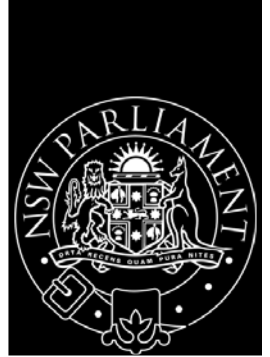

PARLIAMENT OF NEW SOUTH WALES

Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 15 of 2005

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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. Commission for Children and Young People Amendment Bill 2005

Reversal of onus/procedural fairness: proposed s 33J

13. The Committee notes that the provisions of proposed s 33J place a considerable onus on a prohibited person, by requiring that person to prove that he or she does not constitute a risk to children.

14. The Committee notes that proposed s 33J is a key recommendation of the *Review of the Commission for Children and Young People Act 1998 and the Child Protection (Prohibited Employment) Act 1998*, and that its terms effectively codify the existing jurisprudence in this area of the law.

15. Having regard to the aims of the Bill, the recommendations of the Review, the matters which the Commission or a relevant tribunal may take into account pursuant to s 33J(3), the continuing right to a hearing, the narrow judicial definition of risk, and the public interest in ensuring the safety of children, the Committee does not consider that this reverse onus unduly trespasses upon the rights and liberties of a prohibited person.

Reversal of onus: proposed s 41

22. The Committee considers that a *legal burden* of proof should not be placed on a defendant without special justification.

23. The Committee notes that proposed new s 41 places a legal burden on a defendant to prove any reasonable excuse.

24. The Committee has written to the Minister to seek her advice as to the need to place a legal rather than an evidential burden of proof on defendants.

25. The Committee refers to Parliament the question of whether placing a legal burden of proof on a defendant regarding whether he or she has a reasonable excuse for failing to comply with s 41, which carries a maximum penalty of $5,500, 6 months' imprisonment, or both, is an undue trespass on the rights and liberties of employers.

Removal of appeal rights: proposed s 33G

29. The Committee notes that a prohibited person found guilty of an offence prescribed by proposed s 33G(1) has no right to make a review application, subject to the exceptions set out in proposed s 33G(2).

30. However, having regard to the seriousness of the crimes referred to in proposed s 33G(1) and the paramountcy of the safety of children, the Committee does not consider that this refusal of review rights constitutes an undue trespass on the rights and liberties of persons who are prohibited under the Act.

2. Companion Animals Amendment Bill 2005

Penalty for strict liability offence: Schedule 1 [32], [33], [74] & [85]

11. However, the Committee notes the importance of placing a positive duty on the owners of dangerous and restricted dogs to ensure they do not pose a risk to the public.

12. The Committee also notes that fault liability is one of the most fundamental protections of the criminal law and is concerned that severe penalties are to be imposed in the absence of fault.

13. The Committee has written to the Minister for advice as to the need to impose high monetary penalties and, in the case of s 16(1A) a term of imprisonment, for strict liability offences rather than only imposing severe penalties for offences where intention, recklessness or criminal negligence are involved.

3. Criminal Procedure Amendment (Sexual Offence Case Management) Bill 2005

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

4. Industrial Relations Amendment Bill 2005

Retrospectivity: Schedule 1[7] & [8]

14. The Committee will always be concerned with retrospective legislation that adversely impacts on any person. The Committee notes that these amendments may have an adverse impact on some people (eg, employers).

15. The Committee also notes the public interests in enabling the Commission to consider all relevant agreements when determining if a work contract is unfair and in ensuring that disputes between employers and employees are resolved quickly and cheaply.

16. The Committee also notes the exclusion of proceedings pending in a higher court from the application of these amendments.

17. For these reasons, the Committee is of the view that the retrospective application of the amendments to sections 106 and 179 in Schedule 1[7] and [8] respectively, does not unduly trespass on personal rights or liberties.

Appeal/Review Rights: Schedule 1[5]

20. The Committee will always be concerned to identify where a Bill purports to remove or restrict appeal rights.

21. However, in this case, the Committee notes that the restriction applies to allow the Commission to complete its proceedings and does not exclude appeal to the Court of Appeal on jurisdictional questions or an appeal to the Full Bench of the Commission.

22.	The Committee is of the view that Schedule 1[5] does not unduly trespass on the personal right of a person to appeal.

5. Mine Safety (Cost Recovery) Bill 2005

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

6. Parliamentary Superannuation Legislation Amendment Bill 2005

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

7. State Revenue Legislation Further Amendment Bill 2005

Retrospectivity: proposed cl 2(2)

7. The Committee will always be concerned to identify the retrospective application of laws that adversely impact on any person.

8. The Committee notes that allowing a period of time between the introduction of a Bill with provisions preventing duty avoidance and the commencement of those provisions may undermine the intent of those provisions and have other adverse consequences.

9. The Committee therefore considers that commencing schedule 1[10]-[14] on the date the Bill was introduced into Parliament does not unduly trespass on personal rights and liberties.

8. Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005

Right to Liberty; Arbitrary Arrest and Detention: Proposed sections 26D & 26V

23. The Committee is of the view that the right to liberty and the freedom from arbitrary detention are fundamental human rights and as such should not be derogated from except in extraordinary circumstances warranted by compelling public interest considerations and only to the extent necessary to meet those public interest objectives.

24. The Committee is also of the view that where legislation provides for derogation from these rights, it should also provide safeguards to minimise the trespass on those rights. The Committee notes that judicial oversight of the PDO regime in this Bill is an important safeguard.

25. The Committee has written to the Attorney General for advice in relation to the following matters:

- why the threshold for granting an interim and final PDO is “reasonable suspicion” and not “reasonable belief”;

- why the Bill does not prescribe a maximum number of orders that can be made in relation to the same person in order to prevent their being detained for an indefinite period under a PDO or an IPDO; and

- the justification for setting 14 days, rather than a lesser period, as the maximum period a person may be detained under a PDO.

26. The Committee refers to Parliament the question as to whether the PDO regime unduly trespasses on the fundamental right of a person not to be detained arbitrarily.

Prohibited contact orders: Proposed section 26N

31. The Committee notes that prohibited contact orders impose significant restraints on a person's enjoyment of their fundamental rights.

32. The Committee notes that the Bill provides that the detained person may ask the Court to revoke a prohibited contact order. However, the Committee also notes that the person may not be able to enforce that right as the Bill does not require them to be notified either of the making of the order or its contents, but expressly provides that they do not need to be so informed when they are arrested under the PDO to which the prohibited contact order relates.

33. The Committee has written to the Attorney General for advice as to why a detained person need not be informed of a prohibited contact order.

34. The Committee refers to Parliament the question of whether the prohibited contact order regime unduly trespasses on personal rights and liberties.

Fair Trial: Proposed sections 26G, 26H, 26I, 26M & 26N

39. The Committee notes that a lack of a hearing process before a court for authorising any form of preventative detention significantly aggravates the trespass on the right to freedom from arbitrary detention and the right to a fair trial.

40. To provide greater protection against a possible trespass on rights caused by the lack of a hearing, the Committee is of the view that the Bill should expressly provide that the Supreme Court must be satisfied that there are urgent circumstances warranting the granting of an interim preventative detention order before it makes such an order.

41. The Committee has written to the Attorney General for advice as to why the Bill does not so expressly provide.

42. The Committee refers to the Parliament the question as to whether the lack of a hearing of an application for an interim PDO is an undue trespass on personal rights and liberties.

46. The Committee is of the view that, for hearings to comply with the right to a fair trial, the Bill should provide that the burden of proof lies on the applicant who, consistent with the serious consequences for the subject of a PDO, must meet the higher criminal standard of "beyond reasonable doubt".

47. The Committee has written to the Attorney General for advice as to why the Bill does not so provide.

Self-Incrimination and the Right to Silence: Proposed section 26ZK

56. The Committee notes that the privilege against self-incrimination is an important rule of law principle and a fundamental human right.

57. The Committee also notes that the Bill does not protect this right against certain significant intrusions.

58. The Committee has written to the Attorney General for advice as to why, consistent with the preventative purposes of the Bill, the Bill does not protect this right by:

(a) providing that any statements made by the detainee during preventative detention are inadmissible in subsequent proceedings; or

(b) requiring the detaining officer to caution a detainee that anything they do say may be used against them in legal proceedings; and

(c) expressly excluding questioning by non-police officers.

59. The Committee refers to Parliament the question as to whether the failure of the Bill to so provide unduly trespasses on a person's fundamental right to silence.

Rights to legal representation & to have a lawyer of one's own choosing: Proposed section 26ZG

73. The Committee notes that the right to have legal counsel of one's own choosing is an important attribute of the right to a fair trial and a fundamental human right recognised under international law and the common law.

74. The Committee also notes that the Bill provides for a person detained under a PDO to have legal representation and to choose his or her own lawyer, subject to some significant restrictions, namely:

(a) a detained person's entitlement to seek legal advice is limited to seeking advice, and arranging legal representation, in relation to challenging the legality of the preventative detention order or their treatment under that order;

(b) the detained person's choice of lawyer may be circumscribed by a prohibited contact order; and

(c) all communications between the detained person and their lawyer must be monitored, thereby undermining the right to legal representation.

75. The Committee has written to the Attorney General for advice as to the need to so limit the matters a detained person can discuss with his or her lawyer and the low threshold in the test for a prohibited contact order in relation to a person's lawyer.

76. The Committee refers to Parliament the question as to whether proposed section 26Z unduly trespasses on the fundamental right of a detained person to have legal counsel of his or her own choosing.

Legal Professional Privilege: Proposed sections 26ZI and 26ZQ

86. The Committee notes legal professional privilege is a common law right in Australia that has been acknowledged by the High Court to be a fundamental human right.

87. The Committee also notes that the rationale behind the breadth of protection under the common law is not solely the importance of privacy of communications, but relates more fundamentally to the proper administration of justice.

88. The Committee is of the view that the Bill significantly trespasses on this right by prohibiting contact with a lawyer unless the content and meaning of the communications between the detained person and their lawyer can be effectively monitored.

89. The Committee is also of the view that this requirement substantially diminishes the enjoyment by the detained person of their fundamental right to legal representation.

90. The Committee has written to the Attorney General for advice as to the need to monitor such communications in the manner prescribed by the Bill rather than in a manner that would better protect fundamental rights, such as that used in relation to material seized under search warrant.

91. The Committee refers to Parliament the question as to whether proposed section 26ZI requiring monitoring by the police of all communication between a detained person and their lawyer unduly trespasses on the person’s right to legal counsel and legal professional privilege.

Strict Liability: Proposed sections 26T, 26ZC, 26Y, 26Z, 26ZI, 26ZK, 26ZL & 26ZM

98. The Committee has written to the Attorney General for advice as to why proposed section 26ZC does not expressly state the fault element for the offence under that section, especially given that it provides for a term of imprisonment upon conviction.

99. The Committee refers to Parliament the question as to whether proposed section 26ZC unduly trespasses on personal rights or liberties by providing for a term of imprisonment for an offence with no fault element.

102. The Committee notes the important public interest in ensuring police officers comply with the procedural requirements in proposed sections 26Y, 26Z, 26ZI, 26ZK, 26ZL and 26ZM given the vulnerability of persons detained under the Bill and the exceptional powers police officers have over them.

103. The Committee refers to Parliament the question as to whether these proposed sections unduly trespass on personal rights or liberties by providing for a term of imprisonment for an offence with no fault element.

Rights of the Child: Proposed section 26E

106. The Committee notes the particular vulnerability of children and the importance of protecting their rights and notes that a police officer must release a minor from detention “as soon as practicable” after the officer becomes satisfied that the person is a minor.

107. The Committee has written to the Attorney General for advice as to why the Bill does not expressly provide that “as soon as practicable” refers to the ability of the child to be handed over to its parents or guardians and not to the needs of the police officer.

Right to compensation

110. The Committee considers that, while it may be considered necessary for such draconian powers to exist in order to protect community safety, it is not appropriate that an innocent person who suffers damage as a result of the exercise of those powers should be left to bear the cost of that damage.

111. The Committee has written to the Attorney General to seek his advice on the practicability of providing a compensation regime for innocent persons who suffer damage to their liberty, reputation, family life or employment as a result of the exercise of a preventative detention order.

112. The Committee refers to Parliament the question of whether the lack of a compensation regime for innocent persons who suffer damage as a result of the enforcement of a preventative detention order trespasses unduly on personal rights and liberties.

Review Mechanisms: Proposed sections 26ZS, 26ZN & 26ZO

121. The Committee notes the importance of mandatory independent review for legislation which confers extraordinary powers that significantly trespass on rights in order to address specific circumstances.

122. The Committee considers that the acceptability of such extraordinary powers is in part dependent on:

- the duration for which the powers will exist;
- the frequency of their review; and
- the level of independence of any body undertaking their review.

123. The Committee refers to Parliament the question of whether the length of the period before which the sunset clause takes effect and the frequency and independence of the review of the powers is appropriate given the extraordinary nature of the powers provided by the Bill and the extent of their trespass on personal rights and liberties.

9. Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005

11. The Committee is of the view that the right to privacy is an important right that should only be modified or abrogated on clear public interest grounds and only to the extent necessary to achieve those public interests.

12. The Committee notes that the conversion of the PTTC into a State-owned corporation under proposed s 35ZM would result in the PTTC not being subject to privacy safeguards in regard to its handling of personal information, apart from the disclosure restrictions in proposed 35Y in Schedule 11.

13. The Committee also notes that the Minister's office has advised that the PTTC will, prior to its conversion into a State-owned corporation, establish policies and procedures for the ongoing protection of personal information. The Committee notes, however, that administrative protections offer more limited protection than statutory-based protections.

14. The Committee has written to seek the Minister's advice as to why administrative protections are preferable to statutory protections such as making the PTTC subject to NSW privacy law in the Bill itself or prescribing the PTTC as an authority to be opted into the Federal *Privacy Act 1998*.

15. The Committee refers to Parliament the question of whether the limited nature of the safeguards for personal information held by the PTTC as a State-owned corporation unduly trespasses on the right to privacy.

10. Water Management Amendment Bill 2005

Compensation

Changes to plans by an Act

9. The Committee notes that the Bill removes any right to compensation arising from amendments to management plans made by any Act.

10. The Committee notes that such amendments include amendments to plans under the Bill to allow the Minister to provide for the floodplain harvesting of water.

11. The Committee refers to Parliament the question of whether removing any right to compensation for amendments to management plans by an Act unduly trespasses on personal rights and liberties.

Risk assignment framework

13. The Committee does not consider that the future exclusion of access to compensation for reductions in allocations arising from natural causes, or for reductions of 3% or less over 10 years as a result of improved scientific knowledge of environmental needs, trespasses unduly on personal rights and liberties.

Acts or omissions prior to commencement of a management plan: proposed s 87AB

15. The Committee notes that the purpose of proposed s 87AB is to remove any right to compensation of those affected by the amendment of certain inland groundwater plans before their commencement.

16. The Committee notes that a structural adjustment package is to be paid to groundwater irrigators and communities affected by those amendments.

17. The Committee also notes that the removal of compensation for acts and omissions before the commencement of a plan applies generally and is not limited to the five groundwater plans mentioned in the second reading speech.

18. The Committee refers to Parliament the question of whether proposed s 87AB unduly trespasses on the right to compensation for any act or omission occurring before the commencement of a management plan.

Presumption of innocence: proposed section 341(1A)

23. The Committee has written to the Minister to seek his advice as to whether it is necessarily the case that a licensee who has nominated a water supply work under s 71W that is controlled by another person is responsible for all the water taken by that work and, if not, why proposed section 341(1A) makes a licensee necessarily criminally liable for water taken by that work rather than establishing a rebuttable presumption regarding such liability.

24. The Committee refers to Parliament the question of whether proposed section 341(1A) trespasses unduly on the right to the presumption of innocence.

Validation of management plans: Schedule 1 [50]

29. The Committee notes that a purpose of validating all water management plans at the commencement of schedule 1 [50] is to validate certain plans whose commencement was deferred and which were subject to appeal and consequent amendment.

30. The Committee notes that this validating provision would remove the right to appeal the validity of any management plan or amendment of a management plan that was in its judicial review period at the commencement of the provision.

31. The Committee refers to Parliament the question of whether schedule 1 [50] unduly trespasses on the right to review management plans and amendments to management plans.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. COMMISSION FOR CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2005

Date Introduced:	15 November 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Reba Meagher MP
Portfolio:	Youth

Purpose and Description

1. The Bill amends the *Commission for Children and Young People Act 1998* (the Act) as set out below.

2. The Bill also repeals the *Child Protection (Prohibited Employment) Act 1998* (Prohibited Employment Act) and the *Commission for Children and Young People Regulation 2000*. The Prohibited Employment Act is incorporated in the amended Act.

Background

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

> In 1998 the Government established an independent commission to represent the interests of children and young people. The Commission for Children and Young People has since provided invaluable services to promote the safety, welfare and wellbeing of children and young people in New South Wales... This bill follows the statutory five-year review of the legislation underpinning the commission. It implements the review's recommendations, and further strengthens the system we have in New South Wales...The changes the review has recommended are largely directed at the child protection provisions.[1]

4. The introduction to the 2004 *Review of the Commission for Children and Young People Act 1998 and the Child Protection (Prohibited Employment) Act 1998* (the Review) noted that its main findings were that:

- the policy objectives generally remain valid; and
- the terms of the Act generally remain appropriate for securing those objectives.[2]

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[1] The Hon R P Meagher MP, Minister for Youth, Legislative Assembly *Hansard*, 15 November 2005.

[2] H L'Orange, *Review of the Commission for Children and Young People Act 1998 and the Child Protection (Prohibited Employment) Act 1998*, November 2004, www.kids.nsw.gov.au/files/Leg_Review_CCYP.pdf.

The Bill

5. The main changes made by the Bill are to:

- enable the Commission to compel certain information to be produced to enable it to carry out certain functions [proposed s 14A];
- incorporate into the Act provisions currently contained in the Regulations that relate to special inquiries conducted by the Commission and other matters [proposed new s 20A and s 20B];
- incorporate into the Act the provisions of the *Prohibited Employment Act* (relating to prohibitions on employment in child-related employment) [proposed new Part 7 Division 3];
- include in the categories of persons who are prohibited from engaging in child-related employment (prohibited persons) persons who are convicted of offences committed as adults of intentionally wounding or causing grievous bodily harm to a child where the adult was more than 3 years older than the child [proposed new s 33B];
- restrict the right of a prohibited person to apply for a review of the prohibition, if the person is a person convicted of the murder of a child, certain sexual offences involving a child or of offences involving the production of child pornography [proposed new Part 7];
- change references to employment screening throughout the Act to references to background checking;
- extend the offences to be checked as part of background checking procedures for employees in child-related employment [proposed amended s 33]; and
- provide for recent previous background checks on potential short-term employees to be used to satisfy requirements under the Act to carry out background checks on such employees [proposed new s 37A].

Issues Considered by the Committee

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

Reversal of onus/procedural fairness: proposed s 33J

6. Proposed new Subdivision 2 of Part 7, Division 1, provides for the review of prohibition of employment of prohibited persons by the Industrial Relations Commission or the Administrative Decisions Tribunal ["relevant tribunals" – proposed s 33I(2)]. For the purposes of this Division, a prohibited person is:

- a person convicted of a serious sex offence, the murder of a child or a child-related personal violence offence, whether before or after the commencement of this subsection; or

- a person who is a registrable person within the meaning of the *Child Protection (Offenders Registration) Act 2000*.[3]

7. The Commission or a relevant tribunal is not to make an order on a review application unless it is satisfied that the person the subject of the application does not pose a risk to the safety of children [proposed s 33J(1)].

8. In any proceedings for a review application, it is to be presumed - unless the applicant proves to the contrary - that the applicant poses a risk to the safety of children [proposed s 33J(2)].[4] This amendment was specifically recommended in the Review [Recommendation 11].

9. Proposed s 33J(3) recreates the provisions of s 9(5) of the Prohibited Employment Act. It provides that the following matters may be taken into account when deciding whether or not to make an order in relation to a person:
   - the seriousness of the offences;
   - the period of time since the offences were committed;
   - the age of the person at the time those offences were committed;
   - the age of each victim of the offences at the time that they were committed;
   - the difference in age between the prohibited person and each such victim;
   - the prohibited person's present age;
   - the seriousness of the prohibited person's total criminal record; and
   - such other matters as the tribunal considers relevant.[5]

10. The relevant provisions of the Prohibited Employment Act were also based on the assumption that a person who has been found guilty of a serious sex offence poses a risk to children: the applicant was required to show to the satisfaction of a tribunal that on all the relevant material he or she did not pose a danger to the safety of children. The Review considered that this could be made clearer by explicitly providing in the Act that a tribunal should not make an order unless the applicant satisfies the tribunal that he or she does not pose a risk to children.[6]

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[3] A registrable person is a person whom a court has at any time sentenced in respect of a registrable offence as defined in s 3(1) of the *Child Protection (Offenders Registration) Act 2000*.

[4] Generally, in administrative law, the onus of proof is on the applicant. Thus, an administrative act is presumed to be valid and the onus is on the party challenging it. However, courts have been prepared to reverse this onus where executive discretion interferes with liberty or property rights: *Challenge Plastics Pty Ltd v Collector of Customs* (1994) 126 ALR 731. In this regard, the Committee notes the similarity between the Bill's reversal of the onus of proof with judicial consideration of the possible limits on the presumption of innocence, namely that the test to be applied is whether the modification or limitation of the right pursues a legitimate aim and whether it satisfies the principle of proportionality: Lord Hope of Craighead in *R v Lambert* [2001] UKHL 37 at paragraph 88.

[5] Other factors which have previously been held to be relevant under s 9(5) include where the prohibited person has a mental illness: H L'Orange, *Review of the Commission for Children and Young People Act 1998 and the Child Protection (Prohibited Employment) Act 1998*, November 2004, p 59, www.kids.nsw.gov.au/files/Leg_Review_CCYP.pdf.

[6] H L'Orange, *Review of the Commission for Children and Young People Act 1998 and the Child Protection (Prohibited Employment) Act 1998*, November 2004, www.kids.nsw.gov.au/files/Leg_Review_CCYP.pdf.

11. This decision-making process consists of two elements:
    - the presumption that a prohibited person poses a "risk"; and
    - the definition of that risk.

12. The Review noted that "[i]n every application for exemption there is a tension between competing interests", and it was considered that some clarification around the concept of risk would be helpful.[7] In *Commission for Children and Young People v V,* Justice Young agreed with an earlier analysis of the meaning of "risk",[8] that s 9(4) of the Prohibited Employment Act - now proposed s 33J(2) - was focussed on:

> not a mere theoretical or possible risk arising from the fact of a previous conviction, but it is a reference to an unacceptable risk, a real risk, a likelihood of harm or a recognisable potential having regard to the need to jointly protect children and employees and to preserve reasonable civil rights.[9]

13. The Committee notes that the provisions of proposed s 33J place a considerable onus on a prohibited person, by requiring that person to prove that he or she does not constitute a risk to children.

14. The Committee notes that proposed s 33J is a key recommendation of the *Review of the Commission for Children and Young People Act 1998 and the Child Protection (Prohibited Employment) Act 1998*, and that its terms effectively codify the existing jurisprudence in this area of the law.

15. Having regard to the aims of the Bill, the recommendations of the Review, the matters which the Commission or a relevant tribunal may take into account pursuant to s 33J(3), the continuing right to a hearing, the narrow judicial definition of risk, and the public interest in ensuring the safety of children, the Committee does not consider that this reverse onus unduly trespasses upon the rights and liberties of a prohibited person.

Reversal of onus: proposed s 41

16. Proposed s 41(1) provides that the Commission may, by notice in writing served on an employer, require the employer to comply with obligations under s 37, s 39 or s 40 within the period specified in the notice.[10] The Commission may serve a notice on an employer under s 41 if it is of the opinion that the employer has failed to so comply [proposed s 41(2)].

17. A person who fails, without reasonable excuse, to comply with a notice in force under proposed s 41 is guilty of an offence, with a maximum penalty of 50 penalty units (currently $5,500), imprisonment for 6 months, or both. In any proceedings for an offence against this section, the onus of proving that a person had a reasonable excuse lies with the defendant.

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[7] H L'Orange, *Review of the Commission for Children and Young People Act 1998 and the Child Protection (Prohibited Employment) Act 1998*, November 2004, www.kids.nsw.gov.au/files/Leg_Review_CCYP.pdf.

[8] See Haylen J in *R v Commission of Children and Young People* [2002] NSWIR Comm 101.

[9] *Commissioner for Children & Young People v V* [2002] NSWSC 949, per Young CJ in Equity.

[10] These sections detail an employer's obligations with respect to background checking duties, duties to report completed relevant employment proceedings and to notify applicants rejected on the grounds of estimates of risk arising from background checking.

18. The Committee notes that, under the common law and the Commonwealth Criminal Code, a defendant normally only bears an ***evidential burden*** in relation to a defence, ie, the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.[11]

19. The Committee considers that placing the onus of proving a defence (ie, imposing a ***legal burden*** of proof[12]) on a defendant requires specific justification.

20. The Committee also notes the expressed position of the Victorian Scrutiny of Acts and Regulations Committee that, where legislation includes a reverse onus of proof provision, "it expects that the explanatory memorandum should reasonably explain or justify this decision".[13]

21. The second reading speech indicated that:

> This bill will give the commission increased powers to audit compliance with the Act, particularly by asking employers to provide documentary evidence that they are meeting their child protection obligations. Employers who are found not to be complying will be issued with a notice to comply. If they still refuse to comply they could be prosecuted. Just the prospect of receiving such a notice may well encourage compliance.

22. The Committee considers that a *legal burden* of proof should not be placed on a defendant without special justification.

23. The Committee notes that proposed new s 41 places a legal burden on a defendant to prove any reasonable excuse.

24. The Committee has written to the Minister to seek her advice as to the need to place a legal rather than an evidential burden of proof on defendants.

25. The Committee refers to Parliament the question of whether placing a legal burden of proof on a defendant regarding whether he or she has a reasonable excuse for failing to comply with s 41, which carries a maximum penalty of $5,500, 6 months' imprisonment, or both, is an undue trespass on the rights and liberties of employers.

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

Removal of appeal rights: proposed s 33G

26. Proposed s 33G provides that a prohibited person who has been convicted of any of the following offences, committed whilst an adult, is not entitled to make an application under proposed s 33H or s 33I for an order declaring that the Division is not to apply to the person:

- murder of a child [proposed s 33G(1)(a)];

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[11] Section13.3 of the Commonwealth *Criminal Code*.

[12] ***Legal burden***, in relation to a matter, means the burden of proving the existence of the matter: sect 13.1 of the Commonwealth Criminal Code.

[13] Victorian Scrutiny of Acts and Regulations Committee, *Alert Digest* No 9 of 2005, Report on the *Vagrancy (Repeal) and Summary Offences (Amendment) Bill 2005*.

- an offence under s 66A, 66B, 66C, 66D or 73 of the *Crimes Act 1900*[14] or a similar offence under that Act, or any other law, involving sexual intercourse with a child (including a law other than a law of New South Wales) [proposed s 33G(1)(b)];
- an offence under s 91H(2) of the *Crimes Act 1900*, involving the production of child pornography, or a similar offence under a law other than a law of New South Wales [proposed s 33G(1)(c)]; and
- an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in s 33G(1)(a) – (c)[proposed s 33G(1)(d)].

27. However, the Commission or Tribunal *may* grant leave for a review application if the offence related to sexual intercourse with a child, without any circumstance of aggravation, and the prohibited person was not more than three years older than the child [proposed s 33G(2)].

28. Although this provision was not among the recommendations of the Review, it was specifically referred to in the second reading speech:

> The bill will ensure that persons who have been convicted of the most serious crimes against children, and are therefore automatically prohibited from working with children, will not be able to seek a review of their status as prohibited. The Government stands by this position and makes no apology for it: the protection of the children in our society is paramount.[15]

29. The Committee notes that a prohibited person found guilty of an offence prescribed by proposed s 33G(1) has no right to make a review application, subject to the exceptions set out in proposed s 33G(2).

30. However, having regard to the seriousness of the crimes referred to in proposed s 33G(1) and the paramountcy of the safety of children, the Committee does not consider that this refusal of review rights constitutes an undue trespass on the rights and liberties of persons who are prohibited under the Act.

The Committee makes no further comment on this Bill.

[14] These offences relate to having, or attempting to have, sexual intercourse with a child.

[15] The Hon R P Meagher MP, Minister for Youth, Legislative Assembly *Hansard*, 15 November 2005.

2. COMPANION ANIMALS AMENDMENT BILL 2005

Date Introduced: 15 November 2005
House Introduced: Legislative Assembly
Minister Responsible: The Hon Kerry Hickey MP
Portfolio: Local Government

The Bill was passed by the Legislative Assembly on 16 November 2005 and the Legislative Council on 17 November 2005. Under s 8A(2) of the *Legislation Review Act 1987,* the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.

Purpose and Description

1. The second reading speech stated that "[t]he Bill provides strong powers to local councils and the courts to enforce strict control requirements to minimise the risk restricted and dangerous dogs pose to safety on our streets".[16]

Background

2. At present, under the *Companion Animals Act 1998* (the Act), a council or a Local Court may declare a dog to be a dangerous dog if it has (without provocation) attacked or killed a person or animal or has repeatedly threatened to attack or chase a person or animal. Certain control requirements are currently imposed in relation to dangerous dogs. The Act also imposes similar control requirements in relation to dogs that are currently listed as restricted dogs (eg, pit bull terriers) regardless of whether they have been declared dangerous.

3. The failure to comply with the control requirements applying to a dangerous or restricted dog is an offence (the maximum penalty for which is being increased under this Bill from $5,500 to $16,500) and may result in the dog being seized by an authorised officer.

The Bill

4. Amendments to the Act made by this Bill include:

   (a) imposing additional control requirements in relation to dangerous and restricted dogs (such as keeping the dog in an enclosure that complies with the requirements of the regulations, making the dog wear a distinctive collar and ensuring that the dog is muzzled and on a lead when it is outside its enclosure);

   (b) enabling councils to declare certain dogs to be restricted dogs for the purposes of the Principal Act (eg, cross-breeds of dogs listed as restricted dogs, but only if they have not been assessed to be a danger to the public);

[16] The Hon Kerry Hickey MP, Minister for Local Government, Legislative Assembly *Hansard*, 15 November 2005.

(c) requiring restricted dogs to be desexed (dangerous dogs are already required to be desexed within 28 days of being declared dangerous);

(d) prohibiting the sale (which includes giving away), acquisition and breeding of restricted dogs;

(e) increasing the penalties for most of the offences under the Act (particularly in relation to dangerous and restricted dogs);

(f) consolidating and clarifying the enforcement powers (including powers of entry) of authorised officers under the Act;

(g) enabling animals that are seized under the authority of the Act to be taken to premises (such as animal welfare shelters or the premises of veterinary practitioners who are authorised to have access to the Companion Animals Register) instead of having to be taken to council pounds;

(h) clarifying that a council may also deal with companion animals that are surrendered to a council pound or that come into the pound's possession otherwise than by being seized under the Act; and

(i) making a number of other miscellaneous amendments arising out of the statutory review of the Act.

Issues Considered by the Committee

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

Penalty for strict liability offence: Schedule 1 [32], [33], [74] & [85]

5. Clauses 32, 74 and 85 amend offences under sections 16(1), 51 and 56 of the Act to provide for monetary penalties of up to $33,000.[17] Clause 33 provides for a term of imprisonment,[18] a $55,000 penalty, or both for offences under s 16(1A) of the Act.

6. These offences do not appear to include any fault elements so they may be committed even if the person neither intended to do the action nor was reckless or criminally negligent regarding the action that constituted the offence. Offences without a fault element are commonly referred to as strict liability offences.

7. For example, section 16(1) of the Act makes the owner of a dog guilty of an offence if the dog attacks a person or animal, whether or not any injury is caused. To commit the offence, the owner does not need to have been negligent regarding his or her control of the animal. The Bill increases the penalty for this offence in the case of a dangerous or restricted dog from 100 penalty units ($11,000) to 300 penalty units ($33,000). A separate offence, with more severe penalties, applies if a dangerous or

[17] Clause 32 provides that the maximum penalty for an offence under section 16 of the Act where a dog attacks a person or animal is 300 penalty units ($33,000). Clause 74 provides that the maximum penalty for an offence under section 51 of the Act of an owner of a ***dangerous dog*** failing to comply with conditions of ownership is 150 penalty units ($16,500). Clause 85 provides that the maximum penalty for an offence under section 56 of the Act of an owner of a ***restricted dog*** failing to comply with conditions of ownership is also 150 penalty units ($16,500). ***Dangerous dog*** is defined under section 33 of the Act and ***restricted dog*** is defined in proposed section 55 [cl 77] in the Bill.

[18] The penalty of imprisonment was also provided for s 16(1A) offences prior to the commencement of the Bill.

restricted dog attacks a person, whether or not any injury is caused, where the owner failed to comply with the control requirements under section 51 or 56 of the Act.

8. The Committee has commented that strict liability offences should be:

- imposed only after careful consideration of all available options;
- subject to defences wherever possible where contravention appears reasonable; and
- have only limited monetary penalties and no terms of imprisonment.

9. The Committee notes the public interest in protecting people from dangerous dogs and ensuring that owners of such dogs take every precaution to protect the public from their animal. Setting high penalties, especially terms of imprisonment, may deter owners of “dangerous” or “restricted” dogs from failing to comply with all conditions related to their owning such a dog. It also sends a clear message to the community that owners of dangerous dogs have significant obligations to the general public.

10. While noting in the Minister's second reading speech that the “legislation has been developed in consultation with peak companion animal stakeholders”, the Committee is of the view that very high penalties are generally inappropriate for strict liability offences.[19]

11. However, the Committee notes the importance of placing a positive duty on the owners of dangerous and restricted dogs to ensure they do not pose a risk to the public.

12. The Committee also notes that fault liability is one of the most fundamental protections of the criminal law and is concerned that severe penalties are to be imposed in the absence of fault.

13. The Committee has written to the Minister for advice as to the need to impose high monetary penalties and, in the case of s 16(1A) a term of imprisonment, for strict liability offences rather than only imposing severe penalties for offences where intention, recklessness or criminal negligence are involved.

The Committee makes no further comment on this Bill.

[19] The Hon Kerry Hickey MP, Minister for Local Government, Legislative Assembly *Hansard*, 15 November 2005.

3. CRIMINAL PROCEDURE AMENDMENT (SEXUAL OFFENCE CASE MANAGEMENT) BILL 2005

Date Introduced:	16 November 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The Bill amends the *Criminal Procedure Act 1986* to provide that a pre-trial order made by a Judge is binding on the trial Judge if the proceedings relate to a *prescribed sexual offence* (within the meaning of that Act) that is dealt with on indictment. In circumstances where a new trial is ordered, or later trial proceedings commence following the discontinuation of an earlier trial, a pre-trial order will also be binding on the trial Judge hearing the fresh or subsequent proceedings.

2. The amendments are intended to contribute to the better case management of trials for prescribed sexual offences.

Background

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

> Rulings on the admissibility of evidence by a judge other than the trial judge are not currently binding and it is not possible to ensure that the same judge will deal with both the pre-trial hearing and the trial. Therefore, in order for rulings made by one judge to be binding on a subsequent trial judge, there must be legislative amendment. One of the key issues in sexual offence trials is effective case management to ensure all preliminary matters are resolved in advance of the commencement of the trial and to avoid unnecessary legal argument. Effective case management of sexual assault trials would require the court to resolve issues such as the admissibility of evidence and the use and availability of technology prior to the trial commencing. Delay due to adjournment or legal argument on the first day of trial may result in complainant dissatisfaction and trauma.[20]

The Bill

4. The Bill provides that a pre-trial order[21] made by a Judge is binding on the trial Judge unless, in the opinion of the trial Judge, it would not be in the interests of justice for the order to be binding [proposed new s 130A(1)].

5. If, on an appeal against a conviction for a prescribed sexual offence, a new trial is ordered, a pre-trial order made by a judge in relation to the sexual offence proceedings

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[20] Mr B J Gaudry MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 16 November 2005.

[21] A pre-trial order means any order made after the indictment is first presented but before the empanelment of a jury for a trial [proposed s 130A(4)]. When a matter is to be heard by a Judge alone, the empanelment of a jury is taken to be a reference to the point in time when the Judge first assumes the role of the tribunal of fact: proposed s 130A(5).

from which the conviction arose is binding on the trial judge hearing the fresh trial proceedings unless:

- the pre-trial order is inconsistent with an order made on appeal, or
- in the opinion of the trial Judge, it would not be in the interests of justice for the order to be binding [proposed new s 130A(2)].

6. In circumstances where a new trial is ordered, or trial proceedings commence following the discontinuation of an earlier trial, a pre-trial order will also be binding on the trial Judge hearing the fresh or subsequent trial proceedings unless, in the opinion of the trial Judge, it would not be in the interests of justice for the order to be binding [proposed new s 130A(3)].

Issues Considered by the Committee

7. 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.

4. INDUSTRIAL RELATIONS AMENDMENT BILL 2005

Date Introduced: 17 November 2005

House Introduced: Legislative Assembly

Minister Responsible: The Hon John Della Bosca MLC

Portfolio: Industrial Relations

Purpose and Description

1. The Bill amends the *Industrial Relations Act 1996* (the Act) to clarify the unfair contracts jurisdiction of the Industrial Relations Commission (Commission), to limit the exclusion of the Commission in Court Session from the supervisory jurisdiction of the Supreme Court, to authorise the Commission in Court Session to be called the Industrial Court of New South Wales and for other purposes.

Background

2. The second reading speech stated:

> The major purposes of this bill are to clarify the Industrial Relations Commission's jurisdiction to declare void or vary unfair contracts, and to allow for appeals on questions of the jurisdiction of the Industrial Relations Commission [IRC] in Court Session, but only after the processes of the commission are complete. These amendments are necessary to clarify the situation following a number of recent judgments in the Court of Appeal, notably *Mitchforce v Industrial Relations Commission & Ors* [2003] NSWCA 151 and *Solution 6 Holdings Ltd & Ors v Industrial Relations Commission & Ors* [2004] NSWCA 200. These decisions threw the scope of the IRC's unfair contracts jurisdiction into doubt and allowed parties to remove disputes from the IRC to the Court of Appeal before the IRC had had a chance to consider whether or not they fell within its jurisdiction.[22]

The Bill

3. The Bill amends section 106 of the Act to clarify the Commission's power to declare unfair contracts void or varied. This power is extended to a contract that is a related condition or collateral arrangement (even though it does not relate to the performance by a person of work in an industry) if the contract to which it is related or collateral is a contract under which the person performs work in an industry and the performance of that work is a significant purpose of the contractual arrangements [Schedule 1 [1]].

4. The Bill also replaces section 179 to reverse part of the Court of Appeal's decision in *Solution 6 Holdings Limited and Others v Industrial Relations Commission of NSW* [2004] NSWCA 200. The Court held that clause 179 did not prevent the exercise of the Supreme Court's supervisory jurisdiction in relation to proceedings or proposed proceedings before the Commission if an application is made to the Supreme Court before the Commission makes a decision in the proceedings [Schedule 1[5]].

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[22] The Hon Milton Orkopoulos MP, Minister for Aboriginal Affairs and Minister Assisting the Premier on Citizenship, Legislative Assembly *Hansard*, 17 November 2005.

5. The application of the new s 179 is restricted so that the Supreme Court's supervisory jurisdiction is still available if a purported decision of the Industrial Relations Commission in Court Session (in dealing with unfair contracts or other matters) is alleged to be outside the jurisdiction of the Commission, *but only after* the exercise of any right of appeal to the Full Bench of the Commission.

6. The Bill applies the amendment made to section 106 to any contract made before the amendment commences and to proceedings pending in the Commission that have not been finally determined. It does not apply to proceedings pending in any other court [Schedule 1[7]].

7. The Bill also applies the new s 179 to decisions and proceedings of the Commission made or instituted before the commencement of the amendments and to proceedings pending in any state court or tribunal. It does not, however, affect any order or decision of a state court or tribunal made before the commencement of the amendment [Schedule 1[8]].

8. Finally, the Bill enables the Commission, in exceptional circumstances, to extend the time in which an application relating to an alleged unfair contract may be made [Schedule 1[2] & [3]].

Issues Considered by the Committee

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

Retrospectivity: Schedule 1[7] & [8]

9. Schedule 1[7] and [8] provide that the amendments to section 106 and 179 respectively are to apply retrospectively. In the case of Schedule 1[7], the amendment applies to any contract made and any proceedings pending in the Commission before the amendment commences. Under Schedule 1[8], new section 179 applies to decisions of the Commission made, and proceedings of the Commission instituted, *before* the amendment commences. However, neither apply to proceedings that are pending in a higher court (eg, the High Court).

10. The retrospective application of these amendments may be advantageous to some people (eg, employees) seeking to have a collateral contract or condition declared void or varied by the Commission or who have begun proceedings in the Commission that were effectively terminated by the opposing party challenging the jurisdiction of the Commission in the Court of Appeal before the Commission itself could decide on jurisdiction.

11. On the other hand, the retrospective application of these amendments may adversely affect some people (eg, employers) especially if they have relied on the Court's decisions in *Solution 6* or *Mitchforce* in any way. The Committee will always be concerned with retrospective legislation that adversely impacts on any person.

12. The Committee notes that the second reading speech indicated that the amendment to s 106 is intended "to clarify the Commission's power to vary or declare void any

provision or aspect of the overall arrangement found to be unfair".[23] The retrospective application of the amendment to s 106 will enable the Commission to go back and consider a collateral contract or condition made before this amendment commences and consider whether it is fair or not and whether it should be varied or declared void. The amendment allows the Commission to continue the practice it followed with respect to collateral contracts prior to the decision in *Solution 6*.

13. The Committee notes that the second reading speech also stated that the amendment to s 179 "will ensure that parties cannot use the judgement in *Solution 6* to bypass the Commission" resulting in more costly and adversarial proceedings in the Court of Appeal. The retrospective application of this amendment under Schedule 1[8] means that any proceedings on foot before the Commission when the amendment to section 179 commences cannot be challenged in another Court until the Commission's proceedings, including appeal to the Full Bench, have concluded.

14. The Committee will always be concerned with retrospective legislation that adversely impacts on any person. The Committee notes that these amendments may have an adverse impact on some people (eg, employers).

15. The Committee also notes the public interests in enabling the Commission to consider all relevant agreements when determining if a work contract is unfair and in ensuring that disputes between employers and employees are resolved quickly and cheaply.

16. The Committee also notes the exclusion of proceedings pending in a higher court from the application of these amendments.

17. For these reasons, the Committee is of the view that the retrospective application of the amendments to sections 106 and 179 in Schedule 1[7] and [8] respectively, does not unduly trespass on personal rights or liberties.

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

Appeal/Review Rights: Schedule 1[5]

18. This clause amends section 179 of the Act. Section 179, which is a privative clause, currently provides that a decision or purported decision of the Commission is final and cannot be appealed, reviewed, quashed or called in question by any court or tribunal (whether on an issue of fact, law, jurisdiction or otherwise). The provision expressly excepts the exercise of a right of appeal to a Full Bench of the Commission.

19. According to the second reading speech, the Bill amends this section to:

> [R]emove the protection of purported decisions of the Commission in Court Session from the privative clause... to allow for review of decisions that are claimed to be outside the [Commission's] jurisdiction, and so ... cause the Court of Appeal to reinstate the doctrine of restraint, and to refrain from accepting very early applications before the Commission has had an opportunity to consider jurisdiction... [It also] makes clear that there will be no access to the Court of Appeal under any

[23] The Hon Milton Orkopoulos MP, Minister for Aboriginal Affairs and Minister Assisting the Premier on Citizenship, Legislative Assembly *Hansard*, 17 November 2005.

circumstances until the processes of the Commission, including appeal, are complete.[24]

20. The Committee will always be concerned to identify where a Bill purports to remove or restrict appeal rights.

21. However, in this case, the Committee notes that the restriction applies to allow the Commission to complete its proceedings and does not exclude appeal to the Court of Appeal on jurisdictional questions or an appeal to the Full Bench of the Commission.

22. The Committee is of the view that Schedule 1[5] does not unduly trespass on the personal right of a person to appeal.

The Committee makes no further comment on this Bill.

[24] The Hon Milton Orkopoulos MP, Minister for Aboriginal Affairs and Minister Assisting the Premier on Citizenship, Legislative Assembly *Hansard*, 17 November 2005.

5. MINE SAFETY (COST RECOVERY) BILL 2005

Date Introduced: 17 November 2005

House Introduced: Legislative Assembly

Minister Responsible: The Hon Ian Macdonald MLC

Portfolio: Primary Industries

Purpose and Description

1. This Bill provides for the payment of contributions by mining industry workers compensation insurers to fund the costs incurred by the Department of Primary Industries (the Department) in carrying out its regulatory activities under the mine safety legislation and in generally administering that legislation.

Background

2. The second reading speech stated:

> The Government asked the former Premier, the Hon. Neville Wran, QC, to review the progress we are making on mine safety... [T]he review made 31 wide-ranging recommendations...The Government has accepted the Wran review recommendations...[and] will ensure that the review recommendations are addressed.[25]

The Bill

3. The Bill provides for:

- the establishment of the Mine Safety Fund, administered by the Director-General [cl 5] into which specified amounts are to be paid [cl 6];
- the amounts to be paid out of the Fund, including payments required to meet the costs incurred by the Department in administering the mine safety legislation and money required to reimburse the WorkCover Authority for expenses incurred when it exercises functions under an arrangement with the Director-General [cl 7];
- the Director-General to estimate the amount required to be contributed to the Fund each financial year to meet the Fund's required payments [cl 9];
- the Director-General's estimate to be met by contributions by insurers [cl 10]; and
- an offence of an insurer not paying a contribution within the required time.

Issues Considered by the Committee

4. 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.

[25] Ms Linda Burney MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 17 November 2005.

6. PARLIAMENTARY SUPERANNUATION LEGISLATION AMENDMENT BILL 2005

Date Introduced:	15 November 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Della Bosca MLC
Portfolio:	Special Minister of State

Purpose and Description

1. This Bill amends the *Parliamentary Contributory Superannuation Act 1971* and the *Parliamentary Remuneration Act 1989* to close the Parliamentary Contributory Superannuation Scheme to new members from the 2007 State general election and to provide instead for an accumulation style superannuation benefit for new members of Parliament.

Background

2. The second reading speech stated that the Bill:

> overhauls parliamentary superannuation in line with the former Premier's announcement to establish a 9 per cent scheme for future members of Parliament at the 2007 general election.[26]

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

[26] The Hon Reba Meagher MP, Minister for Community Services and Minister for Youth, Legislative Assembly *Hansard*, 15 November 2005.

7. STATE REVENUE LEGISLATION FURTHER AMENDMENT BILL 2005

Date Introduced: 15 November 2005

House Introduced: Legislative Assembly

Minister Responsible: The Hon Morris Iemma MP

Portfolio: Treasurer

Purpose and Description

1. This Bill amends a number of revenue, grant and subsidy Acts.

Background

2. The second reading speech stated that the proposed amendments are

> to ensure that the legislation remains consistent with current commercial practices, and is more equitable and certain in its application. The proposed amendments are the result of monitoring of business practices by the Office of State Revenue [OSR], ongoing liaison with industry and professional bodies, and consultation with revenue offices in other States.[27]

The Bill

3. The Bill makes amendments to:

   (a) the *Duties Act 1997* to prohibit two mortgage duty avoidance practices and to extend various duty concessions [proposed Schedule 1];

   (b) the *First Home Owners Grant Act 2000* to make it more consistent with legislation in other States and the Territories in relation to the grant eligibility criteria and the administration of the grant scheme [proposed Schedule 2];

   (c) the *Insurance Protection Act 2001* to extend an exemption to certain policies of insurance under which the policyholders are liable, as a class, to meet the cost of claims made under insurance policies [proposed Schedule 3];

   (d) the *Land Tax Management Act 1956* to, among other matters, change and clarify the operation of certain exemptions from land tax for land used for primary production, unoccupied land and land the subject of certain conservation agreements and trust agreements [Schedule 4];

   (e) the *Pay-roll Tax Act 1971* both to ensure that employer contributions to redundancy benefit schemes and long service leave funds are treated as wages for the purposes of that Act, and to make further provision with respect to the valuation of shares and options granted by employers [Schedule 5];

   (f) the *Petroleum Products Subsidy Act 1997* to, among other matters, authorise the Chief Commissioner of State Revenue to recovery subsidy amounts

[27] Mr Graham West, Parliamentary Secretary, Legislative Assembly *Hansard*, 15 November 2005.

wrongfully paid, to impose penalties in certain cases, and to provide for an appeal process against such actions [Schedule 6];

(g) to amend the *Taxation Administration Act 1986* to facilitate cross-jurisdictional arrangements for the investigation of revenue law contraventions, and to ensure that statutory State owned corporations are not treated as members of the same group because they are controlled by the same shareholders [Schedule 7]; and

(h) to make consequential amendments and provide for savings and transitional matters [Schedule 8].

Issues Considered by the Committee

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

Retrospectivity: proposed cl 2(2)

4. Provisions amending the *Duties Act 1997* to prevent mortgage duty avoidance commence on the date on which the Bill was introduced into the Legislative Assembly [Schedule 1[10]-[14]].

5. The second reading speech noted that:

> As these provisions are targeted as specific duty avoidance practices, it is appropriate that they commence from the time the intention to amend is made public.[28]

6. Three other provisions commence on specified dates earlier than the Bill's introduction.[29] However, these provisions do not adversely impact upon any person.

7. The Committee will always be concerned to identify the retrospective application of laws that adversely impact on any person.

8. The Committee notes that allowing a period of time between the introduction of a Bill with provisions preventing duty avoidance and the commencement of those provisions may undermine the intent of those provisions and have other adverse consequences.

9. The Committee therefore considers that commencing schedule 1[10]-[14] on the date the Bill was introduced into Parliament does not unduly trespass on personal rights and liberties.

The Committee makes no further comment on this Bill.

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[28] Mr Graham West, Parliamentary Secretary, Legislative Assembly *Hansard*, 15 November 2005.

[29] An insurance duty concession in the *Duties Act 1997* is taken to have commenced on 31 January 2005, the day before the expiry of the existing concession [Schedule 1[16]];
An amendment to the *Pay-roll Tax Act 1971* to clarify that the consideration paid or given by an employee for a share or option granted by an employer is to be deducted from the value of that share or option is taken to have commenced on 1 July 2005 [Schedule 5[3]]; and
Exemptions from duty payable on certain mortgage transfers under s 227A of the *Duties Act 1997* are taken to have commenced on 1 August 2005, being the date that s 227A commenced [Schedule 1[15]].

8. TERRORISM (POLICE POWERS) AMENDMENT (PREVENTATIVE DETENTION) BILL 2005

Date Introduced: 17 November 2005

House Introduced: Legislative Assembly

Minister Responsible: The Hon Bob Debus MP

Portfolio: Attorney General

Purpose and Description

1. The object of this Bill is to amend the *Terrorism (Police Powers) Act 2002* (***the Principal Act***) to give effect in New South Wales to the decision of 27 September 2005 of the Council of Australian Governments (COAG) that States and Territories introduce legislation on preventative detention of persons for up to 14 days to prevent terrorist acts or preserve evidence following a terrorist act (to complement Commonwealth legislation for preventative detention for up to 48 hours). The Commonwealth legislation is an amendment to the Commonwealth Criminal Code set out in the Commonwealth *Anti-Terrorism Bill (No 2) 2005* (***the Commonwealth Bill***).[30]

Background

2. The Bill is part of an integrated package of counterterrorism powers designed to authorise preventative detention. The powers of detention under this Bill 'dovetail' with proposed federal powers to authorise preventative detention of a person for an initial period of 48 hours, though the State powers could be exercised independently of the powers proposed in the Commonwealth Bill.

3. The second reading speech stated:

> There is no doubt that these powers are extraordinary, but they are designed to be used only in extraordinary circumstances and are accompanied by strong safeguards and accountability measures.
>
> …The New South Wales scheme replicates the Commonwealth provisions … in that it provides for the detention of a person … restrictions on communications … and the monitoring of the detained person's communications to ensure that there is no exchange of information between suspects or plans made to evade capture or destroy evidence.
>
> However, this Bill differs in a number of important respects, namely, due to constitutional reasons the Commonwealth scheme can operate for only 48 hours. The New South Wales scheme operates for up to 14 days. The Commonwealth scheme is administrative. Initial orders are made by a senior police officer, which are later confirmed by judicial officers acting in their personal capacity. The New South Wales scheme is judicial. Both the initial and final preventative detention orders are made only by judges of the New South Wales Supreme Court.

[30] The Commonwealth Bill can be viewed at parlinfoweb.aph.gov.au/pieweb/Repository/Legis/Bills/Linked/03110504.pdf. The Commonwealth Bill is currently the subject of a Senate inquiry, www.aph.gov.au/Senate/committee/legcon_ctte/terrorism.

The Commonwealth scheme at no time allows a hearing on the merits between the parties before the expiry of the detention. The New South Wales scheme permits an initial preventative detention order to be made in the absence of the subject person. However, at subsequent confirmation or revocation hearings, the detained person will be permitted to be present and to contest the matter.

The Commonwealth scheme contains a number of disclosure offences, designed to keep the making of a preventative detention order secret. The New South Wales scheme contains no such disclosure offences, but allows the Supreme Court to make non-publication orders in relation to the proceeding, as is usual for all criminal matters before the courts in New South Wales.[31]

4. The Committee notes that the NSW Bill also differs from the Commonwealth Bill by expressly providing that children between the ages of 16-18 who are the subject of a preventative detention order are to be detained in juvenile detention facilities, consistent with the rights of the child.[32]

The Bill

5. The principal features of the scheme for preventative detention orders in this Bill are as follows:

   (a) Preventative detention orders (PDOs) may be issued, on the application of an authorised police officer, in circumstances relating to preventing an imminent terrorist act or to preserving evidence of terrorist acts that have occurred.

   (b) The Supreme Court may issue a PDO (either after detention under the Commonwealth Bill or directly without any such prior Commonwealth detention).[33]

   (c) Pending the hearing and final determination of an application for a PDO, the Supreme Court may make an interim preventative detention order (IPDO) in the absence of, and without notice to, the person to be detained. An interim order remains in force for a maximum of 48 hours.

   (d) A person may be detained under a PDO that is not an interim order for a maximum period of 14 days. This maximum period is reduced by any period of actual detention under an interim order, another PDO or an order under a corresponding law of the Commonwealth, or another State or a Territory, against the person in relation to the same terrorist act.

   (e) A PDO may not be made in relation to children less than 16 years of age.

   (f) A police officer or the person detained may apply to the Supreme Court for the revocation of a PDO.

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[31] The Hon Milton Orkopoulos MP, Minister for Aboriginal Affairs and Minister Assisting the Premier on Citizenship, Legislative Assembly *Hansard*, 17 November 2005.

[32] See Article 37(c) of the *Convention on the Rights of the Child.* Children under 16 years of age cannot be the subjects of a preventative detention order under this Bill [see proposed s 26E].

[33] The Commonwealth Bill provides for initial preventative detention orders to be made by senior members of the Australian Federal Police (for a period of up to 24 hours) and for continued detention (for a further period of up to 24 hours) to be authorised by continuing detention orders made by specially appointed judges, former judges and members of the Administrative Appeals Tribunal acting in their personal capacity.

(g) The Court may make a prohibited contact order (PCO) that prohibits a person detained under a preventative detention order from contacting persons specified in the order.

(h) While a person is detained under a PDO, the persons who may be contacted by the detainee, and the nature of the contact, is restricted. Subject to any prohibited contact order, the detained person is entitled to contact certain specified persons, including a family member, a person with whom the person being detained lives, the person's employer, the person's lawyer, the Ombudsman and the Police Integrity Commission.

(i) Unlike the Commonwealth Bill, the detainee is, during the longer period of detention under this Bill, entitled to inform family members and others of his or her detention and its duration (not merely that he or she is safe but not contactable).

(j) A person being detained under a PDO must be treated with humanity and respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment.

(k) A person being detained cannot be questioned except for the purposes of establishing identity or ensuring his or her safety and well-being.

(l) The legislation sunsets after 10 years.

Issues Considered by the Committee

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

6. The Bill trespasses, to a significant degree, on a number of fundamental rights and liberties. These rights are recognised under common law and international law.

7. The Bill trespasses on the following rights, each of which is addressed in detail below:
   - the right to liberty;
   - the right to be free from arbitrary arrest and detention;
   - the right to a fair trial, including the right to be heard, to present evidence and call witnesses in defence;
   - the right to be presumed innocent until proven guilty beyond reasonable doubt;
   - the right not to be compelled to incriminate oneself;
   - the right to legal representation and to legal counsel of one's own choosing; and
   - the right to confidential communications with legal counsel (the protection of legal professional privilege).

Right to Liberty; Arbitrary Arrest and Detention: Proposed sections 26D & 26V

8. Freedom from arbitrary arrest and detention is a fundamental human right. Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR) states that:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[34]

9. The ICCPR also states that persons should be permitted to challenge the lawfulness of their detention before the courts and order release without delay (Article 9(4)). Lawful detention may still be arbitrary if it is unreasonable. The UN Human Rights Committee has stated that detention is considered unreasonable if it is unnecessary or disproportionate to the legitimate end being sought.[35]

10. Article 9 reflects long-standing remedies under the common law, including the writ of habeas corpus. There have been numerous common law decisions on these matters, including the High Court decision of *Williams v The Queen* (1986) 161 CLR 278. In this decision, the Court held, consistent with the significance attached to personal liberty under the common law, that the purpose of the power to arrest was to bring that person suspected of crime before a justice as soon as reasonably practicable to be dealt with according to law. The “reasonableness” of any delay was to be determined by reference to the availability of a justice rather than the desire of the police to make further inquiries.

11. By contrast, the regime established under the Bill allows for the detention of a person who has not been charged with any offence. Further, it allows this detention to take place solely on the basis of a “reasonable suspicion” that they will engage, or have engaged, in a terrorist act or that they possess a thing connected to a terrorist act.

12. On the basis of this low threshold (ie, reasonable suspicion), a person can be detained, without charge, for successive periods of up to 14 days each. They can also be detained for up to 48 hours under an interim order in relation to which there has been no hearing or other opportunity for the person concerned to challenge the making of the order.

13. The trespass on the fundamental human rights to liberty and not to be arbitrarily detained is compounded by other aspects of the Bill discussed below. However, the Committee notes that, to some extent the trespass on these rights is minimised by judicial oversight of the regime through the involvement of the Supreme Court, which issues interim and final preventative detention orders [proposed s 26H & 26I] and prohibited contact orders [proposed s 26N].

Low standard of proof: Proposed section 26D

14. However, this judicial oversight is weakened in a number of ways and so arguably provides insufficient protection of these fundamental rights. For instance, the making of an interim or final PDO is based on the Court being satisfied that the police have “reasonable grounds to suspect” that the specified conditions in the section exist. This threshold is very low given that, on the basis of such a suspicion, a person can be

[34] In relation to the rights of the child, see the *Convention on the Rights of the Child*, Article 37.

[35] *Toonen v Australia*, UN Human Rights Committee, 4 April 1994, CCPR/C/50/D/488/1992. Referred to in submission no. 80, Senate Constitutional and Legal Committee, Inquiry into the provisions of the *Anti-Terrorism Bill (No. 2) 2005*, www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/submissions/sublist.htm.

deprived of their liberty without charge for an extended period of time and with a very limited right to be heard. Providing for a higher standard such as "reasonable belief" as the standard required for an application for an IPDO or a PDO would lessen the trespass on the right not to be arbitrarily detained.

15. "Reasonable suspicion" and "reasonable belief" are different standards.[36] The Supreme Court of NSW, in considering the meaning of reasonable suspicion in the stop and search powers contained in s 357E of the *Crimes Act 1900*, reduced the test of reasonable suspicion to three propositions:

> (a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something, which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s 357E. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.
>
> (b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.
>
> (c) What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances.[37]

16. Requiring only suspicion on the part of the police officer applying for an IPDO or a PDO widens the scope of these orders considerably. This is compounded by the fact that proceedings before the Supreme Court under the Bill are not bound by the rules of evidence [proposed s 26O] so police may adduce material in support of their application that would ordinarily be excluded or inadmissible (eg, hearsay).

17. Reflecting the extraordinary nature of these police powers and their potential to interfere with liberty, and the broad range of information (including hearsay, evidence from informers, etc) that police officers may adduce, the Committee is of the view that the Bill should at least fix the threshold belief of the police officer at the higher level of "reasonable belief" rather than "reasonable suspicion".

Multiple IPDO or PDO in relation to the same person

18. The Committee notes that the Bill provides no limit on the number of preventative detention orders that may be made in relation to a person.

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[36] "The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. ... Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture": *George v Rockett and another* (1990) 93 ALR 483 at 491, per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

[37] *R v Rondo* [2001] NSWCCA 540, para. 53. See also the High Court decision in *George v Rockett and Another* (1990) 93 ALR 483 at 491.

19. Proposed s 26K provides that more than one PDO may be made against a person in relation to the same terrorist act following a further application for an order. This allows a person to be detained for successive periods of 14 days. Subject to ongoing judicial approval, this could lead to the person being detained for an indefinite and lengthy period without charge under what is intended to be a temporary and preventative measure.

20. Similarly, a person may also be detained under successive interim PDOs, each not exceeding 48 hours, albeit in relation to *different* terrorist acts. Proposed s 26K provides that a terrorist act ceases to be the same terrorist act if there is a change in the date on which the act is expected to occur. This could allow a person to be subject to successive periods of detention under an order that has been made without a hearing and which is meant to be "interim".

21. It is also not apparent to the Committee why COAG chose 14 days as the maximum period a person may be detained under a PDO. The second reading speech is silent on this issue, although the Committee notes that it stated that the PDO regime is only intended to be used in extraordinary circumstances.

22. The Committee is of the view that, without highly compelling public interest justifications, this maximum period is excessive and a significant trespass on what are generally considered to be the most fundamental human rights.

23. The Committee is of the view that the right to liberty and the freedom from arbitrary detention are fundamental human rights and as such should not be derogated from except in extraordinary circumstances warranted by compelling public interest considerations and only to the extent necessary to meet those public interest objectives.

24. The Committee is also of the view that where legislation provides for derogation from these rights, it should also provide safeguards to minimise the trespass on those rights. The Committee notes that judicial oversight of the PDO regime in this Bill is an important safeguard.

25. The Committee has written to the Attorney General for advice in relation to the following matters:

- **why the threshold for granting an interim and final PDO is "reasonable suspicion" and not "reasonable belief";**
- **why the Bill does not prescribe a maximum number of orders that can be made in relation to the same person in order to prevent their being detained for an indefinite period under a PDO or an IPDO; and**
- **the justification for setting 14 days, rather than a lesser period, as the maximum period a person may be detained under a PDO.**

26. The Committee refers to Parliament the question as to whether the PDO regime unduly trespasses on the fundamental right of a person not to be detained arbitrarily.

Prohibited contact orders: Proposed section 26N

27. Prohibited contact orders can be made in relation to a person who is the subject of an interim or final PDO, prohibiting them from contacting a person specified in the order, including their chosen lawyer and family members. A prohibited contact order applies only if there is a PDO in force in respect of the person.

28. A prohibited contact order may be made without the person's knowledge and the Bill expressly states that the person does not need to be informed that there is such an order in force in relation to them or the names on the list, at the time they are arrested under an interim or final PDO [proposed sections 26Y(3) & 26Z(3)]. The Committee is of the view that being informed of a restrictive order made against a person is an essential component of a fair trial. Without such information, it is impossible for a person to assert their rights.

29. In addition to trespassing on a person's right to have a lawyer of their own choosing (as discussed below) and the right to a fair trial, prohibited contact orders may also trespass on a person's right to privacy and to be free from interference with their family.[38] The Committee notes that these rights are not absolute and that detention necessarily involves some diminution of the enjoyment of these rights.

30. The Committee notes that the Bill allows a person who is the subject of a prohibited contact order to seek its revocation by the Supreme Court [proposed s 26N(6)]. However, the Committee also notes that this right may be impossible to exercise and therefore meaningless if the person is not made aware that such an order is in force against them or of its terms.

31. The Committee notes that prohibited contact orders impose significant restraints on a person's enjoyment of their fundamental rights.

32. The Committee notes that the Bill provides that the detained person may ask the Court to revoke a prohibited contact order. However, the Committee also notes that the person may not be able to enforce that right as the Bill does not require them to be notified either of the making of the order or its contents, but expressly provides that they do not need to be so informed when they are arrested under the PDO to which the prohibited contact order relates.

33. The Committee has written to the Attorney General for advice as to why a detained person need not be informed of a prohibited contact order.

34. The Committee refers to Parliament the question of whether the prohibited contact order regime unduly trespasses on personal rights and liberties.

[38] See, for example, the *International Covenant on Civil and Political Rights*, Article 17, and the *Convention on the Rights of the Child*, Article 16.

Fair Trial: Proposed sections 26G, 26H, 26I, 26M & 26N

No hearings for interim preventative detention orders

35. While the Supreme Court is given the power under the Bill to grant and revoke preventative detention orders and prohibited contact orders [proposed ss 26H, 26I, 26M and 26N], hearings are only required in relation to granting a preventative detention order. The Bill states that interim orders "may" be heard in the absence of the subject and without notice [proposed s 26H(3)] but it is unclear to the Committee whether the use of "may" is intended to be mandatory or directory. Similarly, proposed s 26N allows the Supreme Court to make a prohibited contact order without any hearing.

36. The Committee is of the view that the process for authorising any form of preventative detention (and associated prohibited contact orders) should follow from a hearing. A lack of a hearing process before a court for authorising any form of preventative detention significantly aggravates the trespass on the right to freedom from arbitrary detention and the right to a fair trial as protected by Art 14 of the ICCPR. A hearing provides an opportunity for a court to test the credibility of the material adduced by the police to support the application. It also provides an opportunity for legal representation of the proposed subject of the order, or if the proceeding is ex parte, to permit representations to be made by a public interest advocate. As noted below, this is the model proposed in the equivalent Queensland Bill, which will use the office of the Public Interest Monitor.[39]

37. However, as these provisions depart from the requirement to hold a hearing, the Committee is of the view that the Bill should state that interim preventative detention orders should only be granted on an ex parte basis *in cases of urgency* and that such cases should be defined in the legislation.

38. Under the Bill, IPDOs are not limited to such cases, and can be made "when the Court cannot proceed immediately to the hearing and determination of the application". This is not an adequate justification for delay of a hearing. The Committee is of the view that it would not be appropriate to grant an interim order, for example, simply because the police could not attend a hearing or the court was occupied with other proceedings. Dispensing with hearings ought to be considered only when the Court is satisfied that there is a demonstrated urgency about the application. Indeed, the Committee notes that the Bill anticipates that interim orders typically will be urgent, allowing "an application … that is required urgently" to be made by telephone, fax, email or other electronic communication [proposed s 26G(2)]. The legislation should make it clear that an interim order is available only in urgent cases.

39. The Committee notes that a lack of a hearing process before a court for authorising any form of preventative detention significantly aggravates the trespass on the right to freedom from arbitrary detention and the right to a fair trial.

[39] The Queensland Terrorism (Preventative Detention) Bill 2005 is available at www.legislation.qld.gov.au/Bills/51PDF/2005/TerrorismPDB05.pdf.

40. To provide greater protection against a possible trespass on rights caused by the lack of a hearing, the Committee is of the view that the Bill should expressly provide that the Supreme Court must be satisfied that there are urgent circumstances warranting the granting of an interim preventative detention order before it makes such an order.

41. The Committee has written to the Attorney General for advice as to why the Bill does not so expressly provide.

42. The Committee refers to the Parliament the question as to whether the lack of a hearing of an application for an interim PDO is an undue trespass on personal rights and liberties.

Standard of proof in hearings for a PDO

43. Another concern about the fairness of the process of making a PDO, is that the Bill does not stipulate the relevant burden or standard of proof to be applied by the Supreme Court in considering an application for a PDO.

44. The Committee considers that the right to a fair trial would require that the burden of proof in a PDO hearing be placed on the applicant (that is, the relevant police officer) and that, consistent with the order's potential to interfere with personal liberty, the standard of proof imposed on the applicant be the higher criminal standard of "beyond reasonable doubt".

45. Although this hearing is not strictly speaking a criminal proceeding that requires the determination of the guilt of an accused person, there are precedents supporting the position that civil orders may have sufficiently coercive characteristics to warrant the use of a higher criminal standard. For example, in the United Kingdom, the House of Lords has held that in determining whether or not to grant anti-social behaviour orders, the criminal standard of beyond reasonable doubt should be applied. Their Lordships noted that although the relevant proceedings were civil in character, given the serious consequences of the allegations, fairness to the defendant required a higher standard of proof.[40]

46. The Committee is of the view that, for hearings to comply with the right to a fair trial, the Bill should provide that the burden of proof lies on the applicant who, consistent with the serious consequences for the subject of a PDO, must meet the higher criminal standard of "beyond reasonable doubt".

47. The Committee has written to the Attorney General for advice as to why the Bill does not so provide.

Self-Incrimination and the Right to Silence: Proposed section 26ZK

48. The Bill provides that a police officer must not question a person detained under a preventative detention order except in limited circumstances related to determining the identity of, or ensuring the safety and well-being of, the person being detained or for administrative purposes relating to the detention under the Act [proposed s 26ZK].

[40] *R v Manchester Crown Court* [2003] 1 AC 787. See further S Bronitt and McSherry, *Principles of Criminal Law* (2nd ed, Sydney: Lawbook Co, 2005), p122 in Ch 2.

It is an offence, punishable by a maximum 2 years imprisonment, for a police officer to breach this prohibition.

49. The prohibition on questioning underscores that detention under a PDO is for preventative purposes and not for the purposes of investigation. The Committee notes that the detained person may be released at any time in order to be arrested on the basis of reasonable suspicion that they have committed a terrorist offence [proposed s 26W], during which time they may be questioned under the usual procedures and safeguards. They may also be released from a PDO before it has expired, questioned under normal procedures, and then re-detained under the PDO if it has not expired [proposed s 26W(5)].

50. Although interviewing by police cannot take place, the Bill is silent about the admissibility of statements made during detention by detained persons. Moreover, the Bill contains no prohibition on the questioning of detained persons *by persons who are not police officers* (eg, civilians acting under police direction or persons from other government agencies).

51. Since there is no express bar on non-police questioning in the Bill, police officers could use civilians (such as informers or fellow detainees) to undertake questioning for both intelligence and evidence gathering purposes. The High Court has identified that the unfair or improper covert elicitation of statements from suspects will violate the privilege against self-incrimination and courts should refuse to admit such evidence.[41]

52. In the absence of express provisions in the legislation prohibiting interviewing of a detained person by civilians or other non-police officers, and providing that statements made by the detained person are inadmissible, the Committee is of the view that the Bill trespasses on this fundamental right.

53. The right to silence or the privilege against self-incrimination is an important rule of law and a basic human right.[42] To ensure maximum protection of that right (congruent with the preventative purpose of detention), the Committee is of the view that the Bill should expressly provide that any statement made by the detained person during preventative detention is inadmissible in subsequent proceedings. If admissibility of such statements is permitted, the relevant police officer should be under a legal duty to caution the detained person of his or her right to remain silent during detention. A caution plays an important role in advising detained persons, who may be psychologically vulnerable and pressured, of their rights, putting them on notice that they need not speak to state officials and encouraging them to consult a lawyer before making any statements.

54. Also, consideration should be given to extending the proposed prohibition on questioning by police to civilians (including fellow detainees) who are acting under the

[41] *Swaffield and Pavic* (1998) 192 CLR 159. See also S Bronitt, "The Law in Undercover Policing: A Comparative Study Of Entrapment and Covert Interviewing in Australia, Canada and Europe" (2004) 33(1) *Common Law World Review* 35-80. eprints.anu.edu.au/archive/00002395/.

[42] The law and policy governing the right to silence is reviewed in the Legislation Review Committee's Discussion Paper, *The Right to Silence* (2005), www.parliament.nsw.gov.au/lrc#inquiries.

direction of the police. This would minimise the risk of unfairly or improperly elicited statements being obtained in breach of the right to remain silent.

55. Such a prohibition would not appear to unduly restrict or hamper law enforcement powers as the police may carry on investigation of terrorist offences outside the framework of preventative detention, authorised under s 26W of the Bill, to release the detained person so that he or she can be arrested and questioned in the ordinary way. In this context, the procedural safeguards and protections governing the arrest, detention and investigation of suspects would apply under State legislation and relevant codes of practice.[43]

56. The Committee notes that the privilege against self-incrimination is an important rule of law principle and a fundamental human right.

57. The Committee also notes that the Bill does not protect this right against certain significant intrusions.

58. The Committee has written to the Attorney General for advice as to why, consistent with the preventative purposes of the Bill, the Bill does not protect this right by:

(a) providing that any statements made by the detainee during preventative detention are inadmissible in subsequent proceedings; or

(b) requiring the detaining officer to caution a detainee that anything they do say may be used against them in legal proceedings; and

(c) expressly excluding questioning by non-police officers.

59. The Committee refers to Parliament the question as to whether the failure of the Bill to so provide unduly trespasses on a person's fundamental right to silence.

Rights to legal representation & to have a lawyer of one's own choosing: Proposed section 26ZG

60. Proposed s 26ZG provides for a person detained under a PDO to contact a lawyer to obtain advice in relation to a limited number of prescribed matters. The section also provides for the manner in which a person may choose their lawyer, including whom they may choose.

61. The right to have legal counsel of one's own choosing is a fundamental human right recognised under international law[44] and the common law. The right is an attribute of the right to a fair trial. The fundamental importance of the lawyer-client relationship is well established in our legal system, and there is a high degree of protection, both legal and *de facto*, for communications between clients and their lawyers.

62. The Bill recognises the importance of detained persons having reasonable access to a lawyer, and the significance of legal representation at the hearing. However, the

[43] See *Crimes Act 1900* (NSW) and the *Code of Practice for C.R.I.M.E.* (NSW) 1998, respectively.
[44] Eg, see Article 14(3)(b) of the ICCPR, which guarantees to an accused person the right to "communicate with counsel of his own choosing", and the *Convention on the Rights of the Child*, Articles 37(d) and 40.

Committee is of the view that the restrictions and qualifications placed by the Bill on the right to a lawyer trespass on this fundamental right.

63. Specifically, while the Bill imposes an obligation on the police to advise all persons detained under a PDO of their right to a lawyer [proposed s 26Z(2)(f)], contact with that lawyer is limited in several respects.

64. First, contact with a lawyer is permissible *solely* for the purpose of seeking advice and arranging legal representation in relation to challenging the legality of the PDO or the treatment under that order before the courts or other specified bodies such as the Ombudsman and the Police Integrity Commission [proposed s 26ZG(1)].

65. The Committee is of the view that this is unduly restrictive since a person detained may also be under investigation for terrorist offences. Indeed, as noted above, the Bill envisages that a detained person may be released in order to be arrested and charged for an offence [proposed s 26W]. As such charges may be pending or imminent, the lawyer should be able to advise his or her client in relation to any criminal legal matters that are in reasonable prospect.

66. The Bill also restricts access to a lawyer in another respect. The Supreme Court may grant the police officer seeking the preventative detention order a prohibited contact order [proposed s 26N]. Under such an order, the Court may prohibit the detained person from making contact with any other person, including the detained person's lawyer. The Bill expressly envisages this as a possibility under proposed s 26ZG(3), which states that contact with a lawyer may be prohibited. In such circumstances, the police officer must offer reasonable assistance to the detained person in choosing another lawyer, though the police officer may give priority to lawyers who have received federal security clearance [proposed s 26ZG(3) & (4)]. However, the Bill states that the detained person nevertheless has a right to contact a lawyer who does not have security clearance [proposed s 26ZG(5)].

67. The Committee is of the view that the right to counsel of "one's own choosing" is severely circumscribed under this scheme. The proposed abridgment of this fundamental right to a lawyer of the subject's choosing may be forfeited simply on the basis of an assertion in the application by police that the "prohibited contact order will assist in achieving the purposes of the preventative detention order" [proposed s 26N(4)].

68. An application for a prohibited contact order may be determined without a hearing (see discussion of this point above), in which case, the Supreme Court will receive representations only from the police officer seeking the prohibited contact order. Even if it is accepted, as a policy matter, that a full hearing is not feasible or necessary in such cases, as a minimum the Committee is of the view that there should be a rebuttable presumption against granting the prohibited contact order in relation to a lawyer. This would be consistent with the value of upholding this fundamental right to counsel of one's own choosing. Such a presumption would require the police officer to produce to the Supreme Court cogent evidence that the nominated lawyers (who would be subject to the prohibited contact order) pose a *serious* security risk (ie, contact would increase the imminent risk of a terrorist act, or would lead to the destruction of evidence).

69. The Committee notes that the protection of the right to counsel may be further enhanced, while upholding the Bill's objective of preventing terrorist acts and destruction of evidence, by requiring an *ex parte* hearing before a prohibited contact order is granted. At this hearing, the interests of the detained person and the parties subject to the prohibited contact order could be represented by public interest intervenors.

70. In relation to an application for a prohibited contact order that proposes to restrict access to a lawyer, the Law Society of New South Wales or the Law Council of Australia could be granted intervenor status. In all other cases, the intervenor could be a statutory public interest advocate, appointed specifically to intervene in such hearings to represent the broader community interests and privacy rights of the detained person.

71. The Committee notes that the latter model has been adopted in relation to surveillance device warrants in Queensland and consideration could be given to adopting a similar scheme in NSW.[45]

72. The Committee also notes that this right is further restricted by the requirement that the police must monitor all communication between the detained person and their lawyer (discussed in the next section) [proposed s 26ZI]. The Committee is of the view that monitoring the communication between the detained person and their lawyer trespasses on the right to be represented by legal counsel as it inhibits candid conversation, which may undermine the ability of legal counsel to properly represent their client's interests.

73. The Committee notes that the right to have legal counsel of one's own choosing is an important attribute of the right to a fair trial and a fundamental human right recognised under international law and the common law.

74. The Committee also notes that the Bill provides for a person detained under a PDO to have legal representation and to choose his or her own lawyer, subject to some significant restrictions, namely:

(a) a detained person's entitlement to seek legal advice is limited to seeking advice, and arranging legal representation, in relation to challenging the legality of the preventative detention order or their treatment under that order;

(b) the detained person's choice of lawyer may be circumscribed by a prohibited contact order; and

[45] The Queensland Public Interest Monitor has the power to monitor compliance by police officers in relation to surveillance warrants and covert search warrants, to appear at hearings for an application to a Supreme Court judge or magistrate for a surveillance warrant or covert search warrant, and at the hearing present questions for the applicant to answer and examine or cross-examine any witness, and make submissions on the appropriateness of granting the application. The *Police Powers and Responsibilities Act 2000* (Qld), s 159. However, the model has been rejected more broadly by the Standing Committee of Attorneys-General and Australasian Police Ministers Council, Joint Working Group on National Investigative Powers, *Cross Border Investigative Powers For Law Enforcement - Report* (2003) at p 389.

(c) all communications between the detained person and their lawyer must be monitored, thereby undermining the right to legal representation.

75. The Committee has written to the Attorney General for advice as to the need to so limit the matters a detained person can discuss with his or her lawyer and the low threshold in the test for a prohibited contact order in relation to a person's lawyer.

76. The Committee refers to Parliament the question as to whether proposed section 26Z unduly trespasses on the fundamental right of a detained person to have legal counsel of his or her own choosing.

Legal Professional Privilege: Proposed sections 26ZI and 26ZQ

77. The Bill states that it does not affect the law relating to legal professional privilege [proposed s 26ZQ]. However, the Bill requires extensive monitoring of all communications between the lawyer and the detained person. Proposed s 26ZI provides that contact between a person detained under a PDO and their lawyer can only take place if the content and meaning of the communication can be effectively monitored by a police officer.[46] Further, communication between the lawyer and client can only take place in a language other than English if there is a translator present who can monitor the communication.

78. The Committee is of the view that the extent to which monitoring of otherwise confidential communications is authorised under the Bill is wholly inconsistent with the legal protection conventionally conferred on lawyer-client relationships.

79. Legal professional privilege is a common law right in Australia and is acknowledged by the High Court to be a fundamental human right or civil right.[47]

80. The Committee notes that the rationale behind the breadth of protection under the common law is not solely the importance of privacy of communications. Legal professional privilege relates more fundamentally to the proper administration of justice, as the High Court has observed:

> [Legal professional privilege] plays an essential role in protecting and preserving the rights, dignity and freedom of the ordinary citizen - particularly the weak, the unintelligent and the ill-informed citizen - under the law.[48]

81. In the same case it was held that the privilege is not a "mere rule of evidence, it is a substantive and fundamental common law principle.[49]

82. The immediate effect of the monitoring of communications with lawyers under this Bill is the likely chilling effect on the candour of parties, substantially impairing the

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[46] Note that proposed s 26I applies to all contact the detained person may have, including with family members.

[47] *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543: "Australian courts have classified legal professional privilege as a fundamental right or immunity": at 563 per McHugh J; "Legal professional privilege is also an important human right deserving of special protection" at 575 per Kirby J.

[48] *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 133, per Deane J.

[49] *Ibid,* at 132, per Deane J.

utility of the right. In *Grant v Downs,* the High Court identified a public interest of promoting frank exchanges. The Court described this as:

> keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.[50]

83. A further concern to the Committee is the potential use of evidence obtained from monitoring communications. Under proposed s 26ZI(5) of the Bill, any communication between a person who is being detained and a lawyer is not admissible in evidence against the person, if this communication is "for a purpose referred to in s 26ZG". As noted above, proposed s 26ZG expressly limits the purposes for which a person is entitled to contact a lawyer. Thus, communications with a client who strayed into broader discussion of other legal matters, such as circumstances surrounding imminent charges related to terrorist offences, would not be privileged, and could be used to incriminate the accused. This reinforces the need for a wider approach to the purposes for which a detained person may contact a lawyer under proposed s 26ZG (see discussion above).

84. The Committee notes that, if monitoring is required, the level of protection conferred by legal professional privilege could be enhanced in a number of ways in the Bill. First, the monitoring of communications need not be conducted 'live' by police or their interpreters. Rather such communications may be recorded electronically, sealed and dispatched immediately to the judge who granted the preventative detention order. The judge would then review the communications for the purposes of ascertaining whether the communications are protected under proposed sections 26ZI and 26ZG.

85. The Committee notes that a similar system is currently applied to material ostensibly protected by legal professional privilege that has been seized under search warrant, in which case de facto protection is ensured by the adoption procedures agreed between the Law Council of Australia and specified law enforcement agencies for executing warrants over lawyers' offices.[51]

86. The Committee notes legal professional privilege is a common law right in Australia that has been acknowledged by the High Court to be a fundamental human right.

87. The Committee also notes that the rationale behind the breadth of protection under the common law is not solely the importance of privacy of communications, but relates more fundamentally to the proper administration of justice.

88. The Committee is of the view that the Bill significantly trespasses on this right by prohibiting contact with a lawyer unless the content and meaning of the communications between the detained person and their lawyer can be effectively monitored.

[50] *Grant v Downs* (1976) 135 CLR 674 at 685, per Stephen, Mason and Murphy JJ.

[51] See *General Guidelines between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and Like Institutions in Circumstances where a Claim of Legal Professional Privilege is Made*, 3/3/97 www.lawsociety.ans.au/get/policies/1959496083/0.pdf. For an earlier version of the Guidelines, see "Search Warrant Guidelines" (1990) 25(9) *Australian Law News* 58-59.

89. The Committee is also of the view that this requirement substantially diminishes the enjoyment by the detained person of their fundamental right to legal representation.

90. The Committee has written to the Attorney General for advice as to the need to monitor such communications in the manner prescribed by the Bill rather than in a manner that would better protect fundamental rights, such as that used in relation to material seized under search warrant.

91. The Committee refers to Parliament the question as to whether proposed section 26ZI requiring monitoring by the police of all communication between a detained person and their lawyer unduly trespasses on the person's right to legal counsel and legal professional privilege.

Strict Liability: Proposed sections 26T, 26ZC, 26Y, 26Z, 26ZI, 26ZK, 26ZL & 26ZM

92. There are a number of regulatory offences in the Bill that make it an offence to refuse to cooperate with police in specified circumstances or which criminalise breaches of specific duties placed on the police.

93. These offences do not appear to include any fault elements so they may be committed even if the person neither intended to do the action nor was reckless or criminally negligent regarding the action that constituted the offence. Offences without a fault element are commonly referred to as strict liability offences.

94. The Committee has commented that strict liability offences should be:

- imposed only after careful consideration of all available options;
- subject to defences wherever possible where contravention appears reasonable; and
- have only limited monetary penalties and no terms of imprisonment.

Failing to treat detained person with humanity & respect for dignity: Proposed section 26ZC

95. It is an offence for a person exercising authority over detained persons to contravene the obligation to treat them with humanity and with respect for human dignity [proposed s 26ZC]. This provision carries a maximum penalty of 2 years imprisonment.

96. While respect for human rights of detained persons is paramount, the Committee is of the view that the offence provision itself must respect the fundamental importance of the fair trial principle and avoid the prospect of punishing 'innocent' persons who lack sufficient blameworthiness.

97. It is not appropriate to have a "reasonable excuse" defence for breach of this obligation, as it is absolute.[52] However, as a matter of fairness to the accused, and bearing in mind the severity of the penalty, the offence should expressly require proof of a mental state on the part of the person exercising authority over the detained

[52] See Article 7 of the *International Covenant on Civil and Political Rights*, which states in part "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

person, that is, requiring an intentional, reckless or criminally negligent breaching of the relevant duty.

98. The Committee has written to the Attorney General for advice as to why proposed section 26ZC does not expressly state the fault element for the offence under that section, especially given that it provides for a term of imprisonment upon conviction.

99. The Committee refers to Parliament the question as to whether proposed section 26ZC unduly trespasses on personal rights or liberties by providing for a term of imprisonment for an offence with no fault element.

Unlawfully obtaining information & other strict liability offences: Proposed sections 26Y, 26Z, 26ZI, 26ZK, 26ZL & 26ZM

100. The Bill creates a number of other offences which do not include a fault element and which are punishable by terms of imprisonment, namely the offences of a police officer:

- failing to notify a person detained under an interim or final PDO of certain specified matters (eg, the right of the person to apply to the Supreme Court for revocation of the detention order [proposed s 26Y and proposed s 26Z];
- disclosing information from monitored communications between a detained person and their lawyer or family members [proposed s 26ZI];
- questioning a person detained under a PDO [proposed s 26ZK];
- unlawfully taking identification information from a detained person [proposed s 26ZL]; and
- unlawfully using identification information [proposed s 26ZM].

101. These offences criminalise breaches of procedure under the Bill that are intended to protect the rights of detained persons.

102. The Committee notes the important public interest in ensuring police officers comply with the procedural requirements in proposed sections 26Y, 26Z, 26ZI, 26ZK, 26ZL and 26ZM given the vulnerability of persons detained under the Bill and the exceptional powers police officers have over them.

103. The Committee refers to Parliament the question as to whether these proposed sections unduly trespass on personal rights or liberties by providing for a term of imprisonment for an offence with no fault element.

Rights of the Child: Proposed section 26E

104. The Bill contains a provision dealing with wrongful detention of a minor, stipulating that the police officer must release the person as soon as practicable [proposed s 26E]. In light of the above discussion, it is clear that a wrongfully detained minor should have a right to an immediate release into the lawful care of their parents or guardians.

105. The Bill should clarify that “as soon as practicable” is not judged by the needs of the police officers making the detention, but by the availability of the parents or guardians. Preferably, the Bill should impose on the police officer a duty to contact

the parents or guardians of the wrongfully detained minor *immediately* in order to make arrangements for the release without delay. This is consistent with the principle of liberty and the best interests of the child.[53]

106. The Committee notes the particular vulnerability of children and the importance of protecting their rights and notes that a police officer must release a minor from detention "as soon as practicable" after the officer becomes satisfied that the person is a minor.

107. The Committee has written to the Attorney General for advice as to why the Bill does not expressly provide that "as soon as practicable" refers to the ability of the child to be handed over to its parents or guardians and not to the needs of the police officer.

Right to compensation

108. The Bill provides a low threshold for invoking draconian powers against a person that may cause significant damage to a person's reputation, family life and employment, as well as deprive them of liberty for an extended period without charge.

109. As a period of preventative detention that later proves to be unfounded will nevertheless be lawful if, at the time, it was based on a reasonable suspicion, compensation is not likely to be available for the damage a person suffers.

110. **The Committee considers that, while it may be considered necessary for such draconian powers to exist in order to protect community safety, it is not appropriate that an innocent person who suffers damage as a result of the exercise of those powers should be left to bear the cost of that damage.**

111. **The Committee has written to the Attorney General to seek his advice on the practicability of providing a compensation regime for innocent persons who suffer damage to their liberty, reputation, family life or employment as a result of the exercise of a preventative detention order.**

112. **The Committee refers to Parliament the question of whether the lack of a compensation regime for innocent persons who suffer damage as a result of the enforcement of a preventative detention order trespasses unduly on personal rights and liberties.**

Review Mechanisms: Proposed sections 26ZS, 26ZN & 26ZO

113. The Bill provides for significant trespasses on personal rights and liberties in order to promote the public interest in preventing terrorism. Whether such trespasses are "undue" in part requires consideration of the existence of the threat of terrorism, the extent of that threat and the effectiveness of the provisions in the Bill in addressing that threat.

[53] Article 37(b) of the *Convention on the Rights of the Child* provides: "No child shall be deprived of his or her liberty, unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort *and for the shortest appropriate period of time*" (emphasis added).

114. Given the dynamic and transitory nature of such threats, the Committee is of the view that the review provisions of the Bill are relevant to a consideration of whether the trespasses on rights permitted under the Bill are undue.

115. The Bill provides for monitoring and review through:

- a sunset provision preventing the further operation of, or application for, PDOs and PCOs 10 years after the commencement of the powers [proposed s 26ZS];
- annual review of the Act by the Attorney General [s 36 of the Act];
- annual reports by the Commissioner of Police [proposed 26ZN]; and
- monitoring reports by the Ombudsman 2 years and 5 years after the commencement of the powers [proposed s 26ZO].

116. Given the extraordinary police powers provided for in the Bill and the potential of those powers significantly to trespass on fundamental rights, the Committee is of the view that providing a time limit for the operation of the provisions inserted by the Bill is appropriate. Further, requiring an independent review before the powers can continue in force after that period will help to ensure that Parliament can continue to assess whether these extraordinary powers should remain.

117. However, it is unclear to the Committee why the sunset clause is limited in scope to the legal effect and operation of the orders rather than repealing the provisions inserted by the Bill. This limitation leaves 'exceptional' legislation "on the books", capable of being revived by making an amendment to this proposed section.

118. Further, the period before the sunset clause comes into effect is very long, having regard to the fact that the proposed powers of detention are conceded to be "extraordinary" and are rights invasive and have the potential for abuse.

119. The Committee notes the agreement by COAG to a 10-year sunset clause but also notes that the precise terrorist threat which justifies these laws remains unsettled. As such, the laws and regulations enacted in response deserve regularity and frequency of review and scrutiny to ensure they are necessary and functioning appropriately, with safeguards being properly observed.

120. The Committee notes that during the 1970s and 1980s, the Prevention of Terrorism legislation in the UK was subject to repeated annual review through a sunset clause.

121. The Committee notes the importance of mandatory independent review for legislation which confers extraordinary powers that significantly trespass on rights in order to address specific circumstances.

122. The Committee considers that the acceptability of such extraordinary powers is in part dependent on:

- **the duration for which the powers will exist;**
- **the frequency of their review; and**
- **the level of independence of any body undertaking their review.**

123. The Committee refers to Parliament the question of whether the length of the period before which the sunset clause takes effect and the frequency and independence of the review of the powers is appropriate given the extraordinary nature of the powers provided by the Bill and the extent of their trespass on personal rights and liberties.

The Committee makes no further comment on this Bill.

9. TRANSPORT ADMINISTRATION AMENDMENT (PUBLIC TRANSPORT TICKETING CORPORATION) BILL 2005

Date Introduced:	17 November 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Watkins MP
Portfolio:	Transport

Purpose and Description

1. This Bill amends the *Transport Administration Act 1988* to constitute the Public Transport Ticketing Corporation (the PTTC).

Background

2. The second reading speech stated that the PTTC:

> will be responsible for establishing and managing a common ticketing and fare payment system, known as Tcard and currently under development, for public transport users and operators in the greater Sydney metropolitan area. The corporation will not be a policy-making or regulatory agency; it will be relatively small and have an operational focus on delivering ticketing services…
>
> Once the ticketing system is deemed to be fully operational and its activities are of a routine commercial nature it will be feasible to adopt a more commercial governance arrangement, and the bill allows for the corporation to be converted to a State-owned corporation, with the function of providing for the ongoing management of the ticketing and fare payment system. The bill provides for this transition to occur at a time to be determined by the Governor. Tcard should be fully operational within the next three to five years, but the governance structure will not change until the ticketing system is shown to be operating satisfactorily. As stated, in its initial years the corporation will be a statutory authority representing the Crown.[54]

The Bill

3. The Bill:

   (a) establishes the PTTC as a statutory authority [proposed Schedule 1[3], Division 1];

   (b) confers on the PTTC the principle objectives of providing ticketing and fare payment services to NSW public transport operators and promoting and facilitating the integration of ticketing products and fare payment systems for NSW public transport [proposed Schedule 1[3], Division 2];

   (c) confers on the PTTC the principal functions of establishing and managing a ticketing and fare payment system for public transport passengers and

[54] Mr John Watkins MP, Deputy Premier, Minister for Transport and Minister for State Development, Legislative Assembly *Hansard*, 16 November 2005.

operators, and controlling and managing any funds within that system that represent unused prepaid fares [proposed Schedule 1[3], Division 3];

(d) provides for the management of the PTTC, including the establishment of a Board and the preparation of a corporate plan each financial year [proposed Schedule 1[3], Division 4];

(e) contains financial provisions relating to the PTTC [Schedule 1[3], proposed Division 5];

(f) provides for various other matters, including an offence in relation to the disclosure of information except in specified circumstances and for the PTTC to conduct criminal records checks [Schedule 1[3], proposed Division 6]; and

(g) allows the PTTC to be converted into a State owned corporation with the function of managing the ticketing and fare payment system [Schedule 1[6], proposed Schedule 11].

Issues Considered by the Committee

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

Privacy of personal information collected and handled by the PTTC: Schedule 1[3], proposed s 35ZM, and Schedule 1[6], proposed Schedule 11

4. The PTTC's functions envisage the collection of personal information, including information about individual transport users registering for the proposed T-card (which could conceivably give rise to data about the public transport use of those persons) and criminal records information about employees, contractors or contractor's employees subject to criminal records checks.

5. The second reading speech stated that:

> because the ticketing system will offer the opportunity for commuters to register their Tcards - to enable recovery of the cash balance in the event of loss or theft - and because records will be kept of travellers entitled to concession fares, privacy of information will be important. As a statutory authority, the corporation will be automatically subject to the provisions of the Privacy and Personal Information Protection Act 1988. In addition, the bill provides for the corporation, in conjunction with NSW Police, to be able to carry out investigations and inquiries in respect of proposed employees and contractors to establish their fitness to be associated with the exercise of the corporation's functions.[55]

6. As a statutory agency, any personal information collected by the PTTC must be handled (eg, collected, used, disclosed and stored) in accordance with the information protection principles in the *Privacy and Personal Information Protection Act 1998*.[56]

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[55] Mr John Watkins MP, Deputy Premier, Minister for Transport and Minister for State Development, Legislative Assembly *Hansard*, 16 November 2005.

[56] The principles in the *Privacy and Personal Information Protection Act 1998* apply to ***public sector agencies***. A ***public sector agency*** is defined in that Act to include a statutory body representing the Crown: s 3(1).

7. Once converted into a State-owned corporation, it appears that the PTTC will not be governed by such privacy safeguards in relation to its handling of personal information, including criminal records information. In this regard it is noted that:

   - the NSW *Privacy and Personal Information Protection Act 1998* does not apply to State-owned corporations[57];
   - the *State Owned Corporations Act 1989* does not contain privacy safeguards applicable to entities that are subject to it; and
   - State and Territory authorities are generally exempt from the federal *Privacy Act 1988*.[58]

8. The Bill also does not contain provisions governing the handling of personal information, with the exception of creating a disclosure of information offence. An employee, contractor or a contractor's employee who discloses any information obtained in connection with the administration or operation of the ticketing and fare payment system commits an offence, unless that disclosure is made in certain specified circumstances [maximum penalty of 20 penalty units ($2,200)].[59]

9. This offence relates to the PTTC as constituted as a statutory authority [Schedule 1[3], proposed s 35ZG] *and* as a State-owned corporation [Schedule 1[6], proposed s 35Y]. The potential ambit of this disclosure offence may not, however, cover all of the personal information collected by the PTTC, for example, criminal records information obtained to vet the suitability of persons to be associated with the exercise of the Corporation's functions.

10. The Minister's office has advised that prior to the PTTC becoming a State-owned Corporation, it will establish policies and procedures for the ongoing protection of personal information.

11. The Committee is of the view that the right to privacy is an important right that should only be modified or abrogated on clear public interest grounds and only to the extent necessary to achieve those public interests.

12. The Committee notes that the conversion of the PTTC into a State-owned corporation under proposed s 35ZM would result in the PTTC not being subject to privacy safeguards in regard to its handling of personal information, apart from the disclosure restrictions in proposed 35Y in Schedule 11.

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[57] State Owned Corporations are specifically excluded from the definition of a ***public sector agency*** in s 3(1) of the *Privacy and Personal Information Protection Act 1998*.

[58] See *Privacy Act 1998*, s 6C(1) and (3).

[59] Those circumstances are that the disclosure is made:
(a) with the consent of the person from whom the information was obtained; or
(b) in connection with the administration or operation of the ticketing and fare payment system;
(c) in accordance with the *Freedom of Information Act 1989*; or
(d) in accordance with a requirement imposed under the *Ombudsman Act 1974*; or
(e) with other lawful excuse.

13. The Committee also notes that the Minister's office has advised that the PTTC will, prior to its conversion into a State-owned corporation, establish policies and procedures for the ongoing protection of personal information. The Committee notes, however, that administrative protections offer more limited protection than statutory-based protections.

14. The Committee has written to seek the Minister's advice as to why administrative protections are preferable to statutory protections such as making the PTTC subject to NSW privacy law in the Bill itself or prescribing the PTTC as an authority to be opted into the Federal *Privacy Act 1998*.[60]

15. The Committee refers to Parliament the question of whether the limited nature of the safeguards for personal information held by the PTTC as a State-owned corporation unduly trespasses on the right to privacy.

The Committee makes no further comment on this Bill.

[60] Section 6F of the federal *Privacy Act 1988* allows regulations to treat a State or Territory authority as if it is an "organisation" subject to the information protection principles in that Act. Under the *Privacy (Private Sector) Regulations 2001*, four NSW owned utility corporations have been prescribed for the purposes of s 6F.

10. WATER MANAGEMENT AMENDMENT BILL 2005

Date Introduced: 17 November 2005

House Introduced: Legislative Assembly

Minister Responsible: The Hon Ian Macdonald MLC

Portfolio: Natural Resources

Purpose and Description

1. The Bill amends the *Water Management Act 2000*:

   (a) to clarify the provisions relating to planned environmental water and to provide for access licences to be converted to planned environmental water in certain circumstances;

   (b) to provide for access licences with adaptive environmental water conditions;

   (c) to include new provisions in relation to compensation under amended or remade water management plans, as required by the National Water Initiative, in accordance with agreements for the sharing of compensation that are to be entered into with the Commonwealth;

   (d) to include measures, as required by the National Water Initiative, to require irrigation corporations to arrange their affairs so as to remove certain barriers to shareholders transferring their water entitlements away from the corporations;

   (e) to facilitate co-holders of access licences exiting from those access licences;

   (f) to enable management plans to establish different rules of priority of categories and subcategories of access licence to those established in the Act;

   (g) to remove the mandatory 5-year review of a local water utility access licence to allow the Minister to review the licence at any time or on request, to expand the range of commercial activities to be considered and specify the relevant criteria when determining in any such review whether the water entitlements conferred by the licence should be increased, and to provide for civil penalties for certain contraventions by local water utilities of the Act or their access licences;

   (h) to extend the scheme of "water tagging" to enable the holder of an access licence, within certain specified water tagging zones within the State, to nominate a water supply work by which water will be taken under the licence that is located in a different water source to that to which the licence relates;

   (i) to enable the Minister to impose conditions on water management works approvals relating to cold water releases;

   (j) to enable the Ministerial Corporation to construct, maintain and operate gauging stations and other monitoring equipment;

(k) to make amendments relating to savings and transitional matters, particularly to facilitate transition in overallocated water sources, and to improve procedures for the recording of matters in the Water Access Licence Register;

(l) to enable certain management plans to be amended by the Minister to make further provision with respect to planned environmental water, adaptive environmental water and floodplain harvesting; and

(m) to make other minor amendments.

2. The Bill also amends the *Protection of the Environment Operations (General) Regulation 1998* to exempt a person releasing cold water in accordance with conditions referred to in paragraph (b) above from the offence of polluting waters under the *Protection of the Environment Operations Act 1997*.

Background

3. The second reading speech stated:

> This bill will strengthen and improve the provisions of the Water Management Act—an Act which when passed by Parliament in December 2000 and significantly updated in June 2004 represented a major overhaul of the State's previous water legislation and heralded a new approach to water management in New South Wales. At the same time the bill will align our reforms in New South Wales with the broader platform of the National Water Initiatives agreed to by the Council of Australian Governments [COAG]. The New South Wales Government has clearly indicated its willingness to work with the Commonwealth and the other States to ensure that our water policies represent best practice and promote long-term sustainability.[61]

Issues Considered by the Committee

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

Compensation

4. As previously discussed by the Committee,[62] the issues addressed by the *Water Management Act 2000* include enabling effective management of water resources while providing appropriate security for water entitlements to allow ongoing investment and dealing fairly with legitimate expectations of ongoing water entitlements arising from what came to be treated as de facto property rights in water attaching to existing licences. In response to these issues, the Act provides compensation for certain changes in water entitlements.

5. The Bill changes the compensation available under the Act by providing that:

- no compensation is payable for an amendment made by an Act to a management plan [proposed s 87(2)(d)];
- the existing compensation regime under s 87 only applies during the period for the first management plan that established the bulk access regime [proposed s 87(9)];

[61] Ms Linda Burney, Parliamentary Secretary, Legislative Assembly *Hansard*, 17 November 2005.
[62] *Legislation Review Digest* No 8 of 2004, pp 53 – 65.

- for subsequent management plans, contingent on the ongoing agreement between the State and the Commonwealth and Commonwealth funding, compensation is payable for reduced allocations for certain access licences resulting from:
    - changes in Government policy;
    - more accurate scientific knowledge indicating that the environmental allocation is inadequate, if the reduction is greater than 3% (the share from the State set out in the Bill with the balance to come from the Commonwealth) [proposed 87AA];

    but excluding compensation for:

    - reductions in allocations arising from changes to a management plan made by the Minister under s 45 that is authorised by the plan or is required by the Land and Environment Court; and
    - natural reductions in inflow [proposed 87AA(3)]; and
- compensation is not payable by the Crown for any act or omission occurring before the commencement of a management plan in respect of the content, effect or government policy concerning the management plan [proposed s 87AB].

Changes to plans by an Act

6. The Bill provides that no compensation is payable for amendment to management plans made by an Act.

7. Amendments to management plans made by the Bill which would not be compensable as a result of this provision include proposed Schedule 12, Part 3, which amends management plans relating to floodplain harvesting to allow the Minister to further amend the plan to provide for the floodplain harvesting of water [Schedule 1 [59]].

8. The second reading speech states that:

> In the inland catchments, some water users pump or gravity feed floodwater into large storages using pumps that have not been metered or licensed. The Murray-Darling Basin cap requires all water extraction to be accounted for and controlled. A floodplain harvesting policy and rules for managing floodplain water are being developed. As a result changes may be needed to the water sharing plans to incorporate these rules. The bill allows these necessary changes to be made without invoking the compensation provisions of the Act.[63]

9. The Committee notes that the Bill removes any right to compensation arising from amendments to management plans made by any Act.

10. The Committee notes that such amendments include amendments to plans under the Bill to allow the Minister to provide for the floodplain harvesting of water.

[63] Ms Linda Burney, Parliamentary Secretary, Legislative Assembly *Hansard*, 17 November 2005.

11. The Committee refers to Parliament the question of whether removing any right to compensation for amendments to management plans by an Act unduly trespasses on personal rights and liberties.

Risk assignment framework

12. Regarding the change in compensation regimes between first and subsequent management plans, the second reading speech stated:

> Compensation is already available to licence holders if the Government makes a change to a water sharing plan which is not provided for in the plan irrespective of the factor driving the change. The post 2014 risk assignment framework provides for different arrangements for the sharing of the costs of reduction in availability of water. Climatic changes will be borne by the licence holder and policy changes will continue to be borne by Government. The significant difference however is for changes arising from improvements in knowledge or science. The first 3 per cent of the change would be borne by the licence holders. A reduction between 3 and 6 per cent would be compensated by both the State and Australian governments—one-third paid by the State and two-thirds by the Australian Government. Reductions above 6 per cent would be shared equally by the State and Australian governments. I believe that the national risk assignment framework is an appropriate compromise between the concerns of government and stakeholders. It excludes government compensation for natural events which are outside our control, retains the status quo on government policy changes and addresses industry concerns about investor certainty.[64]

13. The Committee does not consider that the future exclusion of access to compensation for reductions in allocations arising from natural causes, or for reductions of 3% or less over 10 years as a result of improved scientific knowledge of environmental needs, trespasses unduly on personal rights and liberties.

Acts or omissions prior to commencement of a management plan: proposed s 87AB

14. Regarding the exclusion of compensation for any act or omission prior to the commencement of a management plan, the second reading speech stated:

> While it is clear that reductions in access are necessary to ensure the sustainability of the groundwater systems and the regional communities—and this will occur—there was concern over the across-the-board approach to reducing entitlements in these overallocated aquifers, and some of the plans were appealed against on this basis. The method has now been refined and will take into account the past water use of licence holders when determining their entitlement reductions. This recognises the significant investment some farmers have made in obtaining and using groundwater for irrigation. In the past few months the Australian Government has also agreed to contribute $55 million dollars in matching funds to the structural adjustment package to be paid to affected groundwater irrigators and communities.
>
> Some $10 million will be provided to these farmers and an additional $10 million to affected regional communities once the plans commence—which is expected to be in July 2006. As a result of the changes to the entitlement reduction approach, amendments will now need to be made to the five inland groundwater plans. This could give rise to claims for compensation on the grounds that the plans as made—that is, as gazetted—are now being changed. Given that some 650 groundwater

[64] Ms Linda Burney, Parliamentary Secretary, Legislative Assembly *Hansard*, 17 November 2005.

> licence holders will receive substantial financial assistance under the structural adjustment package, other claims for compensation would simply be double dipping. As a result the bill includes amendments to the compensation section of the Act clarifying that compensation is not payable for financial loss arising out of the development of a plan, including representations, consultation and changes that occur prior to its commencement.[65]

15. The Committee notes that the purpose of proposed s 87AB is to remove any right to compensation of those affected by the amendment of certain inland groundwater plans before their commencement.

16. The Committee notes that a structural adjustment package is to be paid to groundwater irrigators and communities affected by those amendments.

17. The Committee also notes that the removal of compensation for acts and omissions before the commencement of a plan applies generally and is not limited to the five groundwater plans mentioned in the second reading speech.

18. The Committee refers to Parliament the question of whether proposed s 87AB unduly trespasses on the right to compensation for any act or omission occurring before the commencement of a management plan.

Presumption of innocence: proposed section 341(1A)

19. Under s 71W, an access licence holder may nominate a specified water supply work by means of which water allocations under the licence may be taken.

20. Section 341 provides an offence of illegally taking water. The Bill amends s 341 to provide that, if water is illegally taken by means of a water supply work, a person who holds an access licence that nominates that work under s 71W is also taken to have committed the offence.

21. In the case of a corporation, the maximum penalty for this offence is 2,500 penalty units ($275,000) and, in respect of a continuing offence, a further penalty not exceeding 1,200 penalty units ($132,000) for each day the offence continues. In the case of an individual, the maximum penalty for this offence is 1,200 penalty units ($132,000) and, in respect of a continuing offence, a further penalty not exceeding 600 penalty units ($66,000) for each day the offence continues [s 348].

22. The Committee considers that it may be reasonable to presume, in the absence of evidence to the contrary, that a licensee who has nominated a water supply work is responsible for water illegally taken by that work. However, it is not apparent from the Bill that a licensee is necessarily responsible for all the water taken by a water supply work nominated under section 71W that he or she does not control.

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[65] Ms Linda Burney, Parliamentary Secretary, Legislative Assembly *Hansard*, 17 November 2005.

23. The Committee has written to the Minister to seek his advice as to whether it is necessarily the case that a licensee who has nominated a water supply work under s 71W that is controlled by another person is responsible for all the water taken by that work and, if not, why proposed section 341(1A) makes a licensee necessarily criminally liable for water taken by that work rather than establishing a rebuttable presumption regarding such liability.

24. The Committee refers to Parliament the question of whether proposed section 341(1A) trespasses unduly on the right to the presumption of innocence.

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

Validation of management plans: Schedule 1 [50]

25. The Bill validates any management plan and any amendment of a management plan that was published in the Gazette before the commencement of the validating provision [Schedule 1 [50]].

26. The second reading speech indicates that this provision is aimed at ensuring the validity of five groundwater plans that have been amended following appeals being made against the plans as gazetted.

> The Government last year deferred the commencement of the five inland alluvial groundwater plans that had been gazetted.
>
> While it is clear that reductions in access are necessary to ensure the sustainability of the groundwater systems and the regional communities—and this will occur—there was concern over the across-the-board approach to reducing entitlements in these overallocated aquifers, and some of the plans were appealed against on this basis. The method has now been refined and will take into account the past water use of licence holders when determining their entitlement reductions.
>
> … the validating provision will ensure that these plans are still valid. As the legal appeals to some of these ground water plans were held over, the Minister has determined that the Government will now pay the costs of those who appealed against those plans.[66]

27. However, the validating provision is in general terms and applies to any management plan and any amendment to the management plan that was published in the Gazette before the commencement of the validating provision, including any plan or amendment gazetted after the Act is passed and before commencement.

28. The Act provides a judicial review period of three months during which the validity of a management plan or an amendment to a plan may be challenged in the Land and Environment Court. The Bill appears to remove this right of review for any management plan or amendment in the judicial review period at the commencement of the provision.

29. The Committee notes that a purpose of validating all water management plans at the commencement of schedule 1 [50] is to validate certain plans whose commencement was deferred and which were subject to appeal and consequent amendment.

[66] Ms Linda Burney, Parliamentary Secretary, Legislative Assembly *Hansard*, 17 November 2005.

30. The Committee notes that this validating provision would remove the right to appeal the validity of any management plan or amendment of a management plan that was in its judicial review period at the commencement of the provision.

31. The Committee refers to Parliament the question of whether schedule 1 [50] unduly trespasses on the right to review management plans and amendments to management plans.

The Committee makes no further comment on this Bill.

Part Two – Regulations

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

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Centennial Park and Moore Park Trust Regulation 2004	27/08/04	6699	05/11/04 29/04/05	21/04/05
Companion Animals Amendment (Penalty Notices) Regulation 2005	19/08/05	4579	12/09/05	
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005	29/07/05	4033	12/09/05	
Hunter Water (General) Regulation 2005	01/09/05	6837	04/11/05	
Protection of the Environment Operations (Waste) Regulation 2005	26/08/05	5745	04/11/05	
Stock Diseases General (Amendment) Regulation 2005	30/06/05	3277	12/09/05	
Workers Compensation Amendment (Advertising) Regulation 2005	15/06/05	2288	12/09/05	

Appendix 1: Index of Bills Reported on in 2005

	Digest Number
Anti-Discrimination Amendment (Equality in Education and Employment) Bill 2005*	12
Anti-Discrimination Amendment (Religious Tolerance) Bill 2005*	10
Appropriation Bill 2005	7
Appropriation (Budget Variations) Bill 2005	6
Appropriation (Parliament) Bill 2005	7
Appropriation (Special Offices) Bill 2005	7
Brigalow and Nandewar Community Conservation Area Bill 2005	7
Building Legislation Amendment (Smoke Alarms) Bill 2005	9
Building Professionals Bill 2005	7
Children and Young Persons (Care and Protection) Amendment Bill 2005	14
Civil Liability Amendment (Food Donations) Bill 2004	1
Civil Liability Amendment (Offender Damages) Bill 2005	2, 3
Civil Liability Amendment (Offender Damages Trust Fund) Bill 2005	10
Civil Procedure Bill 2005	5
Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+ Films) Bill 2005*	3
Coal Acquisition Amendment (Fair Compensation) Bill 2005	5
Commission for Children and Young People Amendment Bill 2005	15
Companion Animals Amendment Bill 2005	15
Confiscation of Proceeds of Crime Amendment Bill 2005	11
Consumer Credit (New South Wales) Amendment (Maximum Annual Percentage Rate) Bill 2005	13
Courts Legislation Amendment Bill 2005	7
Court Security Bill 2005	2
Crimes Amendment (Animal Cruelty) Bill 2005	14
Crimes Amendment (Grievous Bodily Harm) Bill 2005	3
Crimes Amendment (Protection of Innocent Accused) Bill 2005*	10
Crimes Amendment (Road Accidents) Bill 2005	11
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	6
Criminal Appeal Amendment (Jury Verdicts) Bill 2004*	3
Criminal Assets Recovery Amendment Bill 2005	7
Criminal Procedure Amendment (Evidence) Bill 2005	3
Criminal Procedure Amendment (Sexual Offence Case Management) Bill 2005	15

	Digest Number
Criminal Procedure Further Amendment (Evidence) Bill 2005	4
Criminal Procedure (Prosecutions) Bill 2005	11
Crown Lands Amendment (Access to Property) Bill 2005*	4
Crown Lands Legislation Amendment Bill 2005	7
Defamation Bill 2005	10
Drug Misuse and Trafficking Amendment Bill 2005	8
Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005	6
Duties Amendment (Abolition of Bob Carr's Vendor Duty) Bill 2005*	9
Duties Amendment (Abolition of Vendor Duty) Bill 2005	10
Electricity Supply Amendment Bill 2005	2, 5
Energy Administration Amendment (Water and Energy Savings) Bill 2005	5
Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004	1
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005	7
Fair Trading Amendment (Responsible Credit) Bill 2005*	6
Farm Debt Mediation Amendment (Water Access Licences) Bill 2005	13
Fire Brigades Amendment (Community Fire Units) Bill 2005	7
First State Superannuation Legislation Amendment (Conversion) Bill 2005	14
Fiscal Responsibility Bill 2005	7
Fisheries Management Amendment (Catch History) Bill 2005*	6
Gambling (Two-up) Amendment Bill 2005	7
Game and Feral Animal Control Amendment Bill 2005	5
Gaming Machines Amendment Bill 2005	8
Gene Technology (GM Crop Moratorium) Amendment (Postponement of Expiry) Bill 2005	12
Governor General's Residence (Grant) Amendment Bill 2005	14
Greek Orthodox Archdiocese of Australia Consolidated Trust Amendment (Duties) Bill 2005	14
Health Legislation Amendment Bill 2005	12
Independent Commission Against Corruption Amendment Bill 2005	2, 3
Industrial Relations Amendment Bill 2005	15
Infrastructure Implementation Corporation Bill 2005	14
James Hardie Former Subsidiaries (Special Provisions) Bill 2005	9
Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004	1
Legal Profession Amendment Bill 2005	8
Legal Profession Bill 2004	1, 5

	Digest Number
Legislation Review Amendment (Family Impact) Bill 2005*	9
Local Government Amendment Bill 2005	8
Local Government Amendment (Stormwater) Bill 2005	10
Local Government and Valuation of Land Amendment (Water Rights) Bill 2005	9
Luna Park Site Amendment (Noise Control) Bill 2005	13
Marine Safety Amendment (Random Breath Testing) Bill 2004	1
Mental Health (Criminal Procedure) Amendment Bill 2005	14
Mine Safety (Cost Recovery) Bill 2005	15
National Park Estate (Reservations) Bill 2005	7
National Parks and Wildlife (Adjustment of Areas) Bill 2005	3
National Parks and Wildlife Amendment (Jenolan Caves Reserves) Bill 2005	11
National Parks and Wildlife (Further Adjustment of Areas) Bill 2005	9
Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005	7
Parliamentary Electorates and Elections Amendment (Voting Age) Bill 2005*	9
Parliamentary Superannuation Legislation Amendment Bill 2005	15
Passenger Transport Amendment (Maintenance of Bus Services) Bill 2005	8
Pawnbrokers and Second-hand Dealers Amendment Bill 2005	8
Pay-roll Tax Amendment (Supporting Jobs and Small Business) Bill 2005*	12
Petroleum (Submerged Lands) Amendment (Permits and Leases) Bill 2005	7
Photo Card Bill 2004	1
Police Integrity Commission Amendment (Shaw Investigation) Bill 2005*	2
Poultry Meat Industry Amendment (Prevention of National Competition Policy Penalties) Bill 2005	7
Prisoners (Interstate Transfer) Amendment Bill 2005	4, 5
Property Legislation Amendment Bill 2005	10
Property, Stock and Business Agents Amendment Bill 2005	14
Protection of Agricultural Production (Right to Farm) Bill 2005*	4
Protection of the Environment Operations Amendment Bill 2005	10
Public Sector Employment and Management Amendment (Ethanol Blended Fuel) Bill 2005*	11
Public Sector Employment and Management Amendment (Extended Leave) Bill 2005	12
Residential Parks Amendment (Statutory Review) Bill 2005	14
Residential Tenancies Amendment (Social Housing) Bill 2005	12
Retail Leases Amendment Bill 2005	13
Rice Marketing Amendment (Prevention of National Competition Policy Penalties) Bill 2005	14

	Digest Number
Road Transport (General) Bill 2004	1, 4
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	1, 4, 7
Royal Blind Society (Merger) Bill 2005	13
Rural Workers Accommodation Amendment Bill 2005	7
Security Industry Amendment Bill 2005	9
Security Interests in Goods Bill 2005	10
Sheriff Bill 2005	2
Shops and Industries Amendment (Special Shop Closures) Bill 2005	14
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2005*	9
Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004	1
Sporting Venues (Offenders Banning Orders) Bill 2005	10
Standard Time Amendment (Co-ordinated Universal Time) Bill 2005	2
Standard Time Amendment (Daylight Saving) Bill 2005	10
State Emergency and Rescue Management Amendment Bill 2005	11
State Emergency Service Amendment Bill 2005	14
State Revenue Legislation Amendment Bill 2005	8
State Revenue Legislation Amendment (Budget Measures) Bill 2005	7
State Revenue Legislation Further Amendment Bill 2005	15
Statute Law Miscellaneous Provisions Bill 2005	8
Statute Law (Miscellaneous Provisions) Bill (No. 2) 2005	14
Surveying Amendment Bill 2005	7
Sydney 2009 World Masters Games Organising Committee Bill 2005	7
Sydney University Settlement Incorporation Amendment Bill 2005*	7
Technical and Further Education Commission Amendment (Staff) Bill 2005	14
Terrorism Legislation Amendment (Warrants) Bill 2005	8
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005	15
Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005	15
Transport Administration Amendment (Transport Levy For Major Events) Bill 2005	2
Transport Legislation Amendment (Implementation of Waterfall Rail Inquiry Recommendations) Bill 2005*	2
Transport Legislation Amendment (Waterfall Rail Inquiry Recommendations) Bill 2005	7
Vocational Education and Training Bill 2005	13
Water Efficiency Labelling and Standards (New South Wales) Bill 2005	3
Water Management Amendment Bill 2005	15
Workplace Surveillance Bill 2005	6

Appendix 2: Index of Ministerial Correspondence on Bills for 2005

Bill	Minister/Member	Letter sent	Reply	Digest 2004	Digest 2005
Building Professionals Bill 2005	Minister for Infrastructure and Planning (Planning Administration)	03/06/05	22/06/05		7, 9
Child Protection (Offender Prohibition Orders) Bill 2004	Minister for Police	18/06/04	12/09/05	6	10
Civil Liability Amendment (Offender Damages) Bill 2005	Minister for Justice	01/03/05	08/03/05		2, 3, 5
Confiscation of Proceeds of Crime Amendment Bill 2005	Attorney General	10/10/05			11
Crime Amendment (Road Accidents) Bill 2005	Attorney General	10/10/05			11
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	Attorney General	23/05/05			6
Criminal Procedure Further Amendment (Evidence) Bill 2005	Attorney General	01/05/05	21/06/05		4, 9
Electricity Supply Amendment Bill 2005	Minister for Energy and Utilities	01/03/05	30/03.05		2, 5
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005	Minister for Infrastructure and Planning	03/06/05	24/06/05		7, 9
Gaming Machines Amendment Bill 2005	Minister for Gaming and Racing	20/06/05	20/09/05		8, 11
Independent Commission Against Corruption Amendment Bill 2005	Premier	01/03/05	02/03/05		2, 3
Legal Profession Amendment Bill 2005					8
Legal Profession Bill 2004	Attorney General	17/02/05	07/04/05		1, 5
Licensing And Registration (Uniform Procedures) Amendment (Photo ID) Bill 2004	Minister for Commerce	03/12/04	09/12/04	17	1
Local Government Amendment Bill 2005	Minister for Local Government	20/06/05	05/09/05		8, 9
Marine Safety Amendment (Random Breath Testing) Bill 2004	Minister for Ports	17/02/05			1
Photo Card Bill 2004	Minister for Roads	17/02/05	30/06/05		1, 9
Prisoners (Interstate Transfer) Amendment Bill 2005	Minister for Justice	01/04/05	18/04/05		4, 5
Road Transport (General) Bill 2004	Minister for Roads	17/02/05 01/04/05	14/03/05 19/07/05 23/09/05		1, 4, 10, 11
Road Transport (General) Amendment (Licence Suspension) Bill 2004	Minister for Roads	18/06/04	01/12/04	9	1, 5

Bill	Minister/Member	Letter sent	Reply	Digest 2004	Digest 2005
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	Minister for Roads	17/02/05 01/04/05	14/03/05 23/05/05		1, 4, 7
Security Industry Amendment Bill 2005	Minister for Police	12/09/05	28/10/05		9, 14
Smoke-free Environment Amendment Bill 2004	Minister for Health	05/11/04		15	
State Emergency and Rescue Management Amendment Bill 2005	Minister for Emergency Services	10/10/05	13/10/05		11, 12
State Revenue Legislation Amendment Bill 2005	Treasurer	20/06/05			8
Vocational Education and Training Bill 2005	Minister for Education and Training	04/11/05			13

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2005

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Anti-Discrimination Amendment (Religious Tolerance) Bill 2005*	N				
Building Professionals Bill 2005	N, C				
Civil Liability Amendment (Food Donations) Bill 2004	N			N	
Civil Liability Amendment (Offender Damages) Bill 2005	N, C				
Civil Liability Amendment (Offender Damages Trust Fund) Bill 2005	N				
Civil Procedure Bill 2005	N			N	
Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+ Films) Bill 2005*	N, C, R		N		
Commission for Children and Young People Amendment Bill 2005	N, C				
Companion Animals Amendment Bill 2005	C				
Confiscation of Proceeds of Crime Amendment Bill 2005	R, C				
Consumer Credit (New South Wales) Amendment (Maximum Annual Percentage Rate) Bill 2005	R				
Court Security Bill 2005				N	
Crimes Amendment (Protection of Innocent Accused) Bill 2005*	R				
Crimes Amendment (Road Accidents) Bill 2005	R, C				
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	R, C		R		
Criminal Appeal Amendment (Jury Verdicts) Bill 2004*	R				
Criminal Assets Recovery Amendment Bill 2005	R				
Criminal Procedure Amendment (Evidence) Bill 2005	N				

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Criminal Procedure Further Amendment (Evidence) Bill 2005	C			N	
Criminal Procedure (Prosecutions) Bill 2005	N				
Drug Misuse and Trafficking Amendment Bill 2005				N	
Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005				N	
Electricity Supply Amendment Bill 2005				C	
Energy Administration Amendment (Water and Energy Savings) Bill 2005				R, N	
Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004			N	N	N
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005	N, R	C	N, C		R, C
Gaming Machines Amendment Bill 2005	C				
Independent Commission Against Corruption Amendment Bill 2005				C	
Industrial Relations Amendment Bill 2005	N		N		
Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004	R			N	
Legal Profession Amendment Bill 2005	N			R	
Legal Profession Bill 2004	N,C			N	
Local Government Amendment Bill 2005	C, R				
Luna Park Site Amendment (Noise Control) Bill 2005	R				
Marine Safety Amendment (Random Breath Testing) Bill 2004				C	
Mental Health (Criminal Procedure) Amendment Bill 2005	R				

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
National Parks and Wildlife (Adjustment of Areas) Bill 2005				N	
Parliamentary Electorates and Elections Amendment (Voting Age) Bill 2005*	R				
Passenger Transport Amendment (Maintenance of Bus Services) Bill 2005	R	R	R	R	
Photo Card Bill 2004				C	
Police Integrity Commission Amendment (Shaw Investigation) Bill 2005*	N				
Prisoners (Interstate Transfer) Amendment Bill 2005				C	
Protection of Agricultural Production (Right to Farm) Bill 2005*	R				
Protection of the Environment Operations Amendment Bill 2005	R				
Residential Parks Amendment (Statutory Review) Bill 2005	N				
Retail Leases Amendment Bill 2005	N, R			N	
Road Transport (General) Bill 2004	N	C		C	
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	N			C	
Rural Workers Accommodation Amendment Bill 2005	R				
Security Industry Amendment Bill 2005	C, R				
Sheriff Bill 2005				N	
Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004	R, N				
State Emergency and Rescue Management Amendment Bill 2005	C				
State Revenue Legislation Amendment Bill 2005	N, C, R				
State Revenue Legislation Amendment (Budget Measures) Bill 2005	N				
State Revenue Legislation Further Amendment Bill 2005	N				
Surveying Amendment Bill 2005	N				

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Terrorism Legislation Amendment (Warrants) Bill 2005	R				
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005	C, R				
Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005	C, R				
Vocational Education and Training Bill 2005	C, R			C, R	
Water Efficiency Labelling and Standards (New South Wales) Bill 2005	N			N	N
Water Management Amendment Bill 2005	N, C, R		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 2005

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2005
Adoption Amendment (Adoption Service Providers) Regulation 2005	Minister for Community Services Barnardos	12/09/05 23/09/05	26/09/05 03/11/05	13, 14
Architects Regulation 2004	Minister for Commerce	21/09/04	30/11/04	1
Centennial and Moore Park Trust Regulation 2004	Minister for Tourism and Sport and Recreation	05/11/04 29/04/05	21/04/05	5
Environmental Planning and Assessment Amendment (ARTC Rail Infrastructure) Regulation 2004	Minister for Infrastructure and Planning	26/10/04 17/02/05	01/02/05	1
Forestry Regulation 2004	Minister for Primary Industries	26/10/04 17/02/05	18/01/05	1
Hunter-Central Rivers Catchment Management Authority Regulation 2005	Minister for Natural Resources	20/06/05	04/09/05	10
Institute of Teachers Regulation 2005	Minister for Education and Training	01/04/05 03/06/05	26/05/05	7
Legal Profession Amendment (Advertising) Regulation 2005	Attorney General	12/09/05	17/10/05	13
Mental Health Amendment (Transfer of Queensland Civil Patients) Regulation 2005	Minister for Health	29/04/05 26/10/05	11/07/05	9
Occupational Health and Safety Amendment (Dangerous Goods) Regulation 2005	Minister for Commerce	18/10/05	11/11/05	14
Occupational Health and Safety Amendment (Transitional) Regulation 2004	Minister for Commerce	01/04/05 23/05/05	17/05/05	6
Passenger Transport (Drug and Alcohol Testing) Regulation 2004	Minister for Transport Services	30/04/04 01/03/05	17/02/05	2
Protection of the Environment Operations (Luna Park) Regulation 2005	Minister for the Environment	29/04/05	10/08/05	9
Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2005	Minister for Roads	01/04/05	12/07/05	9
Stock Diseases (General) Regulation 2004	Minister for Primary Industries	05/11/04	16/12/04	1
Sydney Olympic Park Amendment Regulation 2004	Minister for Sport and Recreation	05/11/04	03/12/04	1

Appendix 5: Notice of Discussion Paper on the Right to Silence

The Legislation Review Committee is seeking comment in relation to the principles it should apply when considering bills that trespass on the right to silence. The Committee will then use these comments when suggesting standards and principles to which the Parliament should have regard when considering bills that trespass on this fundamental right.

The Committee has prepared a Discussion Paper raising a number of questions. This Discussion Paper is available online at **www.parliament.nsw.gov.au** under "Inquiries receiving Submissions". Copies are also available from the Committee's Secretariat.

Tel: (02) 9230 3418 or 9230 2899

Fax: (02) 9230 3052

Legislation.Review@parliament.nsw.gov.au

Submissions responding to the Discussion Paper should be sent to:

Chairman
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
Sydney NSW 2000

Alternatively, submissions can be made on-line by following the links at **www.parliament.nsw.gov.au**

The closing date for submissions is **30 November 2005**.