

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

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

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| 8. | The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987. |
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2. Civil Proceedings Amendment (Transfer of Proceedings) Bill 2009

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

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| 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 <i>who appears to be seriously affected by alcohol or any drug</i> . 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 <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> where section 205 of that Act, applies the definition of an <i>intoxicated person</i> that means a person <i>who appears to be seriously affected by alcohol or another drug or a combination of drugs</i> . |
| 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 <i>seriously affected by alcohol or another drug or a combination of drugs</i> . |

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| 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 <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> . The Committee draws this to the attention of Parliament. |
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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:

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| 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 <i>International Covenant on Civil and Political Rights</i> . |
| 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 <i>Convention on the Rights of the Child</i> : "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 <i>and shall be used only as a measure of last resort and for the shortest appropriate period of time</i> ". |
| 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 <i>Convention on the Rights of the Child</i> , 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*:

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| 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 <i>‘improper conduct’</i> that <i>‘could be reasonably inferred’</i> which would <i>‘further’</i> the criminal activities of the declared organisation that is <i>‘likely to occur’</i> 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 <i>‘the criminal activities of the declared organisation is likely to occur’</i> . |
| 29. | Further, the Committee notes that Schedule 3 (other than Schedules 3.2 and 3.7) imposes strict liability as the wording proposes <i>‘that it could reasonably be inferred that improper conduct that would further the criminal activities of the declared organisation is likely to occur’</i> . 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 <i>reasonably be inferred</i> . |
| 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.

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

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| 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. |
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5. Home Building Amendment (Insurance) Bill 2009

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

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| 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 <i>Strata Plan 57504 v Building Insurers' Guarantee Corporation</i> . |

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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