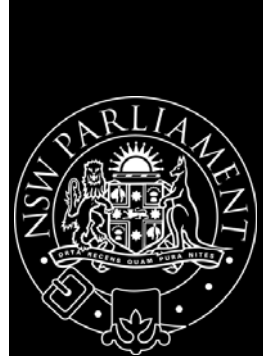


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 3 of 2006

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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 iii).

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 iii).

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 2005

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 2005

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 2005

This table specifies the action the Committee has taken with respect to Bills that received comment in 2005 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 2005

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. Crimes (Sentencing Procedure) Amendment (Gang Leaders) Bill 2006*

- | |
|---|
| 2. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
|---|

2. Industrial Relations Amendment Bill 2006, and Public Sector Employment Legislation Amendment Bill 2006

- | |
|---|
| 1. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
|---|

3. Law Enforcement (Controlled Operations) Amendment Bill 2006

Retrospective authorisation: proposed s 14

- | |
|---|
| 27. The Committee notes the potential for the application of proposed s 14 to lead to the abuse of powers granted under controlled operations authorised by the Act, thereby trespassing on the rights and liberties of third parties adversely affected by the conduct of such operations. |
| 28. The Committee also notes that proposed s 14(5) provides a strict regime for the granting of retrospective authorisation. |
| 29. The Committee refers to Parliament the question as to whether the ability to grant authorisation retrospectively unduly trespasses upon the rights and liberties of third parties adversely affected by the conduct of controlled operations under the Act. |

4. Motor Accidents (Lifetime Care and Support) Bill 2006, and Motor Accidents Compensation Amendment Bill 2006

Compulsory referral to the Scheme: cl 8(2) & 9 Motor Accidents (Lifetime Care and Support) Bill

- | |
|--|
| 8. The Committee notes that the Bill provides for persons to be referred to the Scheme without their consent and, if accepted as a lifetime participant, thereby disentitles them to pursue the payment of damages for treatment and care. |
| 9. The Committee notes that a person may reasonably not wish to be subject to the ongoing assessment of treatment and care needs by the Authority or to the current and any future guidelines regarding the provision of care. |
| 10. The Committee also notes that the Bill provides an alternative model to the payment of damages, by providing for treatment of care needs for catastrophically injured persons that is capable of responding to actual rather than predicted care needs and is part of a scheme to provide for a greater range of catastrophically injured persons. |

11. The Committee refers to Parliament the question of whether providing for persons to become lifetime participants in the Scheme, and thereby disentitling them from obtaining damages for treatment and care, without the person's consent, unduly trespasses on personal rights and liberties.

Deeming fault: cl 7B Motor Accidents Compensation Amendment Bill

16. The Committee has written to the Minister to seek his advice as to whether the deeming of fault under clause 7B may have legal consequences for the blameless driver.
17. The Committee refers to Parliament the question of whether the labelling of a blameless driver as "at fault" for the purposes of the Act may inappropriately trespass on a blameless driver's right not to have his or her reputation needlessly impugned.

Assessor qualifications: Parts 3 & 4, Motor Accidents (Lifetime Care and Support) Bill

22. The Committee notes that, for a right of appeal to be effective, the panel hearing the matter must be sufficiently competent to properly consider the issues raised.
23. The Committee has written to the Minister to seek his advice as to why there is no requirement that panels dealing with disputes regarding eligibility and treatment and care needs must include a person with suitable legal expertise.
24. The Committee refers to Parliament the question of whether not requiring such panels to include a person with suitable legal expertise makes rights, liberties or obligations unduly dependent upon decisions with unsafe review procedures.

LTCS Guidelines: cl 58 Motor Accidents (Lifetime Care and Support) Bill

29. The Committee notes that the Bill delegates to the Authority the power to make guidelines providing for matters fundamental to the ongoing provision of catastrophically injured persons, including the eligibility criteria for participation in the Scheme, the assessment of treatment and care needs, and the types of treatment and care that are covered by the Scheme.
30. The Committee notes that any such guidelines are disallowable by either House of Parliament, although they are not reviewable by the Legislation Review Committee.
31. The Committee refers to Parliament the question of whether the Bill inappropriately delegates legislative power, or insufficiently subjects the exercise of that power to parliamentary scrutiny.

5. Protection of the Environment Operations Amendment (Waste Reduction) Bill 2006

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

6. Royal Rehabilitation Centre Sydney Site Protection Bill 2006

Retrospectivity: cl 5

- | |
|---|
| <ol style="list-style-type: none">10. The Committee will always be concerned to identify the retrospective effects of legislation which may impact adversely on any person.11. The Committee notes that legislatively revoking a declaration duly made under the law trespasses upon a person's right to order his or her affairs in accordance with the current law.12. The Committee refers to Parliament the question of whether providing for the revocation of any declaration under s 75B of the Environmental Planning and Assessment Act 1979 in relation to the site unduly trespasses on personal rights and liberties. |
|---|

Part One – Bills

SECTION A: COMMENT ON BILLS

1. CRIMES (SENTENCING PROCEDURE) AMENDMENT (GANG LEADERS) BILL 2006*

Date Introduced: 9 March 2006
House Introduced: Legislative Assembly
Member Responsible: Mr Andrew Tink MP

Purpose and Description

1. This Bill amends the *Crimes (Sentencing Procedure) Act 1999* to make leadership of a gang an aggravating factor in sentencing.

Issues Considered by the Committee

2. 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.

Industrial Relations Amendment Bill 2006, and
Public Sector Employment Legislation Amendment Bill 2006

2. INDUSTRIAL RELATIONS AMENDMENT BILL 2006, AND PUBLIC SECTOR EMPLOYMENT LEGISLATION AMENDMENT BILL 2006

Date Introduced: 7 March 2006
House Introduced: Legislative Assembly
Minister Responsible: The Hon John Della Bosca MLC
Portfolio: Industrial Relations

Pursuant to a suspension of Standing Orders, these Bills passed all stages in the Legislative Assembly on 7 March 2006 and in the Legislative Council on 9 March 2006.

Issues Considered by the Committee

- | |
|--|
| <p>1. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p> |
|--|

The Committee makes no further comment on these Bills.

3. LAW ENFORCEMENT (CONTROLLED OPERATIONS) AMENDMENT BILL 2006

Date Introduced:	8 March 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Carl Scully MP
Portfolio:	Police

Purpose and Description

1. The Bill provides, within the *Law Enforcement (Controlled Operations) Act 1997* (the Act), a legislative scheme under which law enforcement agencies may carry out cross-border investigations in relation to criminal activities.¹ The Bill substantially adopts the provisions of a model law for such a scheme.
2. This Bill also makes miscellaneous amendments to the Act, including:
 - replacing the provision of the Act that provides for the granting of retrospective authority for unlawful activities;
 - expanding the number of police officers to whom the chief executive officer of NSW Police (ie, the Commissioner of Police) may delegate his or her functions under the Act;² and
 - providing for a further review of the Act to be undertaken as soon as possible after the period of 5 years from the date of assent to the Bill, and for a report on the outcome of the review to be tabled in each House of Parliament.

Background

3. The following background was provided in the second reading speech:

The Act legitimises the actions of undercover officers and other participants and permits evidence obtained during the course of authorised controlled operations to be classified as legal and prima facie admissible.

The Act governs controlled operations carried out in New South Wales by the Independent Commission Against Corruption, NSW Police, the NSW Crime Commission, and the Police Integrity Commission and Commonwealth law enforcement agencies. A statutory review of the Act has been conducted. The Review report recommended several significant changes to the Act including the expansion of the number of NSW Police senior officers able to authorise controlled operations, the expansion of the circumstances in which a retrospective authorisation may be granted and the introduction of cross-border provisions in relation to operations that cross over from New South Wales into other jurisdictions.

¹ The Act and Regulations came into effect in 1998 as a result of the High Court decision in *Ridgeway v The Queen* (1995) 184 CLR 19 to disallow evidence gathered that was a result of officers, with the approval of their superiors, illegally importing drugs as part of their undercover operations with the accused.

² It was noted in the second reading speech that the changes mean that the number of NSW Police senior officers able to authorise controlled operations within New South Wales is expanded from six to twenty: Mr A P Stewart MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 March 2006.

...The provisions relating to cross-border operations are aimed at achieving a national investigative framework. A national Leaders Summit on Terrorism and Multi-Jurisdictional Crime agreed to implement model laws for all jurisdictions and provide mutual recognition for a national set of model powers for cross-border controlled operations. The cross-border provisions seek to facilitate mutual recognition of activities that have been approved in accordance with corresponding legislation in other jurisdictions.³

4. According to the NSW Ombudsman's 2004-2005 Report on the Act, the total number of operations thereunder has increased steadily over the past 5 years, together with a marked increase in the number of variations authorised.⁴ The Report noted the following breakdown of controlled operations conducted by NSW Police:

The majority of the operations involved investigating criminal activities associated with the supply, possession, cultivation and or manufacture of prohibited drugs. 351 controlled operations were connected in some way to prohibited drugs. 19 operations solely targeted firearm and other prohibited weapons offences. 16 operations targeted robbery, armed robbery, theft or stolen property offences. There were 11 operations which involved the investigation of murder, conspiracy to murder or attempted murder. One involved investigating manslaughter. Four others were targeting offences relating to prostitution and four operations targeted fraud offences.⁵

The Bill

5. Throughout the Bill, reference to a "chief executive officer" means the person for the time being holding office or acting as:
- in relation to NSW Police, the Commissioner of Police;
 - in relation to the Independent Commission Against Corruption, the Commissioner for that Commission;
 - in relation to the New South Wales Crime Commission, the Commissioner for that Commission;
 - in relation to the Police Integrity Commission, the Commissioner for that Commission; and
 - in relation to a law enforcement agency prescribed by the regulations, the chief executive officer (however described) of that agency,
- and, in relation to an authorised operation, means the chief executive officer of the law enforcement agency on whose behalf the operation has been, is being or is proposed to be conducted [s 3 of the Act].
6. Under the Act, a *controlled activity* is an activity that, but for an authorisation thereunder, would be unlawful [s 3].

³ Mr A P Stewart MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 March 2006.

⁴ For 2002/2003 NSW Police authorised 28 variations to existing authorities, in 2003/2004, 72 and in 2004/2005 128. NSW Ombudsman, *Law Enforcement (Controlled Operations) Act Annual Report 2004-2005*, www.ombo.nsw.gov.au/show.asp?id=403.

⁵ NSW Ombudsman, *Law Enforcement (Controlled Operations) Act Annual Report 2004-2005*, www.ombo.nsw.gov.au/show.asp?id=403.

Evidence

7. Under the Bill, the fact that particular evidence was obtained as the result of a person engaging in criminal activity must be disregarded in determining whether to admit or exclude that evidence in any proceedings, where:
- the person was a participant acting in the course of an authorised operation;⁶ and
 - the criminal activity was a controlled activity within the meaning of the Act or controlled conduct within the meaning of a corresponding law [proposed s 3A(3A)].
8. The Act currently provides that such authorised activity does not constitute an offence. However, the new provisions relating to cross-border controlled operations in proposed Part 3A provide that the person concerned is not *criminally responsible* for the offence [see proposed s 20K and s 20L]. Proposed s 3A(3A) is based on the conclusion of the 2004 Review that such an amendment would:
- clarify that the Act itself is not a barrier to the admissibility of evidence gathered outside the scope of a controlled authority, but that the rules of evidence in the Evidence Act, in the common law and judicial discretion, may still allow or disallow the admissibility of any such evidence.⁷

Retrospective authority

9. Currently, under s 14 of the Act, a participant in an authorised operation who engages in unlawful conduct for the purpose of protecting any person from death or serious injury may, within 24 hours after engaging in that conduct, apply to the chief executive officer for retrospective authority for that conduct [s 14(1)].
10. The Bill alters this to provide, instead, that the authorisation may be granted if the person who undertook the activity believed on reasonable grounds that there was a substantial risk:
- to the success of the operation;
 - to the health or safety of any person; or
 - that evidence relating to criminal activity or corrupt conduct other than that the subject of the operation would be lost,
- and that the person who undertook the unlawful activity could not avoid the risk otherwise than by undertaking the activity [proposed new s 14(5)].
11. However, s 14(5) does not allow retrospective authority to be granted with respect to conduct giving rise to any of the following:
- murder; or

⁶ Proposed s 3A(3A) also deals with participants who are authorised by a corresponding authority, ie, an authority authorising a cross-border controlled operation that is in force under a law which corresponds to the Act in a jurisdiction other than New South Wales.

⁷ *Law Enforcement (Controlled Operations) Act 1997 Review Report*, Ministry for Police, 2004.

- any other offence for which the common law defence of duress would not be available [s 14(6)].

12. These changes were based on Recommendation 2 of the Act's review.

Cross border controlled operations

13. An authority to conduct a cross-border controlled operation may not be granted unless the chief executive officer is satisfied on reasonable grounds that:

- a relevant offence has been, is being, or is likely to be, committed;
- the controlled operation will be, or is likely to be, conducted in this jurisdiction and in one or more participating jurisdictions;
- the nature and extent of the suspected criminal activity are such as to justify the conduct of a controlled operation in this jurisdiction and in one or more participating jurisdictions; and
- the operation will be conducted in a way that will minimise the risk of more illicit goods being under the control of persons (other than law enforcement officers) at the end of the operation than are reasonably necessary to enable the officers to achieve the purpose of the controlled operation [proposed s 20D].⁸

14. Whereas s 16 effectively renders certain unlawful activities lawful, proposed s 20K protects a participant in a cross-border controlled operation from any criminal liability for engaging in unlawful conduct where:

- the conduct is authorised by, and is engaged in in accordance with, the authority for the operation;
- the conduct does not involve the participant's intentionally inducing a person to commit an offence under a law of any jurisdiction or the Commonwealth that the person would not otherwise have intended to commit;
- the conduct does not involve the participant's engaging in any conduct that is likely to:
 - cause the death of, or serious injury to, any person; or
 - involve the commission of a sexual offence against any person; and
 - if the participant is a civilian participant, he or she acts in accordance with the instructions of a law enforcement officer [proposed s 20K(2)].⁹

⁸ Proposed s 20N is to the effect that protection from criminal liability conferred by proposed s 20K and s 20L does not apply in respect of a person's conduct in the course of a cross-border controlled operation if the unlawful conduct concerned is, or could have been, authorised under a law of New South Wales relating to the matters set out in the proposed section. Those matters include searches of individuals and premises. The relevant chief executive officer must maintain a register relating to cross-border controlled operations: proposed s 20J(1).

⁹ Proposed s 20L is a similar provision relating to ancillary conduct, such as aiding and abetting. It makes similar provision to s 18 (Lawfulness of certain ancillary activities) in relation to cross-border controlled operations. Proposed s 20M is another similar provision relating to civil liability. It is similar to s 19

15. An authority under proposed s 20D may not remain in force longer than 7 days (for an urgent authority) or 3 months (for a formal authority).¹⁰
16. If an authority is varied in any way that limits its scope, or cancelled, proposed Part 3A continues to apply to a participant in the operation as if the variation or cancellation had not occurred, for so long as the participant is:
 - unaware of the variation or cancellation; and
 - is not reckless about the existence of the variation or cancellation [proposed s 200].

Oversight

17. When a chief executive officer grants an authorisation for a controlled operation (or a variation of an authority), or receives a report on the conduct of a controlled operation, he or she must give the Ombudsman written notice of that fact within 21 days [proposed new s 21(1)(a)].
18. Also, where a retrospective authority is granted, written details of the authority and the circumstances justifying it must be provided to the Ombudsman as soon as practicable after granting the authority, and no later than 7 days after it is granted [proposed s 21(1A) & (1B)].
19. The Bill also requires a further review of the Act to be undertaken as soon as possible after the period of 5 years from the date of assent, and for a report on the outcome of the review to be tabled in each House of Parliament [proposed s 32(6) & (7)].

Issues Considered by the Committee

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

Retrospective authorisation: proposed s 14

20. In its 2003/2004 Report on the Act's operations, the Ombudsman noted that controlled activities which various agencies had engaged in included:
 - conversations, negotiations, purchase, possession and other activities concerning the supply and manufacture of prohibited drugs;
 - entry onto private property and removal of a vehicle;
 - installation of surveillance equipment requiring entering onto enclosed lands; and
 - trespass to real property and activities concerning stolen goods.¹¹

(Exclusion of civil liability), and provides for the indemnification of participants in the cross-border controlled operations to which proposed s 20M applies, in the circumstances set out in s 20M(3).

¹⁰ The Act currently provides for 72 hours and 6 months in respect of other controlled operations: s 8(2)(f) & s 8(2)(g) respectively. An authority may be varied for the purpose of identifying additional suspects in relation to the relevant offence: proposed s 20G. No single variation may extend the period for which an authority has effect for more than 3 months at a time, rather than the 6 months allowed under s 10(1A) in respect of authorities to conduct other controlled operations.

Law Enforcement (Controlled Operations) Amendment Bill 2006

21. From this it will be seen that some of the unlawful conduct envisaged by the Act is not only of a serious nature, but may impact on third parties who are in no way involved in the alleged criminal behaviour.
22. Proposed s 14 provides a regime whereby the principal law enforcement officer in an authorised operation may apply to the chief executive officer for retrospective authority for the unlawful conduct of a participant in that operation within 24 hours after the participant engages in that conduct [proposed s 14(1)].
23. The Committee is always concerned to identify the retrospective effects of legislation which may impact adversely on any person, having regard to the basic principles of the Rule of Law.¹² With respect to the Bill, however, the Committee's concerns are that the possibility for retrospective authorisation will tend to undermine the protection of individual rights and liberties which can only be maintained by strict oversight of the conduct controlled operations.
24. The Committee notes that in its submission to the 1999 Review of the Act, ICAC raised a number of concerns with the proposed introduction of retrospective authorisation. In particular, ICAC expressed concerns that:
 - retrospective authorisation could be attractive for officers to embark on activities which can be foreseen before making an application, on the assumption that it will be approved when an application is made; and
 - retrospectivity could lead to corruption whereby officers make false applications in order to protect their criminal/corrupt activity.¹³
25. However, the Committee also notes that proposed s 14(5) provides that retrospective authority ***may not be granted*** unless the chief executive officer is satisfied:
 - (a) that the following circumstances existed when the relevant conduct occurred:
 - (i) the participant who engaged in the conduct believed on reasonable grounds:
 - (A) that there was a substantial risk to the success of the authorised operation;
 - (B) that there was a substantial risk to the health or safety of a participant in the operation, or any other person, as a direct result of the conduct of the authorised operation, or
 - (C) that criminal activity or corrupt conduct other than the criminal activity or corrupt conduct in respect of which the authorised operation is being conducted had occurred, or was likely to occur, and that there was a substantial risk that evidence relating to that criminal activity or corrupt conduct would be lost;

¹¹ NSW Ombudsman, *Law Enforcement (Controlled Operations) Act Annual Report 2003-2004*, www.ombo.nsw.gov.au/publication/PDF/annualreport/The%20Law%20Enforcement%20Act%20Annual%20Report%202005.pdf.

¹² See, eg, *Luna Park Site Amendment (Noise Control) Bill 2005*, Legislation Review Digest No.13 of 2005.

¹³ *Law Enforcement (Controlled Operations) Act 1997 Review Report*, Ministry for Police, 2004.

- (ii) the participant could not avoid that risk otherwise than by engaging in the relevant conduct, and
 - (b) that, at all times prior to those circumstances arising, the participant had been acting in good faith and in accordance with the relevant code of conduct;
 - (c) that the participant had not foreseen, and could not reasonably be expected to have foreseen, that those circumstances would arise;
 - (d) that, had it been possible to foresee that those circumstances would arise, authority for the relevant conduct would have been sought, and
 - (e) it was not reasonably possible in those circumstances for the participant to seek a variation of the authority for the operation to authorise the relevant conduct.
26. As noted above, these changes were based on Recommendation 2 of the Act's 2004 Review, which had concluded while there are difficulties with allowing an extension of retrospective granting of approvals:

it is permitted for original approvals to be able to be varied, and it seems logical for this to be extended to times where, had it been foreseen, the activity would have been included in the original application and given approval by the authorising officer.

However, in order to address some of the concerns of doing this, it is not considered appropriate for this to be extended to any activities that have not been conducted within the general scope of and part of a previously approved operation.¹⁴

- 27. The Committee notes the potential for the application of proposed s 14 to lead to the abuse of powers granted under controlled operations authorised by the Act, thereby trespassing on the rights and liberties of third parties adversely affected by the conduct of such operations.**
- 28. The Committee also notes that proposed s 14(5) provides a strict regime for the granting of retrospective authorisation.**
- 29. The Committee refers to Parliament the question as to whether the ability to grant authorisation retrospectively unduly trespasses upon the rights and liberties of third parties adversely affected by the conduct of controlled operations under the Act.**

The Committee makes no further comment on this Bill.

¹⁴ *Law Enforcement (Controlled Operations) Act 1997 Review Report*, Ministry for Police, 2004, p.29.

4. MOTOR ACCIDENTS (LIFETIME CARE AND SUPPORT) BILL 2006, AND MOTOR ACCIDENTS COMPENSATION AMENDMENT BILL 2006

Date Introduced:	9 March 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Della Bosca
Portfolio:	Commerce

Purpose and Description

1. The object of the *Motor Accidents (Lifetime Care and Support) Bill 2006* is to establish a Scheme to provide lifetime care and support for persons who suffer catastrophic injuries in motor accidents that are covered by the *Motor Accidents Compensation Act 1999* [the Act]. The Scheme will extend to injured persons who are “at fault” for the accident and to motor accidents for which no person is at fault.
2. The principal features of the Scheme are as follows:
 - (a) the Lifetime Care and Support Authority [the Authority] established by the Bill will pay the reasonable treatment and care expenses of participants in the Scheme (including medical treatment, rehabilitation, attendant care services, and home and transport modification);
 - (b) a person will be eligible to participate in the Scheme if the person has suffered a motor accident injury that satisfies the eligibility criteria set out in guidelines issued by the Authority;
 - (c) participation in the Scheme will be either as a lifetime participant or as an interim participant (with interim participation lasting 2 years or until acceptance as a lifetime participant);
 - (d) an application for participation in the Scheme can be made by or on behalf of the injured person or by an insurer of a motor accident claim in respect of the injury;
 - (e) a person will not be eligible to participate in the Scheme if the person has been awarded common law damages for their treatment and care needs, and participation in the Scheme will disentitle a person to recover damages for their treatment and care needs;
 - (f) the Bill provides dispute resolution mechanisms to deal with disputes as to eligibility, disputes as to whether an accident is a motor accident covered by the Scheme and disputes about the Authority’s assessment of the treatment and care needs of a participant; and
 - (g) funding for the Scheme will be provided by way of a special levy to be paid by persons to whom third-party policies are issued, with the levy to be collected

Motor Accidents (Lifetime Care and Support) Bill 2006, and
Motor Accidents Compensation Amendment Bill 2006

on behalf of the Authority by licensed insurers at the time of issue of third-party policies.

3. The object of the *Motor Accidents Compensation Amendment Bill 2006* is to amend the Act as follows:
- (a) to provide a no-fault benefit for children injured in motor accidents, covering hospital, medical and pharmaceutical expenses, rehabilitation expenses, respite care expenses, attendant care services expenses and (in the case of death) funeral or cremation expenses;
 - (b) to provide an entitlement to recover common law damages under the motor accidents compensation scheme for injury or death caused by a blameless (or “inevitable”) motor accident, except for the driver whose act or omission caused the accident;
 - (c) to clarify the application of the Act by providing that the Act will only apply to a motor accident injury if the injury is caused during the driving of the vehicle, a collision involving the vehicle or the vehicle’s running out of control, and the injury is not one that arises gradually from a series of incidents;
 - (d) to limit the operation of the Act to motor accident injuries for which a motor accident insurer (or the Nominal Defendant) is “on risk” under a third-party policy or that give rise to a work injury claim under workers compensation legislation (other than claims by coal miners);
 - (e) to remove the existing right of action against the Nominal Defendant in respect of motor accidents occurring on land that constitutes a road because it is open to or used by the public for driving, riding or parking vehicles in those cases where the injured person is a trespasser on the land;
 - (f) to clarify the circumstances in which a vehicle is considered to be “capable of registration” for the purposes of claims against the Nominal Defendant;
 - (g) to cap the liability of a motor accident insurer arising from a single incident at \$200 million, with provision for the Nominal Defendant to indemnify the insurer for the amount by which the insurer’s liability exceeds that amount;
 - (h) to extend provisions for the suspension and cancellation of vehicle registration for non-payment of third-party insurance premiums to cover cases of credit card fraud and underpayment resulting from the provision of false information, and to make it clear that the RTA is required to suspend and cancel registration under those provisions when the Motor Accidents Authority [MAA] approves of an insurer request for that action;
 - (i) to authorise the MAA to enter into bulk billing arrangements under which the MAA agrees to make bulk billing payments (instead of insurers as at present);
 - (j) to provide that contributions currently made by insurers to the MAA Fund are made on behalf of third-party policy holders and are payable by policy holders as a levy on third-party premiums (rather than as a component of premium as at present); and

Motor Accidents (Lifetime Care and Support) Bill 2006, and
Motor Accidents Compensation Amendment Bill 2006

- (k) to protect medical assessors against personal liability incurred in good faith and against compellability to give evidence;

Background

4. The following background was set out in the second reading speech:

Motor vehicle crashes are the single biggest contributor to traumatic catastrophic injury in Australia...Each year about 125 people will be catastrophically injured in motor vehicle accidents in New South Wales and left with significant disabilities requiring lifetime support...

Under the current Motor Accidents Compensation Act only 65 of the 125 people catastrophically injured in a motor vehicle accident are likely to be eligible for compensation. This is because compensation is available only where the accident was caused by the fault of another driver. People who are considered at fault are not entitled to any compensation and must rely upon family and community services to provide support. Even those in receipt of compensation are not guaranteed a lifetime of reasonable care and medical treatment. ... To address the special circumstances of catastrophically injured motor accident victims, the Government released its lifetime care and support plan in June 2005.

The plan proposed that all people catastrophically injured in motor vehicle accidents in New South Wales would receive the medical care and support services they need throughout their life, regardless of who was at fault in the accident. The Government undertook extensive consultation on the plan, with a series of public consultations conducted across Sydney and regional New South Wales to discuss the scheme with key stakeholders. The plan was enthusiastically endorsed by medical specialists, health professionals, disability support groups and service providers. The new scheme established by the bill will give effect to the proposals outlined in the Government's lifetime care and support plan. This new scheme will include those people with catastrophic injuries entitled to make a negligence or fault-based claim under the Motor Accidents Compensation Act 1999. The scheme will also extend cover to such injured people who are at fault in a motor vehicle accident and to catastrophic injuries resulting from those motor vehicle accidents where no person is at fault.¹⁵

The Bills

5. In the second reading speech it was stated that:

The Motor Accidents (Lifetime Care and Support) Bill establishes a scheme to provide lifetime care and support for persons who suffer catastrophic injuries such as spinal damage or brain trauma in motor vehicle accidents...

The Motor Accidents Compensation Amendment Bill introduces enhancements to the existing CTP motor accidents injury scheme, firstly, by introducing a new special children's benefit providing a no-fault benefit for those New South Wales resident children injured in motor accidents who currently are not covered by the compulsory third party [CTP] scheme. Secondly, the bill extends the scope of the CTP scheme to provide compensation entitlements for injury or death resulting from a blameless or

¹⁵ Hon J A Watkins MP, Deputy Premier and Minister for Transport, Legislative Assembly *Hansard*, 9 March 2006.

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inevitable accident, which is a motor vehicle accident where no-one is considered to have been at fault.¹⁶

Issues Considered by the Committee

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

Compulsory referral to the Scheme: cl 8(2) & 9 Motor Accidents (Lifetime Care and Support) Bill

6. The Bill permits an insurer to apply, without the person's consent, for that person to be accepted into the proposed Scheme [cl 8(2)]. The MAA can direct an insurer to make such an application, and the Authority must accept a person into the Scheme if he or she is eligible [cl 9]. As acceptance of a person into the scheme will relieve the insurer from direct liability for the payment for treatment and care, it may be presumed that all persons considered by the insurer to be eligible will be so referred.
7. However, there may be reasons why a person (personally or by the person's guardian or next friend) would not wish to be accepted into the Scheme. For example, a person may wish to pursue the payment of damages for treatment and care needs so as to be independent from the Scheme and not be subject to its ongoing assessment requirements or the current or any future terms in the guidelines to receive payment.

8. **The Committee notes that the Bill provides for persons to be referred to the Scheme without their consent and, if accepted as a lifetime participant, thereby disentitles them to pursue the payment of damages for treatment and care.**
9. **The Committee notes that a person may reasonably not wish to be subject to the ongoing assessment of treatment and care needs by the Authority or to the current and any future guidelines regarding the provision of care.**
10. **The Committee also notes that the Bill provides an alternative model to the payment of damages, by providing for treatment of care needs for catastrophically injured persons that is capable of responding to actual rather than predicted care needs and is part of a scheme to provide for a greater range of catastrophically injured persons.**
11. **The Committee refers to Parliament the question of whether providing for persons to become lifetime participants in the Scheme, and thereby disentitling them from obtaining damages for treatment and care, without the person's consent, unduly trespasses on personal rights and liberties.**

Deeming fault: cl 7B Motor Accidents Compensation Amendment Bill

12. The Bill deems a "blameless" driver to have been at fault, even though that driver has not "actually" been at fault (cII 7A, 7B). This is a legal fiction to provide a mechanism for the payment of compensation.

¹⁶ Hon J A Watkins MP, Deputy Premier and Minister for Transport, Legislative Assembly *Hansard*, 9 March 2006.

Motor Accidents (Lifetime Care and Support) Bill 2006, and
Motor Accidents Compensation Amendment Bill 2006

13. If a driver has in fact been blameless, that driver - or other people who know that driver due to family, work or social connections - may be concerned that he or she is, nonetheless “deemed” to have been at “fault”. The blameless driver may be socially stigmatized or psychologically traumatised by such a legislative finding.
14. The fact that the “deeming” provision is merely a drafting technique to make various other provisions operative may not prevent blameless drivers from needlessly suffering social stigmatisation and stress.
15. It is also not apparent to the Committee whether such deeming provision may have consequences apart from those contemplated in the Bill, such as affecting no-claim bonuses.

16. **The Committee has written to the Minister to seek his advice as to whether the deeming of fault under clause 7B may have legal consequences for the blameless driver.**
17. **The Committee refers to Parliament the question of whether the labelling of a blameless driver as “at fault” for the purposes of the Act may inappropriately trespass on a blameless driver's right not to have his or her reputation needlessly impugned.**

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

Assessor qualifications: Parts 3 & 4, Motor Accidents (Lifetime Care and Support) Bill

18. The Bill proposes new roles for assessors with regard to:
 - eligibility disputes [cll 12-19];
 - treatment and care needs [cll 24-26]; and
 - definition of motor accident injuries [cl 20].
19. The assessors for “eligibility disputes” must have medical qualifications, or otherwise be “suitably qualified” [cl 13]. Eligibility disputes will be referred to a panel of three such assessors [cl 14(3)] all of whom could, it would appear, be medical practitioners, but none of whom may have legal expertise. This contrasts, for example, with the *Workplace Injury Management & Workers Compensation Act 1998*, which establishes a review panel constituted by a legally qualified person and two approved medical specialists [see s 328].
20. Similarly, the assessors for “treatment and care needs” as proposed in the current Bill would have “health qualifications” or other “suitable” qualifications [not defined – cl 24(3)]. An appeal is made to a panel of 3 such assessors [cl 25(3)].
21. The Committee notes that resolving disputes over eligibility, and treatment and care needs may involve difficult questions regarding both the facts of a person’s health condition and the law of whether such health conditions or proposed treatment and care fall within the guidelines and the Act. This may include considering questions of causation or whether a particular condition meets a threshold set in the guidelines.

- 22. The Committee notes that, for a right of appeal to be effective, the panel hearing the matter must be sufficiently competent to properly consider the issues raised.**
- 23. The Committee has written to the Minister to seek his advice as to why there is no requirement that panels dealing with disputes regarding eligibility and treatment and care needs must include a person with suitable legal expertise.**
- 24. The Committee refers to Parliament the question of whether not requiring such panels to include a person with suitable legal expertise makes rights, liberties or obligations unduly dependent upon decisions with unsafe review procedures.**

Delegation and parliamentary scrutiny of legislative powers [s 8A(1)(b)(iv) & (v) *LRA*]

LTCS Guidelines: cl 58 Motor Accidents (Lifetime Care and Support) Bill

25. The Bill provides for the Authority to issue guidelines providing for:
- which treatment and care needs of a participant in the Scheme are reasonable and necessary in the circumstances [cl 6(4)];
 - criteria for eligibility for participation in the Scheme as a lifetime participant and as an interim participant, including criteria which a motor accident injury must satisfy in order for the injured person to be eligible for participation in the Scheme in respect of that injury, and the determination of whether a motor accident injury satisfies those criteria [cl 7];
 - the making of applications for participation in the scheme, including:
 - the making and determination of applications;
 - the payment of assessment costs by insurers; and
 - imposing restrictions on the time within which an application can be made or requiring deferral of an application until an injury has stabilised [cl 8(6)];
 - the approval by the Authority of providers other than medical practitioners to provide any service in connection with the provision of treatment and care needs, and requiring services to be provided only by approved providers [cl 10];
 - procedures for the referral of disputes for determination or review of determinations and the procedure for determination [cl 19]; and
 - the assessment of the treatment and care needs of a participant in the Scheme, including:
 - the procedures for such assessment;
 - the intervals at which such assessment is to be carried out;
 - the methods and criteria to be used to determine the treatment and care needs; and
 - the information to be provided by participants [cl 28].

Motor Accidents (Lifetime Care and Support) Bill 2006, and
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26. The guidelines therefore provide for matters which are fundamental to the operation of the Bill, including the eligibility criteria for participation in the Scheme, the assessment of treatment and care needs, and the type of treatment and care needs that are covered by the Scheme.
27. Consequently, the ongoing provision for the treatment and care needs of the participants of the Scheme is dependent on the terms of the guidelines.
28. The guidelines must be tabled in, and may be disallowed by, each House of Parliament [cl 58 (5)]. However, they are *not* subject to review by the Legislation Review Committee.¹⁷

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| <ol style="list-style-type: none">29. The Committee notes that the Bill delegates to the Authority the power to make guidelines providing for matters fundamental to the ongoing provision of catastrophically injured persons, including the eligibility criteria for participation in the Scheme, the assessment of treatment and care needs, and the types of treatment and care that are covered by the Scheme.30. The Committee notes that any such guidelines are disallowable by either House of Parliament, although they are not reviewable by the Legislation Review Committee.31. The Committee refers to Parliament the question of whether the Bill inappropriately delegates legislative power, or insufficiently subjects the exercise of that power to parliamentary scrutiny. |
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The Committee makes no further comment on this Bill.

¹⁷ A disallowable instrument is only reviewable by the Committee if it is a statutory rule, proclamation or order. A "statutory rule" only includes regulations, by-laws and ordinances that are made or must be approved by the Governor and rules of court [ss 3 & 9 *Legislation Review Act 1987*].

5. PROTECTION OF THE ENVIRONMENT OPERATIONS AMENDMENT (WASTE REDUCTION) BILL 2006

Date Introduced:	8 March 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Environment

Purpose and Description

1. This Bill is part of a series of proposed legislative and other reforms (the City and Country Environment Restoration Program) that aim to achieve the targets of the NSW Waste Strategy and to promote environmental improvement in New South Wales.
2. The program includes:
 - (a) investment in the Inland Rivers and Wetlands Restoration Program, and
 - (b) establishment of new marine parks, and
 - (c) implementation of urban sustainability programs, including stormwater harvesting for recycling, waste reduction and increased recycling, and
 - (d) establishment of a local government waste reduction scheme for recycling, resource recovery and other reduction of waste, including payments to local councils for achieving waste reduction goals set by the Environment Protection Authority.
3. The object of this Bill is to enable regulations to be made to give effect to the scheme referred to in paragraph (d).

Issues Considered by the Committee

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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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The Committee makes no further comment on this Bill.

6. ROYAL REHABILITATION CENTRE SYDNEY SITE PROTECTION BILL 2006

Date Introduced: 2 March 2006
House Introduced: Legislative Assembly
Member Responsible: Mr Anthony Roberts MP

Purpose and Description

1. The object of this Bill is to protect the site of the Royal Rehabilitation Centre at Putney (the site) by:
 - ensuring that Ryde City Council (the Council) remains the consent authority for any application to carry out development on the site;
 - prohibiting the carrying out of excessive development on the site;
 - ensuring that satisfactory alternative arrangements are made for users of the site displaced by any development;
 - protecting certain buildings on the site from demolition or alteration and requiring them to be maintained;
 - reserving part of the site as public open space; and
 - requiring community consultation in relation to the carrying out of development on the site and the management of that public open space.

Background

2. Royal Rehabilitation Centre Sydney is a private, not-for-profit organisation, which provides public and private rehabilitation and disability services for people who have sustained traumatic injury and illness. According to the Centre itself, it is:

seeking Government approval to construct a new purpose-built, state-of-the-art specialist rehabilitation, disability and research facility on the Ryde site that would be a model for Australia.

Our current buildings are old and out-dated, impose unnecessary limitations on best practice rehabilitation and disability support provided to our clients and are increasingly having difficulty meeting accreditation standards.

The new facility will form the headquarters of the statewide speciality services in brain injury, spinal injury, stroke, aged care and disability support as well as network of community based support services, integrating rehabilitation and disability services into the community – where they were needed most.¹⁸
3. In 2005 the State Government took over the planning control of the site from the Council. The Centre's plans for redevelopment have been the focus of community complaints, particularly in respect of the proposed building of some 900 residences.¹⁹

¹⁸ The Royal Rehabilitation Centre Sydney, *Concept Plan Fact Sheet*, 16 February 2006. See www.royalrehab.com.au.

¹⁹ See, eg, the *Northern District Times*, 16 February 2006.

The Bill

4. The Bill provides that no declaration shall be made in relation to development of the site under s 75B of the *Environmental Planning and Assessment Act 1979* (EPA Act) that the carrying out of development on the site is a project to which Part 3A of that Act applies²⁰ [proposed s 5(1) & (2)].
5. Further, any such declaration made before the commencement of the Bill is revoked [proposed s 5(3)].
6. The Bill also provides, amongst other things, that:
 - all development of the site requires development consent under Part 4 of the EPA Act [proposed s 6];
 - the Council is the consent authority for any development applications for the site [proposed s 4]; and
 - only specified development may be carried out on the site, namely limited development for the purposes of a detached dwelling house; a new purpose built rehabilitation facility and demolition or alteration of a building [proposed s 7(1)].
7. The Bill provides that the Council must:
 - establish a Community Consultative Forum [proposed s 23(1)];
 - prepare and implement a concept plan for the site in consultation with the Community Consultative Forum [proposed s 19];
 - within 6 months after the commencement of this Bill, assess each building on the site to determine which should be protected from demolition or alteration [proposed s 12(3)];
 - after 2 years, preserve as public open space those parts of the site not being used as a rehabilitation facility or subject of a development consent [proposed s 15(2)]; and
 - acquire land reserved as public open space if requested to by the owner in accordance with the process under the *Land Acquisition (Just Terms Compensation) Act 1991* [proposed s 16(2)].
8. The Bill further provides that the Council must not consent to development of the site unless:
 - it has taken into consideration the concept plan [proposed s 10];

²⁰ The kinds of projects to which Part 3A applies are:

- major infrastructure or other development that, in the opinion of the Minister, is of State or regional environmental planning significance,
- major infrastructure or other development that is an activity for which the proponent is also the determining authority (within the meaning of Part 5) and that, in the opinion of the proponent, would (but for Part 3A) require an environmental impact statement to be obtained under that Part: s 75B of the *Environmental Planning and Assessment Act 1979*.

Royal Rehabilitation Centre Sydney Site Protection Bill 2006

- it is satisfied that the local community has been properly informed of the proposed development and has taken into consideration any objections raised [proposed s 21(1)]; and
- it is satisfied that satisfactory alternative arrangements are made for current users of the site, including the Riding for the Disabled Association (NSW), after the development [proposed s 11].

Issues Considered by the Committee

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

Retrospectivity: cl 5

9. The Bill provides that any declaration under s 75B in relation to the site made before the commencement of the Bill is revoked. Such a revocation could cause losses to persons who have taken action in reliance on any such declaration, or on decisions consequential to the declaration.

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| <p>10. The Committee will always be concerned to identify the retrospective effects of legislation which may impact adversely on any person.</p> <p>11. The Committee notes that legislatively revoking a declaration duly made under the law trespasses upon a person's right to order his or her affairs in accordance with the current law.</p> <p>12. The Committee refers to Parliament the question of whether providing for the revocation of any declaration under s 75B of the Environmental Planning and Assessment Act 1979 in relation to the site unduly trespasses on personal rights and liberties.</p> |
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The Committee makes no further comment on this Bill.

Part Two – Regulations

SECTION A: COPIES OF CORRESPONDENCE ON REGULATIONS

Regulation & Correspondence	Gazette ref
<p>Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005</p> <ul style="list-style-type: none">• Letter dated 12/09/05 from the Committee to the Minister for Planning• Letter dated 23/03/06 from the Minister for Planning to the Committee.	<p>29/07/05 page 4033</p>

1. Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005



PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

12 September 2005

Our Ref: LRC1403

The Hon Frank Sartor MP
Minister for Planning
Level 34, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005

The Committee considered the above Regulation at its meeting of 12 September 2005, pursuant to s 9 of the *Legislation Review Act 1987*. It resolved to write to you regarding the following three matters.

Exceptions from the requirement for land owner consent

Clause 8F of the Regulation prescribes the circumstances in which a land owner's consent is required for an application for approval of a project under Part 3A of the *Environmental Planning and Assessment Act 1979* (the Act), and where it is not required, what public notification requirements must be satisfied.

The Committee seeks your advice as to the rationale for the relatively broad exceptions from the requirement for a land owner's consent.

Time period for public consultation on the environmental impacts of Part 3A projects

Clause 8A(2)(a) of the Regulation defines the "end of the public consultation period" to be the end of the 30 day period referred to in s 75H(3) of the Act. The Committee notes, however, that the Act refers to that 30-day period as a *minimum* period.

The Committee seeks your advice as to whether the Director-General of the Department of Planning retains any discretion to extend the public consultation period beyond 30 days and if not, why not.

Transitional provision permitting previous public consultation processes to be a basis for the wide approval conveyed by Part 3A

The Committee supports the avoidance of unnecessary repetition of the development application process that underpins the transitional provisions in cl 8J of the Regulation.

The Committee notes that approvals under Part 3A are to stand in the place of any approval requirements listed in ss 75U and 75V of the Act. As approval under Part 3A has wider consequences than consent or approval under Part 4 or Division 4 of Part 5 of the Act, there may be issues members of the public may wish to raise under a Part 3A exposure period that they did not raise under a Part 4 or Division 4 of Part 5 exposure period.

Accordingly, the Committee seeks your assurance that the operation of cl 8J will not result in a less comprehensive consultation process for any application than that provided for by Part 3A.

Yours sincerely



Peter Primrose MLC
Chairman



The Hon Frank Sartor MP

Minister for Planning
Minister for Redfern Waterloo
Minister for Science and Medical Research
Minister Assisting the Minister for Health (Cancer)

The Hon Peter Primrose MLC
Parliament of New South Wales
Chairman
Legislation Review Committee
Macquarie Street
Sydney NSW 2000
23 MAR 2006



Dear Mr Primrose

I am writing to thank you for your letter about the *Environmental Planning & Assessment Amendment (Infrastructure & other Planning Reform) Regulation 2005*. I note the Committee's particular concerns and answer them each in turn.

Exception from the requirement for land owners consent.

The provisions for land owners to give consent to a proponent (where they are not the owner of the land to which the application applies) under Part 3A exactly mirror the existing provisions which would apply if the application was dealt with under Part 4 and Part 5 of the Act. To avoid confusion, the existing requirements not to have to obtain landowners consent in the Mining Act and Petroleum (Onshore) Act have been duplicated in these provisions in the EP&A Regulations. These regulations do not represent any change in policy from that previously applying.

Time periods for public consultation

The public consultation period is a minimum of 30 days as set out in s75(3) of the Act. The Department of Planning has a policy that where the public consultation period involves traditional "holiday" periods such as in December, the Director General will extend the exhibition period. In addition, the period may be extended by the Director General in special circumstances including when there is a high level of public interest.

The provisions in the clause 8A of the EP&A Regulations relating to the "public consultation period" are focused not on the length of the period (which is prescribed in s75(3)) but on what needs to be done by the Director General or the proponent before and after that public consultation period. It should be noted that provisions of the Act, places greater importance on the consultation process by

- Ensuring adequate and complete information is exhibited for public information and comment, by requiring a review of the environmental assessment prior to exhibition to ensure adequacy
- Sending the submissions received as a result of the exhibition process to the proponent for comment and if necessary amendment of the project and draft statement of commitments to minimise impacts on the environment.

This places greater importance on community submissions and ensures the issues raised are appropriately considered by both the proponent and the regulatory authorities.

Transitional provisions permitting previous public consultation processes to be a basis for the approval conveyed by Part 3A

The Committee's support for the avoidance of unnecessary repetition of assessment processes is noted. The transitional provisions provide that where the assessment process for projects under Part 4 or Division 4 Part 5 are in progress, there is the potential to accredit the assessment documentation and the exhibition/public consultation process for the purposes of Part 3A.

It should be noted that the projects (previously being assessed under Part 4 which required approvals listed under s75U or 75V), would have been "integrated development" and would have required consultation with the relevant agencies during the assessment and exhibition period. The requirement for these approvals under the other acts would have also been noted in the advertisement and the exhibition documentation. As a result, for previous Part 4 projects, there would be no diminishment of consultation opportunities.

Under the transitional provisions with regard to approvals transferred from Division 4 Part 5 into Part 3A, there is no suspension of the approvals under s75U or integration of approvals under s75V. While there are not equivalent integrated development provisions in Division 4 Part 5, the EIS would have included reference to the relevant legislation that would have applied and would have addressed relevant issues. As a result, the public would have been aware of issues which would have been licensed under the legislation under s75U and the mitigation measures proposed.

It should be noted that with most of the approvals listed in s75U or 75V, there are no exhibition or public consultation requirements prior to issuing a licence under the various Acts. As a result, the consultation process under the Part 3A, Part 4 or Part 5 of the EP&A Act, provides the only opportunity for the community to make comments on a project as a whole or the issues previously addressed by the 'single issues' licences.

As a result, it is considered that there are adequate provisions in clause 8J to ensure that there is appropriate consultation and assessment provisions for major projects being transitioned from the provision assessment process under Part 4 or Part 5 into Part 3A.

Yours sincerely

A handwritten signature in black ink, appearing to read "Frank Sartor". The signature is stylized with a large, sweeping initial "F" and "S".

Frank Sartor

Appendix 1: Index of Bills Reported on in 2006

	Digest Number
Air Transport Amendment Bill 2006	2
Careel Bay Protection Bill 2006*	2
Child Protection (International Measures) Bill 2006	2
Crimes and Courts Legislation Amendment Bill 2005	1
Crimes (Sentencing Procedure) Amendment (Gang Leaders) Bill 2006*	3
Environmental Planning and Assessment Amendment Bill 2006	2
Fines Amendment (Payment of Victims Compensation Levies) Bill 2006	2
Firearms Amendment (Good Behaviour Bonds) Bill 2006*	2
Fisheries Management Amendment Bill 2006	2
Freedom of Information Amendment (Open Government-Disclosure of Contracts) Bill 2005	1
Industrial Relations Amendment Bill 2006	3
James Hardie (Civil Liability) Bill 2005	1
James Hardie (Civil Penalty Compensation Release) Bill 2005	1
James Hardie Former Subsidiaries (Winding up and Administration) Bill 2005	1
Land Tax Management Amendment (Tax Threshold) Bill 2006	2
Law Enforcement (Controlled Operations) Amendment Bill 2006	3
Law Enforcement Legislation Amendment (Public Safety) Bill 2005	1
Motor Accidents Compensation Amendment Bill 2006	3
Motor Accidents (Lifetime Care and Support) Bill 2006	3
National Parks and Wildlife (Adjustment of Areas) Bill 2006	2
Police Amendment (Death and Disability) Bill 2005	1
Protection of the Environment Operations Amendment (Waste Reduction) Bill 2006	3
Public Sector Employment Legislation Amendment Bill 2006	3
Royal Rehabilitation Centre Sydney Site Protection Bill 2006*	3
Workers Compensation Legislation Amendment (Miscellaneous Provisions) Bill 2005	1

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply	Digest 2005	Digest 2006
Commission for Children and Young People Amendment Bill 2005	Minister for Community Services	25/11/05		15	
Companion Animals Amendment Bill 2005	Minister for Local Government	25/11/05	15/12/05		1
Confiscation of Proceeds of Crime Amendment Bill 2005	Attorney General	10/10/05	23/11/05	11	1
Crimes Amendment (Road Accidents) Bill 2005	Attorney General	10/10/05	12/12/05	11	1
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	Attorney General	23/05/05		6	
Smoke-free Environment Amendment Bill 2004	Minister for Health	05/11/05	12/01/06		2
State Revenue Legislation Amendment Bill 2005	Treasurer	20/06/05	03/01/05	8	1
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005	Attorney General	25/11/05		15	
Vocational Education and Training Bill 2005	Minister for Education and Training	04/11/05	28/11/05	13	1
Water Management Amendment Bill 2005	Minister for Natural Resources	25/11/05		15	

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2006

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Careel Bay Protection Bill 2006*	R				
Environmental Planning and Assessment Amendment Bill 2006	R				
Fines Amendment (Payment of Victims Compensation Levies) Bill 2006	N				
Fisheries Management Amendment Bill 2006	R				
Law Enforcement (Controlled Operations) Amendment Bill 2006	R				
Law Enforcement Legislation Amendment (Public Safety) Bill 2005	R				
Motor Accidents (Lifetime Care and Support) Bill 2006	R, C		R, C	R	R
Motor Accidents Compensation Amendment Bill 2006	R, C		R, C		
Royal Rehabilitation Centre Sydney Site Protection Bill 2006*	R				

Key

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

Appendix 4: Index of correspondence on regulations reported on in 2006

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2006
Centennial Park and Moore Park Trust Regulation 2004	Minister for Tourism and Sport and Recreation	29/04/05	19/01/06	1
Companion Animals Amendment (Penalty Notices) Regulation 2005	Minister for Local Government	12/09/05	21/12/05	1
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005	Minister for Planning	12/09/05	24/12/06	3
Hunter Water (General) Regulation 2005	Minister for Utilities	04/11/05	09/01/06	1
Protection of the Environment Operations (Waste) Regulation 2005	Minister for the Environment	04/11/05	29/11/05	1
Stock Diseases (General) Amendment Regulation 2005	Minister for Primary Industries	12/09/05	07/02/06	1
Workers Compensation Amendment (Advertising) Regulation 2005	Minister for Commerce	12/09/05	28/11/05	1