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* Denotes Private Member's Bill

Membership & Staff

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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) makers 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.

Part One – Bills SECTION A: COMMENT ON BILLS

1. CHILD PROTECTION LEGISLATION AMENDMENT BILL 2003

Introduced:	3 September 2003
House:	Legislative Assembly
Minister:	The Hon C Tebbutt MLC
Portfolio:	Community Services

Matters for comment raised by the Bill						
Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny		
\checkmark			\checkmark			

Purpose and Description

- 1. The object of this Bill is to improve the operation of certain child protection legislation under the *Ombudsman Act 1974* and the *Commission for Children and Young People Act 1998*.
- 2. In particular, the Bill clarifies the types of conduct of employees that must be reported and investigated under these Acts for the purposes of child protection, including employment screening of those seeking to work with children. The principal amendment in the Bill creates one definition of such conduct, known as "reportable conduct", to apply under both Acts. This new definition clarifies both the kinds of conduct that must be reported under these Acts and those that are excluded from the reporting requirements. The exclusions relate particularly to teachers.

Background

- 3. In May 2003, the Premier requested the Director-General of The Cabinet Office to conduct a review into the impact of child protection and employment screening legislation on teachers. Teachers and teachers' unions had expressed concern that the current legislation created confusion about what kind of conduct was acceptable in a teaching context. They were concerned that the current legislation undermined teachers' ability to exercise effective classroom management and discipline and develop positive student/teacher relationships necessary for effective teaching.
- 4. The Review made the following findings:
 - The term "child abuse" raises strong emotions in the community, which in turn inhibits the effective implementation of the legislation.
 - The current definition of "child abuse" does not clearly enough describe the type of behaviour that warrants investigation in a child protection context.

Child Protection Legislation Amendment Bill 2003

• The current legislation captures conduct, such as low-level physical contact by teachers. While in some instances this conduct may be inappropriate, it should be dealt with by employers and does not warrant consideration in an employment screening context.

The Bill

- 5. The amendments to the Bill implement these findings. Schedule 1 to the Bill amends the *Ombudsman Act 1974*. Schedule 2 to the Bill amends the *Commission for Children and Young People Act 1998*. The main amendments are as follows:
 - The term "child abuse" is replaced with "reportable conduct".
 - The new definition of "reportable conduct" is more detailed than the old definition of "child abuse". The new definition in both Acts now reads:

"reportable conduct means:

- (a) any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence);
- (b) any assault, ill-treatment or neglect of a child; or
- (c) any behaviour that causes psychological harm to a child; whether or not, in any case, with the consent of the child."
- The definition *explicitly excludes* conduct

"that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards".

- Also excluded is conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25 CA, in the case of the *Ombudsman Act*. In the *Commission for Children and Young People Act*, conduct of a class or kind that is exempted by guidelines made by the Minister under section 35 is also exempted.
- A note giving examples of conduct that would not be *reportable conduct* has been added to both Acts. These examples include:

"touching a child in order to attract a child's attention, to guide a child or to comfort a distressed child; a school teacher raising his or her voice in order to attract attention or to restore order in the classroom; and conduct that is established to be accidental."

• The Bill also makes several consequential amendments to both Acts.

Issues Arising Under s 8A

Clause 2, Commencement

6. The Act is to commence by proclamation.

- 7. The Committee notes that providing that an Act commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all. The Committee recognises that there may be good reasons why such a discretion may be required. It also considers that, in some circumstances, such discretion can give rise to an inappropriate delegation of legislative power.
- 8. Given the findings of the review and the importance of this particular legislation, the Committee has written to the Minister for Community Services seeking her advice as to the likely commencement date of the Act.

Schedule 2, Clause 8 & Schedule 3, Clause 9

Retrospectivity

- 9. These clauses have retrospective application. They provide that the amendments apply to matters arising under the *Ombudsman Act* and the *Commission for Children and Young People Act* before the amendments commence. However, the amendments do not apply to any action already taken by the Ombudsman or Commission, or reported to them by an employer or employee, as the case may be, in relation to matters arising before the amendments commence.
- 10. Although these provisions are retrospective, they do not appear to adversely affect any person. They do not unduly trespass on individual rights and liberties. They merely clarify the type of conduct that must be reported under both Acts.
- 11. Neither the rights of a person subject to an allegation of child abuse nor the protection of children from abuse is compromised by the retrospective application of these amendments.
- 12. Any conduct reported to the Ombudsman, the Commission or another person or agency as required under the existing legislation, is not affected by these amendments.

13. The Committee considers that these retrospective clauses do not unduly trespass on individual rights and liberties.

Commonwealth Powers (De Facto Relationships) Bill 2003

2. COMMONWEALTH POWERS (DE FACTO RELATIONSHIPS) BILL 2003

Introduced:	5 September 2003			
House:	Legislative Assembly			
Minister:	The Hon B Debus MP			
Portfolio:	Attorney General			

Matters for comment raised by the Bill						
Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny		
			\checkmark	\checkmark		

Purpose and Description

- 1. The object of this Bill is to refer certain financial matters arising out of the breakdown of de facto relationships to the Parliament of the Commonwealth in accordance with section 51 (xxxvii) of the Commonwealth Constitution so as to enable the Commonwealth Parliament to make laws about those matters.
- 2. Section 51 (xxxvii) of the Commonwealth Constitution enables the Commonwealth Parliament to make laws in relation to matters referred by the Parliament of any State.

Background

- 3. The Bill implements an agreement by the Standing Committee of Attorneys General for all States, except Western Australia, to refer power on the Commonwealth in relation to property on the breakdown of a de facto relationship. Following an earlier referral of power in relation to children's issues, de facto children's issues are now dealt with by courts exercising jurisdiction under the Commonwealth *Family Law Act* 1975.
- 4. Most significantly, the Bill allows the Commonwealth to legislate so that persons who have been in a de facto relationship are covered by the Commonwealth's superannuation splitting regime, which was introduced in December 2002.

The Bill

- 5. The Bill refers to the Commonwealth Parliament power to legislate regarding:
 - (a) financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of different sexes, and
 - (b) financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of the same sex.
- 6. In his second reading speech, the Minister has explained that the Bill makes separate references to different sex and same sex de facto relationships to ensure the validity of the referral of power should the Commonwealth legislate only in relation to different

sex de facto relationships. The Commonwealth Government has indicated its intention to only legislate in relation to different sex relationships, while the New South Wales *Property (Relationships) Act* provides for both different sex and same sex relationships.

Issues Arising Under s 8A

Clause 2, Commencement

- 7. The Bill is to commence by proclamation. Providing that an Act commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all.
- 8. The Bill aims to give effect to a multi-jurisdiction legislative response requiring coordination with the Commonwealth and other States. In the circumstances, the Committee regards the flexibility in commencement to be an appropriate delegation of legislative power.

Clause 5, Termination of references

- 9. Clause 5 allows the Governor to terminate the reference of legislative power to the Commonwealth by proclamation with 3 months' notice. A proclamation terminating the reference may be revoked up until the day it has effect. There is no provision for review of the Governor's power to terminate the reference.
- 10. The revocation of the reference could render invalid laws that the Commonwealth had previously made under the reference with respect to people in New South Wales. This has the potential to significantly impact on the rights already created as a result of the reference.
- 11. However, while clause 5 provides a significant delegation of legislative power, one direct effect of terminating the reference will be to repatriate to the Parliament of New South Wales the power previously referred. The termination power has the benefit of allowing the New South Wales Government to maintain a reasonable degree of control over the referral of the power thereby permitting it to respond appropriately should the power be exercised contrary to the interests of the people of New South Wales.
- 12. In the circumstances, the Committee considers the Governor's power to revoke the reference of power to the Commonwealth on 3 months' notice to be an appropriate delegation of legislative power.

Crimes Amendment (Protection of Innocent Accused) Bill 2003*

3. CRIMES AMENDMENT (PROTECTION OF INNOCENT ACCUSED) BILL 2003*

Introduced:	4 September 2003
House:	Legislative Council
Member:	The Hon D Oldfield MLC
Portfolio:	Private Member's Bill

Matters for comment raised by the Bill

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
\checkmark				

Purpose and Description

- 1. The object of this Bill is to amend the *Crimes Act 1900*:
- (a) to prohibit the publication of information that would identify, or would be likely to lead to the identification of, a person accused of having committed a crime before that person is convicted, and
- (b) to provide that a court may order the publication of a notice of acquittal of a person in certain cases.

The Bill

- 2. The Bill creates a new offence of publishing information that identifies a person accused of having committed a crime before that person is convicted. It also provides that a court that acquits a person of an offence may order the publication of a notice of acquittal of a person in certain cases. Failure to comply with such an order is also an offence.
- 3. The Bill provides that certain publications which identify an accused person are exempted. These include:
 - (a) publications authorised by the Commissioner for Police for the purpose of apprehending a person accused of committing an offence;
 - (b) an official law report of the criminal proceedings or any official publication made in the course of and for the purpose of the criminal proceedings;
 - (c) the supply of transcripts of the criminal proceedings to persons "with a genuine interest in those proceedings or for genuine research purposes"; and
 - (d) publications made after the person's death.
- 4. Under the Bill, proceedings are to be dealt with summarily by a local court or the Supreme Court in its summary jurisdiction.

Issues Arising Under s 8A

Schedule 1, proposed sub-section 583(2)

5. Proposed subsection 583(2) makes it an offence to publish any matter that accuses a person of having committed an offence, or identifies a person who has been accused of committing an offence, before that person has been convicted of that, or a related, offence. The maximum penalty given for this offence is 200 penalty units (currently \$22,000) and 2 years imprisonment for an individual or 4,000 penalty units (\$440,000) for a corporation.

Openness of criminal proceedings

- 6. Openness is an important element of the criminal justice system to ensure both that justice is done, and that justice is seen to be done. Society's confidence in the criminal justice system and the effectiveness of that system as a deterrent is dependent on justice being administered in public.
- 7. The public's right to be fully informed of judicial proceedings is not absolute and information regarding proceedings is sometimes restricted to protect other important rights and interests. For example, a court may, in certain circumstances, suppress information to protect national security or the identity of a victim of crime, witnesses, or, in the case of minors, the alleged perpetrator.
- 8. This Bill further restricts the public's right to openness of criminal proceedings with a view to protecting accused persons by making it an offence to reveal the identity of an accused person unless they are convicted. Clearly, the impact of this kind of public exposure on people's personal and professional lives can be devastating and may be seen to undermine the fairness of their trial. Where issues of fairness are raised by the accused's counsel, the court will make appropriate directions to the jury and, in some cases, change the trial venue.
- 9. In creating this new offence, the Bill diminishes the public's ability to be informed of the apprehension of suspects and any subsequent proceedings. The public has a genuine interest in knowing that those who allegedly endanger the community have been apprehended and that they will face a fair trial. They have an interest in knowing the identity of the accused in many, if not all, cases. This interest may relate to public safety and confidence in law enforcement and the legal system itself.
- 10. Proposed subsection 583(2)(ii) of the Bill makes it an offence to publish matter that is likely to lead to the identification of the accused. In circumstances where the alleged facts of the offence are likely to indicate the identity of the accused, it could become an offence to merely publish the nature of the matter being proceeded with. This could greatly restrict the public's ability to know whether or how a matter was being dealt with, particularly in cases of general public notoriety.

Right to free speech

11. This Bill clearly trespasses on the right to free speech. However, while the right to free speech may be considered essential for a democratic society, it is not absolute and it has long been accepted that, in certain circumstances, freedom of speech needs to be limited to protect the reputation of individuals.

Crimes Amendment (Protection of Innocent Accused) Bill 2003*

12. The Committee refers to Parliament the question whether it is appropriate to restrict the right to free speech in the circumstances set out in the Bill.

Right to fair trial and defend reputation

- 13. Proposed sub-section 583(2) also appears to make it an offence for the accused to publish his or her own identity as an accused person. This would appear to restrict an accused persons' ability to use any kind of publicity in aid of their defence, whether in order to seek information or for other means. This also appears anomalous given that the intention of the Bill is to protect, rather than control, the accused person.
- 14. The Committee notes that in attempting to protect the reputation of innocent accused persons, the Bill further restricts the public's right to be informed regarding criminal proceedings and the right of free speech. In cases of public notoriety, this restriction could substantially restrict publication regarding the details of proceedings or even the fact that such proceedings were occurring.
- 15. The Committee refers to Parliament the question of whether this diminution of the openness of the criminal justice system and the right to free speech is an undue trespass on personal rights.
- 16. The Committee also notes that the Bill appears to make it an offence for an accused person to publish their own identity as an accused person. As the object of the Bill is to protect such persons, the Committee considers this to be an undue trespass on personal rights.

Clause 583(4)

Strict Liability

- 17. Proposed section 583(4) of the Bill provides that the offence of publishing or broadcasting the name of an accused person is a *strict liability offence*. Strict liability offences remove the requirement that the prosecution prove that the accused had the requisite intention to commit the crime (*mens rea*). The only defence to an offence of strict liability is reasonable and honest mistake of fact.
- 18. Strict liability is seen as appropriate for some offences mainly offences of a regulatory nature (eg, driving a car without a current registration).
- 19. However, strict liability may not be appropriate in the case of offences with heavy penalties, such as the penalties set out in this Bill (\$22,000 or up to 2 years' imprisonment or both for individuals and \$440,000 for corporations).
- 20. The Committee considers that, except in extraordinary circumstances, it is inappropriate for an offence with such heavy penalties to be an offence of strict liability.
- 21. The Committee refers to Parliament the question as to whether the classification of the offences set out in the Bill as strict liability offences amounts to an undue trespass on individual rights.

Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2003

4. DRUG SUMMIT LEGISLATIVE RESPONSE AMENDMENT (TRIAL PERIOD EXTENSION) BILL 2003

Introduced:	5 September 2003
House:	Legislative Assembly
Minister:	The Hon J Della Bosca MLC
Portfolio:	Special Minister of State

Matters for comment	raised	by the Bill	
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Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
\checkmark		\checkmark		

Purpose and Description

- 1. The object of the Bill is to amend Part 2A of the *Drug Misuse and Trafficking Act 1985* (DMTA) to extend the trial period of the Medically Supervised Injecting Centre (MSIC) so that it will finish on 31 October 2007.
- 2. Other amendments in the Bill aim to ensure that a review of the operations of the centre is completed by May 2007. All other aspects of the current licence, the terms and conditions for operating the centre and the trial remain unchanged under the Bill.

Background

- 3. Part 2A of the DMTA currently permits the operation and use, under licence to Uniting Care, of the MSIC in Kings Cross. It restricts the period during which such a licence can have effect to a trial period from 1 May 2001 to 31 October 2003.
- 4. The MSIC was established as a result of recommendations from the 1999 NSW Drug Summit. The Final Report of the independent MSIC Evaluation Committee, released on 9 July 2003, made an assessment of the outcomes of the MSIC since its inception.
- 5. The Evaluation Committee found that the evidence indicated that:
 - Operation of the MSIC in the Kings cross area is feasible;
 - The MSIC made service contact with its target population, including many who had no prior treatment for drug dependence;
 - There was no detectable changes in heroin overdoses at the community level;
 - A small number of opiod doses managed at the MSIC may have been fatal had they occurred elsewhere;
 - The MSIC made referrals for drug treatment, especially among frequent attenders;
 - There was no increase in blood borne virus transmission;
 - There was no overall loss of public amenity;
 - There was no increase in crime;
 - The majority of the community accepted the initiative; and

Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2003

• The MSIC has afforded an opportunity to increase knowledge that can guide public health responses to drug injecting and its harms.¹

During the extended period, the trial will continue to be assessed by the MSIC Evaluation Committee and the NSW Expert Advisory Group on Drugs.

6. The Committee notes that other assessments have been undertaken.

Issues arising under s 8A

Schedule 1 [6]

Unduly trespasses on personal rights

- 7. Schedule 1 [6] of the Bill amends s 36T(1) of the DMTA to provide that:
 - (1) The licence in force immediately before the date of assent to the *Drug Summit Legislative Response Amendment (Trial Period Extension) Act 2002*:
 - (a) is, by operation of this section, extended for the whole of the trial period despite any of its provisions to the contrary, and
 - (b) may not be challenged or called into question in proceedings before any court or tribunal as a consequence of its having been so extended.
- 8. The effect of the amendment of s 36T of the DMTA is to create an "ouster clause", which excludes from judicial review the extension of the MSIC trial. Any decision as to whether an ouster clause is justified requires a balancing of the legislative and policy objectives against the infringement of individual rights that the exclusion of judicial review entails.
- 9. Judicial review of administrative decisions is a basic means of keeping in balance the various arms of government. In considering provisions of the *Keno Bill 1996* that prohibited judicial review of the granting of a licence by the Minister, the Queensland Scrutiny of Legislation Committee noted the following in respect of ouster clauses:

In general the Committee's views on access to judicial review is that its purpose is to deal with actions of public officials who act beyond the powers intended for them. Judicial review therefore protects the legislative intention approved by Parliament and proposed by the Executive. As such, ouster clauses should rarely be contemplated and even more rarely implemented.

10. In the Bill's Second Reading speech, it was stated that the Government considers s 36T(1)(b) necessary to "minimise disruption to the [MSIC's] operations by vexatious litigants". In support of this, it was stated that "[t]he legality of the centre has, in any event, been well tested by the courts." This appears to refer to the NSW Supreme Court decision in which Justice Sully upheld the validity of the original grant of the

¹ MSIC Evaluation Committee, *Final Report of the Evaluation of the Sydney Medically Supervised Injecting Centre*, Sydney, July 2003 at xvi.

licence to conduct the MSIC made by the Commissioner of Police and the Director-General of the Department of Health under s 36E of the DMTA.²

- 11. The High Court has held that it will not recognise ouster clauses where they "protect manifest jurisdictional errors or ultra vires acts".³ However, it will usually respect a legislative intention that it should not review a particular class of decisions where that intention is expressed sufficiently clearly.⁴ In this instance, s 36T(1)(b) clearly expresses the legislature's intention.
- 12. The Committee notes the importance of judicial review for protecting individuals' rights against oppressive administrative action and upholding the rule of law. It further notes that the Bill limits judicial review in order to prevent vexatious litigation.
- 13. Having regard to the fact that section 36T(1)(b) clearly expresses the intention of the section, the High Court dictum, the decision of Justice Sully and the findings of the Evaluation, the Committee is of the opinion that the limitation of judicial review does not, in the circumstances, unduly trespasses on personal rights.

² Kings Cross Chamber of Commerce and Tourism Inc v The Uniting Church of Australia Property Trust (NSW) & Ors [2001] NSWSC 245 (5 April 2001).

³ Mason J in *The Church of Scientology v. Woodward* (1984) 154 CLR 25 at 55 – 56.

⁴ Darling Casino Ltd v NSW Casino Control Authority (1997) 143 ALR 55.

Education Amendment (Computing Skills) Bill 2003

5. EDUCATION AMENDMENT (COMPUTING SKILLS) BILL 2003

Matters for	comment	raised	by	the	Bill
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Introduced:	5 September 2003
House:	Legislative Assembly
Minister:	The Hon. A Refshauge MP
Portfolio:	Education

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny

Purpose and Description

- 1. The object of this Bill is to amend the *Education Act 1990* to require candidates for the School Certificate to be tested on a state-wide basis on computer skills. This will be in addition to the already compulsory examinations in English literacy, mathematics, science and Australian history, geography, civics and citizenship.
- 2. The requirements will be phased in to take effect on 1 January 2006 or, if before that date the Minister for Education and Training after consultation with the Board of Studies determines a later date, on that later date.

Issues Arising Under s 8A

Clause 2, Commencement

3. The Committee notes that the Act commences on assent.

Local Government Amendment (No Forced Amalgamations) Bill 2003*

6. LOCAL GOVERNMENT AMENDMENT (NO FORCED AMALGAMATIONS) BILL 2003*

Introduced:	4 September 2003
House:	Legislative Assembly
Member:	Mr A Fraser MP
Portfolio:	Private Member's Bill

Matters for comment raised by the Bill					
Trespasses unduly on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny	

Purpose and Description

1. The object of this Bill is to require the Local Government Boundaries Commission to poll the residents and ratepayers affected by a proposed amalgamation of two or more local government areas, or by a substantial change to the boundaries of a local government area, so as to ascertain their attitude to the proposal.

Issues Arising Under s 8A

2. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1987*.

Powers of Attorney Bill 2003

7. POWERS OF ATTORNEY BILL 2003

Introduced:	5 September 2003
House:	Legislative Assembly
Minister:	The Hon B Debus MP
Portfolio:	Attorney General

Ma	Matters for comment raised by the Bill					
Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny		
\checkmark			\checkmark			

Purpose and Description

1. The object of this Bill is to re-enact the provisions of Part 16 of the *Conveyancing Act 1919* relating to powers of attorney, with some modifications as outlined below.

Background

2. The Second Reading Speech states that the changes made in this Bill are aimed at remedying certain problems that have arisen in practice. These problems included uncertainty as to the scope of an attorney's role under a power of attorney and the complex requirements for executing a protected power of attorney (*now called an enduring power of attorney*). These and other problems were identified in the course of a lengthy consultation process that began in 1999. Consultations were held with a wide range of groups, including The Law Society, the Committee on the Ageing, the Public Trustee, a number of Commonwealth and State Departments and some individual solicitors.

The Bill

- 3. The Bill aims to:
 - a) simplify the process for making certain types of powers of attorney,
 - b) clarify what an attorney can and cannot do in several common situations that have sometimes caused confusion in practice,
 - c) strengthen protection for certain classes of people affected by execution of powers of attorney and
 - d) recognise powers of attorney lawfully made elsewhere in Australia.
- 4. Among other things, the Bill:
 - Clarifies the extent to which an attorney can take a benefit or confer a gift;
 - Renames a "protected power of attorney", executed in case of the mental incapacity of the principal, to "enduring power of attorney". This terminology change brings the legislation into line with other jurisdictions;
 - Provides that an enduring power of attorney is only valid if its execution is witnessed, the appointed attorney accepts the appointment by signature and it is accompanied by a certificate by the witness stating that the witness explained the effect of the instrument to the principal (i.e. the person who makes a power

Powers of Attorney Bill 2003

of attorney) and the principal appeared to understand the effect of the power of attorney before it was signed.

- Witnesses are prescribed in the Bill and must be either a qualified legal practitioner, a registrar of a Local Court or another person prescribed in subclause 19(2) and who has completed a relevant course of study;
- Protects the interests of a beneficiary under the will of a principal where the attorney, before the principal's death, disposed of the gift conferred on the beneficiary under that will;
- Expands the jurisdiction of the Supreme Court and the Guardianship Tribunal to deal with enduring powers of attorney and issues of incapacity affecting a power of attorney; and
- Extends the concept of "incommunicate" principals to include those that cannot be located or contacted. Currently the term refers to a principal who suffers from some incapacity that makes them unable to understand communications about, or express their wishes relating to, their affairs.

Issues arising under s 8A

Clause 2, Commencement

- 5. The Act is to commence by proclamation.
- 6. The Committee notes that providing that an Act commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all. The Committee recognises that there may be good reasons why such a discretion may be required. It also considers that, in some circumstances, such discretion can give rise to an inappropriate delegation of legislative power.
- 7. In this case, the Second Reading Speech states that commencement of this Bill by proclamation is necessary to allow time to educate the public and the legal profession about the changes introduced by the Bill.
- 8. The Committee considers education of the public and the legal profession about this Bill to be a necessary and sufficient reason to defer commencement of the Bill. However, the time required to prepare and deliver an education campaign of this nature would be finite and it is not apparent to the Committee why the discretion to commence this Bill should be indefinite.
- 9. The Committee has written to the Minister seeking advice as to some time frame within which the Act will commence after assent, allowing for an appropriate education campaign to be conducted.

Powers of Attorney Bill 2003

Clause 25, Recognition of enduring powers of attorney made in other States and Territories Part 5, Review of powers of Attorney Division 3 of Part 6, Registration of powers of attorney

Retrospectivity

- 10. Clause 6 provides that, as a general rule, the provisions of the Bill will apply only to powers of attorney created by an instrument executed on or after the commencement of the Act.
- 11. There are three exceptions to this general rule.
 - Clause 25 enables powers of attorney validly made in other States and Territories before the commencement of the clause to be recognised in New South Wales.
 - Part 5 of the Bill extends the new powers of the Supreme Court and the Guardianship Tribunal to review of powers of attorney made before commencement.
 - Division 3 of Part 6 allows for powers of attorney made before commencement to be registered by the Registrar-General in the General Register of Deeds kept under the *Conveyancing Act 1919*.
- 12. Although these provisions have retrospective application, they are beneficial and may even cause hardship if they were not to apply retrospectively.
- 13. The Committee considers that the retrospective application of these provisions does not have any adverse impact and may confer important benefits on principals, attorneys, third parties and others affected by a power of attorney.
- 14. In the circumstances, these provisions do not unduly trespass on personal rights and liberties.

Quarantine Station Preservation Trust Bill 2003*

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8. QUARANTINE STATION PRESERVATION TRUST BILL 2003*

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Introduced:	4 September 2003
House:	Legislative Assembly
Member:	Mr M Richardson MP
Portfolio:	Private Members Bill

_	Matters for comment raised by the Bill					
	Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny	
		\checkmark				

Purpose and Description

- 1. The object of the Bill is to establish a new Trust, to be known as the Quarantine Station Preservation Trust ("the Trust").
- 2. The role of the Trust is to advise the Minister on the care, control and management of the Quarantine Station, and to approve leases or licences relating to the Quarantine Station site.

Background

3. The Bill is in response to the Government's plans to lease the Manly Quarantine Station to a single leaseholder for a period of 21 years.

Issues Arising Under s 8A

Clause 10, Grant of leases and licences must have prior approval of Trust Clause 11, Trust must not give approval unless it considers certain factors

- 4. The Bill restricts the Minister's ability to grant leases or licences under the *National Parks and Wildlife Act 1974* in respect of land within the Quarantine Station site.
- 5. Under the Bill, the Minister must not exercise any power to grant a lease or licence unless:
 - the Minister has received the prior written approval of the Trust (cl 10); and
 - the Trust has given its approval in accordance with the requirements of cl 11. This requires, *among other things*, that the Trust have regard to:
 - (a) any written comments received by the Minister in response to the Minister's notice that were forwarded to the Trust, and
 - (b) any written comments received directly by the Trust in response to the Minister's notice, and
 - (c) the impact of the proposal on open space at the Quarantine Station site, the floor area of buildings on the site and the significant heritage fabric of the Quarantine Station site.
- 6. Any lease or licence that is purportedly granted by the Minister, without complying with these requirements, is void. Consequently, any lessee's or licensee's rights are

Quarantine Station Preservation Trust Bill 2003*

dependent on both the Minister receiving written approval from the Trust, and the Trust's compliance with cl 11. A lessee or licensee would therefore need to make certain that these conditions had been met prior to entering into the lease or taking up the licence.

- 7. Assurance from the Minister that the Trust had given written approval would be relatively straightforward to obtain. However, the Bill provides no means of obtaining assurance that the Trust has had regard to the factors required by cl 11 when granting the approval. It appears open for any person with standing to bring an action challenging an approval granted by the Trust, and, if successful, have the lease declared void.
- 8. A prospective lessee or licensee would therefore need to investigate the adequacy of any approval given by the Trust in order to gain assurance that a lease or licence was validly granted by the Minister. As the Bill stands, even such an investigation would not necessarily put the validity of a lease beyond doubt.
- 9. Clause 11(3) creates uncertainty regarding whether any lease or licence the Minister purports to issue under the Bill is valid. The Committee considers that this makes the rights of a lessee or licensee under the Bill unduly dependent upon insufficiently defined administrative powers.

Sporting Venues (Pitch Invasion) Bill 2003

9. SPORTING VENUES (PITCH INVASION) BILL 2003

Introduced:	4 September 2003
House:	Legislative Assembly
Member:	The Hon J Watkins MP
Portfolio:	Police

Ma	Matters for comment raised by the Bill					
Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny		
\checkmark						

Purpose and Description of Bill

1. The object of the Bill is to prohibit unauthorised entry to the playing fields of certain sporting venues. The maximum penalty for the offence is 50 penalty units (currently \$5,500). A penalty notice may be issued in respect of the offence. Upon removal from the venue for a contravention, a person is banned from the venue for 12 months. A person removed from a venue for committing a further contravention at the venue or entering the venue while banned is banned for life from the venue. A person banned during a Rugby World Cup match is banned from all Rugby World Cup matches in the State.

Background

2. The Bill was introduced on 4 September 2003. The Legislative Assembly agreed that the Bill be dealt with urgently, and passed the Bill on 5 September 2003.

3. The Bill introduces equivalent penalties for pitch invasion at all of the NSW Rugby World Cup venues, thereby expanding to Central Coast Express Advocate Stadium in Gosford and WIN Stadium in Wollongong the same penalties as are applicable at Aussie Stadium and Telstra Stadium. The last-named venues are already regulated by the Sydney Cricket Ground and Sydney Football Stadium By-law 1999 and the Sydney Olympic Park Regulation 2001 respectively.

The Bill

- 4. Clause 4 of the Bill provides that any person who enters onto the playing field of a Rugby World Cup venue during an authorised match is guilt of an offence, and liable to a fine of \$5,500 and a 12-month ban from that, and all other, Rugby World Cup venues. The exceptions are in the case of a person who is:
 - a participant; or
 - is engaged in the control or management of the match; or
 - is an authorised officer; or
 - has been authorised to enter the playing field.
- 5. A person removed from a venue for committing a further contravention at the venue or entering the venue while banned will be banned for life from that venue.

Sporting Venues (Pitch Invasion) Bill 2003

Issues arising under s 8A

Clause 4, Pitch invasions prohibited

- 6. The prohibition of pitch invasion in clause 4 is an offence of strict liability in that the prosecution does not have to prove any criminal intent.
- 7. Strict liability is seen as appropriate for some offences, for example in relation to offences of a regulatory nature, particularly offences designed to discourage careless non-compliance with a statute, or offences dealt with under an infringement notice scheme.
- 8. Entry on the playing field is prohibited at any "match", which is defined in cl 3 as including any performance or formalities held, or conducted in conjunction with, the match, but does not include a training session or rehearsal. "Playing field" includes any area between the playing field and any structure intended to be a barrier between competitors competing on the competition area and spectators.
- 9. The Committee notes that there may be circumstances in which a person (other than those authorised by cl 4) enters the playing field consequent upon events beyond his or her control, eg, to escape a crowd surge or to flee from a fight. Such a person would not have available to them a defence of *reasonable excuse* under the current Bill.
- 10. The Committee considers that strict liability to generally be appropriate for this particular offence.
- 11. The Committee refers to Parliament the question as to whether the absence of any defence of reasonable excuse unduly trespasses on personal rights.

Clause 10 Requirement to state name and address

- 12. Clause 10 of the Bill provides that an authorised officer at a sporting venue who suspects on reasonable grounds that a person at the venue has committed, or has been involved in the commission of, a contravention of a provision of the Bill at the venue may require the person to state his or her full name and residential address. The failure to do so without reasonable excuse, or the supply of false details, is an offence with a maximum penalty of \$2,200.
- 13. Clause 10(3) provides that a person is not guilty of an offence against cl 10 unless it is established that the authorised officer warned the person that the failure to comply with the requirement is an offence.

14. Having regard to the objects of the Bill and the authorised officer's obligation to give a warning, the Committee considers that the requirement to provide personal details does not unduly trespass on personal rights.

Clause 11 Taking photographs of certain persons

15. Clause 11 of the Bill provides that an authorised officer at a sporting venue who suspects on reasonable grounds that a person at the venue has committed, or has

been involved in the commission of, a contravention of a provision of the Bill at the venue may take a photograph or make another form of image of the person.

- 16. There is no provision in the Bill for notification to persons in attendance at the venue generally that they may be photographed. The Bill also contains no provision for informing a person individually that they have been photographed in relation to a specific contravention of the provisions of the Bill. Arguably, this lack of notification means that cl 11 currently provides for a form of surveillance of persons in attendance at Rugby World Cup matches, and may be regarded as a breach of the right to privacy.
- 17. In its 2001 Report, *Surveillance: an interim report*, the NSW Law Reform Commission ("the Commission") distinguished between "covert" and "overt" surveillance. The Commission considered overt surveillance to be where adequate prior notice of the nature of the surveillance is given.⁵ This notice consists of the person or agency conducting surveillance providing:
 - Clearly visible signs which are able to be understood by everyone (including, for example, people from non-English speaking backgrounds and people with a disability); or
 - Other warnings of the type of surveillance occurring, such as audio announcements or written notification (where practicable); and
 - Clearly visible and recognisable surveillance equipment which indicates the type of surveillance that is occurring, eg audio, visual or both, etc.⁶
- 18. Provided these measures are taken, the Commission considered that the requirements of notice would be fulfilled, even if the subjects of the surveillance did not in fact read the signs or observe the equipment.⁷
- 19. With respect to the Bill, cl 11 would infringe less on the privacy rights of spectators at Rugby World Cup matches if notice were given, whether by writing or announcement, that persons whom authorised officers reasonably believed had been involved in the contravention of a provision of the Bill at the venue might be photographed.
- 20. The Committee refers to Parliament the question of whether the Bill's failure to require notice of the possibility that persons attending Rugby World Cup match venues might be photographed, either generally or in relation to a suspected or alleged breach of the Act, unduly trespasses on personal rights.

⁵ NSW Law Reform Commission, *Surveillance: an interim report* (Sydney:2001) at paragraph 2.78.

⁶ NSW Law Reform Commission, *Surveillance: an interim report* (Sydney:2001) at paragraph 2.78.

⁷ NSW Law Reform Commission, *Surveillance: an interim report* (Sydney:2001) at paragraph 2.79.

Part Two – Regulations

SECTION A: REGULATIONS ABOUT WHICH THE COMMITTEE IS SEEKING FURTHER INFORMATION

Regulation	Gazette reference		Information
	Date	Page	sought
Aboriginal Land Rights Amendment (Rate Exemptions) Regulation 2003	04/07/03	6805	20/08/03
Children and Young Persons (Savings and Transitional) Amendment (Out-of-Home Care) Regulation 2003 and Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003	11/07/03	7021 7054	20/08/03
Inclosed Lands Protection Regulation 2002	06/12/02	10370	29/05/03
Rail Safety (General) Regulation 2003	07/02/03	800	26/06/03

Appendix 1: Index of Bills Reported on in 2003

	Digest Number
Child Protection Legislation Amendment Bill 2003	2
Commonwealth Powers (De Facto Relationships) Bill 2003	2
Crimes Amendment (Protection of Innocent Accused) Bill 2003	2
Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003	1
Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2003	2
Education Amendment (Computing Skills) Bill 2003	2
Local Government Amendment (No Forced Amalgamations) Bill 2003	2
Powers of Attorney Bill 2003	2
Quarantine Station Preservation Trust Bill 2003	2
Sporting Venues (Pitch Invasion) Bill 2003	2

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply	Digests
Child Protection Legislation Amendment Bill 2003	Minister for Community Services	12/09/03		2
Powers of Attorney Bill 2003	Attorney General	12/09/03		2

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2003

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Child Protection Legislation Amendment Bill 2003	N			С	
Commonwealth Powers (De Facto Relationships) Bill 2003				N	
Crimes Amendment (Protection of Innocent Accused) Bill 2003	R				
Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003	N				
Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2003	N		N		
Powers of Attorney Bill 2003	N			С	
Quarantine Station Preservation Trust Bill 2003		R			
Sporting Venues (Pitch Invasion) Bill 2003	R				

Key

- R Issue referred to or brought to the attention of Parliament
- C Correspondence with Minister/Member
- N Issue noted