

SUMMARY OF CONCLUSIONS

1. Child Protection Legislation (Registrable Persons) Amendment Bill 2009

Issue: Freedom of Association – Amendment of *Child Protection (Offenders Prohibition Orders) Act 2004* - Schedule 2 [3] – insertion of Part 2A Contact prohibition orders:

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| 23. Therefore, by taking into consideration the general limits on the making of contact prohibition orders under proposed section 16D and the provision for variation and revocation of such orders under proposed section 16E, along with the protection of the best interests of victims in the nature of such offences, the Committee is of the view that the proposed insertion of the new Part 2A, will not unduly trespass on individual rights and liberties. |
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Issue: Privacy – Amendment of *Child Protection (Offenders Registration) Act 2000* - Schedule 1 [9] – proposed insertion of sections 19BA (3A); (3B) and (3C) after section 19BA (3) Exemption of certain agencies from privacy protection legislation:

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| 26. The Committee notes that under the current section 19BA of the <i>Child Protection (Offenders Registration) Act 2000</i> , certain agencies are already exempt from the privacy protection legislation and may collect and use personal information about a registrable person and may also disclose personal information about a registrable person to another scheduled agency. |
| 27. The Committee considers that the proposed subsections 19BA (3A), (3B) and (3C) to be inserted after the current section 19BA (3), seek to clarify the current operation. This includes giving effect to a case management plan for a registrable person as referred to in the existing subsection (3), where a senior officer of a schedule agency needs to be satisfied that there are reasonable grounds to suspect that there is a risk of substantial adverse impact on the registrable person or some other person or class of persons if the use or disclosure of the personal information to a scheduled agency does not occur; or the use or disclosure of the personal information to the schedule agencies is likely to assist in developing or giving effect to a case management plan for the registrable person. Therefore, the Committee is of the view that this does not trespass unduly on individual rights such as privacy. |

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

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| 29. The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the <i>Legislation Review Act 1987</i> . |
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2. Constitution Amendment (Lieutenant-Governor) Bill 2009

Issue: Retrospectivity – Clause 3 – Amendment of *Constitution Act 1902* – Proposed section 9B (6) Appointment of Lieutenant-Governor and Administrator:

18. However, the Committee considers that the retrospectivity of the proposed section 9B (6), does not, in this instance, unduly trespass on individual rights and liberties, since it continues the current and long-standing practice in New South Wales that the Chief Justice is appointed as Lieutenant-Governor and clarifies that the Chief Justice would be authorised to act as Administrator even if the appointment of the Chief Justice as Lieutenant-Governor had not been validly made at the relevant time, as the Bill would deem that the Chief Justice has taken to have been acting as Administrator.
19. The Committee also notes that the retrospective application will ensure certainty of previous acts or matters done or omitted by the Chief Justice of the Supreme Court in the capacity of Administrator for individuals who have relied upon such acts and ordered their affairs accordingly.

3. Crimes Amendment (Fraud, Identity And Forgery Offences) Bill 2009

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

28. The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

4. Electricity Supply Amendment (GGAS) Bill 2009

Issue: Denial of Compensation – Amendment of *Electricity Supply Act 1995* - Schedule 1 [19] – proposed section 179A Compensation not payable:

14. The Committee is of the view that the right to seek damages or compensation is an important personal right and that such a right should not be removed or restricted by legislation unless there is a compelling public interest in doing so. Therefore, the Committee refers to Parliament to consider whether the proposed section 179A in schedule 1 [19] may trespass unduly on individual rights by removing the right to seek compensation or damages in relation to changes to the legislative framework for GGAS or its termination.

5. Electricity Supply Amendment (Solar Bonus Scheme) Bill 2009

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

18. The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

6. Emergency Services Legislation Amendment (Finance) Bill 2009

Issue: Strict Liability - Proposed section 64(4)(a) *Fire Brigades Act 1989*; section 117E(4)(a) *Rural Fires Act 1997*; and section 24U(4)(a) *State Emergency Service Act 1989*

17. The Committee notes that proposed section 64(4)(a) *Fire Brigades Act 1989*; section 117E(4)(a) *Rural Fires Act 1997* and section 24U(4)(a) *State Emergency Service Act 1989* introduce strict liability offences. The Committee has always been concerned to identify strict liability offences that may have an adverse impact on a person. However, the Committee is of the view that it is appropriate to impose strict liability offences with monetary penalties that are of sufficient severity to act as a deterrent so long as balanced against the protection of personal rights and liberties.
18. The Committee notes that the proposed penalties in proposed section 64(4)(a) *Fire Brigades Act 1989*; section 117E(4)(a) *Rural Fires Act 1997* and section 24U(4)(a) *State Emergency Service Act 1989* are monetary penalties with a maximum penalty of 50 penalty units rather than a term of imprisonment. Accordingly, the Committee is of the view that these proposed sections do not unduly trespass on personal rights and liberties.

7. Graffiti Control Amendment Bill 2009

Issue: Excessive Punishment And Reverse Onus of Proof – Amendment of *Graffiti Control Act 2008* - Schedule 1 [2] – section 4 damaging or defacing property by means of graffiti implement; and Schedule 1 [3] – section 5 possession of graffiti implement:

28. The Committee considers the reference made to the report done by the Department of Justice and Attorney General with interviewing 52 graffiti offenders along with the various recent research and statistical findings of the NSW Bureau of Crime Statistics and Research (BOCSAR) and the Australian Institute of Criminology (AIC), involving larger matched samples and longitudinal studies, as referred to above. The Committee, therefore, notes the conclusions of BOCSAR and the AIC that increasing the penalty to a longer term of imprisonment may not necessarily act as an effective deterrent.
29. However, the Committee also notes the seriousness of graffiti offences including the defacement, vandalism and deliberate damage of private and public property in proportionality to the deterrence effect and severity of the increased penalties.
30. The Committee weighs up the general community interests in addressing and deterring graffiti offenders from the defacement and vandalism to property, including the apparent public expectation for more serious penalties to reflect the nature and extent of damage caused by graffiti offences.

31. Therefore, the Committee refers to Parliament the questions of whether increasing the maximum penalty to a longer imprisonment term under section 4 (1) (from 6 months to 12 months) and under section 5 (1) (from 3 months to 6 months), by Schedule 1 [2] and [3], would be an appropriately effective deterrent in proportionality to the offences concerned and their likely impact on the victims, without being excessive and unduly trespassing on personal liberties.
32. The Committee also refers to Parliament the question of whether increasing the maximum penalty to a longer imprisonment term (under sections 4 (1) and 5 (1)), is a measure of last resort and for the shortest appropriate period of time in accordance with the rights of a child under Article 37 (b) of the *Convention on the Rights of the Child*.
33. The Committee observes that the current section 4 (1) of the *Graffiti Control Act 2008* indicates that the defendant carries the onus of proof. Section 4 (1) states that a person must not, without reasonable excuse (proof of which lies on the person), intentionally damage or deface any premises or other property by means of any graffiti implement.
34. This reverses the onus of proof that requires the prosecution to prove all elements of an offence. This is inconsistent with a presumption of innocence, a fundamental right established by Article 14 (2) of the *International Covenant on Civil and Political Rights*.
35. Therefore, the Committee refers to Parliament to consider whether the maximum penalty of imprisonment up to 12 months as proposed in Schedule 1 [2], in the context of the current reversal of onus of proof under section 4 (1), may unduly trespass on individual rights and liberties, especially that of young people, when balancing the interests of the general community in deterring graffiti offences.

Issue: Strict Liability – Amendment of *Graffiti Control Act 2008* - Schedule 1 [5] – insertion of proposed sections 8B (1) and (2) Possession of spray paint cans by persons under 18:

40. The imposition of strict liability may give rise to concern as the prosecution is not required to prove that the defendant intended to commit the offence or that the person's possession of the spray paint was for an unlawful purpose. Presumption of innocence is a fundamental right. Reversing the onus of proof is inconsistent with this right.
41. However, the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.

42. The Committee takes into consideration the adverse impact of graffiti offences on the general community. The Committee also notes that terms of imprisonment are generally considered inappropriate in relation to strict liability offences. However, proposed section 8B (2) provides for the availability of defences but proof of which lies on the defendant under 18 years of age, to establish that it was not unlawful for him or her to possess the spray paint can.
43. The Committee, therefore, refers to Parliament to consider whether Schedule 1 [5] and its proposed sections 8B (1) and (2) may unduly trespass on the rights and liberties of young people who could be charged with the strict liability offence that attracts a possible maximum penalty of imprisonment for 6 months, when weighing up the adverse impact of such graffiti offences on the general community.

Issue: Excludes reviews – Amendment of *Graffiti Control Act 2008* – Schedule 1 [7] – proposed section 9N - No appeals against order; and proposed section 9P (2)(a) – application of *Children (Community Service Orders) Act 1987* to orders made in respect of child offenders:

49. The Committee notes that the proposed section 9P (2)(a) of this Bill will exclude those above provisions under the *Children (Community Service Orders) Act 1987* with respect to their corresponding rights of appeals. The Committee is also concerned that the proposed section 9N is very broad.
50. Accordingly, the Committee refers the proposed sections 9N and 9P (2)(a), to Parliament for consideration as to whether they may potentially subject individual rights of children and young people, to be unduly dependent on non-reviewable decisions.

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

52. The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

8. Historic Houses Amendment (Throsby Park Historic Site) Bill 2009

12. The Committee notes the above advice and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

9. Independent Commission Against Corruption and Ombudsman Legislation Amendment Bill 2009

Issue: Schedule 1 [3] – Obtaining, possessing, publishing, and communicating recordings of private conversations - Right to Privacy

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| 21. The Committee acknowledges that, in relation to admitting or excluding illegally obtained evidence, courts have a discretion to consider and weigh the competing requirements to protect the public interest and protection of the individual from unlawful and unfair treatment. However, the Committee considers that Clause 1 [3] of the bill adversely effects the rights to privacy of all parties who may be included on the tapes associated with Michael McGurk and refers the matter to Parliament. |
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Issue: Clause 1 [3] – Retrospective Operation of Clause 1 [3]

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| 24. The Committee is concerned about the retrospective application of Clause 1 [3], particularly in cases such as this one, where there is the real potential to adversely impact upon individual privacy and refers the matter to Parliament. |
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10. Independent Commission Against Corruption Amendment (Political Donations) Bill 2009

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| 4. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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11. Parliamentary Electorates And Elections Amendment (Automatic Enrolment) Bill 2009

Issue: Proposed Part 4, Division 6 – Collection of electoral information – Privacy

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| 15. Certain provisions exempt the Electoral Commissioner and officers acting under the direction of the Electoral Commissioner from the requirements under the <i>Privacy and Personal Information Protection Act 1998</i> . However, proposed section 48(1) of the Bill specifically provides that it is an offence, with a maximum penalty of 50 penalty units for a person who acquires information in the exercise of functions under Part 4, Division 6 to make a record of the information or divulge the information to another person. Accordingly, the Committee considers that in the circumstances there is no undue trespass on personal rights, in particular rights to privacy. |
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Issue: Proposed 151EA *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Bill 2009* - Strict Liability

21. The Committee understands that it may be in the public interest to impose strict liability offences in certain circumstances, for example to act as a deterrent. However, the Committee notes that terms of imprisonment are generally considered inappropriate in relation to strict liability offences. Accordingly, the Committee refers to Parliament to consider whether the proposed sections 114AA and 151EA, which provide a possible maximum penalty of imprisonment of 6 months, may unduly trespass on the personal rights and liberties.

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

23. The Committee notes the above advice and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

12. Personal Property Securities (Commonwealth Powers) Amendment Bill 2009

Issue: Proposed Clause 22 – Denial of Compensation

13. The Committee notes that proposed Clause 22(1) of the Bill, which provides that compensation is not payable by the State, State officers and agencies with respect to PSS transitional matters is limited by the application of Clause 22(2). However, the Committee refers to Parliament for its consideration whether proposed Clause 22(1) unduly trespasses on personal rights and liberties.

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

16. The Committee notes the above and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

13. Public Sector Restructure (Miscellaneous Acts Amendments) Bill 2009

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

14. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee asks Parliament to consider whether schedule 15 to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.

14. Road Transport Legislation Amendment (Miscellaneous Provisions) Bill 2009

Issue: Proposed section sections 179(6) and (7) *Road Transport (General) Act 2005*; Proposed section 38(1E) *Fines Act 1996* – Excessive Punishment

25. The Committee notes that the significant increase in penalties through, in particular, proposed sections 179(6) and 179(7) *Road Transport (General) Act 2005* may be considered excessive punishment and an undue trespass on personal rights and liberties. Accordingly, the Committee refers proposed sections 179(6) and 179(7) *Road Transport (General) Act 2005* to Parliament for its consideration.

Issue – Schedule 1.1[5] – Amendments to the *Road Transport (Driver Licensing) Act 1998* and Schedule 1.2[15] – Amendments to the *Road Transport (General) Act 2005* – Retrospectivity

29. The Committee has always been concerned to identify provisions with a retrospective application that may detrimentally impact on personal rights and liberties. The Committee notes that the retrospective application of proposed amendments to sections 25 and 25A *Road Transport (Driver Licensing) Act 1998* may impact on the rights and liberties of persons convicted for offences under these sections. Accordingly, the Committee refers Schedule 1.1[5] of the Bill regarding the application of the proposed amendments to sections 25 and 25A *Road Transport (Driver Licensing) Act 1998*, to Parliament for its consideration.
31. The Committee has always been concerned to identify provisions with a retrospective application that may impact on personal rights and liberties. The Committee has concerns that proposed Schedule 1.2 [15] of the Bill provides that proposed amendments to the *Road Transport (General) Act 2005*, which will impact the scope and operation of terms such as “registered operator” will apply retrospectively on and from September 2005. The Committee has particular concerns that the proposed amendments will also retrospectively validate enforcement action that may have otherwise been considered invalid. Accordingly, the Committee refers Schedule 1.2[15] of the Bill to Parliament for its consideration.

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

36. The Committee accepts the above advice and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

15. Save The Graythwaite Estate Bill 2009*

Issue: Retrospectivity – Clause 2 – Commencement; and Clause 13 – Retrospective invalidation of transfer etc:

25. The Committee is concerned with clause 2 which provides that the proposed Act is taken to have commenced on the date on which the notice for the introduction of the Bill for the proposed Act was given, rather than commence on the date of assent after the Bill has been duly passed by both Houses of the Parliament.
26. The Committee is also concerned with clause 13 and its retrospective invalidation of any sale, transfer, lease, mortgage, charge or other alienation or encumbrance of the Graythwaite Estate, that occurred on or after 10 September 2009 but before the date of assent to the proposed Act, and which is contrary to the proposed Act. The Committee believes clause 13 could cause loss to persons who have acted on the basis of the sale, transfer, mortgage or other alienation duly made under a contract before the commencement of this proposed Act.
27. However, the Committee notes the strong community campaign with the support of various levels of government such as the Commonwealth Government, North Sydney Council, along with major community groups such as the Friends of Graythwaite, the RSL, the Construction, Forestry, Mining and Energy Union (CFMEU), as well as, interests from major hospitals such as the St Vincent's Hospital and Mater, to preserve the Graythwaite Estate within public ownership and control.
28. The Committee refers to Parliament to consider whether allowing retrospectivity is justified in this context of strong community interests or whether the retrospective effects of clauses 2 and 13 may constitute as undue trespasses on individual rights of those who have relied on the law at the time, and ordered their affairs accordingly based on the sale, transfer, mortgage or other alienation duly made under contract at the time before the commencement of the proposed Act.

16. Statute Law (Miscellaneous Provisions) Bill (No 2) 2009

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

17. Surface Coal Mining Prohibition (Lake Macquarie) Bill 2009*

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

18. Swimming Pools Amendment Bill 2009

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

19. Trade Measurement (Repeal) Bill 2009

Issue: Commencement by Proclamation - Provide the executive with unfettered control over the commencement of an Act

13. The Committee notes the above information and has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

20. Trustee Companies Amendment Bill 2009

Issue: Commencement by Proclamation - Provide the executive with unfettered control over the commencement of an Act

14. The Committee notes the above information and has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

21. Valuation of Land Amendment Bill 2009

Issue: Proposed section 18 *Valuation of Land Act 1916* – Retrospectivity

18. The Committee will always be concerned to identify any retrospective application of proposed legislation that may adversely impact on personal rights and liberties. The Committee notes that this Bill has been introduced in response to *Valuer-General v Commonwealth Custodial Services Ltd* [2009] NSWCA 143, in which the State of NSW was a party. As stated in the Second Reading Speech, the Bill intends to clarify the approach to valuing heritage land that has been developed by the Valuer General and to “maintain the status quo” regarding this approach. Accordingly, in these circumstances, the Committee does not consider that the retrospective application of the proposed amendments will unduly trespasses on personal rights and liberties.

22. Water Management Amendment Bill 2009

Issue: Proposed section 372B(2) *Water Management Act 2000* – Denial of Compensation

17. Proposed section 372B(2) *Water Management Act 2000* reads that no compensation is payable by or on behalf of the Crown to any person who suffers loss or damage because of the removal by the Ministerial Corporation of metering equipment installed by the Ministerial Corporation. The Committee notes that this provision may be considered to unduly trespass on personal rights of individuals, and refers it to Parliament for its consideration.

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

19. The Committee accepts the above advice and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.