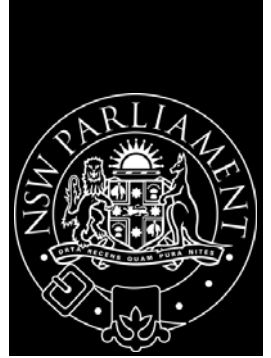


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 6 of 2009

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* Denotes Private Member's Bill

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

- (1) The functions of the Committee with respect to Bills are:
 - (a) to consider any Bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - (i) trespasses unduly on personal rights and liberties, or
 - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - (iv) inappropriately delegates legislative powers, or
 - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- (2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations:

- (1) The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - (i) that the regulation trespasses unduly on personal rights and liberties,
 - (ii) that the regulation may have an adverse impact on the business community,
 - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
 - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
 - (v) that the objective of the regulation could have been achieved by alternative and more effective means,
 - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - (vii) that the form or intention of the regulation calls for elucidation, or
 - (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
 - (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (2) Further functions of the Committee are:
 - (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
 - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament. Following a brief description of the Bill, the Committee considers each Bill against the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987* (see page 3).

Section B: Ministerial correspondence – Bills previously considered

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

Part Two – Regulations

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

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

Appendix 1: Index of Bills Reported on in 2009

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

Appendix 2: Index of Ministerial Correspondence on Bills for 2009

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

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2009

This table specifies the action the Committee has taken with respect to Bills that received comment in 2008 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

Appendix 4: Index of correspondence on Regulations reported on in 2009

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

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Children and Young Persons (Care and Protection) Amendment Bill 2009

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

2. Civil Proceedings Amendment (Transfer of Proceedings) Bill 2009

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

3. Criminal Legislation Amendment Bill 2009

Issue: Schedule 1 [5] – Ill-defined powers - proposed section 198 (5) - directions relating to dispersal of groups of intoxicated persons in public places – amendment of *Law Enforcement (Powers and Responsibilities) Act 2002*:

12. The Committee does not hold any strong position on the proposed definition under section 198 (5) of schedule 1[5] providing that it is clearly defined and restricted to the application for the purpose of section 198 in relation to dispersing groups of intoxicated persons in public places. Currently, for the purpose of the section, an intoxicated person is a person *who appears to be seriously affected by alcohol or any drug*. This will be replaced by the above proposed section.
13. However, the Committee expresses its concern that confusion may likely arise if the new definition becomes contradictory with the current definition existing under a different part (Part 16) of the *Law Enforcement (Powers and Responsibilities) Act 2002* where section 205 of that Act, applies the definition of an *intoxicated person* that means a person *who appears to be seriously affected by alcohol or another drug or a combination of drugs*.
14. The Committee is concerned that the lower threshold under the new definition proposed by section 198 (5) of Part 14 (and for the purpose of that section), may lead to circumstances or situations where the powers relating to the detention of intoxicated persons under Part 16 may be exercised. However, as Part 16 deals with the detention of intoxicated persons involving a person's liberty, the Committee accepts the existing current definition of an intoxicated person under section 205, since it retains a higher threshold definition such that a person has to appear to be *seriously affected by alcohol or another drug or a combination of drugs*.
15. The Committee will be concerned with the proposed section 198 (5) and its new definition of an intoxicated person if it becomes ill-defined and leads to undermining the higher threshold definition used for the detention of intoxicated persons under Part 16 of the *Law Enforcement (Powers and Responsibilities) Act 2002*. The Committee draws this to the attention of Parliament.

4. Criminal Organisations Legislation Amendment Bill 2009

Issue: Schedule 1 [2] – proposed section 26A recruiting persons to become member of declared organisation – Freedom of Association and Rights of the Child:

17. The Committee is concerned that the proposed section 26A will criminalise a person's associations instead of a guilty act of a specific criminal conduct, and will deny a person's right of freedom of association with others, a right that is established by Article 22 (1) of the *International Covenant on Civil and Political Rights*.
18. The Committee notes that by analogy to the comparable offence of consorting, the Law Reform Commission of Western Australia in 1992, stated that it was: "inconsistent with the principles of criminal law to make it an offence to associate with particular people. Offences should proscribe conduct thought deserving of punishment. Merely associating with people, whether they are known to be in a particular category or are merely reputed to be in a particular category, should not be criminal".
19. Therefore, the Committee refers the proposed section 26A of this Bill to Parliament, as constituting an undue trespass on personal rights and liberties by undermining the right of freedom of association.
21. The Committee expresses its concern with the potential involvement of youths and the impact of the proposed offence on young people. The Committee observes that this may undermine the rights of a child such as established by Article 27 (b) of the *Convention on the Rights of the Child*: "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law *and shall be used only as a measure of last resort and for the shortest appropriate period of time*".
22. The Committee is concerned that for such an offence under the proposed section 26A (1), the maximum penalty is imprisonment for 5 years. The Committee is of the view that imprisonment for such an offence could erode the rights of the child under Article 37 (b) of the *Convention on the Rights of the Child*, especially in respect of detention or imprisonment of a child under the age of 18 years old, which shall only be used as a measure of last resort and for the shortest appropriate period of time. Therefore, the Committee refers this as an undue trespass on the rights of the child, to Parliament.

Issue: Schedule 3 (other than Schedules 3.2 and 3.7) – amendment of other Acts – Right To Work; Presumption Of Innocence; Strict Liability and Retrospectivity - Schedule 3.1 master licences and operator licences under the *Commercial Agents and Private Inquiry Agents Act 2004*; Schedule 3.3 licences and approvals to manage licensed premises under the *Liquor Act 2007*; Schedule 3.4 licences under the *Motor Dealers Act 1974*; Schedule 3.5 licences and tradespersons' certificates under the *Motor Vehicle Repairs Act 1980*; Schedule 3.6 licences under the *Pawnbrokers and Second-hand Dealers Act 1996*; Schedule 3.8 licences and drivers certificates under the *Tow Truck Industry Act 1998*:

26. The Committee believes that if an applicant is not considered as a fit and proper person for the above licences or authorisations, it should, at least be based on a prior conviction for a serious indictable or violent offence rather than be based on any non-convicted 'improper conduct' that 'could be reasonably inferred' which would 'further' the criminal activities of the declared organisation that is 'likely to occur' if they hold or continue to hold authorisations.

28. By applying the above legal principles, the Committee finds that Schedule 3 (other than Schedules 3.2 and 3.7) is proposing that no crime needs to be actually committed (or no crime needs to have actually occurred), as the wording proposes that ‘the criminal activities of the declared organisation *is likely to occur*’.
29. Further, the Committee notes that Schedule 3 (other than Schedules 3.2 and 3.7) imposes strict liability as the wording proposes ‘that *it could reasonably be inferred* that improper conduct that would further the criminal activities of the declared organisation is likely to occur’. Therefore, the authority would not be required to establish that the applicant knew all the essential facts or circumstances and the applicant intentionally assisted or encouraged the principal participant of the declared organisation to commit the crime, since the decision to cancel or prohibit the holding of the licence or authorisation would be based on what could *reasonably be inferred*.
30. Strict liability will in some cases cause concern as it displaces the common law requirement that the authority or prosecution prove beyond reasonable doubt that the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may, in some cases, be considered reasonable such as public interest, the impact of the offence on the community, the potential penalty and the availability of any defences or safeguards.
31. The Committee holds concerns for the imposition of strict liability in Schedule 3 (other than Schedules 3.2 and 3.7) since there is no availability of any defences or safeguards as the applicant will be banned from holding or applying for such licences or authorisations. In this context, the Committee is similarly concerned that this may deny a person’s right to work as established by Article 6 (1) of the *International Covenant on Economic, Social and Cultural Rights*, which provides that: “The State Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely choose or accepts, and will take appropriate steps to safeguard this right”.
32. The Committee believes the above proposed Schedule 3 could unduly interfere with the right and opportunity of a person to gain their living by work which they choose or accept, as established under Article 6 (1) of the *International Covenant of Economic, Social and Cultural Right*. Accordingly, the Committee refers this to Parliament.
33. The Committee also concludes that the above Schedule 3 (other than Schedules 3.2 and 3.7) may be inconsistent with the right to a presumption of innocence including the right to be treated as innocent until a crime has been committed and the person has been proven guilty. Therefore, the Committee finds this trespasses unduly on personal rights and liberties and refers it to Parliament.
35. The Committee notes that retrospectively cancelling a licence or authorisation which was duly made under the law at the time before the amendments, may trespass on a person’s right to order his or her affairs in accordance with the law given at the time. The Committee will always be concerned with any retrospective effect of legislation which impacts adversely on personal rights, and considers the proposed Schedule 3 (other than Schedules 3.2 and 3.7) which will amend the relevant legislation to cancel licences and authorisations that had been duly granted before the amendments, may trespass unduly on personal rights and refers this to Parliament.

Issue: Schedule 2 [8], [10] and [12] – amendment of *Law Enforcement (Powers and Responsibilities) Act 2002* – Oppressive Official Powers; Right to Privacy and Property - proposed section 46D (Authority to apply for criminal organisation search warrant); proposed section 47 (3A) and proposed section 73 (2B) (Expiry of warrant):

41. The Committee remains concerned with Schedule 2 and the proposed sections 46D, 47 (3A) and 73 (2B) including the lower threshold for applying for criminal organisation search warrants together with the longer warrant duration of 7 days rather than the 3 days period for existing search warrants. The Committee appreciates the reasons behind the proposed amendments as provided in the Agreement in Principle speech but the Committee is of the view that if the threshold applying for criminal organisation search warrants is lowered from 'reasonable belief' to 'reasonable suspicion', then this could be balanced by maintaining the warrant duration to be 72 hours instead of the proposed 7 days, in order to ensure that the right to privacy and the right to enjoy property will not be unduly interfered with.
42. The Committee believes that if the threshold applying for criminal organisation search warrants is to be lowered to 'reasonable suspicion', this could address the concerns of such crimes involving high levels of organisation, planning and concealment, without also requiring the extended warrant duration of 7 days (or 168 hours). Otherwise, the Committee refers this to Parliament as it may lead to oppressive powers where the rights to privacy and enjoyment of property could be unduly trespassed.

Issue: Clause 2 (2) - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

44. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether Schedule 2 of the Bill to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.

5. Home Building Amendment (Insurance) Bill 2009

Issue: Retrospectivity, Right to Compensation - Section 103BA – Limitations on Policy Coverage – Retrospective Application Regarding Rights to Compensation

15. The Committee is always concerned with the enactment of retrospective provisions in legislation, particularly where they affect individual rights such as the right to compensation.
16. However, the Committee accepts the government's argument that, without the enactment of Section 103BA, insurers would be seriously adversely effected in a way that was not anticipated. The Committee also accepts that insurance premiums in home building warranty insurance will almost definitely increase by a substantial amount as a result and insurers may withdraw from the market.
17. It is also acknowledged that the retrospective action of Section 103BA is only to instate what had been widely accepted to be the amount of coverage provided under the Act prior to the Supreme Court decision in *Strata Plan 57504 v Building Insurers' Guarantee Corporation*.

6. Hurlstone Agricultural High School Site Bill 2009*

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| 3. The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987. |
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7. Motor Accidents Compensation Amendment Bill 2009

Issue: Clause 2 – Commencement by Proclamation – Provide the Executive with unfettered control over the commencement of an Act

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| 6. The Committee has not identified any issues under s8A(1)(b) of the Legislation Review Act 1987. |
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Part One – Bills

SECTION A: COMMENT ON BILLS

1. CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) AMENDMENT BILL 2009

Date Introduced:	6 May 2009
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Linda Burney MP
Portfolio:	Community Services

Purpose and Description

1. The object of this Bill is to amend the Children and Young Persons (Care and Protection) Act 1998 (the Principal Act) so as:
 - a. to provide that if the Department of Community Services (*the Department*) takes over supervising the placement of a child or young person in out-of-home care because a designated agency has ceased to be able to fulfil its responsibilities in relation to the child or young person, the Department does not take or assume any assets, rights or liabilities of the designated agency, and
 - b. to make it clear that the Children's Guardian and the Director-General of the Department (*the Director-General*) may, for the purpose of exercising their functions, exchange information with, and require the provision of information from, other persons, and
 - c. to make it an offence for certain prescribed persons to fail to comply with a direction of the Children's Guardian to provide information, and
 - d. to enable the making of regulations for or with respect to the licensing of principal and other officers of designated agencies, and

Background

2. In New South Wales only designated agencies are permitted to provide out-of-home care for children and young persons who do not live with their families in accordance with orders of the Children's Court. The New South Wales Children's Guardian is responsible for accrediting designated agencies and monitoring their responsibilities.
3. In mid 2006 the New South Wales Children's Guardian commenced a review of the program and its systems. The main purpose of the review was to improve the efficiency, effectiveness and ease of use of the program for out-of-home-care designated agencies, having regard to the best interests of children and young people in out-of-home care.
4. While the review found that the majority of agencies reported that the program helped them to deliver better outcomes for children and young people in their care, it also found that a number of improvements should be made to the program. It found that the existing regulation lacked necessary flexibility and unnecessarily burdened out-of-

Children and Young Persons (Care and Protection) Amendment Bill 2009 home care agencies and organisations applying for accreditation. It also found the existing

5. regulatory framework for interim accredited agencies to be unclear and insufficient to address any significant concerns that could exist about the quality of care provided by these agencies.
6. The review recommended legislative and regulatory changes to provide for greater flexibility and clarity in the accreditation and monitoring framework and to reduce the red tape on agencies applying for accreditation. The amending Principal Regulation and the amending Savings and Transitional Regulation have been gazetted already. The review also recommended several minor amendments to the Children and Young Persons (Care and Protection) Act 1998. The Children and Young Persons (Care and Protection) Amendment Bill 2009 will make these minor amendments to the Children and Young Persons (Care and Protection) Act 1998.
7. According to the Agreement in Principle Speech the amendments are not substantive but will help to provide greater flexibility to out-of-home care agencies applying for accreditation and reduce the regulatory burden of applying for accreditation. In addition, the amendments will permit developing new regulations to provide greater clarity for out-of-home care agencies regarding the regulatory process. The amendments will also allow the Children's Guardian to do its work of accrediting and monitoring agencies that provide out-of-home care services more effectively.

The Bill

Outline of provisions

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

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of *Children and Young Persons (Care and Protection) Act 1998 No 157*

Section 141 (Inability of designated agency to fulfil responsibilities) of the Principal Act provides that if a designated agency, other than the Department, is designated to supervise the placement of a child or young person in out-of-home care and that agency ceases to be able to fulfil its responsibilities in relation to the child or young person, the Department is to supervise the placement of the child or young person.

Schedule 1 [1] inserts proposed section 141 (1A) into the Principal Act to provide that the Department, in supervising the placement of a child or young person in out-of-home care, does not take or assume any assets, rights or liabilities of the designated agency.

Sections 185 and 248 of the Principal Act provide that the Children's Guardian and the Director-General, respectively, may, for the purposes of providing information to, or exchanging information with, a prescribed person or body, do either or both of the following:

- (a) furnish a prescribed person or body (within the meaning of the section concerned) with information relating to the safety, welfare and well-being of a particular child or young person or class of children or young persons,
- (b) direct a prescribed person or body to furnish information to the Children's Guardian or the Director-General, respectively, relating to the safety, welfare and well-being of a particular child or young person or class of children or young persons.

Schedule 1 [2] and [6] insert proposed sections 185 (1A) and 248 (1AA),

respectively, into the Principal Act to provide that the functions referred to above may also be exercised by the Children's Guardian or the Director-General, respectively, for the purpose of exercising their functions. **Schedule 1 [3], [4], [7] and [8]** make consequential amendments.

Schedule 1 [5] inserts proposed section 185 (2A) into the Principal Act to provide that a prescribed person (other than the Director-General or a Department of the Public Service) must comply with a direction of the Children's Guardian to furnish information relating to the safety, welfare and well-being of a particular child or young person or class of children or young persons within such reasonable time as is specified in the direction. Failure to comply will be an offence carrying a maximum penalty of 10 penalty units (currently, \$1,100). **Schedule 1 [5]** also substitutes section 185 (2) of the Principal Act to make consequential amendments.

Schedule 1 [9] inserts proposed section 264 (1A) (k) into the Principal Act to provide that regulations may be made under the Principal Act for or with respect to the licensing of principal and other officers of designated agencies.

Schedule 1 [10] amends Schedule 3 to the Principal Act to provide that regulations may be made of a savings or transitional nature consequent on the enactment of the proposed Act.

Issues Considered by the Committee

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| <p>8. The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987.</p> |
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The Committee makes no further comment on this Bill.

2. CIVIL PROCEEDINGS AMENDMENT (TRANSFER OF PROCEEDINGS) BILL 2009

Date Introduced:	6 March 2009
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. Currently, Division 2A of Part 9 of the *Civil Procedure Act 2005* enables the Supreme Court to transfer proceedings to the Land and Environment Court if it is satisfied that those proceedings could properly have been commenced in the Land and Environment Court. The object of this Bill is to amend the *Civil Procedure Act 2005* so as to enable either the Supreme Court or the Land and Environment Court to transfer proceedings to the other court if:
 - a. the court is satisfied that it is more appropriate for proceedings before it to be heard in the other court, or
 - b. there are related proceedings pending in the other court and the court is satisfied that it is more appropriate for all the proceedings to be heard together in the other court.

Background

2. According to the Agreement in Principle Speech: "Currently the Supreme Court can transfer proceedings to the Land and Environment Court and the Land and Environment Court is given ancillary jurisdiction to deal with the proceedings under sections 149A to 149E of the *Civil Procedure Act 2005*."
3. However, the Land and Environment Court does not have an equivalent power to transfer proceedings to the Supreme Court. The bill addresses this issue with a scheme that has been agreed to by the Chief Justice of the Supreme Court and the Chief Judge of the Land and Environment Court. The bill will amend the *Civil Procedure Act 2005* so as to enable either the Supreme Court or the Land and Environment Court to transfer proceedings to the other court if the court is satisfied that it is more appropriate for proceedings before it to be heard in the other court or there are related proceedings pending in the other court and the court is satisfied that it is more appropriate for all the proceedings to be heard together in the other court.
4. The cross-vesting provisions apply only in civil proceedings at first instance and not to appellate proceedings or criminal proceedings. The proposal aims to reduce unnecessary litigation by enabling one court to deal with the same set of issues instead of having concurrent proceedings running in each court.

The Bill

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

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of *Civil Procedure Act 2005 No 28*

Schedule 1 to the proposed Act substitutes Division 2A of Part 9 of the *Civil Procedure Act 2005* to give effect to the objects set out in the Overview above. More specifically:

- (a) proposed section 149A contains definitions for the purposes of the proposed new Division, and
- (b) proposed section 149B contains provisions to enable the Supreme Court and the Land and Environment Court to make orders to transfer proceedings between the courts as referred to in the Overview above, and
- (c) proposed section 149C deals with the operation of those transfer orders, and
- (d) proposed section 149D deals with the conduct of proceedings after such a transfer, and
- (e) proposed section 149E provides that the transferee court has, and may exercise, all of the jurisdiction of the transferor court in relation to any proceedings to which such a transfer order relates, including jurisdiction to determine any question arising in any such proceedings.

Issues Considered by the Committee

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| <p>5. The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987.</p> |
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The Committee makes no further comment on this Bill.

3. CRIMINAL LEGISLATION AMENDMENT BILL 2009

Date Introduced: 7 May 2009
House Introduced: Legislative Council
Minister Responsible: Hon John Hatzistergos MLC
Portfolio: Attorney General

Purpose and Description

1. This Bill makes miscellaneous amendments to legislation relating to crimes, criminal procedure and other matters. Some of the main amendments are described further below.
2. Schedule 1.1 amends the *Child Protection (Offenders Registration) Act 2000*. This amendment provides that a registrable person must make an initial report of their relevant information to the Commissioner of Police within seven days of being sentenced for a registrable offence. This must be done whether the person has previously been required to report or not. The amendment addresses an anomaly whereby offenders, who had never before been sentenced in relation to a registrable offence, had seven days in which to report to the Commissioner of Police, however, repeat offenders, whose reporting period in relation to a registrable offence had expired, were given 28 days within which to report.
3. Schedule 1.2 amends the *Confiscation of Proceeds of Crime Act 1989* in relation to the cultivation of prohibited plants. Section 23A of the *Drug Misuse and Trafficking Act 1985* covers offences of enhanced cultivation of prohibited plants in the presence of children when there is more than a small quantity of a prohibited plant. This amendment provides that an offence under this section is a drug trafficking offence for the purposes of the *Confiscation of Proceeds of Crime Act 1989*.
4. Schedule 1.3 amends the *Crimes Act 1900* to include the additional circumstance of aggravation of breaking and entering in respect of the offences of sexual intercourse with a child under the age of 10 and sexual intercourse with a child aged between 10 and 16 years.
5. Schedule 1.4 amends the *Crimes (Domestic and Personal Violence) Act 2007* to create two offences. One is the offence of attempting to stalk or intimidate another person with the intention of causing the other person to fear physical or mental harm, and the second offence is attempting to contravene a prohibition or restriction specified in an apprehended violence order. Any person who attempts to commit either of these two offences will be liable to the same penalty as applies if the person had committed the offence itself. These amendments aim to provide greater protection to victims of domestic violence by criminalising the conduct of those persons who have attempted to commit such offences.
6. Item [1] of schedule 1.5 removes an incorrect reference to a child under 10 from item 9B of the table to division 1A of part 4 of the *Crimes (Sentencing Procedure) Act*

1999. This item provides for a standard non-parole period in relation to the offence of aggravated indecent assault under section 61M (2) of the *Crimes Act 1900*. That subsection was recently amended by the *Crimes Amendment (Sexual Offences) Act 2008* so that the subsection now applies to all children under 16 years, rather than just to children under 10 years.

7. Item [2] of Schedule 1.8 amends the *Law Enforcement (Powers and Responsibilities) Act 2002* as a result of the repeal of the *Liquor Act 1982* and its replacement by the *Liquor Act 2007*. Item [5] amends section 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002*. This section provides police officers with the power to give directions relating to the dispersal of groups of intoxicated persons in public places. Currently, for the purposes of this section, an intoxicated person is a person who appears to be seriously affected by alcohol or any drug. This definition will be replaced by the definition found in the *Liquor Act 2007* but will also refer to intoxication caused by both drugs and alcohol.
8. Under the proposed definition, a person is intoxicated if their speech, balance, coordination or behaviour is noticeably affected and it is reasonable in the circumstances to believe that affected speech, balance, coordination or behaviour is a result of the consumption of alcohol or any drug.

Background

9. According to the Second Reading speech, the new definition of intoxicated person under section 198 for directions relating to dispersal of groups of intoxicated persons in public places, will:

...enable police to utilise their move-on powers when they believe on reasonable grounds that the person's behaviour as a result of intoxication is likely to cause injury to any other person or persons, damage to property or otherwise gives rise to a risk to public safety. This is an important reform. It gives police an early intervention power that will enable them to defuse potentially dangerous situations before they escalate into more serious incidents.

...However, with this reform police will have the power to disperse the group or move them away from the shopping centre and the public on the basis that their speech, balance, coordination or behaviour is noticeably affected and that they believe on reasonable grounds that the behaviour is likely to cause injury to another person or persons, damage to property or otherwise gives rise to risk to public safety. A uniform definition between the *Law Enforcement (Powers and Responsibilities) Act 2002* and the *Liquor Act 2007* will greatly assist police involved in alcohol enforcement operations.

The Bill

The object of this Bill is to make miscellaneous amendments to legislation relating to crimes, criminal procedure and other matters.

Schedule 1 Amendment of Acts

Schedule 1.1 [1] and [2] amend the *Child Protection (Offenders Registration) Act 2000* to specify 7 days as the period within which an initial report of the person's relevant personal information must be made to the Commissioner of Police, regardless of whether the person has previously been required to report. Currently the period is 7 days in the case of a person who becomes a registrable person for the first time and 14 or 28 days in the case of a

person whose reporting obligations have expired or are suspended and who is then required to report because of a new offence or because the suspension is revoked.

Schedule 1.2 amends the *Confiscation of Proceeds of Crime Act 1989* to provide that an offence under section 23A (offences with respect to enhanced indoor cultivation of prohibited plants in presence of children) of the *Drug Misuse and Trafficking Act 1985*, involving more than a small quantity of a prohibited plant within the meaning of that Act, is a drug trafficking offence for the purposes of the *Confiscation of Proceeds of Crime Act 1989*.

Schedule 1.3 [1] amends the *Crimes Act 1900* to include an additional circumstance of aggravation in respect of the offences of sexual intercourse with a child under the age of 10 and sexual intercourse with a child aged between 10 and 16 years. The additional circumstance of aggravation occurs if the alleged offender breaks and enters into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence.

Schedule 1.4 [1] and [4] amend the *Crimes (Domestic and Personal Violence) Act 2007* to make it an offence to attempt to commit an offence under section 13 (1) or 14 (1) of that Act. Those sections create offences of stalking or intimidating another person with the intention of causing the other person to fear physical or mental harm (maximum penalty, imprisonment for 5 years or a fine of \$5,500, or both) and knowingly contravening a prohibition or restriction specified in an apprehended violence order (maximum penalty, imprisonment for 2 years or a fine of \$5,500, or both). A person who attempts to commit such an offence is liable to the same penalty as if the person had committed the offence itself.

Schedule 1.5 [1] removes an incorrect reference to a child under 10 from item 9B of the Table to Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999*. That item provides for a standard non-parole period in relation to an offence against section 61M (2) of the *Crimes Act 1900*. That subsection, which deals with aggravated indecent assault, was recently amended by the *Crimes Amendment (Sexual Offences) Act 2008* so that the subsection now applies to persons under 16 years rather than to persons under 10 years of age.

Schedule 1.5 [2]–[5] amend the *Crimes (Sentencing Procedure) Act 1999* to increase the membership of the New South Wales Sentencing Council from 13 to 15 members. The two additional members are to be appointed by the Attorney General. One of the new members is to have expertise or experience in criminal law or sentencing and the other is to have academic or research expertise or experience of relevance to the functions of the Sentencing Council.

Schedule 1.6 amends the *Criminal Procedure Act 1986* to provide that the Ombudsman's report under section 344A of that Act is to be provided to the Attorney General and the Minister for Police by 31 August 2009 rather than 31 May 2009 as is currently the case. The report relates to the impact of penalty notices on Aboriginal and Torres Strait Islander communities.

Schedule 1.7 [1] amends the *Inclosed Lands Protection Act 1901* to omit a redundant provision.

Schedule 1.7 [2] amends the *Inclosed Lands Protection Act 1901* to remove the 2 month time limit for the commencement of criminal proceedings under that Act. Section 179 of the *Criminal Procedure Act 1986* will now apply in respect of any such proceedings requiring them to be commenced within 6 months after the offence is alleged to have been committed.

Schedule 1.7 [3] amends the *Inclosed Lands Protection Act 1901* to provide for particulars to be furnished to a defendant who is charged with an offence under that Act.

Schedule 1.8 [1] amends the *Law Enforcement (Powers and Responsibilities) Act 2002* to update a cross-reference to a renumbered provision.

Schedule 1.8 [2]–[4] and [6] make consequential amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* as a result of the repeal of the *Liquor Act 1982* and its replacement by the *Liquor Act 2007*.

Schedule 1.8 [5] amends section 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002*. That section provides police officers with a power to give directions relating to the dispersal of groups of intoxicated persons in public places. The proposed amendment replaces the definition of **intoxicated person** (a person who appears to be seriously affected by alcohol or any drug) with a definition of **intoxicated** (a person is intoxicated if the person's speech, balance, co-ordination or behaviour is noticeably affected and it is reasonable in the circumstances to believe that the affected speech, balance, co-ordination or behaviour is the result of the consumption of alcohol or any drug).

Schedule 1.9 makes an amendment to section 37 (b) of the *Mental Health (Forensic Provisions) Act 1990* as a consequence of amendments to that Act by the *Mental Health Act 2007*. Section 43 of the *Mental Health (Forensic Provisions) Act 1990* (which was inserted by the *Mental Health Legislation Amendment (Forensic Provisions) Act 2008*) provides that the Mental Health Review Tribunal must not make an order for the release of a forensic patient unless it is satisfied, on the evidence available to it, that the safety of the patient or any member of the public will not be seriously endangered by the patient's release.

Issues Considered by the Committee

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

Issue: Schedule 1 [5] – Ill-defined powers - proposed section 198 (5) - directions relating to dispersal of groups of intoxicated persons in public places – amendment of *Law Enforcement (Powers and Responsibilities) Act 2002*:

10. Proposed section 198 (5) reads: For the purposes of this section, a person is **intoxicated** if: (a) the person's speech, balance, co-ordination or behaviour is noticeably affected, and (b) it is reasonable in the circumstances to believe that the affected speech, balance, co-ordination or behaviour is the result of the consumption of alcohol or any drug.
11. From the Second Reading speech, the Committee notes the reasons provided with respect to the proposed definition of *intoxicated person*, especially if this would give "police an early intervention power that will enable them to defuse potentially dangerous situations before they escalate into more serious incidents". The Committee also notes that policing and its enforcement of groups of intoxicated persons in public places could sometimes disproportionately affect marginalised or disadvantaged individuals who may congregate in public places including those more highly visible such as young people, Indigenous people, people who are homeless and/or those with mental, drug and/or alcohol related health problems.

12. The Committee does not hold any strong position on the proposed definition under section 198 (5) of schedule 1[5] providing that it is clearly defined and restricted to the application for the purpose of section 198 in relation to dispersing groups of intoxicated persons in public places. Currently, for the purpose of the section, an intoxicated person is a person *who appears to be seriously affected by alcohol or any drug*. This will be replaced by the above proposed section.

13. However, the Committee expresses its concern that confusion may likely arise if the new definition becomes contradictory with the current definition existing under a different part (Part 16) of the *Law Enforcement (Powers and Responsibilities) Act 2002* where section 205 of that Act, applies the definition of an *intoxicated person* that means a person *who appears to be seriously affected by* alcohol or another drug or a combination of drugs.
14. The Committee is concerned that the lower threshold under the new definition proposed by section 198 (5) of Part 14 (and for the purpose of that section), may lead to circumstances or situations where the powers relating to the detention of intoxicated persons under Part 16 may be exercised. However, as Part 16 deals with the detention of intoxicated persons involving a person's liberty, the Committee accepts the existing current definition of an intoxicated person under section 205, since it retains a higher threshold definition such that a person has to appear to be *seriously affected by* alcohol or another drug or a combination of drugs.
15. The Committee will be concerned with the proposed section 198 (5) and its new definition of an intoxicated person if it becomes ill-defined and leads to undermining the higher threshold definition used for the detention of intoxicated persons under Part 16 of the *Law Enforcement (Powers and Responsibilities) Act 2002*. The Committee draws this to the attention of Parliament.

The Committee makes no further comment on this Bill.

4. CRIMINAL ORGANISATIONS LEGISLATION AMENDMENT BILL 2009

Date Introduced:	6 May 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. This Bill amends the *Crimes (Criminal Organisations Control) Act 2009* to make further provision with respect to the control of criminal organisations and to amend various other Acts with respect to associates of such organisations; to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* to make further provision with respect to search powers; and for other purposes.
2. This Bill amends the *Crimes (Criminal Organisations Control) Act 2009* to permit the Supreme Court, where satisfied that the Commissioner of Police has taken all reasonable steps to effect personal service of an interim control order and those steps have failed, to extend the period within which the interim control order must be served, and specify alternative means for effecting service.
3. Schedule 1 [1] enables the Supreme Court to make an order for substituted service of an interim control order on the person to whom it relates if it has not been possible to personally serve the order and, if substituted service also fails, to order its public notification.
4. Schedule 1 [2] makes it an offence for a controlled member of a declared organisation to recruit another person to be a member of the organisation. The offence carries a maximum penalty of five years imprisonment. Items [3] to [5] of schedule 1 clarify that information may be published on the criminal organisations register 28 days after a control order is made in relation to a member of a declared organisation, unless an appeal against the order is lodged before the expiration of that period.
5. Schedule 2 amends the *Law Enforcement (Powers and Responsibilities) Act 2002* to create a search warrant for organised crime offences which must be approved by an officer of the rank of superintendent or above, be applied to the Supreme Court on the basis of reasonable suspicion, and be valid for seven days. The powers conferred by criminal organisation search warrants are the same as for existing search warrants, with the only differences being, the threshold for applying for the warrant is put at the level of "reasonable suspicion", rather than a belief; and, that the warrants will be available for a period of seven days (168 hours), rather than 72 hours (3 days).
6. A criminal organisation search warrant may be applied for if there are reasonable grounds to suspect that there is, or within seven days will be, in or on premises a thing connected with an organised crime offence. An organised crime offence is a

serious indictable offence arising from, or occurring as a result of, organised criminal activity. Organised criminal activity means any activity that is carried out to advance the objectives of committing serious violence offences or gaining material benefits from conduct constituting serious indictable offences, and is carried out in such a manner as to indicate that the activity is carried out on more than one occasion and involves more than one participant.

7. In addition, this Bill amends the *Commercial Agents and Private Inquiry Agents Act 2004*, *Liquor Act 2007*, *Motor Dealers Act 1974*, the *Motor Vehicles Repairs Act 1980*, *Pawnbrokers and Second-hand Dealers Act 1996* and, the *Tow Truck Industry Act 1998*, to create a means for the Commissioner of Police to make available to regulators in these industries confidential criminal intelligence relating to associates of declared criminal organisations, so as to prohibit their participation in these industries.
8. Schedule 3 amends the above Acts to enable the relevant regulatory authorities to refuse to grant or cancel authorisations to carry on occupations and activities under those Acts where the regulatory authorities have reasonable grounds to believe from information held or provided by the Commissioner of Police in relation to applicants for authorisations or holders of authorisations that:
 - the applicants or holders are members of, or regularly associate with one or more members of, a declared organisation within the meaning of the *Crimes (Criminal Organisations Control) Act 2009*; and,
 - nature and circumstances of the applicants or holders relationship with the organisation or its members are such that it could reasonably be inferred that improper conduct that would further the criminal activities of the declared organisation is likely to occur if they hold or continue to hold authorisations.
9. The amendments include provisions to ensure that any information provided by the Commissioner of Police to the regulatory authorities that he classifies as criminal intelligence is not disclosed in the reasons given by the regulator. Reasons must still be given to the extent that they do not disclose such intelligence. Criminal intelligence is also not to be disclosed in any subsequent review by the Administrative Decisions Tribunal, unless approved by the Commissioner.
10. The Bill also amends the *Surveillance Devices Act 2007* to authorise the use of protected information obtained through a surveillance device warrant in proceedings for criminal organisation declarations and for the making of control orders.

Background

11. On 5 May 2009, the Government announced that new anti-bikie laws would be introduced to make it an offence for declared criminal organisations to recruit new members. This aims to build on the recently passed legislation, the *Crimes (Criminal Organisations Control) Act 2009*. A new offence of recruiting will be created, which will carry a maximum penalty of five years' imprisonment. It will also allow police to issue a public notice if they are not able to personally serve a control order on a member of a declared criminal organisation.

12. Both the Agreement in Principle speech and the Premier's media statement have informed that police have evidence that a number of youth gangs are used as feeder gangs to outlaw motorcycle gangs.
13. According to the Agreement in Principle speech:

...the different threshold for criminal organisation search warrants is balanced by the fact that warrants will only be able to be granted by a judge at the Supreme Court level. This threshold is consistent with the threshold for obtaining surveillance device warrants and covert search warrants, and is justified in this instance on the basis that organised crime offences, unlike crimes committed by an individual or casual group of offenders, often involve high levels of organisation and planning. The lower threshold will enable police to cut through existing practices of systematic concealment and collusion often associated with organised crime offences. Similarly, the longer warrant duration is reflective of the fact that investigations into organised criminal activity often demand considerably higher levels of planning and logistical organisation.

The new class of search warrant is accompanied by the following safeguards: first, only a judge at the Supreme Court level will be authorised to grant warrants; secondly, the application for the warrant will need to be authorised by a senior police officer holding the rank of superintendent or above; thirdly, police will be required to report annually on the exercise of the search warrant powers; and, fourthly, the New South Wales Ombudsman will have an ongoing oversight role in relation to the scheme. In addition, warrants will not be available in respect of all criminal offences but, rather, restricted to an organised crime offence defined as any serious indictable offence arising from "organised criminal activity", defined as activity which is carried out on an organised basis, and carried out to advance the objective of obtaining material benefits from conduct constituting a serious indictable offence, and/or committing serious violence offences.

The Bill

14. The object of this Bill is to amend various Acts to make further provision to disrupt and restrict the activities of declared organisations within the meaning of the *Crimes (Criminal Organisations Control) Act 2009 (the 2009 Act)*. These are organisations whose members associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and that represent a risk to public safety and order in New South Wales and that are the subject of a declaration of an eligible Judge under that Act.

15. Outline of provisions

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

Clause 2 provides for the commencement of the proposed Act on the date of assent to the Act (with the exception of Schedule 2 which is to commence on a day or days to be appointed by proclamation).

Schedule 1 Amendment of *Crimes (Criminal Organisations Control) Act 2009 No 6*

Schedule 1 amends the 2009 Act as follows:

(a) to enable the Supreme Court to make an order for substituted service of notice of an interim control order on the person to whom it relates if it has not been possible to personally serve the notice of the order and (if substituted service also fails) to order its public notification (**Schedule 1 [1]—proposed section 16A**),

(b) to make it an offence for a member of a declared organisation who is subject to a control order under that Act to recruit another person to be a member of the organisation (**Schedule 1 [2]—proposed section 26A**),

(c) to enable information to be published on the criminal organisations register 28 days after a control order is made in relation to a member of a declared organisation (unless an appeal against the order is lodged before the expiration of that period) (**Schedule 1 [3]–[5]**),

(d) to enable regulatory authorities having functions under legislation relating to authorisations to carry on occupations and activities to enter into arrangements with the Commissioner of Police for the supply of information (including criminal intelligence) concerning declared organisations and their members and associates to assist them in exercising those functions (**Schedule 1 [6]— proposed section 30A**).

Proposed section 30A will facilitate the operation of provisions relating to the exercise of functions by regulatory authorities to be inserted in various Acts by **Schedule 3** that are described below.

Schedule 2 Amendment of *Law Enforcement (Powers and Responsibilities) Act 2002* No 103 (as amended by Act 2009, No 8)

Schedule 2 amends the *Law Enforcement (Powers and Responsibilities) Act 2002* (as recently amended by Act 2009, No 8) to enable an eligible Judge (a Supreme Court judge acting as *persona designata*) to issue a new form of search warrant (a **criminal organisation search warrant**) (see **Schedule 2 [3]**).

A criminal organisation search warrant may be issued if there are reasonable grounds to suspect that there is, or within 7 days there will be, in or on premises a thing connected with an organised crime offence. An organised crime offence is a serious indictable offence arising from, or occurring as a result of, organised criminal activity (see the definitions of these terms as inserted by **Schedule 2 [5]–[7]**).

An application for a criminal organisation search warrant may be made only by a police officer authorised to make the application by a police officer holding the rank of Superintendent or above (see **Schedule 2 [2] and [8]**). The warrant generally expires 7 days after issue (see **Schedule 2 [12]–[16]**). The powers exercisable under such a warrant are essentially the same as those exercisable under a standard search warrant (not as will be able to be exercised under a covert search warrant on the commencement of the amendments made to the *Law Enforcement (Powers and Responsibilities) Act 2002* by Act 2009, No 8).

Provision is made for the Ombudsman to inspect the records of the NSW Police Force every 2 years and report on the results of that inspection to ensure that the requirements of the 2002 Act are being complied with in relation to the new form of warrant (**Schedule 2 [17]–[19]**). Provision is also made for annual reports on the exercise of the new search powers (**Schedule 2 [20]–[22]**).

Schedule 2 [1], [4], [9], [10] and [11] make consequential amendments.

Schedule 2 [23] enables the making of savings and transitional regulations.

Schedule 3 Amendment of other Acts

Schedule 3 (other than **Schedule 3.2 and 3.7**) amends certain Acts to enable regulatory authorities having functions under those Acts relating to authorisations to carry on occupations and activities under the Acts to refuse to grant such authorisations (and to cancel them) where the regulatory authorities have reasonable grounds to believe from information held or provided by the Commissioner of Police in relation to applicants for authorisations or holders of authorisations that:

(a) the applicants or holders are members of, or regularly associate with one or more members of, a declared organisation within the meaning of the *Crimes*

(*Criminal Organisations Control*) Act 2009, and

(b) the nature and circumstances of the applicants' or holders' relationship with the organisation or its members are such that it could reasonably be inferred that improper

conduct that would further the criminal activities of the declared organisation is likely to occur if they hold or continue to hold authorisations.

The amendments include provisions to ensure that any information provided by the Commissioner of Police to the regulatory authorities that is classified by the Commissioner as criminal intelligence is not disclosed.

The Acts amended and authorisations affected are as follows:

- (a) master licences and operator licences under the *Commercial Agents and Private Inquiry Agents Act 2004* (**Schedule 3.1**),
- (b) licences and approvals to manage licensed premises under the *Liquor Act 2007* (**Schedule 3.3**),
- (c) licences under the *Motor Dealers Act 1974* (**Schedule 3.4**),
- (d) licences and tradespersons' certificates under the *Motor Vehicle Repairs Act 1980* (**Schedule 3.5**),
- (e) licences under the *Pawnbrokers and Second-hand Dealers Act 1996* (**Schedule 3.6**),
- (f) licences and drivers certificates under the *Tow Truck Industry Act 1998* (**Schedule 3.8**).

Schedule 3.7 amends the definition of **relevant proceeding** in section 4 (1) of the *Surveillance Devices Act 2007*. Section 40 of that Act prohibits the use, communication or publication of protected information (defined to include, for example, information from the use of a surveillance device under a warrant under the Act or relating to an application for such a warrant) except for specified purposes. The proposed amendment will enable protected information to be used in any proceeding in respect of a declaration under Part 2, or a control order under Division 1 or 2 of Part 3, of the *Crimes (Criminal Organisations Control) Act 2009*.

Schedule 3.2 amends the *Criminal Procedure Act 1986* so that the proposed new indictable offence relating to recruitment of members of declared organisations to be inserted in the *Crimes (Criminal Organisations Control) Act 2009* by **Schedule 1 [2]** may be prosecuted summarily.

Issues Considered by the Committee

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

Issue: Schedule 1 [2] – proposed section 26A recruiting persons to become member of declared organisation – Freedom of Association and Rights of the Child:

16. The proposed section 26A reads: (1) A controlled member of a declared organisation who recruits another person to become a member of the organisation is guilty of an offence. Maximum penalty: Imprisonment for 5 years. (2) In this section: **recruit** includes counsel, procure, solicit, incite or induce.

17. **The Committee is concerned that the proposed section 26A will criminalise a person's associations instead of a guilty act of a specific criminal conduct, and will deny a person's right of freedom of association with others, a right that is established by Article 22 (1) of the *International Covenant on Civil and Political Rights*.**

18. **The Committee notes that by analogy to the comparable offence of consorting, the Law Reform Commission of Western Australia in 1992, stated that it was: “inconsistent with the principles of criminal law to make it an offence to associate with particular people. Offences should proscribe conduct thought deserving of punishment. Merely associating with people, whether they are known to be in a particular category or are merely reputed to be in a particular category, should not be criminal”¹.**
19. **Therefore, the Committee refers the proposed section 26A of this Bill to Parliament, as constituting an undue trespass on personal rights and liberties by undermining the right of freedom of association.**
20. According to the background media statements and the Agreement in Principle speech, the police have advised that youth gangs are being used as feeder gangs to motorcycle gangs, and it is the intent of this proposed section 26A to make it an offence for such members to recruit another person to become a member of the declared organisation.
21. **The Committee expresses its concern with the potential involvement of youths and the impact of the proposed offence on young people². The Committee observes that this may undermine the rights of a child such as established by Article 27 (b) of the *Convention on the Rights of the Child*: “No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law *and shall be used only as a measure of last resort and for the shortest appropriate period of time*”.**
22. **The Committee is concerned that for such an offence under the proposed section 26A (1), the maximum penalty is imprisonment for 5 years. The Committee is of the view that imprisonment for such an offence could erode the rights of the child under Article 37 (b) of the *Convention on the Rights of the Child*, especially in respect of detention or imprisonment of a child under the age of 18 years old, which shall only be used as a measure of last resort and for the shortest appropriate period of time. Therefore, the Committee refers this as an undue trespass on the rights of the child, to Parliament.**

Issue: Schedule 3 (other than Schedules 3.2 and 3.7) – amendment of other Acts – Right To Work; Presumption Of Innocence; Strict Liability and Retrospectivity - Schedule 3.1 master licences and operator licences under the *Commercial Agents and Private Inquiry Agents Act 2004*; Schedule 3.3 licences and approvals to manage licensed premises under the *Liquor Act 2007*; Schedule 3.4 licences under the *Motor Dealers Act 1974*; Schedule 3.5 licences and tradespersons’ certificates under the *Motor Vehicle Repairs Act 1980*; Schedule 3.6 licences under the *Pawnbrokers and Second-hand Dealers Act 1996*; Schedule 3.8 licences and drivers certificates under the *Tow Truck Industry Act 1998*:

23. Other than Schedules 3.2 and 3.7, Schedule 3 amends the above Acts to enable regulatory authorities (such as for commercial agents and private inquiry agents;

¹ Law Reform Commission of Western Australia, *Report on Police Act Offences*, Project No 85, 1992: 41 – 42.

² In this context, the Committee also notes recent concerns over the 40% increase in two years of young people in detention on remand from the article ‘Locking Up Young Viewed A Criminal Waste’ by Adele Horin, Sydney Morning Herald, 27 April 2009.

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licences and approvals to manage licensed premises; licences under the Motor Dealers Act; licences and tradespersons' certificates under the Motor Vehicle Repairs Act; licences under the Pawnbrokers and Second-hand Dealers Act; and Tow Truck Industry licences and drivers certificates):

- to refuse to grant (and to cancel) authorisations to carry on occupations and activities under the above Acts where the regulatory authorities have reasonable grounds to believe from information held or provided by the Commissioner of Police in relation to applicants for authorisations or holders of authorisations that,
 - (a) the applicants or holders are members of, or regularly associate with one or more members of, a declared organisation within the meaning of the *Crimes (Criminal Organisations Control) Act 2009*, and
 - (b) the nature and circumstances of the applicants' or holders' relationship with the organisation or its members are such that it could reasonably be inferred that improper conduct that would further the criminal activities of the declared organisation is likely to occur if they hold or continue to hold authorisations.
 - The amendments also include provisions to ensure that any information provided by the Commissioner of Police to the regulatory authorities that is classified by the Commissioner as criminal intelligence is not disclosed.
24. The Committee has already expressed its concerns previously in relation to the erosion of the right to work and the broad and ill-defined administrative powers under section 27 of the *Crimes (Criminal Organisations Control) Act 2009*, where controlled members are prohibited from applying for licences and carrying on certain activities when interim control order or control order takes effect.
25. However, it appears that Schedule 3 (other than Schedules 3.2 and 3.7) of this Bill has gone beyond the original scope of section 27 of the *Crimes (Criminal Organisations Control) Act 2009*, by including applicants or holders who are not necessarily subject to an interim control order or control order, but who are members of, or regularly associate with one or more members of, a declared organisation, and that the nature and circumstances of the applicants' or holders' relationship with the organisation or its members are such that it could reasonably be inferred that improper conduct that would further the criminal activities of the declared organisation is likely to occur if they hold or continue to hold authorisations.
- 26. The Committee believes that if an applicant is not considered as a fit and proper person for the above licences or authorisations, it should, at least be based on a prior conviction for a serious indictable or violent offence rather than be based on any non-convicted 'improper conduct' that 'could be reasonably inferred' which would 'further' the criminal activities of the declared organisation that is 'likely to occur' if they hold or continue to hold authorisations.**
27. If the above Schedule is proposing accessorial liability when the liability of the accessory arises where there is no agreement or understanding but the accessory (or in this instance, the applicant), is still liable for a crime along with the primary participant (other members of the declared organisation) providing if the accessory

intentionally ‘aids, abets, counsels or procures’ the commission of a crime. Therefore, at law, accessorial liability exists when³:

- “A crime is committed;
- The accessory knew all the essential facts and circumstances linking the principal participant (other members of the declared organisation), including the principal participant’s criminal intention (which is the accessory’s mental element or mens rea); and
- The accessory intentionally assisted or encouraged the principal participant to commit the crime (which is the accessory’s criminal conduct or actus reus)”⁴.

28. **By applying the above legal principles, the Committee finds that Schedule 3 (other than Schedules 3.2 and 3.7) is proposing that no crime needs to be actually committed (or no crime needs to have actually occurred), as the wording proposes that ‘the criminal activities of the declared organisation is likely to occur’.**
29. **Further, the Committee notes that Schedule 3 (other than Schedules 3.2 and 3.7) imposes strict liability as the wording proposes ‘that *it could reasonably be inferred* that improper conduct that would further the criminal activities of the declared organisation is likely to occur’. Therefore, the authority would not be required to establish that the applicant knew all the essential facts or circumstances and the applicant intentionally assisted or encouraged the principal participant of the declared organisation to commit the crime, since the decision to cancel or prohibit the holding of the licence or authorisation would be based on what could *reasonably be inferred*.**
30. **Strict liability will in some cases cause concern as it displaces the common law requirement that the authority or prosecution prove beyond reasonable doubt that the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may, in some cases, be considered reasonable such as public interest, the impact of the offence on the community, the potential penalty and the availability of any defences or safeguards.**
31. **The Committee holds concerns for the imposition of strict liability in Schedule 3 (other than Schedules 3.2 and 3.7) since there is no availability of any defences or safeguards as the applicant will be banned from holding or applying for such licences or authorisations. In this context, the Committee is similarly concerned that this may deny a person’s right to work as established by Article 6 (1) of the *International Covenant on Economic, Social and Cultural Rights*, which provides that: “The State Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely choose or accepts, and will take appropriate steps to safeguard this right”.**

³ The explanation on accessorial liability is provided from *Consultation Paper 2 (2008) on Complicity* by the NSW Law Reform Commission in its Chapter 3. Available from http://www.lawlink.nsw.gov.au/lawlink/lrc/11_1rc.nsf/vwPrint1/LRC_cp02chp3

⁴ See previous footnote 3.

32. **The Committee believes the above proposed Schedule 3 could unduly interfere with the right and opportunity of a person to gain their living by work which they choose or accept, as established under Article 6 (1) of the *International Covenant of Economic, Social and Cultural Right*. Accordingly, the Committee refers this to Parliament.**
33. **The Committee also concludes that the above Schedule 3 (other than Schedules 3.2 and 3.7) may be inconsistent with the right to a presumption of innocence including the right to be treated as innocent until a crime has been committed and the person has been proven guilty. Therefore, the Committee finds this trespasses unduly on personal rights and liberties and refers it to Parliament.**

34. The above Schedule 3 (other than Schedules 3.2 and 3.7) also contains provisions consequent on the enactment of the Bill, which will extend to a licence or authorisation in force immediately before the commencement of the relevant clause. This means Schedule 3 will apply to licences or authorisation already previously granted under the relevant Acts for commercial agents and private inquiry agents; licences and approvals to manage licensed premises; licences under the Motor Dealers Act; licences and tradespersons' certificates under the Motor Vehicle Repairs Act; licences under the Pawnbrokers and Second-hand Dealers Act; and the Tow Truck Industry licences and drivers certificates.

35. **The Committee notes that retrospectively cancelling a licence or authorisation which was duly made under the law at the time before the amendments, may trespass on a person's right to order his or her affairs in accordance with the law given at the time. The Committee will always be concerned with any retrospective effect of legislation which impacts adversely on personal rights, and considers the proposed Schedule 3 (other than Schedules 3.2 and 3.7) which will amend the relevant legislation to cancel licences and authorisations that had been duly granted before the amendments, may trespass unduly on personal rights and refers this to Parliament.**

Issue: Schedule 2 [8], [10] and [12] – amendment of *Law Enforcement (Powers and Responsibilities) Act 2002* – Oppressive Official Powers; Right to Privacy and Property - proposed section 46D (Authority to apply for criminal organisation search warrant); proposed section 47 (3A) and proposed section 73 (2B) (Expiry of warrant):

36. Proposed section 46D reads: (1) An application for a criminal organisation search warrant may be made by a police officer authorised to make the application by a police officer holding the rank of Superintendent or above. (2) An authorisation to apply for a criminal organisation search warrant in respect of a searchable offence may be given in accordance with this section if the person giving the authorisation suspects on reasonable grounds that there is, or within 7 days there will be, in or on the premises a thing of a kind connected with the searchable offence.
37. Proposed section 47 (3A) reads: An eligible applicant may apply to an eligible issuing officer for a criminal organisation search warrant in respect of premises if the eligible applicant has reasonable grounds to suspect that there is, or within 7 days there will be, in or on the premises a thing connected with a searchable offence in relation to the warrant.

38. Proposed section 73 (2B) reads: The time so specified for a criminal organisation warrant is the date that is 7 days after the date on which the warrant is issued.
39. The Committee notes the reasons provided in the Agreement in Principle speech in relation to the lower threshold of 'reasonable suspicion' for criminal organisation search warrants as contrasted to the higher threshold of 'reasonable belief' for existing search warrants, as well as the longer duration available for such warrants for a period of 7 days (168 hours) as opposed to the 3 days (72 hours) ordinarily available for existing search warrants. The reasons given include that such crimes involve high levels of organisation and planning and the lower threshold and longer warrant duration will enable police to "cut through existing practices of systematic concealment and collusion often associated with organised crime offences".
40. The Committee also notes the safeguards as explained by the Agreement in Principle speech such as Supreme Court judges to authorise the granting of such warrants; the application for the warrants be authorised by a senior police holding the rank of Superintendent or above; and the police reporting annually on the exercise of these search warrant powers, as well as the NSW Ombudsman to have an ongoing oversight role. However, the Committee considers these safeguards as general good practice, such that the granting of warrants should ordinarily require a justice of an appropriate court; that the application for warrants should be authorised by a senior police officer and exercise of such search warrant powers should be reported annually and be overseen by the NSW Ombudsman.

41. The Committee remains concerned with Schedule 2 and the proposed sections 46D, 47 (3A) and 73 (2B) including the lower threshold for applying for criminal organisation search warrants together with the longer warrant duration of 7 days rather than the 3 days period for existing search warrants. The Committee appreciates the reasons behind the proposed amendments as provided in the Agreement in Principle speech but the Committee is of the view that if the threshold applying for criminal organisation search warrants is lowered from 'reasonable belief' to 'reasonable suspicion', then this could be balanced by maintaining the warrant duration to be 72 hours instead of the proposed 7 days, in order to ensure that the right to privacy and the right to enjoy property will not be unduly interfered with.

42. The Committee believes that if the threshold applying for criminal organisation search warrants is to be lowered to 'reasonable suspicion', this could address the concerns of such crimes involving high levels of organisation, planning and concealment, without also requiring the extended warrant duration of 7 days (or 168 hours). Otherwise, the Committee refers this to Parliament as it may lead to oppressive powers where the rights to privacy and enjoyment of property could be unduly trespassed.

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

Issue: Clause 2 (2) - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

43. The Committee notes that the proposed Act is to commence on the day of assent, except as provided by subsection (2) where Schedule 2 is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Schedule 2 on whatever day it chooses or not at all. While

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

- 44. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether Schedule 2 of the Bill to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

5. HOME BUILDING AMENDMENT (INSURANCE) BILL 2009

Date Introduced:	6 May 2009
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Virginia Judge MP
Portfolio:	Fair Trading

Purpose and Description

1. The object of this Bill is to make the following amendments to the *Home Building Act 1989* and the *Home Building Regulation 2004*:
 - a. the Act is amended to provide that a home warranty insurance policy only covers a loss that becomes apparent and is notified to the insurer within the period of insurance (or is notified within 6 months after the loss becomes apparent in the case of a loss that becomes apparent in the last 6 months of the period of insurance),
 - b. the Act is amended to clarify the operation of provisions that enable a claim to be made under a home warranty insurance policy when a contractor's licence is suspended for failure to comply with a court or Tribunal order to pay money on a building claim,
 - c. the Act is amended to make it clear that when home warranty insurance policies are expressed to provide the minimum cover required under the Act, the amount of cover provided is the minimum applicable when the policy is issued,
 - d. the Act is amended to enact consequential savings and transitional provisions, including provisions that extend the amendments referred to in paragraphs (a) and (c) to insurance policies issued before the commencement of those amendments,
 - e. the Regulation is amended to extend the grounds for refusing to issue, renew or restore an authority under the Act to include failure to satisfy certain judgments and orders relating to building claims or claims by insurers in relation to home warranty insurance,
 - f. the Regulation is amended to permit home warranty insurance policies to include a provision allowing the insurer to reduce its liability for any failure by the insured to enforce a statutory warranty, to the extent that the failure has prejudiced the insurer.

Background

2. The Bill is largely drafted in response to a Supreme Court decision in *Strata Plan 57504 v Building Insurers' Guarantee Corporation* which was handed down in October 2008. The Supreme Court decision drew attention to the fact although

section 103B of the *Home Building Act 1989* specifies a minimum period of insurance cover, there was no explicit statutory limit on when a claim can be made. The consequence of this decision is that as long as the loss was incurred during a period of insurance cover, a claim can be made at any time.

3. Regulatory provisions in place since the start of the private home warranty insurance scheme on 1 May 1997 prevent an insurer from denying liability or reducing an amount paid if a claim is notified to the insurer within six months of the beneficiary becoming aware of the cause of a claim. As a consequence, it was clearly possible that an insurer could be found liable for losses arising from any defect caused by a breach of statutory warranty, as long as the claimant notified the insurer within six months. This could happen potentially whenever the defect became apparent within the life of the building. Previously it had been assumed that an insurance contract provided cover only where the homeowner became aware of an insured loss and notified the insurer during the period of insurance specified in the insurance contract or any minimum period prescribed by section 103B of the *Home Building Act 1989*.
4. The Supreme Court decision potentially opened the door to claims being notified after the period of insurance to all 18 insurers who have operated in the home warranty insurance market since 1997 with no clear limit on when their liability for claims would end. It became quite feasible that an insurer could be found liable for defects that appeared 20 or 30 years after a home was completed. It is not possible to give precise figures on the number of insurance contracts issued since 1997 or the number of separate dwellings that had been covered by these contracts. However, the Office of Fair Trading has estimated that there would have been more than 650,000 home building projects covered by the scheme since 1997.
5. Insurers faced a dramatic increase in liability, which had not been taken into account when their insurance products were priced. They faced an open-ended liability that could result in large-scale losses. The Supreme Court decision affected also the Crown because of indemnities provided to homeowners who are insured by contracts issued by the insolvent HIH and FAI insurance group. Following the Supreme Court decision, approved insurers began assessing whether it was commercially viable to continue providing insurance cover. Some approved insurers advised the Office of Fair Trading that they may withdraw from the home warranty insurance market.
6. The Insurance Council of Australia also advised the Office of Fair Trading that the capital adequacy requirements for a home warranty insurance would need to increase significantly for any insurers that remained in the market. This would have resulted in significant increases in the cost of home warranty insurance.
7. The bill therefore sets out what is widely accepted as the coverage of the home warranty insurance scheme prior to the Supreme Court decision. The bill inserts section 103BA into Home Building Act to confirm which losses are being insured. Section 103BA makes it clear that a home warranty insurance contract does not provide open-ended coverage. An insurance contract only covers a loss if the homeowner becomes aware of the loss during the period of insurance specified in the insurance contract. Minimum periods of insurance that must be included in a contract are prescribed by section 103B of the *Home Building Act 1989*. Section 103BA also provides that if a loss becomes apparent during the last six months of the period of insurance the homeowner has six months from whenever they become aware of the loss to notify the insurer.

8. The bill also amends the *Home Building Regulation 2004* by inserting clause 58A, which provides that an insurer can include provisions in an insurance contract reducing its liability or the amount payable on a claim if the beneficiary fails to enforce a statutory warranty. The amount of the reduction is limited to the extent that the beneficiary's failure has prejudiced the interests of the insurer.
9. The bill applies section 103BA retroactively to all home warranty insurance contracts entered into since 1 May 1997. According to the Agreement in Principle Speech the Government is of the view that retroactive legislation is necessary in this instance to confirm the previously accepted coverage of the home warranty insurance scheme and to prevent any unintended and retrospective increase in the costs of home warranty insurance.
10. The second drafting matter addressed by the bill is the date of effect for an increase in the minimum amount of insurance coverage for a home warranty insurance contract. Subclause 60 (4) of the *Home Building Regulation 2004* provides that an insurance contract must provide that the minimum amount of cover payable is to be the amount provided from time to time by the Act or the regulation. An equivalent provision has been in place since the commencement of the scheme in May 1997. The Government has become aware that some insurers at various stages during the life of the scheme may have used the exact words in the regulation rather than specify the amount that was in effect at the time that the insurance contract was entered into. As a consequence, the minimum coverage for these contracts could potentially be seen to increase whenever the prescribed minimum amount increases.
11. The minimum amount of insurance was increased on 1 March 2007 from \$200,000 to \$300,000. The intention was to increase the minimum amount for all future contracts. There was no intention to retroactively increase the minimum coverage for existing contracts that had inadvertently used an ambiguous reference to the amount of the minimum coverage. The bill includes a provision at section 102 of the Act, which confirms that the minimum coverage for an insurance contract is the minimum amount prescribed at the time that contract was entered into. This includes any right that the claimant may have under part 3A of the Home Building Act.

The Bill

12. Schedule 1 Amendment of *Home Building Act 1989 No 147*

Schedule 1 [1] makes it clear that a recent extension of the home warranty insurance policy (enabling a claim to be made when a contractor fails to pay money required to be paid by a building claim order) operates on the same basis as if the contractor had become insolvent, which is an existing ground of liability under such a policy.

Schedule 1 [6] makes a consequential amendment.

Schedule 1 [2] provides that when a home warranty insurance policy provides that the amount of cover is the minimum amount required under the Act it means that the amount of cover is that minimum amount as at the time the policy is issued. A transitional provision (**Schedule 1 [7]**) extends this amendment to existing policies.

Schedule 1 [3] limits the claims covered by a home warranty insurance policy to make it clear that such a policy only covers a loss that becomes apparent and is notified to the insurer within the period of insurance or (if the loss becomes apparent during the last 6 months of the period of insurance and does not arise from non-completion of work) is notified within 6 months after becoming apparent. A

transitional provision (**Schedule 1 [7]**) extends this amendment to existing policies.

Schedule 1 [4] clarifies an existing regulation-making power that authorises limitations on liability under a home warranty insurance policy to include reductions in liability.

Schedule 1 [5] inserts a savings and transitional regulation-making power.

Schedule 1 [7] inserts savings and transitional provisions consequent on the other amendments that the Bill makes to the Act and the Regulation.

Schedule 2 Amendment of *Home Building Regulation 2004*

Schedule 2 [1]–[4] extend provisions of the Regulation that provided the grounds on which the issue, renewal or restoration of a licence and other authority under the Act must be refused to include the following grounds:

(a) being a debtor under an unsatisfied judgment for payment of money in relation to a building claim or to an insurer in relation to a home warranty insurance claim,

(b) being a director in the last 3 years of a corporation that is a debtor as referred to in paragraph (a),

(c) being subject to an unsatisfied order of a court on a building claim.

Schedule 2 [5] permits a home warranty insurance policy to include a provision allowing the insurer to reduce its liability because of a failure by the beneficiary to take action to enforce a statutory warranty from the breach of which the insured loss arises, but only to the extent of an amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of the failure. A transitional provision (**Schedule 1 [7]**) extends this amendment to existing policies.

Schedule 2 [6] omits a provision that will be redundant. The provision was an interim measure introduced in December 2008 to limit the making of a claim under a home warranty insurance policy in essentially the same way as the amendment to be made by **Schedule 1 [3]**. A transitional provision (**Schedule 1 [7]**) provides a period of grace for the notification of a loss in a case in which the redundant provision prevented a claim from being made.

Schedule 2 [7] omits a provision that will be redundant as a result of the amendment to be made by **Schedule 1 [1]**.

Issues Considered by the Committee

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

Issue: Retrospectivity, Right to Compensation - Section 103BA – Limitations on Policy Coverage – Retrospective Application Regarding Rights to Compensation

13. The Committee is always concerned with the enactment of retrospective provisions in legislation, particularly where they affect individual rights such as the right to compensation. However, the Committee accepts the government's argument that, without the enactment of Section 103BA, insurers would be seriously adversely effected in a way that was not anticipated. The Committee also accepts that insurance premiums in home building warranty insurance are therefore likely to increase by a substantial amount and insurers may withdraw from the market.
14. It is also acknowledged that the retrospective action of Section 103BA is only to instate what had been widely believed to be the amount of coverage provided under the Act prior to the Supreme Court decision in *Strata Plan 57504 v Building Insurers' Guarantee Corporation* and, as such, does not directly effect policy beneficiaries'

expectations of the coverage they were receiving when they entered into the insurance contract initially.

- 15. The Committee is always concerned with the enactment of retrospective provisions in legislation, particularly where they affect individual rights such as the right to compensation.**
- 16. However, the Committee accepts the government's argument that, without the enactment of Section 103BA, insurers would be seriously adversely effected in a way that was not anticipated. The Committee also accepts that insurance premiums in home building warranty insurance will almost definitely increase by a substantial amount as a result and insurers may withdraw from the market.**
- 17. It is also acknowledged that the retrospective action of Section 103BA is only to instate what had been widely accepted to be the amount of coverage provided under the Act prior to the Supreme Court decision in *Strata Plan 57504 v Building Insurers' Guarantee Corporation*.**

The Committee makes no further comment on this Bill.

6. HURLSTONE AGRICULTURAL HIGH SCHOOL SITE BILL 2009*

Date Introduced: 6 May 2009
House Introduced: Legislative Council
Member Responsible: The Hon Charlie Lynn MLC
Portfolio: Non-Government

Purpose and Description

1. The objects of this Bill are:
 - a. to ensure that the Hurlstone Agricultural High School site remains in public ownership, and
 - b. to limit the use of the site to that of a government school.

Background

2. The Bill is drafted in response to government proposals to sell up to 140 hectares of farmland joined to Hurlstone Agricultural High School at Glenfield. The government has announced a public inquiry into the proposed sale.

The Bill

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

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Clause 3 defines the Hurlstone Agricultural High School site and contains other interpretative provisions.

Clause 4 specifies the objects of the proposed Act (as referred to in the Overview above).

Clause 5 prohibits the Hurlstone Agricultural High School site from being sold, transferred, leased or otherwise alienated.

Clause 6 restricts development of the site so that it can only be used for the purposes of a government school.

Clause 7 prevents any development of the site from becoming a project to which Part 3A of the *Environmental Planning and Assessment Act 1979* applies.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

7. MOTOR ACCIDENTS COMPENSATION AMENDMENT BILL 2009

Date Introduced:	6 May 2009
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Joe Tripodi MP
Portfolio:	Finance

Purpose and Description

1. The objects of this Bill are as follows:
 - a. to extend the early payment scheme (for treatment and lost earnings of injured persons) and bulk billing arrangements under the *Motor Accidents Compensation Act 1999* to all injured persons (including those who are at fault in a motor accident),
 - b. to allow greater flexibility in the adjustment of the Motor Accidents Authority Fund levy by allowing the Authority to vary the period in respect of which contributions to the Fund are to be determined,
 - c. to make provision for refunds, on a pro rata basis, of amounts that are contributed to the Motor Accidents Authority Fund and the Lifetime Care and Support Authority Fund in certain circumstances.

Background

2. According to the Agreement in Principle Speech the purpose of this bill is to further reform the green slip compulsory third party insurance scheme, in particular, to provide hospital and ambulance cover for at-fault drivers, as announced by the Treasurer in the mini-budget speech last year. Historically, the green slip scheme has only covered people injured in motor accidents caused by a negligent or at-fault driver. A vehicle driver or motorbike rider who causes an accident does not receive any green slip scheme benefits.
3. The Bill extends the green slip scheme bulk-billing arrangement to cover the cost of public hospital and ambulance services for at-fault drivers. This will provide savings in the public health system, allowing the reallocation of funds for the benefit of all people of New South Wales. The Bill also extends the green slip scheme early accident notification process to cover those road users who are considered to have caused a motor vehicle accident. The early accident notification process provides reimbursement for up to a maximum of \$5,000 for medical treatment, rehabilitation expenses and any lost earnings related to the accident injury.
4. It is estimated that each year approximately 4,000 road users will benefit from these amendments. This will encourage all injured people to access early medical treatment, with the goal of maximising recovery from their injuries. As well, the Motor Accidents Authority will be given greater flexibility in adjustment of the Motor Accidents Authority Fund levy, which raises the revenue to cover bulk-billing payments for the public health system. Motorists will be eligible also for a pro rata

refund of their levy payment when a vehicle registration is cancelled, for example, in circumstances where a vehicle is written off as a result of an accident.

The Bill

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

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Motor Accidents Compensation Act 1999 No 41

Schedule 1 [5] amends section 50 of the *Motor Accidents Compensation Act 1999* to extend the early payment scheme (that is, the payment of treatment expenses and lost earnings of persons injured in a motor accident by the insurer who issued the relevant third-party policy) to all injured persons (whether or not the person's injuries were caused by the fault of the owner or driver of the vehicle in the use or operation of the vehicle and even if the motor accident was caused by the fault of the injured person).

Schedule 1 [1], [3], [4] and [6] make consequential amendments.

Schedule 1 [7] makes it clear that the bulk billing arrangements that may be entered into by the Authority with respect to hospital, ambulance and other expenses may extend to cover such expenses for persons injured in a motor accident even if the motor accident was caused, wholly or partly, by the fault of the injured person.

Schedule 1 [2] makes a consequential amendment.

Currently, the Motor Accidents Authority is required to determine the Motor Accidents Authority Fund levy on a yearly basis. **Schedule 1 [9]** enables the Authority to assess the amount of the levy within a period determined by the Authority to allow greater flexibility in the adjustment of the levy. **Schedule 1 [8], [10] and [12]** make consequential amendments.

Schedule 1 [11] makes provision for refunds, on a pro rata basis, of amounts that are contributed to the Motor Accidents Authority Fund in conjunction with the payment of the premium of a third-party policy if the policy is cancelled on the cancellation of the registration of the motor vehicle to which the policy relates.

Schedule 1 [13] enables regulations of a savings and transitional nature to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [14] inserts savings and transitional provisions into Schedule 5 consequent on the amendments referred to above.

Schedule 2 Amendment of *Motor Accidents (Lifetime Care and Support) Act 2006* No 16

Schedule 2 makes provision for refunds, on a pro rata basis, of amounts that are contributed to the Lifetime Care and Support Authority Fund in conjunction with the payment of the premium of a third-party policy if the policy is cancelled on the cancellation of the registration of the motor vehicle to which the policy relates.

Issues Considered by the Committee

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

Issue: Clause 2 – Commencement by Proclamation – Provide the Executive with unfettered control over the commencement of an Act

5. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. However, the Committee accepts the advice received from the Motor Accidents Authority that commencing the proposed Act by proclamation reflects the differing commencement dates of the

Motor Accidents Compensation Amendment Bill 2009
various initiatives to be implemented by the proposed Act. The Motor Accident Authority explained that under the bill each provision creates an obligation either on the Motor Accidents Authority or licensed private insurers which can only be commenced when either the necessary revised levy or premium collection arrangements to meet the relevant obligation can be implemented operationally.

6. The Committee has not identified any issues under s8A(1)(b) of the Legislation Review Act 1987.

The Committee makes no further comment on this Bill.

Part Two – Regulations

SECTION A: REGULATIONS FOR THE SPECIAL ATTENTION OF PARLIAMENT UNDER S 9 (1)(B) OF THE *LEGISLATION REVIEW ACT 1987*

Outline of the Regulation/Issues

Nurses and Midwives Amendment (Fees) Regulation 2009

Recommendation

That the Committee:

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

Persons contacted	Mr Iain Martin, Manager of Legislation, Legal and Legislative Services Branch, NSW Department of Health. Phone: 93919851.
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Explanatory Note

- (a) The object of this Regulation is to increase certain fees payable under the *Nurses and Midwives Act 1991* in respect of the registration and enrolment of nurses and midwives.

This Regulation is made under the *Nurses and Midwives Regulation 2008*, including section 78 (the general regulation-making power) and sections 18 (1) (registration of nurses), 19 (1) (registration of midwives), 24 (1) (temporary registration), 27 (1), 28 and 33 (1) (annual practicing fee) and (4) (restoration of registration).

The *Nurses and Midwives Regulation 2008* is amended by omitting “\$80” from Schedule 3 wherever occurring in the matter relating to sections 18 (1), 19 (1), 24 (1), 27 (1), 28 and 33 (4) and by inserting instead “\$105”. Schedule 3 is also amended by omitting “\$70” from the matter relating to section 33 (1) and by inserting instead \$95.

The effect is to increase registration, temporary registration and restoration of registration fees from \$80 to \$105 (31.25% increase); and to increase annual practicing fees from \$70 to \$95 (35.71% increase).

Comment

1. The increased cost to registration, temporary registration, restoration of registration fees and annual practicing fees (31.25% increase and 35.71% increase respectively)

is considerably larger than the accepted practice of raising fees in line with rises to the CPI.

2. The Manager of Manager of Legislation, Legal and Legislative Services Branch, NSW Department of Health explained the fee increases were due to:
 - The need to offset increased costs incurred by the Nurses and Midwives Board;
 - The relative lack of fee increases over the last few years; and
 - The need for the Nurses and Midwives Board to cover operation costs as a statutory authority, self funded by registration fees.

3. According to the contact from the NSW Department of Health, the Nurses and Midwives Board incurred increased costs and a financial deficit due to:
 - An increase to public salaries (4%);
 - An increase in disciplinary hearings (22 hearings at the Nurses and Midwives Tribunal in 2007, compared to 29 hearings in 2008); and
 - A reduction in interest gained on registration fees.

4. The contact from NSW Department of Health further explained that few fee increases had been implemented over the last few years on the recommendation of the Auditor-General that the Board run down previously held financial reserves. As a result of this practice, the Board is now running at a deficit and needs to increase fees to reasonably cover operational expenses.

5. The Committee notes the above reasons provided by the NSW Department of Health with regard to the fees as reasonable, and finds this Regulation requires no further action.

Appendix 1: Index of Bills Reported on in 2009

	Digest Number
Appropriation (Budget Variations) Bill 2009	4
Associations Incorporation Bill 2009	2
Barangaroo Delivery Authority Bill 2009	2
Biofuel (Ethanol Content) Amendment Bill 2009	3
Children and Young Persons (Care and Protection) Amendment Bill 2009	6
Children and Young Persons (Care and Protection) Amendment (Children's Employment) Bill 2009	2
Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009	2
Civil Procedure Amendment (Transfer of Proceedings) Bill 2009	6
Crimes (Administration of Sentences) Amendment (Private Contractors) Bill 2009	2
Crimes (Appeal and Review) Amendment Bill 2009	2
Crimes (Criminal Organisations Control) Bill 2009	5
Crimes (Sentencing Procedure) Amendment (Council Law Enforcement Officers) Bill 2009	5
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Criminal Organisations Legislation Amendment Bill 2009	6
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Telecommunications (Interception and Access) (New South Wales) Amendment Bill 2008	1
Transport Administration Amendment (CountryLink Pensioner Booking Fee Abolition) Bill 2009	3
Western Lands Amendment Bill 2008	1

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1		
Civil Liability Legislation Amendment Bill 2008	Attorney General	28/10/08			12	
Contaminated Land Management Amendment Bill 2008	Minister for Climate Change and the Environment	22/09/08	03/12/08		10	1
Crimes (Administration of Sentences) Amendment Bill 2008	Attorney General and Minister for Justice	2/12/07			15	
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Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07	13/2/09	1		2
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1	
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning		12/06/08		8	
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7		
Home Building Amendment	Minister for Fair Trading		30/10/08		10, 13	
Liquor Legislation Amendment Bill 2008	Minister for Gaming and Racing	24/11/08	5/01/09		14	2
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07	22/01/09	1		2
Parking Space Levy Bill 2009	Minister for Transport	23/03/09				3
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1, 2		
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1		
Water Management Amendment Bill 2008	Minister for Water	28/10/08	15/12/08		12	2

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2009

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Associations Incorporation Bill 2009		N, R			N, R
Barangaroo Delivery Authority Bill 2009	N				
Biofuel (Ethanol Content) Amendment Bill 2009	N			N	N, R
Crimes (Criminal Organisations Control) Bill 2009	R, N		R		
Criminal Legislation Amendment Bill 2009		N			
Criminal Organisations Legislation	R, N			N	
Gas Supply Amendment (Ombudsman Scheme) Bill 2009				N	
Greyhound Racing Bill 2009				N	
Harness Racing Bill 2009				N	
Hawkesbury-Nepean River Bill 2009				N	
Health Legislation Amendment Bill 2009	N				
Home Building Amendment (Insurance) Bill 2009	N				
Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Bill 2009				N	
Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009	N, R, C	R			
Liquor Amendment (Special Licence) Conditions Bill 2008				N, R	
Motor Accidents Compensation Amendment Bill 2009				N	
Nation Building and Jobs Plan (State Infrastructure Delivery) Bill 2009	N		N	N	
Parking Space Levy Bill 2009				N	N, C
Racing Legislation Amendment Bill 2009				N	
Real Property and Conveyancing Legislation Amendment Bill 2009	N, R				
Succession Amendment (Intestacy) Bill 2009	N			N	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Surveillance Devices Amendment (Validation) Bill 2009	N, R				
Western Lands Amendment Bill 2008				R	

Key

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

Appendix 4: Index of correspondence on regulations

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2008	Digest 2009
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12	
Liquor Regulation 2008	Minister for Gaming and Racing and Minister for Sport and Recreation	22/09/08	5/01/09	10	2
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10	