoidable damage to the ship or its equipment and all reasonable precautions were taken after the occurrence of the damage or the discovery of the discharge for the purpose of preventing or minimising the escape of the oil.
26. Clause 19 provides that it is a defence to a prosecution under proposed Division 1 if the oil was discharged for the purpose of securing the safety of a ship or saving life at sea.
27. Clause 20 provides that it is a defence to a prosecution under proposed Division 1 relating to a mixture of oil if the mixture containing oil was discharged for the purpose of combating pollution.
28. Clause 21 provides that it is a defence to a prosecution under proposed Division 1 if the oil was discharged for the purpose of training authorised by the Minister.
29. Clause 22 provides a defence to a prosecution under proposed Division 1 in relation to certain larger ships and oil tankers not within a special area.
30. Clause 23 provides a defence to a prosecution under proposed Division 1 in relation to certain larger ships and oil tankers within a special area.
31. Clause 24 provides a defence to a prosecution under proposed Division 1 in relation to certain smaller ships and oil tankers that have certain equipment in operation.
32. Clause 25 provides that it is a defence to a prosecution under proposed Division 1 that the discharge was of clean or segregated ballast from the cargo area of an oil tanker.

Division 3 Offence relating to oil residues

33. Clause 26 requires the master and owner of a ship to ensure that oil residues are retained on the ship while the ship is in State waters unless they are discharged at certain reception facilities.

Part 4 Prevention of pollution by noxious liquid substances

34. The proposed Part implements Annex II of MARPOL, which deals with pollution by noxious liquid substances.

Division 1 Offences relating to carrying uncategorised noxious liquid substances

35. Clause 27 provides that the master and owner of an Australian ship each commit an offence if an uncategorised noxious liquid substance is carried as cargo or part cargo in bulk on the ship in State waters.

36. Clause 28 makes it an offence to cause an uncategorised noxious liquid substance to be carried as cargo or part cargo in bulk on an Australian ship in State waters.

Division 2 Offences relating to discharge of noxious liquid substances

37. Clause 29 provides that the master and owner of a ship that is subject to a chemical tanker construction certificate certifying the ship to carry noxious liquid substances in bulk are each guilty of an offence if any noxious liquid substance is discharged from the ship into State waters.
38. Clause 30 provides that a crew member, or a person involved in the operation or maintenance, of a ship that is subject to a chemical tanker construction certificate certifying the ship to carry noxious liquid substances in bulk is guilty of an offence if the crew member's or person's act causes any noxious liquid substance to be discharged from the ship into State waters.
39. Clause 31 provides that if any noxious liquid substance is discharged from a ship that is subject to a chemical tanker construction certificate certifying the ship to carry noxious liquid substances in bulk into State waters, each person responsible for the discharge is guilty of an offence.

Division 3 Defences

40. Clause 32 provides that it is a defence to a prosecution under proposed Division 2 if the noxious liquid substance escaped from the ship as a consequence of unavoidable damage to the ship or its equipment and all reasonable precautions were taken after the occurrence of the damage or the discovery of the discharge for the purpose of preventing or minimising the escape of the substance.
41. Clause 33 provides that it is a defence to a prosecution under proposed Division 2 if the noxious liquid substance was discharged for the purpose of securing the safety of a ship or saving life at sea.
42. Clause 34 provides that it is a defence to a prosecution under proposed Division 2 if the noxious liquid substance was discharged for the purpose of combating pollution.
43. Clause 35 provides a defence to a prosecution under proposed Division 2 in relation to the discharge of certain Category X substances.
44. Clause 36 provides a defence to a prosecution under proposed Division 2 in relation to the discharge of certain high-viscosity or solidifying substances in Category Y.
45. Clause 37 provides a defence to a prosecution under proposed Division 2 in relation to the discharge of certain other Category Y substances.
46. Clause 38 provides a defence to a prosecution under proposed Division 2 in relation to the discharge of certain Category Z substances from certain ships constructed before 1 January 2007.
47. Clause 39 provides a defence to a prosecution under proposed Division 2 in relation to the discharge of certain Category Z substances from certain ships constructed on or after 1 January 2007.

48. Clause 40 provides a defence to a prosecution under proposed Division 2 in relation to the discharge of bilge water.
49. Clause 41 provides a defence to a prosecution under proposed Division 2 in relation to the discharge of clean ballast or segregated ballast.

Division 4 Cleaning of tanks of ships

50. Clause 42 provides for the regulations to make provision for the cleaning of tanks of ships.

Part 5 Prevention of pollution by harmful substances in packaged form

51. The proposed Part implements Annex III of MARPOL, which deals with pollution by certain harmful substances in packaged form.

Division 1 Offences relating to carriage

52. Clause 43 provides that the master and owner of a ship are each guilty of an offence if any harmful substance in packaged form is carried on a ship into State waters otherwise than in accordance with the regulations.
53. Clause 44 provides that a person is guilty of an offence if the person causes a harmful substance in packaged form to be carried on a ship in State waters otherwise than in accordance with the regulations.

Division 2 Offences relating to jettisoning

54. Clause 45 provides that the master and owner of a ship are each guilty of an offence if any harmful substance in packaged form is jettisoned from the ship into State waters.
55. Clause 46 provides that a crew member, or a person involved in the operation or maintenance of a ship, is guilty of an offence if the crew member's or person's act causes any harmful substance in packaged form to be jettisoned from the ship into State waters.
56. Clause 47 provides that if any harmful substance in packaged form is jettisoned from a ship into State waters, each person responsible for the jettisoning is guilty of an offence.

Division 3 Defences

57. Clause 48 provides that it is a defence to a prosecution under proposed Division 2 if the jettisoning of a harmful substance in packaged form from a ship was for the purpose of securing the safety of a ship or saving life at sea.
58. Clause 49 provides that it is a defence to a prosecution under proposed Division 2 if the jettisoning of certain harmful substances in packaged form occurs as a result of a leakage.

Division 4 Miscellaneous

59. Clause 50 provides that the proposed Part does not apply to a ship's stores or equipment.

60. Clause 51 provides that certain leakages are taken to be jettisoned.
61. Clause 52 provides that, for the purposes of the proposed Part, empty packaging that has been used previously for the carriage of harmful substances is itself taken to be a harmful substance unless the precautions required by the regulations have been taken to ensure that the packaging contains no residue that is harmful to the marine environment.

Part 6 Prevention of pollution by sewage

62. The proposed Part implements Annex IV of MARPOL, which deals with pollution by sewage.

Division 1 Offences relating to discharge of sewage

63. Clause 53 provides that the master and owner of a ship are each guilty of an offence if any sewage is discharged from the ship into State waters.
64. Clause 54 provides that a crew member, or a person involved in the operation or maintenance of a ship, is guilty of an offence if the crew member's or person's act causes any sewage to be discharged from the ship into State waters.
65. Clause 55 provides that if any sewage is discharged from a ship into State waters, each person responsible for the discharge is guilty of an offence.

Division 2 Defences

66. Clause 56 provides that it is a defence to a prosecution under proposed Division 1 if the discharge of sewage was caused by unavoidable damage to the ship or its equipment and all reasonable precautions were taken before and after the occurrence of the damage for the purpose of preventing or minimising the escape of the sewage.
67. Clause 57 provides that it is a defence to a prosecution under proposed Division 1 if the discharge of sewage was for the purpose of securing the safety of a ship or saving life at sea.
68. Clause 58 provides that it is a defence to a prosecution under proposed Division 1 if the discharge of sewage was of comminuted and disinfected sewage not less than 3 nautical miles from the nearest land.
69. Clause 59 provides a defence to a prosecution under proposed Division 1 for certain treated sewage.

Part 7 Prevention of pollution by garbage

70. The proposed Part implements Annex V of MARPOL, which deals with pollution by garbage.

Division 1 Offences relating to discharge of garbage

71. Clause 60 provides that the master and owner of a ship are each guilty of an offence if any garbage is discharged from the ship into State waters.

72. Clause 61 provides that a crew member, or a person involved in the operation or maintenance of a ship, is guilty of an offence if the crew member's or person's act causes any garbage to be discharged from the ship into State waters.
73. Clause 62 provides that if any garbage is discharged from a ship into State waters, each person responsible for the discharge is guilty of an offence.

Division 2 Defences

74. Clause 63 provides that it is a defence to a prosecution under proposed Division 1 if the discharge of garbage was caused by unavoidable damage to the ship or its equipment and all reasonable precautions were taken before and after the occurrence of the damage for the purpose of preventing or minimising the escape of the garbage.
75. Clause 64 provides that it is a defence to a prosecution under proposed Division 1 if the discharge of garbage was for the purpose of securing the safety of a ship or saving life at sea.
76. Clause 65 provides that proposed Division 1 does not apply to the accidental loss of nets and other materials.
77. Clause 66 provides that proposed Division 1 does not apply to certain discharges of dunnage, lining or packing materials that will float.

Part 8 Prevention of pollution from transfer operations

78. The proposed Part makes additional provision to that made by MARPOL, in relation to pollution by oil and noxious liquid substances as part of a transfer operation (that is, any operation that is involved in the preparation for, or in the commencement, carrying on or termination of, a transfer of oil or a noxious liquid substance to or from a ship or a place on land).

Division 1 Application of Part

79. Clause 67 defines a prescribed marine pollutant as oil or a noxious liquid substance or any combination of those substances (whether in bulk, packaged or another form).

Division 2 Offences relating to transfer operations

80. Clause 68 creates an offence of discharging prescribed marine pollutants from a ship in, or in connection with, a transfer operation.
81. Clause 69 creates an offence of discharging prescribed marine pollutants from a place on land in, or in connection with, a transfer operation.
82. Clause 70 creates an offence of discharging prescribed marine pollutants from an apparatus on a ship used in, or in connection with, a transfer operation.
83. Clause 71 creates an offence of discharging prescribed marine pollutants from an apparatus on a place on land used in, or in connection with, a transfer operation.
84. Clause 72 creates an offence of causing prescribed marine pollutants to be discharged from a pipeline in, or in connection with, a transfer operation.

- 85. Clause 73 creates an offence of discharging prescribed marine pollutants from a pipeline in, or in connection with, a transfer operation.
- 86. Clause 74 regulates the transfer of prescribed marine pollutants at night.

Division 3 Discharges to which Division 2 does not apply

- 87. Clause 75 provides that the offences in proposed Division 2 do not apply to certain discharges.
- 88. Clause 76 provides that the offences in proposed Division 2 do not apply to discharges for the purposes of combating a pollution incident.
- 89. Clause 77 provides that the offences in proposed Division 2 do not apply to a discharge if the discharge was carried out by the holder of a licence under the Protection of the Environment Operations Act 1997 in accordance with that licence.

Division 4 Record keeping relating to transfer operations

- 90. Clause 78 requires certain persons to keep records relating to transfer operations.
- 91. Clause 79 requires certain entries to be made in records relating to transfer operations.
- 92. Clause 80 requires the transmission of records relating to transfer operations.
- 93. Clause 81 prohibits the disposal of records relating to transfer operations.
- 94. Clause 82 makes it an offence to make false or misleading entries in records relating to transfer operations.

Division 5 Miscellaneous

- 95. Clause 83 provides that if a prescribed marine pollutant is discharged into State waters from 2 or more ships in, or in connection with, a transfer operation, and it is not reasonably practicable to identify the marine pollutant that has been discharged from a particular ship, all of the marine pollutant discharged is taken, for the purposes of the proposed Part, to have been discharged from each of those ships.
- 96. Clause 84 provides that more than one person may be found guilty of an offence under the proposed Part in relation to a discharge.
- 97. Clause 85 makes it clear that the proposed Part regulating transfer operations applies to a discharge prohibited by proposed Part 3 or 4.

Part 9 Reporting of pollution incidents

- 98. The proposed Part implements Protocol I of MARPOL, which requires certain pollution incidents (including some incidents for which there is a defence to prosecution) to be reported.

Division 1 Meaning of “reportable incident”

- 99. Clause 86 specifies the incidents to which the proposed Part applies.

Division 2 Master's obligations

- 100. Clause 87 requires the master of a ship to report a reportable incident in relation to the ship.
- 101. Clause 88 requires the master of a ship to provide a supplementary report if the Minister requires it.
- 102. Clause 89 requires the master of a ship to provide a further supplementary report if any significant further developments arise.

Division 3 Obligations of other persons

- 103. Clause 90 requires certain persons to report a reportable incident if the ship is abandoned or a report cannot be obtained from the ship's master.
- 104. Clause 91 requires certain persons to report a reportable incident if the report of the master of the ship is incomplete.
- 105. Clause 92 requires certain persons to provide supplementary reports.

Division 4 Miscellaneous

- 106. Clause 93 prohibits a person from making false or misleading reports or supplementary reports.
- 107. Clause 94 provides that certain evidence is inadmissible in certain prosecutions.

Part 10 Emergency plans and other plans

- 108. The proposed Part implements Regulation 37 of Annex I, Regulations 14 and 17 of Annex II and Regulation 9 of Annex V, of MARPOL, which deal with emergency plans and other plans.

Division 1 Shipboard oil pollution emergency plan

- 109. Clause 95 requires a shipboard oil pollution emergency plan to be carried on board certain ships.
- 110. Clause 96 provides for the Minister to approve shipboard oil pollution emergency plans.
- 111. Clause 97 specifies the matters that a shipboard oil pollution emergency plan must include.
- 112. Clause 98 provides that the shipboard oil pollution emergency plan on a ship must be written in the working language of the master of, and the crew on board, the ship.
- 113. Clause 99 provides that a shipboard oil pollution emergency plan may be combined with a shipboard marine pollution emergency plan for noxious liquid substances.

Division 2 Shipboard marine pollution emergency plan for noxious liquid substances

- 114. Clause 100 requires a shipboard marine pollution emergency plan for noxious liquid substances to be carried on board certain ships.

- 115. Clause 101 provides for the Minister to approve a shipboard marine pollution emergency plan for noxious liquid substances.
- 116. Clause 102 specifies the matters that a shipboard marine pollution emergency plan for noxious liquid substances must include.
- 117. Clause 103 provides that a shipboard marine pollution emergency plan for noxious liquid substances must be written in the working language of the master of, and the officers on board, the ship.

Division 3 Procedures and arrangements manual

- 118. Clause 104 requires a procedures and arrangements manual to be carried on certain ships.
- 119. Clause 105 specifies the matters that a procedures and arrangements manual must contain and the form that it must be in.
- 120. Clause 106 specifies the language that a procedures and arrangements manual must be in.

Division 4 Shipboard garbage management plan

- 121. Clause 107 requires a shipboard garbage management plan to be carried on board certain ships.
- 122. Clause 108 specifies the matters that a shipboard garbage management plan must contain.
- 123. Clause 109 specifies the language that a shipboard garbage management plan must be in.

Division 5 Placards relating to garbage disposal requirements

- 124. Clause 110 requires a placard relating to garbage disposal requirements to be displayed on board certain ships.
- 125. Clause 111 specifies the matters that must be included on a garbage disposal requirements placard.
- 126. Clause 112 requires a garbage disposal requirements placard to be written in the working language of the ship's crew.

Part 11 Record keeping

- 127. The proposed Part implements Regulations 17 and 36 of Annex I, Regulation 15 of Annex II and Regulation 9 of Annex V, of MARPOL, which deal with record keeping.

Division 1 Requirement to carry oil record book

- 128. Clause 113 requires an oil record book to be carried on board certain ships.
- 129. Clause 114 specifies the form of an oil record book.

130. Clause 115 specifies the language that an oil record book must be in.
131. Clause 116 requires a completed page of an oil record book to be signed by the master of the ship.
132. Clause 117 requires entries to be made in an oil record book relating to certain prescribed operations or occurrences.
133. Clause 118 requires entries to be made in an oil record book relating to inspections.
134. Clause 119 prohibits the making of false or misleading entries in the oil record book of a ship.
135. Clause 120 requires an oil record book to be retained on a ship for one year after the last entry is made.
136. Clause 121 requires an oil record book to be retained for 2 years after the last entry is made.
137. Clause 122 provides that the master of a ship may be required to certify entries in the ship's oil record book.
138. Clause 123 provides that a certified entry in an oil record book is admissible as evidence of the facts stated in that entry in the book.

Division 2 Requirement to carry cargo record book

139. Clause 124 requires a cargo record book to be carried on board certain ships.
140. Clause 125 specifies the form of a cargo record book.
141. Clause 126 specifies the language that a cargo record book must be in.
142. Clause 127 requires a completed page of a cargo record book to be signed by the master of the ship.
143. Clause 128 requires the entries to be made in a cargo record book relating to certain prescribed operations or occurrences.
144. Clause 129 requires the entries to be made in a cargo record book relating to inspections.
145. Clause 130 prohibits the making of false or misleading entries in the cargo record book of a ship.
146. Clause 131 requires cargo record books to be retained on a ship for one year.
147. Clause 132 requires a cargo record book to be retained for 2 years.
148. Clause 133 provides that the master of a ship may be required to certify entries in the ship's cargo record book.

149. Clause 134 provides that a certified entry in a cargo record book is admissible as evidence of the facts stated in that entry in the book.

Division 3 Requirement to carry garbage record book

150. Clause 135 requires a garbage record book to be carried on board certain ships.
151. Clause 136 requires a garbage record book to be carried on a platform.
152. Clause 137 provides that the Minister may waive the requirement to carry a garbage record book.
153. Clause 138 specifies the form of a garbage record book.
154. Clause 139 specifies the language that a garbage record book must be in.
155. Clause 140 requires a completed page of a garbage record book to be signed by the master of the ship.
156. Clause 141 requires entries to be made in a garbage record book relating to certain prescribed operations or occurrences.
157. Clause 142 requires entries to be made in a garbage record book relating to inspections.
158. Clause 143 prohibits the making of false or misleading entries in the garbage record book of a ship or platform.
159. Clause 144 requires garbage record books to be retained on a ship for one year.
160. Clause 145 requires garbage record book to be retained for 2 years.
161. Clause 146 provides that the master of a ship may be required to certify entries in the ship's garbage record book.
162. Clause 147 provides that a certified entry in a garbage record book is admissible as evidence of the facts stated in that entry in the book.

Part 12 Certification of construction of ships

163. The proposed Part implements Chapters 3 and 4 of Annex I, Regulations 11 and 12 of Annex II, Regulations 1.3 and 2–6 of Annex III and Regulations 2.2, 4 and 11 of Annex IV, of MARPOL, which deal with the construction of ships and with their certification.

Division 1 Regulations relating to construction of ships

164. Clause 148 provides for the regulations to make provisions for and in relation to giving effect to certain provisions of MARPOL relating to the construction of ships.
165. Clause 149 provides for the interpretation of references to a ship complying with the provisions of an Annex of MARPOL.

Division 2 Requirement for certification of certain ships

166. Clause 150 requires certain ships to have ship construction certificates.

167. Clause 151 requires certain ships to have chemical tanker construction certificates.

168. Clause 152 requires large ships to have sewage pollution prevention certificates.

Division 3 Local certification

169. Clause 153 provides for the master or owner of a ship to apply for a NSW certificate.

170. Clause 154 requires ships to be surveyed if an application has been made for a NSW certificate.

171. Clause 155 provides for the issue of NSW certificates.

172. Clause 156 provides that a NSW certificate has force for 5 years, unless it is cancelled sooner.

Division 4 Surveys after accident or discovery of defect

173. Clause 157 requires the master and owner of a ship in respect of which a NSW certificate is in force to notify the Minister of any accident that substantially affects the integrity of the ship or the efficiency or completeness of its equipment.

174. Clause 158 requires the master and owner of a ship in respect of which a NSW certificate is in force to notify the Minister of any defect that substantially affects the integrity of the ship or the efficiency or completeness of its equipment.

175. Clause 159 provides that the Minister may investigate a ship if the Minister is notified of an accident or defect or otherwise becomes aware of the accident or defect and may direct that a survey is required.

176. Clause 160 requires the owner of such a ship to cause it to be surveyed.

Division 5 Approval of major changes to NSW certified ship

177. Clause 161 requires certain changes to the construction of a ship in respect of which a NSW certificate is in force to be notified to, and pre-approved by, the Minister.

178. Clause 162 provides that the Minister may investigate a ship after notice of a proposed change is given.

179. Clause 163 requires a ship to be surveyed after notice is given of a proposed change.

Division 6 Annual surveying of ships

180. Clause 164 provides for the annual surveying of certain ships.

Division 7 Renewal of local certification

181. Clause 165 provides for the master or owner of a ship to apply for renewal of its NSW certificate.

182. Clause 166 provides for a ship to be surveyed before its NSW certificate is renewed.

183. Clause 167 provides for the renewal of a NSW certificate.

184. Clause 168 provides for the extension of a NSW certificate.

Division 8 Cancellation of local certification

185. Clause 169 provides for the cancellation of a NSW certificate.

186. Clause 170 provides that a cancelled NSW certificate has no effect.

187. Clause 171 requires the surrender of a cancelled NSW certificate and provides for the detention of the ship until a cancelled certificate is surrendered.

188. Clause 172 makes the master and the owner of a detained ship guilty of an offence if the ship departs from the port or other place where it is detained before its release from detention.

Part 13 Ships must be insured against damage by discharge of oil

189. Clause 173 provides that the proposed Part does not apply to certain ships.

190. Clause 174 requires ships to be adequately insured against liability arising because of oil pollution.

191. Clause 175 requires ships to carry evidence that they are adequately insured.

192. Clause 176 provides that an inspector may detain a ship if the inspector believes on reasonable grounds that the ship does not have adequate insurance or is not carrying on board evidence of such insurance.

193. Clause 177 makes it an offence for the master and the owner of a detained ship to allow the ship to depart from the port or other place where it is detained before its release from detention.

Part 14 Reception facilities for collecting waste

Division 1 Minister may provide reception facilities

194. Clause 178 provides that the Minister may arrange for the provision of certain reception facilities.

195. Clause 179 provides for the regulations to fix charges for, and impose conditions on, the use of reception facilities.

Division 2 Minister may direct persons to provide reception facilities

196. Clause 180 provides for the Minister to serve a notice requiring the owner or occupier of a prescribed reception facility to provide, maintain or make available reception facilities.

197. Clause 181 requires the owner or occupier of a prescribed reception facility to comply with requirements of such a notice.

198. Clause 182 makes provision in relation to notices relating to prescribed reception facilities.

Part 15 Minister may take action to prevent or clean up pollution

199. Clause 183 provides that the Minister may take action to prevent or clean up marine pollution.
200. Clause 184 provides that the Minister may recover all costs and expenses incurred by the Minister in respect of preventative or clean up action.
201. Clause 185 provides that the amount of any costs and expenses incurred by the Minister in respect of action taken by or on behalf of the Minister under the proposed Part is a charge on the relevant ship.
202. Clause 186 provides for the detention of the ship until the recovery of those costs and expenses or the giving of security to cover them.
203. Clause 187 makes the master and the owner of a detained ship guilty of an offence if the ship departs from the port or other place where it is detained before its release from detention.
204. Clause 188 makes it an offence to obstruct a person who is taking action on behalf of the Minister under the proposed Part.

Part 16 Marine environment protection notices

Division 1 Preliminary

205. Clause 189 defines terms used in the proposed Part.
206. Clause 190 states that marine environment protection notices consist of marine pollution clean-up notices, marine pollution prevention notices and marine pollution prohibition notices.
207. Clause 191 provides that marine environment protection notices may be given orally in certain circumstances.

Division 2 Marine pollution clean-up notices

208. Clause 192 provides that the responsible person may be directed by the Minister to take such clean-up action as is specified in a marine pollution clean-up notice. Failure to comply with such a notice is an offence.
209. Clause 193 enables the Minister to direct a public authority to take specified clean-up action.
210. Clause 194 provides that the Minister may recover the administrative costs of preparing and giving a marine pollution clean-up notice.

Division 3 Marine pollution prevention notices

211. Clause 195 provides that an activity is carried on in an environmentally unsatisfactory manner if certain listed factors exist.
212. Clause 196 provides that when the Minister reasonably suspects that an activity has been or is being carried on in an environmentally unsatisfactory manner, the Minister

may direct the responsible person to take such action as is specified in a marine pollution prevention notice.

- 213. Clause 197 provides that it is an offence to fail to comply with such a marine pollution prevention notice.
- 214. Clause 198 outlines the time at which a marine pollution prevention notice begins to operate.
- 215. Clause 199 enables the Minister to recover the administrative costs of preparing and giving a marine pollution prevention notice.

Division 4 Marine pollution prohibition notices

- 216. Clause 200 provides that the Minister may direct a polluter to cease carrying on the activity that is causing the pollution.
- 217. Clause 201 provides that it is an offence to fail to comply with such a marine pollution prohibition notice.

Division 5 Minister may take action if marine environment protection notice not complied with

- 218. Clause 202 provides for the Minister to cause action to be taken in the event of failure to comply with a marine environment protection notice.
- 219. Clause 203 makes it an offence to wilfully obstruct a person who is acting in compliance with a marine environment protection notice.

Division 6 Compliance costs

- 220. Clause 204 provides for the issue of marine pollution compliance cost notices.
- 221. Clause 205 provides that the cost of causing a marine pollution clean-up notice, marine pollution prevention notice or marine pollution prohibition notice to be complied with (in cases where a person fails to comply with the notice) is recoverable from the person who was the subject of the notice. Such costs may be specified in a compliance cost notice, and any amounts unpaid are recoverable as a debt in court.

Division 7 Recovery of costs and expenses if the Minister takes action

- 222. Clause 206 provides that costs and expenses incurred by the Minister under the proposed Part are charges on the relevant ship.
- 223. Clause 207 provides for the detention of a ship until recovery of those costs and expenses or the giving of security.
- 224. Clause 208 makes the master and the owner of a detained ship guilty of an offence if the ship departs from the port or other place where it is detained before its release from detention.

Division 8 Miscellaneous

- 225. Clause 209 makes it clear that the Minister's other preventative powers are not affected by the proposed Part.
- 226. Clause 210 provides that more than one notice under the proposed Part may be given to the same person.
- 227. Clause 211 provides for the extraterritorial application of notices.
- 228. Clause 212 provides for the revocation or variation of notices under the proposed Part.
- 229. Clause 213 gives the Minister or a public authority the power to enter any premises for the purposes of exercising the Minister's or public authority's functions under the proposed Part.
- 230. Clause 214 makes it an offence to wilfully delay or obstruct a person carrying out any action in compliance with a marine environment protection notice.

Part 17 Recovery of costs, expenses and damages

Division 1 Recovery of costs, expenses and damages by Minister or any other person

- 231. Clause 215 provides that a person who suffers loss of or damage to property because of a discharge prohibited by the proposed Act may recover from certain persons.
- 232. Clause 216 provides that the person may recover the amount of the loss or damage and the costs and expenses incurred as a debt in a court of competent jurisdiction.

Division 2 Joint liability for damage relating to transfer operations

- 233. Clause 217 provides for joint and several liability where oil or a noxious liquid substance is discharged from a pipeline.
- 234. Clause 218 provides for several liability where oil or a noxious liquid substance is discharged from 2 or more ships.

Division 3 Rights of recovery not affected

- 235. Clause 219 provides that certain rights of recovery are not affected by the proposed Act.

Part 18 Detention of ships and taking of securities

- 236. Clause 220 provides that a ship that is believed to have discharged marine pollutants may be detained.
- 237. Clause 221 makes the master and the owner of a detained ship guilty of an offence if the ship departs from the port or other place where it is detained.
- 238. Clause 222 requires certain security to be provided.
- 239. Clause 223 provides that a detained ship must be released if security is provided or there is no liability.
- 240. Clause 224 provides for security to be taken by the Minister.

Part 19 Enforcement

Division 1 Appointment of inspectors and authorised persons

- 241. Clause 225 provides for the appointment of inspectors.
- 242. Clause 226 provides for inspectors and authorised persons to be issued with identity cards and requires them to produce the cards on request if exercising a function under the proposed Act.

Division 2 Powers of inspectors and authorised persons

- 243. Clause 227 specifies the powers of inspectors and authorised persons.
- 244. Clause 228 provides that inspectors and authorised persons may enter or inspect certain places on land.
- 245. Clause 229 provides that inspectors and authorised persons must not unnecessarily delay ships.
- 246. Clause 230 makes it an offence to wilfully delay or obstruct inspectors or authorised persons or to fail to comply with certain requirements.
- 247. Clause 231 provides that inspectors and certain other persons have no personal liability for acts or omissions in good faith for the purpose of executing the proposed Act or any other Act.

Part 20 Proceedings for enforcement

Division 1 Proceedings for enforcement

- 248. Clause 232 requires prosecutions for offences dealt with by the Local Court to be brought within 2 years of the alleged commission of the offence.
- 249. Clause 233 provides for proceedings for offences to be dealt with summarily before the Local Court or the Land and Environment Court in its summary jurisdiction.
- 250. Clause 234 provides for offences by corporations.

Division 2 Penalties are charges on ship

- 251. Clause 235 provides that penalties are charges on a ship.
- 252. Clause 236 provides for the detention of a ship until a penalty is recovered or security is provided.

Division 3 Evidence

- 253. Clause 237 provides that certain records are admissible as evidence.
- 254. Clause 238 provides that proof of certain matters is not required.
- 255. Clause 239 provides for the giving of evidence by analysts.

Division 4 Miscellaneous

- 256. Clause 240 prevents double jeopardy.
- 257. Clause 241 provides that certain defences operate separately.

Part 21 Regulations and orders

- 258. Clause 242 empowers the Governor to make regulations and the Minister to make orders.
- 259. Clause 243 empowers the Governor to make regulations prescribing decisions that are reviewable by the Administrative Decisions Tribunal.
- 260. Clause 244 makes provision in relation to orders.
- 261. Clause 245 provides for the regulations to prescribe matters by reference to other instruments.

Part 22 Miscellaneous

- 262. Clause 246 provides for the delegation of the Minister's powers under the proposed Act.
- 263. Clause 247 provides for service of notices or other instruments issued under the proposed Act.
- 264. Clause 248 provides that the proposed Act binds the Crown.
- 265. Clause 249 provides for the repeal of the Marine Pollution Act 1987.
- 266. Clause 250 provides for the review of the proposed Act.

Schedule 1 Amendment of other Acts

- 267. Schedule 1 makes amendments to other Acts that are consequential on the repeal of the Marine Pollution Act 1987 and the enactment of the proposed Act.

Schedule 2 Savings, transitional and other provisions

- 268. Schedule 2 makes provisions of a savings and transitional nature.

ISSUES CONSIDERED BY COMMITTEE

The Committee makes no comment on the Bill in respect of the issues set out in s 8A(1) of the *Legislation Review Act 1987*.

8. Mental Health Commission Bill 2011

Date introduced	24 November 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Kevin Humphries MP
Portfolio	Mental Health

PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
 - (a) to establish the Mental Health Commission of New South Wales (the "Commission") as an independent statutory body and to provide for its functions;
 - (b) to provide for the appointment of a Mental Health Commissioner and one or more Deputy Mental Health Commissioners;
 - (c) to establish the Mental Health Community Advisory Council to advise the Commission on mental health issues; and
 - (d) to make consequential amendments to the *Public Finance and Audit Act 1983* and the *Statutory and Other Offices Remuneration Act 1975*.

BACKGROUND

2. Prior to the NSW Election in March 2011, the then NSW Opposition Leader Mr Barry O'Farrell and the then Shadow Minister for Mental Health Mr Kevin Humphries proposed the establishment of a Mental Health Commission to drive reform and improve outcomes for patients should the coalition be elected to government.
3. Following the election of the Coalition Government, on 9 May 2011 Cabinet approved the establishment of a Taskforce to Establish the NSW Mental Commission. The Taskforce consulted with the community and stakeholders and provided a Final Report to Government in late September 2011.
4. The Minister for Mental Health, Mr Kevin Humphries, has indicated that the Commission will drive a more accountable and efficient mental health system and enhance the wellbeing and mental health of the people of NSW.¹

OUTLINE OF PROVISIONS

Part 1 Preliminary

5. Clause 1 sets out the name (also called the short title) of the proposed Act.

¹ The Minister for Mental Health, Mr Kevin Humphries, Mental Health Commission Bill 2011, Agreement in Principle Speech, *Hansard*, 24 November 2011

6. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
7. Clause 3 sets out the object of the proposed Act.
8. Clause 4 defines certain words and expressions used in the proposed Act.

Part 2 Mental Health Commission

9. Clause 5 constitutes the Commission as a statutory body that is not and does not represent the Crown.
10. Clause 6 provides for the Governor to appoint a Mental Health Commissioner (the *Commissioner*) who will exercise the functions of the Commission.
11. Clause 7 provides for the Governor to appoint one or more Deputy Mental Health Commissioners (a *Deputy Commissioner*).
12. Clause 8 requires the Commissioner or at least one Deputy Commissioner to be a person who has or has had a mental illness.
13. Clause 9 provides that the Commission is subject to the direction and control of the Minister, except in relation to the preparation and contents of a draft strategic plan for the mental health system in New South Wales or any other report prepared by the Commission.
14. Clause 10 establishes the Mental Health Community Advisory Council to advise the Commission on any mental health issue it considers appropriate or that is referred to it by the Commission.

Part 3 Functions of Commission

15. Clause 11 sets out the principles that are to govern the work of the Commission, which are as follows:
 - (a) people who have a mental illness, wherever they live, should have access to the best possible mental health care and support,
 - (b) people who have a mental illness and their families and carers should be treated with respect and dignity,
 - (c) the primary objective of the mental health system should be to support people who have a mental illness to participate fully in community life and lead meaningful lives,
 - (d) the promotion of good mental health and the effective provision of mental health services are the shared responsibility of the government and non-government sectors,
 - (e) an effective mental health system requires:
 - (i). a co-ordinated and integrated approach across all levels of government and the non-government sector, including in the

- areas of health, housing, employment, education and justice,
and
- (ii). communication and collaboration between people who have a mental illness and their families and carers, providers of mental health services and the whole community.
16. Clause 12 sets out the functions of the Commission, which are as follows:
- (a) to prepare, in consultation with providers of mental health and related services and government agencies, a draft strategic plan for the mental health system in New South Wales for submission to the Minister for approval,
 - (b) to monitor and report on the implementation of the strategic plan,
 - (c) to review and evaluate, and report and advise on, mental health services and other services and programs provided to people who have a mental illness, and other issues affecting people who have a mental illness,
 - (d) to promote and facilitate the sharing of knowledge and ideas about mental health issues,
 - (e) to undertake and commission research, innovation and policy development in relation to mental health issues,
 - (f) to advocate for and promote the prevention of mental illness and early intervention strategies for mental health,
 - (g) to advocate for and promote the general health and well-being of people who have a mental illness and their families and carers,
 - (h) to educate the community about mental health issues, including for the purpose of reducing the stigma associated with mental illness and discrimination against people who have a mental illness,
 - (i) such other functions relating to mental health as may be prescribed by the regulations.
17. Clause 13 enables the Minister to direct the Commission to prepare a special report on any significant systemic issue affecting people who have a mental illness (not being an issue that relates only to a particular specialist mental health service). The Minister may table a special report in Parliament.
18. Clause 14 provides that the Commission may, at any time, prepare a report on the implementation of the strategic plan or a systemic issue relating to the mental health system or affecting people who have a mental illness. Such a report will be tabled in Parliament.
19. Clause 15 enables the Commission to delegate any of its functions to a Deputy Commissioner or a member of staff of the Commission.

Part 4 Miscellaneous

20. Clause 16 requires the Commission and public sector agencies that provide mental health services or are involved in dealing with people who have a mental illness to work co-operatively in the exercise of their respective functions. Public sector agencies should have regard to the principles governing the Commission's work in exercising their functions. The Commission may request a public sector agency to provide the Commission with any information held by the agency that is reasonably required by the Commission for the exercise of its functions and the agency must comply with such a request if it is reasonable to do so.

21. Clause 17 provides for the tabling in Parliament of reports prepared by the Commission.
22. Clause 18 protects the Commissioner, Deputy Commissioners, members of the Mental Health Community Advisory Council or persons acting under the direction of the Commission or a Council member from personal liability for acts done or omitted to be done in good faith.
23. Clause 19 enables the Governor to make regulations for the purposes of the proposed Act.
24. Clause 20 provides for the review of the proposed Act in 5 years. The Minister is also required to review the work of the Commission every 5 years.

Schedule 1 Provisions relating to Commissioner and Deputy Commissioners

25. Schedule 1 contains provisions relating to the office of the Mental Health Commissioner and Deputy Mental Health Commissioners.

Schedule 2 Savings, transitional and other provisions

26. Schedule 2 provides for the making of regulations of a savings and transitional nature consequent on the enactment of the proposed Act.

Schedule 3 Amendment of other legislation

27. Schedule 3.1 amends the *Public Finance and Audit Act 1983* to provide for financial auditing and annual reporting by the Mental Health Commission.
28. Schedule 3.2 amends the *Statutory and Other Offices Remuneration Act 1975* to provide that the remuneration and allowances payable to the Mental Health Commissioner and any full-time Deputy Mental Health Commissioner will be determined by the Statutory and Other Offices Remuneration Tribunal.

ISSUES CONSIDERED BY COMMITTEE

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by proclamation

29. Clause 2 of the Bill provides that the Act will commence on a day or days to be appointed by proclamation.
30. The Committee notes that the object of the Bill is to establish the Mental Health Commission of New South Wales, and this will involve undertaking a number of arrangements including the recruitment of staff, the establishment of offices and other administrative measures.
31. As such, the Committee understands the administrative convenience of commencing the Act by proclamation.

The Committee will always be concerned where the commencement of an Act is delegated to the Executive, once passed by the Legislature. However, the Committee notes the administrative arrangements necessary when establishing a body such as the Mental Health Commission and the Committee acknowledges that commencing the Act by proclamation will assist in ensuring

that the Commission is appropriately established. Accordingly, in these circumstances, the Committee does not consider there to be an inappropriate delegation of legislative powers.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s 8A(1)(b)(v) of the LRA

Matters in regulation which should be included in legislation

32. Clause 12 of the Bill outlines the functions of the Commission. Subclauses 12(1)(a)-(h) outline 8 functions of the Commission, with subclause 12(1)(i) allowing further functions relating to mental health to be prescribed by the regulations.
33. The Minister for Mental Health has indicated that subclause 12(1)(i) has been included to ensure the relevance and sustainability of the commission in years to come if the need for new responses to mental illness arises.²

The Committee notes that the Bill enables further functions of the Commission to be prescribed by the regulations. The Committee refers to Parliament whether this constitutes insufficiently subjecting the exercise of legislative power to parliamentary scrutiny.

² The Minister for Mental Health, Mr Kevin Humphries, Mental Health Commission Bill 2011, Agreement in Principle Speech, *Hansard*, 24 November 2011

9. Residential Tenancies Amendment (Occupancy Agreements) Bill 2011*

Date introduced	25 November 2011
House introduced	Legislative Assembly
Member responsible	Ms Clover Moore MP
Portfolio	n/a

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Residential Tenancies Act 2010* to specify some rights and duties of certain persons who enter into agreements under which a person is granted the right to occupy residential premises as a residence and who are presently outside the scope of the Act (and whose rights and obligations are generally governed by unregulated common law contracts) and to give those persons access to the Consumer, Trader and Tenancy Tribunal to resolve disputes. The occupants affected include the following:
 - (a) those who live in boarding houses;
 - (b) people with a disability who live in group homes or residential centres;
 - (c) occupants of educational institutions and residential colleges;
 - (d) occupants of hotels and motels, backpackers' hostels and serviced apartments;
 - (e) those who live in refuges or crisis accommodation and other supported accommodation;
 - (f) those who live in caravans in caravan parks and who are not protected by other legislation;
 - (g) those who live in share houses who are not currently subject to the Act; and,
 - (h) lodgers in private homes.

BACKGROUND

2. Currently, the *Residential Tenancies Act 2010* excludes a number of agreements from being subject to the Act. Specifically, section 8 of the Act provides:

"Agreements to which Act does not apply

- (1) This Act does not apply to the following agreements:

- (a) occupation agreements to which the Holiday Parks (Long-term Casual Occupation) Act 2002 applies,
- (b) residence contracts within the meaning of the Retirement Villages Act 1999,
- (c) an agreement under which a person boards or lodges with another person,
- (d) an agreement under which a person resides in refuge or crisis accommodation of a kind prescribed by the regulations,
- (e) leases and licences under the Crown Lands Act 1989, the Western Lands Act 1901 or the Crown Lands (Continued Tenures) Act 1989,
- (f) an agreement for the sale of land that confers a right to occupy residential premises on a party to the agreement,
- (g) an agreement that arises under a term of a mortgage and confers a right to occupy residential premises on a party to the mortgage,
- (h) an agreement made for the purpose of giving a person the right to occupy residential premises for a period of not more than 3 months for the purpose of a holiday,
- (i) an agreement that arises under a company title scheme under which a group of adjoining or adjacent premises is owned or leased by a corporation each of whose shareholders has, by virtue of his or her shares, an exclusive right to occupy one or more of the residential premises,
- (j) an agreement having a term, together with the term of any further agreement that may be granted under an option in respect of it, that is equal to or exceeds 99 years.

(2) This Act (other than Parts 8, 9 and 11) does not apply to residential tenancy agreements to which the Residential Parks Act 1998 applies."

3. Many persons who live under such agreements are vulnerable persons. The Act does not afford the protections offered to such persons, including access to the Consumer, Tenancy and Trader Tribunal to resolve disputes. Instead, these agreements are currently governed by common law.
4. The Bills aims to amend the *Residential Tenancies Act 2010* to provide certain coverage to new classes of people, which will allow greater security of tenure for residents covered by various occupancy agreements.

OUTLINE OF PROVISIONS

5. Clause 1 sets out the name (also called the short title) of the proposed Act.
6. Clause 2 provides for the commencement of the proposed Act 3 months after the date of assent to the proposed Act, unless commenced sooner by proclamation.

Schedule 1 Amendment of Residential Tenancies Act 2010 No 42

7. Schedule 1 [7] provides that the Consumer, Trader and Tenancy Tribunal may, on application by the Director-General or another person, make an order declaring that a specified agreement is, or is not, an occupancy agreement to which the Act applies.
8. Schedule 1 [8] inserts a new Part into *the Residential Tenancies Act 2010* dealing with previously unprotected occupants. That Part contains the following provisions:
9. Clause 186A defines terms used in the proposed Part. A grantor is defined as the person who grants the right to occupy residential premises under an occupancy agreement. An occupant is defined as the person who has the right to occupy residential premises under an occupancy agreement.
10. Clause 186B specifies the agreements that are occupancy agreements. An occupancy agreement is an agreement under which a person grants to another person for value a right to occupy specified residential premises as a residence (whether or not with other people). However, an agreement that is a residential tenancy agreement to which the Act applies is not an occupancy agreement.
11. Clause 186C specifies when an occupancy agreement commences.
12. Clause 186D specifies the occupancy principles that apply in relation to an occupancy agreement for premises.
13. Clause 186E provides that the regulations may make provision in relation to occupancy agreements, including, for example, standard occupancy terms and that the regulations may provide for more than one form of standard occupancy agreement for use for different classes of residential premises, occupancy agreements and parties. The proposed section also requires that any regulation about standard occupancy terms must be consistent with the occupancy principles.
14. Clause 186F provides that an occupancy agreement must contain, and is taken to contain, terms to the effect of the occupancy principles and terms to the effect of the standard occupancy terms prescribed by the regulations and may contain other terms that are consistent with those standard occupancy terms and the occupancy principles.
15. Clause 186G provides that the grantor under an occupancy agreement must deposit the amount of any bond under the agreement with the Director-General. If the Director-General accepts the bond, Divisions 1–3 of Part 8 of the Act apply in relation to the occupancy agreement with the appropriate modifications.
16. Schedule 1 [17] provides that the Consumer, Trader and Tenancy Tribunal must give effect to the occupancy principles in considering a matter, or making a decision under the Act, in relation to a dispute between the parties to an occupancy agreement or a dispute under such an agreement.
17. Schedule [1] and [2] update the long title to include references to grantors, occupants and occupancy agreements.
18. Schedule 1 [9] and [11]–[16] extend certain provisions about landlords and tenants to include grantors and occupants.

19. Schedule 1 [4], [10] and [18] extend references to residential tenancy agreements to include occupancy agreements.
20. Schedule 1 [3] inserts definitions used in the new provisions.
21. Schedule 1 [5] and [6] limit the application of existing provisions about residential tenancy agreements.
22. Schedule 1 [19] provides for the making of applications to the Tribunal in relation to breaches of occupancy agreements or of the occupancy principles.
23. Schedule 1 [20] provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Commencement by Proclamation / Retrospectivity

24. The Bill provides that the Act will commence three months after the date of assent (unless commenced sooner by proclamation). This provides the Government with the power to commence the Act at any time between assent and three months.
25. Although the Bill affects occupancy agreements and bonds in existence prior to the commencement of the legislation, the Committee notes the purpose of the Act is to strengthen the rights of tenants subject to such agreements.
26. However, given the class of persons subject to the Act, which include vulnerable persons, the need for certainty, and to allow for preparation in anticipation of the amendments, the Committee notes that possible commencement of the Act by proclamation may be an issue.
27. The Committee also notes that the effect of the providing entitlements to occupants under the Act places new obligations on grantors. The Committee is of the view that, in circumstances where a grantor is required to meet new obligations, clarity in relation to the commencement of such obligations is important.
28. Further, the Bill states that applications relating to breaches of occupancy agreements or occupancy principles that occurred prior to the commencement of the Act must be made within 28 days after commencement of the Act. Given the time constraints to seek judicial review of a potential breach, the desirability for affected individuals to have advance notice of the Act's commencement date is heightened.

The Committee notes that the possible commencement by proclamation may be a concern for both grantors, who have new obligations under the Act, and occupants, who may be subject to removal by grantors who do not wish to continue to provide accommodation upon commencement of the Act.

In addition, as the Bill states that applications relating to breaches of occupancy agreements or occupancy principles that occurred prior to the commencement of the Act must be made within 28 days after the commencement of the Act, the Committee is of the opinion that advance notice of the Act's commencement date would provide affected individuals with sufficient time to seek a judicial review of a potential breach.

The Committee refers to Parliament whether commencement by proclamation is appropriate in these circumstances.

10. Valuation of Land Amendment Bill 2011

Date introduced	22 November 2011
House introduced	Legislative Council
Minister responsible	The Hon. Greg Pearce MLC
Portfolio	Finance and Services

PURPOSE AND DESCRIPTION

1. The *Valuation of Land Amendment Bill 2011* passed both houses on 1 June 2011. Under section 8A(2) of the Legislation Review Act 1987, the Committee is not precluded from reporting on a Bill that has been passed by Parliament or has become an Act.
2. The object of this Act is to amend the *Valuation of Land Act 1916* as follows:
 - (a) to make it clear that the Valuer-General can make a valuation of land for the purposes of a private agreement at the request of a party to the agreement and to provide that for the purposes of such an agreement a valuation carried out in accordance with the Valuer-General's usual delegation and contract valuer arrangements is deemed to have been carried out by the Valuer-General,
 - (b) to affirm the methodology used by the Valuer-General in valuing heritage restricted land by ensuring that the cost of construction of improvements is not to be taken into account in determining the land value of land and to make it clear that there is to be no adjustment of the land value of heritage restricted land except that which results from the specific assumptions required by the Act for such a valuation.

The Act also amends the *Heritage Act 1977* in relation to the valuation of land on the State Heritage Register to the same effect as the amendments referred to in paragraph (b).

BACKGROUND

3. In 2011, the Land and Environment Court determined that a heritage cost penalty should be taken into account in valuations of heritage properties by the Valuer-General. Referring to the *Valuation of Land Act*, the Minister for Finance and Services, stated in his Second Reading speech:

"...this was not the intention of the legislation. As noted earlier, heritage valuations are intended to be made without regard to the actual condition of improvements on the land. There was certainly no intention of introducing the complex process that would be required if the cost of construction of a new heritage building and a non-heritage building had to be calculated and compared. This calculation would involve not only a detailed inspection of each heritage property but would require quantity surveyors to be employed to estimate the construction costs. Not only would this process be expensive,

it would be extremely time consuming and would be a challenge to complete within the time frames required by the Act.

Introduction of a heritage cost penalty would also have a serious impact on State revenue. As the penalty would be applied in addition to the deduction already received through the heritage assumptions, land values would fall significantly, leading to corresponding deduction in State Government revenues. This reduction in revenue has not been budgeted and would have to be recouped by other means."

4. The Act also seeks to confirm that a valuation made by a delegate of the Valuer-General or by the Valuer-General on the recommendation of a contract valuer are deemed to have been made by the Valuer-General, as, according to the Minister, "a recent case before the Supreme Court has raised some doubt as to whether the Valuer-General can delegate or use contract valuers to carry out valuations not specifically required by the Valuation of Land Act."

OUTLINE OF PROVISIONS

Outline of provisions

5. Clause 1 sets out the name (also called the short title) of the proposed Act.
6. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Valuation of Land Act 1916 No 2

7. Schedule 1 [3] inserts a new section that specifically authorises the Valuer-General to carry out private valuations of land at the request of a party to a private agreement that provides for the valuation to be made by the Valuer-General. Current arrangements under which the Valuer-General delegates the making of a valuation or makes a valuation on the recommendation of a contract valuer will extend to these private valuations, and a valuation made by a delegate or on the recommendation of a contract valuer will operate for the purposes of the private agreement as a valuation made by the Valuer-General. Schedule 1 [1] and [2] make consequential amendments.
8. Schedule 1 [4] affirms the methodology used by the Valuer-General in valuing heritage restricted land by ensuring that the cost of construction of improvements is not to be taken into account in determining the land value of heritage restricted land. The amendment reverses the effect of the decision of the Land and Environment Court in *Adam Pty Ltd v Valuer-General* [2011] NSWLEC 55 which involved a deduction from land value of a "heritage cost penalty" calculated as the increased cost of construction of improvements on heritage restricted land.
9. Schedule 1 [5] makes it clear that there is to be no deduction from or other adjustment of the land value of heritage restricted land on account of the effect on land value of any factor concerned with the land being heritage restricted land other than the effect of the assumptions specifically required to be made under the Act for such a valuation.
10. Schedule 1 [6] inserts a savings and transitional regulation-making power.
11. Schedule 1 [7] inserts the following transitional provisions for the amendments to be made by the Act:

- (a) Proposed clause 19 extends the operation of the new section that authorises the Valuer-General to carry out private valuations to private valuations made before the commencement (but not so as to affect any previous court decision).
- (b) Proposed clause 20 validates past valuations of heritage restricted land made on the basis of the methodology that is affirmed by Schedule 1 [4] and [5] but not so as to affect any decision in court proceedings commenced before the date of introduction of the Bill into Parliament.

Schedule 2 Amendment of Heritage Act 1977 No 136

- 12. Schedule 2 amends the *Heritage Act 1977* in relation to the valuation of land listed on the State Heritage Register to make amendments to the same effect as those made by Schedule 1 [4] and [5]. The transitional provision (proposed clause 20) to be inserted by Schedule 1 [7] extends to the amendments made by Schedule 2.

ISSUES CONSIDERED BY COMMITTEE

Trespasses on rights and liberties: s 8A(1)(b)(i) of the LRA

Retrospectivity

- 13. The amendments contained within the Act commenced on the day the Bill was introduced into Parliament.
- 14. However the Committee notes that the Act contains provisions which ensure that valuations made during the period following the decision of *In Adam v Valuer General* and the introduction of the Bill are not retrospectively affected if proceedings have been commenced before the date of introduction into Parliament of this Bill. The Committee further notes that, as outlined by the Minister for Finance and Services, none of the valuations made within this period included a "heritage cost penalty". As such, no persons should be adversely affected by the amendments.

It is incumbent on the Committee to identify those provisions in legislation that are to commence retrospectively as it is generally the Committee's view that Bills should commence on assent or on a specified date after the date of assent. This enables all affected individuals to be made aware of changes to their rights and responsibilities before they occur.

However, as the retrospective provisions do not apply to matters currently before the courts, and no valuations made within the specified period raise the issue that is the subject of the retrospective provisions, the Committee makes no adverse comments on this Act in respect of retrospectivity.

Part Two – Regulations

1. Proposed Postponement of the Repeal of the Criminal Records Regulation 2004

BACKGROUND

1. By correspondence received 11 January 2012, the Attorney General advised the Committee of the intention to postpone the repeal of the above regulation.

COMMENT

1. The postponement of the repeal of the above regulation is proposed for the fourth time.
2. The Attorney General advised that the postponement was sought due to amendments to the principal Act being brought forward in 2012.
3. Consideration is also being given to whether New South Wales should adopt the Standing Committee of Attorneys General Model Spent Convictions Bill.

CONCLUSION

That the Committee writes to the Attorney General to advise that it does not have any concerns with the postponement of the repeal of the regulation.

2. Proposed Postponement of the Repeal of the Legal Profession Regulation 2005

BACKGROUND

2. By correspondence received 11 January 2012, the Attorney General advised the Committee of the intention to postpone the repeal of the above regulation.

COMMENT

4. The postponement of the repeal of the above regulation is proposed for the third time.
5. The Attorney General advised that the postponement was sought on the basis that the Council of Australia Government's national legal profession reforms will be implemented in 2012. The Government will introduce a Bill to apply the National Law in New South Wales.

CONCLUSION

That the Committee writes to the Attorney General to advise that it does not have any concerns with the postponement of the repeal of the regulation.

3. Proposed Postponement of the Repeal of the Privacy and Personal Information Protection Regulation 2005

BACKGROUND

1. By correspondence received 11 January 2012, the Attorney General advised the Committee of the intention to postpone the repeal of the above regulation.

COMMENT

2. The postponement of the repeal of the above regulation is proposed for the third time.
3. The Attorney General advised that the postponement was sought on the basis that there is currently a national privacy reform process underway. Consideration is also being given to implementing certain recommendations in the New South Wales Law Reform Commission's Report 126, *Access to personal information*.

CONCLUSION

That the Committee writes to the Attorney General to advise that it does not have any concerns with the postponement of the repeal of the regulation.

4. Proposed Postponement of the Repeal of the Protection of the Environment (Waste) Regulation 2005

BACKGROUND

1. By correspondence received 31 January 2012, the Minister for the Environment advised the Committee of the intention to postpone the repeal of the above regulation.

COMMENT

2. The postponement of the repeal of the above regulation is proposed for the third time.
3. The Minister advised that the postponement was sought due to a comprehensive review of the Protection of the Environment (Waste) Regulation currently underway in respect of waste levies. The review is expected to be completed in 2012.
4. The completion of the waste levy review will lead to a re-make of the above regulation.

CONCLUSION

That the Committee writes to the Minister for the Environment to advise that it does not have any concerns with the postponement of the repeal of the regulation.

5. Work Health and Safety (Savings and Transitional) Regulation 2011

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide transitional arrangements for the prosecution after the repeal of the Occupational Health and Safety Act 2000 (the OHS Act) of offences committed under that Act before its repeal.

ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Fair trial

2. The Committee notes that clause 6 will discontinue proceedings for an OHS offence committed on or before 7 June 2011 that have been commenced in the Industrial Court but have not been finally determined, and for such proceedings to be dealt with summarily before the District Court.
3. The Committee notes that the discontinuance of such proceedings may result in unnecessary costs and time spent by parties subject to this clause.

PROPOSED COURSE OF ACTION

The Committee resolves to write to the Minister seeking clarification of whether the Minister envisages detrimental effects for parties whose proceedings for an OHS offence have commenced in the Industrial Court and are yet to be determined which will be dismissed by the Regulation and will have these proceedings then dealt summarily by the District Court.

Appendix One – Index of Ministerial Correspondence on Bills

The Committee currently has no Ministerial correspondence in respect of Regulations.

Appendix Two – Index of Correspondence on Regulations on which the Committee has reported

The Committee currently has no correspondence in respect of Regulations on which it has reported.