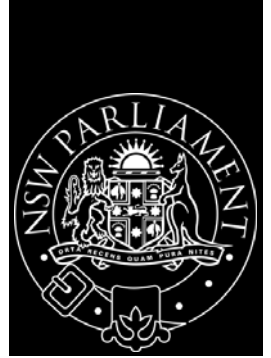


PARLIAMENT OF NEW SOUTH WALES



# Legislation Review Committee

## LEGISLATION REVIEW DIGEST

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No 4 of 2010

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\* Denotes Private Member's Bill

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## FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

### 8A Functions with respect to Bills

- (1) The functions of the Committee with respect to Bills are:
  - (a) to consider any Bill introduced into Parliament, and
  - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
    - (i) trespasses unduly on personal rights and liberties, or
    - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
    - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
    - (iv) inappropriately delegates legislative powers, or
    - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- (2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

### 9 Functions with respect to Regulations:

- (1) The functions of the Committee with respect to regulations are:
  - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
  - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
    - (i) that the regulation trespasses unduly on personal rights and liberties,
    - (ii) that the regulation may have an adverse impact on the business community,
    - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
    - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
    - (v) that the objective of the regulation could have been achieved by alternative and more effective means,
    - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
    - (vii) that the form or intention of the regulation calls for elucidation, or
    - (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
  - (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (2) Further functions of the Committee are:
  - (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
  - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

## GUIDE TO THE *LEGISLATION REVIEW DIGEST*

### Part One – Bills

#### Section A: Comment on Bills

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament. Following a brief description of the Bill, the Committee considers each Bill against the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987* (see page iii).

#### Section B: Ministerial correspondence – Bills previously considered

This section contains the Committee's reports on correspondence it has received relating to Bills and copies of that correspondence. The Committee may write to the Minister responsible for a Bill, or a Private Member of Parliament in relation to his or her Bill, to seek advice on any matter concerning that Bill that relates to the Committee's scrutiny criteria.

### Part Two – Regulations

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the *Digest*. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the *Digest* drawing the regulation to the Parliament's "special attention". The criteria for the Committee's consideration of regulations is set out in s 9 of the *Legislation Review Act 1987* (see page iii).

#### Regulations for the special attention of Parliament

When required, this section contains any reports on regulations subject to disallowance to which the Committee wishes to draw the special attention of Parliament.

#### Regulations about which the Committee is seeking further information

This table lists the Regulations about which the Committee is seeking further information from the Minister responsible for the instrument, when that request was made and when any reply was received.

#### Copies of Correspondence on Regulations

This part of the *Digest* contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought information. The Committee's letter to the Minister is published together with the Minister's reply.

## Appendix 1: Index of Bills Reported on in 2010

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

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 2010

This table specifies the action the Committee has taken with respect to Bills that received comment in 2010 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

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. Children and Young Persons (Care and Protection) Amendment (Parental Responsibility) Bill 2010\*

**Issues:** Proposed Section 34 – lack of procedural fairness – uncertainty of penalties for non-compliance – undermining of the rights of the family.

15. The Committee has identified key issues with this Bill. Firstly, it compels parents and care-givers to attend meetings and possibly enter into arrangements where there is a power imbalance, both by affording the power of one party to compel the other to appear and also an inherent power imbalance by the parent or care-giver's potential vulnerability in such circumstances.
16. Secondly, despite requiring parents or care-givers to appear at a meeting with the Department of Community Services, there does not appear to be any accompanying penalty for a failure to do so, leaving uncertain what measures can be taken against parents or care-givers for non-compliance. The Committee finds it difficult to comment on the bill's infringement on personal rights and liberties where non-compliance penalties are not attached.

#### 2. Coal Mine Health and Safety Amendment Bill 2010

**Issue:** Retrospective Operation of Schedule 1 [25]

19. The Committee recognises the intention of this Bill is to clarify potential jurisdictional uncertainties by ensuring that a defendant in an occupational health and safety matter does not escape liability on the basis of a technicality. However, the Committee is always concerned about the retrospective application of legislation, especially when criminal matters are concerned and where legislative authority is backdated. The Committee refers this matter to Parliament for its consideration.

**Issue:** Commencement by Proclamation at Cl. 2

21. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

#### 3. Companion Animals Amendment (Dogs in Outside Eating Areas) Bill 2010\*

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



#### 4. Court Information Bill 2010

##### Issue: Privacy

20. The Committee notes the intent of the Bill to strike an appropriate balance between two important interests, facilitating open access to court information and maximising privacy protections. The Committee recognises the value these interests have on the rights and liberties of individuals, but at times appreciates that these interests may compete. In light of comments received by Privacy NSW that it does not take significant issue with this Bill, and given the safeguards implemented to protect personal identification information, the Committee appreciates the extent to which the balance has been achieved.
21. The Committee also notes the differentiated standards that will apply between court records created before the enactment of the Bill and those created afterward. The Committee is concerned that the lesser standard of protection afforded to court records created before this Bill is proclaimed risks compromising an individual's security and raising the threat of identity theft. Although the Committee recognises the onerous task of subjecting all pre - *Court Information Act 2010* court records to the privacy standards provided for under the Bill, the Committee is still concerned about the differentiated standard of privacy protection and refers this matter to Parliament for its consideration.

##### Issue: Commencement by proclamation at clause 2.

23. The Committee accepts that there may be good reasons for commencing an Act on proclamation, such as additional provisions to be included in the Act or the Act's contingency on the making of certain regulations, and has not identified any issues under s8A(1)(b)(iv) of the *Legislation Review Act 1987*.

#### 5. Crimes Amendment (Grievous Bodily Harm) Bill 2010\*

##### Issue: Personal Physical Integrity – Clause 3 (1) and (2) – Amendment of *Crimes Act 1900*:

12. As the Bill proposes to redefine human life and the foetus, it may also revolve around concerns for personal physical integrity. The Committee notes that a range of interests and rights may potentially be impacted upon, including references made in the Second Reading speech as suggesting a conscience vote.
13. Therefore, the Committee refers clauses 3 (1) and (2) of this Bill to Parliament for consideration as to whether the Bill may trespass unduly on personal rights and liberties including matters of personal physical integrity and wider criminal liabilities potentially arising from the contrasting definition of 'grievous bodily harm' as extended to any embryonic stage.

**6. Parliamentary Electorates and Elections Amendment Bill 2010**

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

**7. Registrar-General Legislation (Amendment And Repeal) Bill 2010**

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

**8. Road Transport Legislation Amendment (Unauthorised Vehicle Use) Bill 2010**

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

12. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

**9. Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010 (No 2)**

**Issue: Commencement by Proclamation at Cl. 2**

11. Although some provisions of the Bill commence on proclamation, the Committee recognises the difficulty in commencing all provisions on assent or a fixed date and therefore has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

## 10. Weapons And Firearms Legislation Amendment Bill 2010

**Issue:** Not required to provide reasons – closed justice – denial of natural justice and procedural fairness – amendment of *Weapons Prohibition Act 1998* - Schedule 1 [5] - proposed insertion of section 10 (3A) and (3B); Schedule 1 [13] – proposed insertion of section 16 (1A); Schedule 1 [14] – proposed insertion of section 18 (2A); and Schedule 1 [26] – proposed insertion of section 35 (2) and (3); amendment of *Firearms Act 1996* – Schedule 2 [4] – proposed insertion of section 22 (1A); Schedule 2 [5] – proposed insertion of section 24 (2A) and Schedule 2 [8] – proposed insertion of section 30 (8) and (9):

22. The Committee is concerned that the Commissioner of Police will not be required to provide any reasons for the decision that a particular applicant will be refused a permit or that the permit holder will have their permit suspended or revoked respectively under the proposed section 10 (3B) of Schedule 1 [5]; proposed section 16 (1A) of Schedule 1 [13]; and proposed section 18 (2A) of Schedule 1 [14], based on the public safety and public interest grounds arising from the proposed section 10 (3A) with the reliance of criminal intelligence report or other criminal information held in relation to the person.
23. Such affected permit applicants or permit holders who will have their permits refused, suspended or revoked under the above proposed provisions may then be denied a right of reply or an opportunity to test the veracity of the criminal intelligence reports submitted against them.
24. By way of comparison, the Committee notes that when the then Security Industry Amendment Bill 2005 was first introduced and which had been passed both Houses and received the Royal Assent on 1 July 2005, a similar concern with regard to procedural fairness was reported in *Digest 9 of 2005*. The Security Industry Amendment legislation in 2005 also contained a new provision that when determining whether an applicant is a fit and proper person, the Commissioner of Police may have regard to certain criminal intelligence reports and other criminal information and may revoke the security licence if of the opinion that the licensee is no longer a fit and proper person to hold a licence. In the public interest, the security legislation, similarly, ensures that any such information will remain confidential in a review by the Administrative Decisions Tribunal of a decision to refuse to grant a licence or to revoke a licence.

- 25.** In *Digest 9 of 2005*, with respect to procedural fairness on the comparative provision proposed by that Security Industry Amendment legislation, the Committee commented at paragraph 11 on page 14, that: “While the Committee appreciates the aim of maintaining the confidentiality of such information, it is concerned that decisions may be made with potentially deleterious effects on a person’s livelihood, without that person being aware of the material on which those decisions are based”. “Procedural fairness, or natural justice, means that decision-makers must comply with certain obligations where any decision made may directly and adversely affect a person’s rights, interests, status or legitimate expectations”. At paragraphs 16 to 19, on page 15 of the *Digest 9 of 2005*, the Committee noted that it is a fundamental common law rule that a person must be given an opportunity to participate in the decisions that affect him or her. The Committee then referred the matter to Parliament to consider whether that new provision unreasonably trespasses on an applicant’s right to a fair hearing.
- 26.** The Committee notes the above comments and conclusions reached in *Digest 9 of 2005* on a similar amendment in the context of the security industry where the Commissioner and the Tribunal could rely on confidential criminal intelligence reports and other criminal information held against the applicant.
- 27.** The reliance of criminal intelligence reports has become increasingly important and useful, particularly in the context of protecting public safety. The Committee also has the obligation of considering what may constitute an undue trespass on personal rights and liberties. In determining whether a trespass on a right is undue, this may require the identification of the degree of trespass to the right; evaluation of the right that is trespassed upon; the importance of the purpose of the trespass such as public interests and public safety concerns; and assessment of the necessity of trespassing on the right to achieve the intended legislative objective including the least restrictive means available to achieve that purpose.
- 28.** The Committee notes that traditionally, the common law rule of procedural fairness is treated as a core right and fundamental principle. Some of the key sources such as the recent South Australian Supreme Court decision and previous High Court judgment may also assist the Committee in assessing whether the extent or degree of a trespass were undue in the context of public interest concerns.
- 29.** By taking consideration of the above issues, the provisions proposed by this Bill could appear to be contrary to the fundamental principles of natural justice and procedural fairness by relying on secret or confidential evidence which would not be disclosed to the affected individual and may lead to an undue trespass on individual rights and liberties. Accordingly, the Committee refers the Bill’s amendments to the *Weapons Prohibition Act 1998*, concerning proposed section 10 (3B) of Schedule 1 [5]; proposed section 16 (1A) of Schedule 1 [13]; and proposed section 18 (2A) of Schedule 1 [14] to Parliament for consideration.

36. It could appear that the proposed section 35 (3)(b) affecting the right to natural justice and an opportunity to test the veracity of the criminal intelligence reports or other criminal information may be further undermined by the reliance by the Administrative Decisions Tribunal to base its review on material received in closed hearing, in the absence of the affected applicant and the applicant's representative.
37. The Committee notes the recent decision of the South Australian Supreme Court in *Totani & Anor v The State of South Australia* [2009] SASC 301. The South Australian Supreme Court discussed a legislation which involved secret intelligence and administrative decision making on questions which should be judicially decided and on appeal by a superior court; and how the person should have a right to know that he or she has been accused as well as what he or she has been accused of; and that courts should have a right to question and test the accuracy of 'criminal intelligence'.
38. Based on the South Australian Supreme Court decision, the proposed amendments may appear to cause the Tribunal to act in a manner contrary to natural justice and due process by denying people the right to know the allegations made against them including a right of access by a party to all adverse materials taken into account by the Tribunal.
39. While the Committee appreciates the aim of maintaining the confidentiality of such information, however, in light of the above principles decided from the recent South Australian Supreme Court decision, the Committee is concerned that the Administrative Decisions Tribunal is not required to provide any reasons arising from the review of a decision by the Commissioner of Police to refuse to issue a permit, or the revocation or suspension of a permit that was made on the grounds in the proposed section 10 (3A), by the insertion of section 35 (2) and (3) of Schedule 1 [26].
40. The Committee, therefore, refers this to Parliament to consider whether it may be contrary to principles of natural justice and due process and could unduly trespass on individual rights and liberties.
44. The Committee expresses similar concerns with the Bill's amendment to the *Firearms Act 1996* with regard to the proposed section 22 (1A) of Schedule 2 [4], proposed section 24 (2A) of Schedule 2 [5], proposed section 30 (8) and (9) of Schedule 2 [8], where they respectively ensure that the Commissioner of Police will not need to provide any reasons for suspending the licence under the new section 11 (5A); for revoking the licence arising from the new section 11 (5A); or for suspending or revoking a permit because of the grounds for revoking the permit under the new section 11 (5A).

45. Such affected licence or permit holders under the above proposed provisions may then be denied a right of reply or an opportunity to test the veracity of the materials submitted against them. The Committee is aware of the public interest concerns and also weighs up the implications for fundamental principles of natural justice and procedural rights as discussed earlier in relation to the equivalent amendments to the *Weapons Prohibition Act 1998* and also identified in the context of the previously reported *Digest 9 of 2005* with respect to the security industry amendments.
46. Therefore, the proposed amendments to the *Firearms Act 1996* may appear to be contrary to the fundamental principles of natural justice and procedural fairness, and may trespass unduly on personal rights and liberties. Accordingly, the Committee refers this to Parliament for consideration.

**Issue: Retrospectivity – amendment of *Weapons Prohibition Act 1998* - Schedule 1 [42] - proposed insertion of Part 4 - section 11 – existing permits may be revoked on grounds of risk to public safety etc:**

48. The Committee will always be concerned to identify the retrospective effects of legislation that may have an adverse impact on a person. The Committee also observes the right established by Article 15 of the *International Covenant on Civil and Political Rights* that a person not be subject to a heavier penalty than what was applicable at the time of the commission of the offence.
49. Therefore, the Committee refers to Parliament to consider whether providing for the revocation of permits which had been duly made under the law and in force immediately before the commencement of the new section 10 (3A) as proposed in Schedule 1 [42] by the insertion of section 11 in the new Part 4, may unduly trespass on personal rights and liberties.

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

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

## Part One – Bills

### SECTION A: COMMENT ON BILLS

# 1. CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) AMENDMENT (PARENTAL RESPONSIBILITY) BILL 2010\*

Date Introduced:	19 March 2010
House Introduced:	Legislative Assembly
Member with Carriage:	Pru Goward MP
Portfolio:	Private Members' Bill

### Purpose and Description

1. The object of this Bill is to amend the *Children and Young Persons (Care and Protection) Act 1998* so as to ensure that care plans and parent responsibility contracts under the Act become a mandatory step in the process of dealing with children and young persons who are in need of care and protection.
2. As a result of the proposed Act, the Director-General of the Department of Human Services will be required to make all reasonable efforts to develop a care plan or parent responsibility contract for a child or young person who is in need of care or protection before the Director-General can proceed to make a care application before the Children's Court in relation to the child or young person. The parents or primary care-givers will also be required to attend the first meeting arranged by the Director-General for the purposes of developing the care plan or parent responsibility contract.
3. The Bill also makes it clear that care plans and parent responsibility contracts may be made in relation to unborn children who may be at risk of harm subsequent to their birth.

### Background

4. In December 2009, the Wood Commission of Inquiry handed down its report on 'The death of Dean Shillingsworth: Critical challenges in the context of reforms to the child protection system'. In all, 111 recommendations were made in this report.
5. The *Children and Young Persons (Care and Protection) Amendment (Parental Responsibility) Bill 2010* will make it mandatory for Community Services to seek parents and develop with them either care plans or parent responsibility contracts when a child or young person is determined to be in need of care and protection.
6. As the *Children and Young Persons (Care and Protection) Act 1998* currently stands, Community Services *may* require parents to sign up to a care plan or parent responsibility contracts where the Director-General is of the opinion that their child is

in need of care and protection. In this respect, the option is discretionary. The discrepancy between the existing legislation and this Bill is that seeking a care plan or parent responsibility contract under the Bill will no longer be discretionary where the Director-General is of the opinion that a child is in need of care and protection, but be made incumbent on the Director-General to take all reasonable steps to develop such plans.

7. According to the Agreement in Principle Speech, asking a parent to sign a mandatory care order acts to: give parents the opportunity to take responsibility; enable child protection services entrée into the family to offer help; and ensures that the family understand what is going on and why they have been reported in the first place.
8. This Bill also relates to an unborn child who, under a pre-natal report, is deemed to be at risk of harm.

## The Bill

### 9. Outline of Provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent to the proposed Act.

**Schedule 1** amends the *Children and Young Persons (Care and Protection) Act 1998* in the manner described in the above overview.

## Issues Considered by the Committee

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

**Issues: Proposed Section 34 – lack of procedural fairness – uncertainty of penalties for non-compliance – undermining of the rights of the family.**

10. Proposed section 34(2) of this Bill requires the Department of Community Services to make all reasonable efforts to develop, in consultation with the parents or primary care-givers of the child or young person, a care plan or parent responsibility contract before making any care application in respect of the child or young person where that child or young person is in need of care and protection. This provision makes it incumbent on the Department of Community Services to request to relevant parents and care-givers that they enter into such plans or contracts, although does not make it mandatory for parents or care-givers to accept entrance into such arrangements.
11. However, proposed section 34(3) makes it mandatory that parents or care-givers attend the first meeting arranged by the Department of Community Services for the purposes of the Department seeking that parents or caregivers enter into such contracts.
12. The Committee accepts that the protection of children is paramount. However, the Committee has identified some issues.



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Children and Young Persons (Care and Protection) Amendment (Parental Responsibility) Bill 2010\*

13. Firstly, the Committee notes that compelling parents or care-givers to attend a meeting and to subsequently attempt that they enter into agreements is a significant extension of the current arrangements which leaves the seeking of an agreement at the discretion of the Department. It raises issues such as a power imbalance, with one party being afforded the power to compel the other party to appear at the meeting. This power balance is potentially exacerbated by differences in knowledge and access to resources between the parties and the potentially limited exposure parents and care-givers have had in discussing such arrangements. Parents or care-givers could also be in a potentially vulnerable position, particularly where those with mental illness are involved. The Committee is concerned that this power imbalance may adversely affect parents or care-givers placed in this position.
14. Secondly, although this Bill provides that attending the first meeting organised by the Department is mandatory, it omits an accompanying penalty for the failure of a parent or care-giver to attend such meetings. The Committee is concerned that this omission leaves uncertain what measures can be taken against parents or care-givers for non-compliance. The Committee finds it difficult to comment on the bill's infringement on personal rights and liberties where non-compliance penalties are not attached.

- 15. The Committee has identified key issues with this Bill. Firstly, it compels parents and care-givers to attend meetings and possibly enter into arrangements where there is a power imbalance, both by affording the power of one party to compel the other to appear and also an inherent power imbalance by the parent or care-giver's potential vulnerability in such circumstances.**
- 16. Secondly, despite requiring parents or care-givers to appear at a meeting with the Department of Community Services, there does not appear to be any accompanying penalty for a failure to do so, leaving uncertain what measures can be taken against parents or care-givers for non-compliance. The Committee finds it difficult to comment on the bill's infringement on personal rights and liberties where non-compliance penalties are not attached.**

***The Committee makes no further comment on this Bill.***

## 2. COAL MINE HEALTH AND SAFETY AMENDMENT BILL 2010

Date Introduced:	18 March 2010
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Linda Burney MP
Portfolio:	Community Services

### Purpose and Description

1. This Bill amends the *Coal Mine Health and Safety Act 2002* to clarify that inspectors from the Department of Industry and Investment, not the WorkCover Authority, have jurisdiction under the *Occupational Health and Safety Act 2000* over all workplaces where coal mining related activities occur.
2. In addition, the Bill provides the Minister for Mineral and Forest Resources to determine whether a mine or other place is a mine or place to which the *Coal Mine Health and Safety Act 2002* applies.
3. The Bill provides that the *Coal Mine Health and Safety Act 2002* does not apply to railway operations, public roads, civil engineering works or power lines.
4. Lastly, the Bill provides for the registration of mines under the *Mining Act 1992*, in place of the current registration of colliery holdings.

### Background

5. The existing *Coal Mine Health and Safety Act 2002* aims to secure the health, safety and welfare of those working in the New South Wales coal mining industry. The Act supports the *Occupational Health and Safety Act 2000* and there is a division of responsibilities between WorkCover and Industry and Investment NSW.
6. A statutory review of the *Coal Mine Health and Safety Act 2002*, undertaken in 2009, identified the need to clarify the places of work in which the Act applies. The review identified difficulties with using the existing definition of colliery holding boundaries to identify the jurisdictional boundary for most mining activities.
7. This confusion has created jurisdictional uncertainty relating to the administration of the *Occupational Health and Safety Act 2000* with respect to coal mining related activities, leading to a potential uncertainty in the lawfulness of regulatory action under the *Occupational Health and Safety Act 2000*.
8. To create certainty, the Bill removes the geographical concept of a colliery holding as the basis of the application of the Act and, in its place, bases the application of the *Coal Mine Health and Safety Act 2002* on the activities intended to be covered by it. In doing so, this amendment delineates between the authority of the WorkCover NSW and Industry and Investment NSW.

9. The Bill proposes to give the Minister the power to make a binding determination on the application of the Act where it would not otherwise be clear.
10. The savings and transition provisions of the Bill will ensure that potential breaches of the *Occupational Health and Safety Act 2000* can be investigated and, if necessary, prosecuted.
11. The Bill validates the actions of inspectors exercising regulatory functions in relation to coalmining workplaces in New South Wales. In doing so, this provision removes the basis for a technical challenge by a defendant that an investigation or prosecution is invalid because of jurisdictional uncertainty.
12. The Bill amends the *Coal Mine Health and Review Act 2002* to ensure that its regulatory functions can be exercised at all the places of work it covers, ensuring that the chief inspector and industry check inspectors are informed of all notifiable incidents.
13. The Bill also amends the *Mining Act 1992* to replace existing colliery holding register with a single register of coal and other mines.

## The Bill

### 14. Outline of Provisions

#### **Schedule 1 Amendment of *Coal Mine Health and Safety Act 2002 No 129***

**Schedule 1 [1]** omits the definition of a term that will no longer be used and inserts instead a definition of ***abandoned mine***, which includes a discontinued mine, a closed mine (other than a suspended mine) and a former mine.

**Schedule 1 [2]** inserts four definitions (two of which are transferred from elsewhere in the CMH&S Act, having been omitted by **Schedule 1 [15]**). ***Coal exploration*** is defined as the carrying out of works on, or the removal of samples from, land for the purpose of testing the coal-bearing qualities of the land, but the definition provides for the regulations to exclude activities or classes of activities.

**Schedule 1 [3]** replaces the definition of ***coal exploration site*** so that it means a place where coal exploration is carried out and includes a place where coal exploration has been carried out and that is being rehabilitated.

**Schedule 1 [4]** replaces the definition of ***coal operation***. The new definition includes any place of work to which the CMH&S Act applies that is prescribed by the regulations.

**Schedule 1 [5]** replaces the definition of ***colliery holder***. The new definition clarifies that, in relation to land subject to an authority for coal granted under the *Mining Act 1992*, the colliery holder is the person who holds the authority. In relation to land subject to a licence for coal granted under the *Offshore Minerals Act 1999*, the colliery holder is the person who holds the licence. In relation to other land, the colliery holder is the person having beneficial ownership of the mine.

**Schedule 1 [6]** replaces the definition of ***colliery holding***.

**Schedule 1 [7]** updates the definition of *Department*.

**Schedule 1 [8] and [9]** replace the definition of *mine*. The new definition of the noun extends beyond any coal operation within which coal is disturbed in its natural place of formation, and means any of the following:

- (a) any place where the extraction of material from land for the purpose of recovering coal is carried out,
- (b) any coal preparation plant at or near the place from which the material or coal was extracted,
- (c) any place where the storage or treatment of waste resulting from the extraction of material from land for the purpose of recovering coal is carried out (if that place is at or near the place from which the material or coal was extracted),
- (d) any place where the treatment of the coal or the material extracted for the purpose of recovering or improving coal is carried out (if that place is at or near the place from which the material or coal was extracted),
- (e) any place where coal exploration is carried out,
- (f) any place where offshore mining activities (within the meaning of the *Offshore Minerals Act 1999*) for coal are carried out,
- (g) any place where operations associated with the care, security or maintenance of such a place are carried out during any time when activities or operations at that place are suspended,
- (h) any place where operations associated with the decommissioning or abandonment of such a place are carried out,
- (i) any place where such an activity or operation is or has been carried out and that is being rehabilitated.

**Schedule 1 [10]** omits a provision that provides that certain things are part of a coal operation. (The substance of the provision is transferred to the regulations by

**Schedule 3.3 [1].)**

**Schedule 1 [11]** substitutes Part 2 of the CMH&S Act, which currently deals with the application of that Act. Proposed Part 2 includes the following provisions:

- (a) proposed section 8 provides that the CMH&S Act applies to all places or work that are mines and to certain other specified places. (At present, that Act applies to all places of work that are within a colliery holding, that are coal exploration sites or that are the subject of a licence to mine coal under the *Offshore Minerals Act 1999*),
- (b) proposed section 8A provides for the regulations to exclude a mine or place of a certain class from the operation of the CMH&S Act and for the Minister for Mineral

and Forest Resources to specify (by notice published in the Gazette) mines or places to which that Act does not apply,

(c) proposed section 8B provides for the Minister to determine certain jurisdictional questions,

(d) proposed section 8C provides that the CMH&S Act does not apply to railway operations or public roads,

(e) proposed section 8D provides that the CMH&S Act does not apply to civil engineering works,

(f) proposed section 8E provides that the CMH&S Act does not apply to powerlines,

(g) proposed section 9 provides that the CMH&S Act binds the Crown.

**Schedule 1 [12]–[14]** extend duties that currently require exploration holders to give notice of drilling operations so that those duties apply to any colliery holder.

**Schedule 1 [16]** updates a definition of *mine*.

**Schedule 1 [17]** provides that obligations to notify incidents under Division 1 of Part 7 of the CMH&S Act apply to all coal operations and mines.

**Schedule 1 [18]** updates a provision relating to the making of stop work orders.

**Schedule 1 [19]** provides that an instrument appointing a person as a government official may limit the person's functions under the OH&S Act, as well as under the CMH&S Act.

**Schedule 1 [20] and [21]** provide for the consideration and investigation of complaints concerning mines rather than just coal operations.

**Schedule 1 [22]** provides that a government official has the function of providing advice relating to the health, safety and welfare of people at work at mines, rather than just at coal operations, as is currently the case.

**Schedule 1 [23]** inserts a power for government officials to require the colliery holder for a mine to provide a plan of all or part of the mine.

**Schedule 1 [24]** provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.

**Schedule 1 [25]** inserts savings and transitional provisions consequent on the enactment of the proposed Act.

## **Schedule 2 Amendment of *Mining Act 1992 No 29***

**Schedule 2 [1]** omits a provision that restricts the granting of an exploration licence over land within a colliery holding.

**Schedule 2 [2]** omits a provision that restricts the granting of an assessment lease over land within a colliery holding.

**Schedule 2 [3]** omits a provision that restricts the granting of a mining lease over land within a colliery holding.

**Schedule 2 [4]** replaces a requirement to keep a register of colliery holdings with a requirement to keep a register of mines. The register must record, among other things, the name of each mine at which mining operations are carried out under the authority of a lease.

**Schedule 2 [5]** omits a provision that restricts the granting of mineral claims over land within a colliery holding.

**Schedule 2 [6]** provides for the making of savings and transitional regulations consequent on the enactment of the proposed Schedule.

**Schedule 2 [7]** inserts savings and transitional provisions consequent on the amendment made by **Schedule 2 [4]**.

**Schedule 2 [8]** updates the definition of ***colliery holding***.

### **Schedule 3 Amendment of other Acts and instruments**

**Schedule 3.1** updates the definition of ***colliery holding*** in the *Coal Acquisition (Compensation) Arrangements 1985* and clarifies where that term only relates to past matters.

**Schedule 3.2** inserts definitions of ***colliery holder*** and ***colliery holding*** in the *Coal Acquisition (Re-acquisition Arrangements) Order 1997*.

**Schedule 3.3** makes amendments to the *Coal Mine Health and Safety Regulation 2006* that are consequential on the amendments made by Schedule 1.

**Schedule 3.4** makes it clear that a reference to a ***colliery holding*** in the *Coal Ownership (Restitution) Act 1990* relates to a colliery holding within the meaning of the *Coal Mining Act 1973* as in force on 1 January 1986.

**Schedule 3.5** makes it clear that a particular reference to a ***colliery holding*** in the *Coal Ownership (Restitution) Regulation 2005* relates to a colliery holding within the meaning of the *Coal Mining Act 1973* as in force immediately before its repeal.

**Schedule 3.6** amends the *Mine Health and Safety Act 2004* to bring section 8 of that Act in line with proposed section 8B of the CMH&S Act. The amendments also provide that instruments appointing a person as a government official may limit the functions that the person has.

**Schedule 3.7** updates the definitions of ***Colliery holding*** and ***Proprietor*** in the *Mine Subsidence Compensation Act 1961*.

**Schedule 3.8** omits uncommenced amendments to provisions of the *Mining Act 1992* from the *Mining Amendment Act 2008*. Those amendments relate to the registration of colliery

holdings and are redundant as a result of the amendments made by **Schedule 2**. The Subschedule also makes an amendment that is consequential on the amendment made by **Schedule 2 [4]**.

**Schedule 3.9** updates a provision of the *Mining Regulation 2003* relating to the registration of colliery holdings as a consequence of the amendment made by **Schedule 2 [4]**.

**Schedule 3.10** provides that the functions that an inspector appointed under the *Mine Health and Safety Act 2004* or the CMH&S Act has under the OH&S Act may be limited by his or her appointment.

**Schedule 3.11** updates the definition of *holding* in the *Petroleum (Onshore) Regulation 2007* and inserts a new definition of *colliery holding*.

## Issues Considered by the Committee

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

#### Issue: Retrospective Operation of Schedule 1 [25]

15. The Bill provides at Schedule 1 [25] that anything done in the exercise or purported exercise of a function under the *Coal Mine Health and Safety Act 2002* or the *Occupational Health and Safety Act 2000* before the relevant date that would have been validly done if the amending Act had been in force, is validated. To this end, the Bill validates those investigations and prosecutions that have commenced under the Act but would not have been otherwise valid at the time the prosecution or investigation commenced. Similarly, the Act validates penalty notices issued under the Act but which would not have been otherwise valid at the time the penalty notice was issued.
16. This Bill is designed to clarify potential jurisdictional uncertainties that may arise under existing legislation. The Committee recognises the Bill's intention to ensure a defendant does not escape liability for a breach of duty on the basis of a jurisdictional technicality. As this Bill relates to the occupational health and safety or those working in the coal mining industry, there is a strong public interest in ensuring workers are adequately protected and breaches of relevant work safety legislation are appropriately dealt with.
17. However, the Committee is always concerned about the retrospective application of legislation, especially when it concerns criminal matters. Generally, when an investigation, prosecution or the issuance of a penalty notice takes place, adequate authority should be in place at the time of commencement or issuance, and not be subject to backdated validation. This ensures that individuals are aware of their responsibilities at any given time and, by deduction, their rights to be free from liability.
18. As Schedule 1 [25] validates those investigations and prosecutions of suspected occupational health and safety breaches that have already commenced and those penalty notices that have already been issued relating to breaches, this Schedule may be regarded as adversely impacting the rights of individuals to not be subject to offences with retrospective force.

- 19. The Committee recognises the intention of this Bill is to clarify potential jurisdictional uncertainties by ensuring that a defendant in an occupational health and safety matter does not escape liability on the basis of a technicality. However, the Committee is always concerned about the retrospective application of legislation, especially when criminal matters are concerned and where legislative authority is backdated. The Committee refers this matter to Parliament for its consideration.**

**Delegation of legislative powers [s 8A(1)(b)(iv) LRA]**

**Issue: Commencement by Proclamation at Cl. 2**

20. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

- 21. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.**



### 3. COMPANION ANIMALS AMENDMENT (DOGS IN OUTSIDE EATING AREAS) BILL 2010\*

Date Introduced:	19 March 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Chris Hartcher MP
Portfolio:	Private Member - Liberal Party

#### Purpose and Description

1. This Bill amends the *Companion Animals Act 1998* to authorise the presence of dogs in outside eating areas in certain circumstances.
2. The Bill provides that a dog is not prohibited from being in an outside eating area despite existing provisions in the *Companion Animals Act 1998*, the *Food Act 2003* and the Food Standards Code under that Act that prohibit dogs from being in food preparation and consumption areas. These provisions will not prohibit a dog from being in an outside eating area as long as the dog is under the effective control of a competent person, is kept on the ground and is restrained by a chain, cord or leash that is not more than one metre in length.
3. An outside eating area is defined as an area in which food is consumed by humans that is not enclosed and that can be entered by the public without passing through an enclosed area in which dogs are prohibited by the *Companion Animals Act 1998*.

#### Background

4. Statistics show that in NSW in 2007, there were 1.209 million dogs, which represented about 70 per cent family dog ownership.
5. The issue of prohibition on dogs in food service areas arose last year when Mosman Municipal Council received complaints from two residents regarding dogs in Balmoral cafes. Cafe proprietors in Cronulla Plaza have also indicated that they are losing 8 to 10 customers each day because they were unable to serve people with dogs in outdoor eating areas.
6. According to the Agreement in Principle speech:

This legislation is supported by Mosman Municipal Council, the directors of the Royal New South Wales Canine Council trading as Dogs New South Wales, and the Local Government Association of New South Wales. The Executive of the Local Government Association of New South Wales supported a late conference motion received from Mosman Municipal Council, at the behest of the deputy mayor, Councillor Simon Menzies. In South Australia the regulations to the *Food Act* were amended in 2003 to allow the presence of dogs in outside eating areas which are not enclosed.
7. Under current legislation, people who depend on their dogs for companionship cannot take them to outdoor eating areas. In Europe, dogs are allowed into dining areas, however, this Bill provides that dogs cannot go into totally covered areas.

8. Currently, section 14 of the *Companion Animals Act* provides:

(1) Dogs are prohibited in the following places (whether or not they are leashed or otherwise controlled): (b) Food preparation/consumption areas (meaning any public place, or part of a public place, that is within 10 metres of any apparatus provided in that public place or part for the preparation of food for human consumption or for the consumption of food for humans).

9. However, the current section 14 (4) provides that: A dog is not prohibited under the section in a place that is a food preparation/consumption area if the place is a public thoroughfare (such as a road, footpath or pathway).

10. These sections appear to be contradictory. The Department of Local Government has indicated that section 14 (4) relates to dogs being walked through areas of footpath where outdoor dining has been approved, not allowing them to stay in such areas.

11. At present, section 21 (1) of the *Food Act 2003* states: (1) A person must comply with any requirement imposed on the person by a provision of the Food Standards Code in relation to the conduct of a food business or to food intended for sale or food for sale. The guide to food safety standards indicates that there is a requirement that prohibits all animals from areas in which food is handled unless the live animal is seafood or other shellfish. Areas in which food is handled include those in which food is made, manufactured, produced, collected, extracted, processed, stored, transported, delivered, prepared, treated, preserved, packed, cooked, thawed, served or displayed. Food businesses may keep security animals outside provided the area is not used for outdoor dining or drinking.

12. Clause 24(1)(b) of the food standards code also states: (b) permit an assistance animal only in dining and drinking areas and other areas used by customers; Clause 24(2) states: (2) In subclause (1), 'assistance animal' means an animal referred to in section 9 of the *Disability Discrimination Act 1992* of the Commonwealth. This refers to a guide, a dog trained to assist a person in activities where hearing is required and any other animal trained to assist a person to alleviate the effect of a disability.

13. The owner of the cafe still retains a right to refuse entry or deny service to a person with a dog as the provision only overrides the specific legislative restrictions on having dogs in outside eating areas and does not interfere with private property rights.

## The Bill

14. The object of this Bill is to amend the *Companion Animals Act 1998* to allow dogs in outside eating areas, such as cafe tables on footpaths.

### 15. Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent to the proposed Act.

### Schedule 1 Amendment of *Companion Animals Act 1998* No 87:

**Schedule 1 [2]** provides that a dog is not prohibited from being in an outside eating area despite existing provisions in the *Companion Animals Act 1998*, the *Food Act 2003* and the Food Standards Code under that Act that prohibit dogs from being in food preparation and consumption areas. These provisions will not prohibit a dog from being in an outside eating area as long as the dog is under the effective control of a competent person, is kept on the ground and is restrained by a chain, cord or leash that is not more than 1 metre in length.

An **outside eating area** is defined as an area in which food is consumed by humans that is not enclosed and that can be entered by the public without passing through an enclosed area in which dogs are prohibited by the *Companion Animals Act 1998*.

**Schedule 1 [1]** includes a note in the provision of the *Companion Animals Act 1998* that prohibits dogs from being in food preparation/consumption areas to draw attention to the new provision.

## Issues Considered by the Committee

16. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> .
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***The Committee makes no further comment on this Bill.***

## 4. COURT INFORMATION BILL 2010

Date Introduced: 19 March 2009  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon John Hatzistergos MLC  
Portfolio: Attorney-General

### Purpose and Description

1. The object of this Bill is to establish a new system for the provision of access to information held by courts in New South Wales. The new system includes provision for the following:
  - (a) open access to certain court information, known as **open access information**, unless the court otherwise orders in a particular case,
  - (b) access to information, known as **restricted access information** (being information that is not open access information) if access is permitted by leave of the court or by the regulations,
  - (c) access by news media organisations to certain restricted access information,
  - (d) access by parties to proceedings to any court information relating to the proceedings,
  - (e) the imposition of conditions on access to court information relating to the way the information is provided or that restrict the disclosure or use of the information,
  - (f) the protection of privacy and safety of participants in court proceedings, including by limiting access to personal identification information,
  - (g) the protection of court information from misuse and unauthorised access, use or disclosure,
  - (h) methods of access to court information, including charging of fees for access.

### Background

2. In 2003, the New South Wales Law Reform Commission conducted a review on the 'Law of Contempt by Publication'. In its report, the Law Reform Commission recognised that the law of contempt by publication is intrinsically linked to the right to access court information. The report suggested that rights to access court information should be clarified and made several recommendations in that regard.
3. In 2004, the New South Wales Supreme Court conducted community consultations on the issue of access to court records, raising various issues pertaining to the existing framework for access, privacy protections, what exhibits should be made

available to the public and the media and review decisions about access for third parties.

4. In June 2006, the Attorney General's Department released a discussion paper – 'Review of the Policy on Access to Court Information' for public consultation. The Department released its 'Report on Access to Court Information' in July 2008. In October 2008, the Attorney General released a consultation draft of the Court Information Bill, based on recommendations contained in the report, to targeted stakeholders, including the media, the courts and the legal profession.
5. This Bill is the culmination of those reviews and represents the first tranche of reforms pertaining to the access of court information.
6. The Bill simplifies access to court information by creating two categories of information: 'open access' or 'restricted access'. The Bill sets out the framework by which these two categories of court information can be accessed by the public, including victims of crime and others who are directly affected by criminal and civil proceedings, as well as the media.
7. The second tranche of the reform process will involve the inclusion of additional provisions to clarify and consolidate in one statute the law relating to the making of non-publication and suppression orders by the courts. Work currently being undertaken by the Standing Committee of Attorneys General is working toward the development of harmonised suppression and non-publication orders across all Australian jurisdictions.
8. According to the Agreement in Principle Speech, the objects of the Bill are largely fourfold: Firstly, to promote consistency in the provision of access to court information across New South Wales courts; Secondly, to provide for open access to the public to certain court information to promote transparency and a greater understanding of the justice system; Thirdly, to provide for additional access to the media to certain court information to facilitate fair and accurate reporting of proceedings; and Lastly, to ensure that access to court information does not compromise the fair conduct of court proceedings, the administration of justice, or the privacy and safety of participants in court proceedings, by restricting access to certain court information.
9. To assist in the development of regulations, the Department of Justice and Attorney General is establishing an advisory group, consisting of representatives of the courts, the media and the legal profession to provide guidance and advice on the regulations that will be required under this Bill.
10. Meanwhile, the Attorney General is encouraging the courts to use the Uniform Rules Committee established under the *Civil Procedure Act 2005* to act as a separate advisory committee to assist in the development of uniform rules for the purpose of the Bill.

## The Bill

### 11. Outline of Provisions

#### Part 1 Preliminary

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** sets out the objects of the proposed Act, which are as follows:

(a) to promote consistency in the provision of access to court information across NSW courts,

(b) to provide for open access to the public to certain court information to promote transparency and a greater understanding of the justice system,

(c) to provide for additional access to the media to certain court information to facilitate fair and accurate reporting of court proceedings,

(d) to ensure that access to court information does not compromise the fair conduct of court proceedings, the administration of justice or the privacy or safety of participants in court proceedings, by restricting access to certain court information.

**Clause 4** defines certain words and expressions used in the proposed Act. ***Personal identification information*** is defined to include information such as a person's tax file number, passport number, social security number, medicare number and personal telephone number.

**Clause 5** provides for the types of court information that is open access information. Open access information is information that any person is entitled to access, unless the court otherwise orders in a particular case. Open access information includes the following:

(a) in relation to criminal proceedings—indictments, court attendance notices, police fact sheets and statements of facts,

(b) in relation to civil proceedings—originating processes and pleadings,

(c) written submissions made by a party in proceedings,

(d) transcripts of proceedings,

(e) statements and affidavits admitted into evidence, including expert reports,

(f) records of judgments and directions given in proceedings.

**Clause 6** provides that court information that is not open access information is restricted access information. Restricted access information is information that a person is entitled to access only if permitted by leave of the court or by the regulations made under the proposed Act. In addition, the provision specifies information that would otherwise be open access information but that is to be restricted access information, including:

- (a) personal identification information,
- (b) medical, psychiatric, psychological and pre-sentence reports,
- (c) criminal records,
- (d) victim impact statements,
- (e) letters of comfort provided by the prosecution in connection with criminal proceedings.

**Clause 7** defines when proceedings are taken to be concluded for the purposes of the proposed Act. Civil proceedings are concluded when judgment is given or entered in the substantive proceedings or the substantive proceedings are withdrawn, dismissed or discontinued. Criminal proceedings are concluded when the accused person is discharged or acquitted or the court makes a finding (or accepts a plea) that the accused person is guilty or when the accused person is sentenced. Proceedings on an appeal against a decision are to be regarded as separate proceedings.

## **Part 2 Entitlement to access to court information**

**Clause 8** provides that a person is entitled to access to court information that is open access information unless the court otherwise orders in a particular case. The court can also impose conditions on access to open access information relating to the way in which the information is provided or that restrict the disclosure or use of the information to which access is provided.

**Clause 9** provides that a person is entitled to access to court information that is restricted access information if access is permitted by leave of the court or by the regulations. When deciding whether to grant leave for access to restricted access information, the court may take certain matters into account, including the following:

- (a) the public interest in access to the information being provided,
- (b) the extent to which the principle of open justice will be adversely affected if access is not provided to the information,
- (c) the extent to which an individual's privacy or safety will be compromised by providing access to the information,
- (d) the extent to which providing access to the information will adversely affect the administration of justice.

A court may impose conditions on access to restricted access information granted by leave of the court and the regulations may impose conditions on access to restricted access information conferred by the regulations, but only conditions that relate to the way in which the information is provided or that restrict the disclosure or use of the information to which access is provided.

**Clause 10** provides for a news media organisation to have access to certain court information that is restricted access information (in addition to access to open access information) unless the court orders otherwise in a particular case, including the following:

- (a) transcripts of proceedings in closed court or proceedings on a *voire dire*,
- (b) transcripts of and evidence in proceedings on an application to a court for an order to prohibit or restrict the publication or disclosure of information,
- (c) the brief of evidence in criminal proceedings. It will be an offence with a maximum penalty of 250 penalty units for a news media organisation to publish any personal identification information except with the permission of the court or the person to whom the information relates.

A **news media organisation** is defined to mean a commercial enterprise that engages in the business of broadcasting or publishing news or a public broadcasting service that engages in the dissemination of news through a public news medium.

**Clause 11** provides that a party to proceedings and the party's legal representative are entitled to access any court information (in addition to open access information) that relates to the proceedings unless the court orders otherwise in a particular case. A court that makes an order under the proposed section may impose conditions on access but only conditions that relate to the way in which the information is provided or that restrict the disclosure or use of the information to which access is provided.

**Clause 12** provides that the proposed Act is not intended to prevent or otherwise interfere with the giving of access to court information as permitted or required by or under any other Act or law that entitles a person to access to court information.

**Clause 13** provides that there is no entitlement to access to court information under the proposed Act if providing that access would contravene a court order or a provision of another Act or law.

### **Part 3 How access to court information is provided**

**Clause 14** specifies the methods by which a person can be provided with access to court information, including:

- (a) by being given a reasonable opportunity to inspect the information,
- (b) by being provided with a copy of a court record that contains the information,
- (c) by any means provided for by the rules.

A court may refuse to provide access to court information in a particular case if providing access would require an unreasonable diversion of the court's resources or it is necessary to refuse access to ensure the safe custody and proper preservation of court records.

**Clause 15** provides for the charging of fees for providing access to court information.

### **Part 4 Privacy protection**



**Clause 16** provides that the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002* do not apply to the providing of access to court information under the proposed Act.

**Clause 17** requires each court to publish on its website or by other appropriate means general information that promotes awareness of the potential for information provided by a party to proceedings to be accessed by other persons under the proposed Act and the court's practices and procedures for preventing or limiting access to personal information.

**Clause 18** requires a court to ensure, to the maximum extent reasonably practicable, that court records that contain open access information do not contain personal identification information.

### **Part 5 Protection of court information**

**Clause 19** requires a court to take reasonable security safeguards to ensure court information is protected against misuse and unauthorised access, use or disclosure.

**Clause 20** makes it an offence (with a maximum penalty of 100 penalty units or 2 years imprisonment or both) for a person to disclose or use court information obtained in the exercise of the person's functions as a court officer or in the execution or administration of the proposed Act, except with the consent of the person from whom the information was obtained, in the exercise of those functions or in the execution or administration of the proposed Act, as authorised by the regulations or as otherwise authorised or required by law.

**Clause 21** makes it an offence (with a maximum penalty of 100 penalty units) for a person who is provided with access to court information under the proposed Act to disclose or use the information for a purpose or in a manner that the person knows is contrary to any condition imposed by a court or the regulations on the person's access to the information.

### **Part 6 Miscellaneous**

**Clause 22** enables a senior judicial officer of a court to delegate functions of the court under the proposed Act to registrars or other officers of the court.

**Clause 23** provides that an action for defamation or breach of confidence cannot be brought against the Crown, a court or a court officer in respect of the disclosure of court information pursuant to an entitlement under the proposed Act.

**Clause 24** protects persons involved in the administration of the proposed Act acting in good faith from personal liability.

**Clause 25** enables the Uniform Rules Committee under the *Civil Procedure Act 2005* to make rules for the purposes of the proposed Act.

**Clause 26** enables the Governor to make regulations for the purposes of the proposed Act.

**Clause 27** provides that proceedings under the proposed Act are to be dealt with summarily before the Local Court.

**Clause 28** provides for the review of the proposed Act in 2 years.

### **Schedule 1 Savings, transitional and other provisions**

**Schedule 1** enables regulations of a savings or transitional nature to be made and contains a transitional provision consequent on the enactment of the proposed Act.

### **Schedule 2 Amendments**

**Schedule 2** amends the legislation specified in the Schedule as a consequence of the enactment of the proposed Act.

## **Issues Considered by the Committee**

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

#### **Issue: Privacy**

12. The general thrust of the Bill is to establish a new system for the provision of access to information held by courts, reversing the onus currently placed on the applicant seeking information to demonstrate an interest in seeking access, and placing in onto the courts to demonstrate why access should be denied. Facilitating wide access to court information potentially raises privacy issues, with the personal identification information of parties to proceedings and witnesses possibly compromised by the relaxation of non-disclosure standards. This concern is reinforced by Clause 16 of the Bill which excludes the operation of the *Privacy and Personal Information Protection Act 1998* from the provision of access to court information.
13. However, the Committee notes at Clause 18 that for the purpose of facilitating access to court records, a court must ensure to the maximum extent reasonably practicable that court records that contain open access information do not contain personal identification information. The Committee also notes comments received by Privacy NSW that it is not concerned by the waiver provisions of this Bill. For its part, personal identification information is classified as 'restricted access information' under Clause 9 and therefore subject to a more stringent standard of protection. Personal identification information is in turn defined under Clause 4, discussed below.
14. It is noted that under proposed Schedule 1 [2], proposed section 18 does not apply in respect of a court record created before the commencement of that section. In other words, it is not incumbent on the courts to 'ensure to the maximum extent reasonably practicable' that court records that contain open access information do not contain personal identification information for those records created before the commencement of the section. This is despite the open access provisions of the Bill applying to all court records – that is – those created both before and after the commencement of the section. The Committee notes that the differentiated standard could reasonably lead to the release of personal identification information contained in court records created before this Bill is proclaimed, with the associated risks of compromising an individual's security and raising the threat of identity theft. The Committee recognises the onerous task of subjecting all pre – *Court Information Act*

2010 court records to the privacy standards provided for under the Bill. However, the Committee is still concerned about the differentiated standard of privacy protection.

15. Regarding the definition of 'personal identification information', unlike the equivalent definition of 'personal information' in the *Privacy and Personal Information Protection Act 1998*, the definition of 'personal identification information' under Clause 4 appears to limit what constitutes 'personal identification information' to nine specific criteria. This includes one's passport number, date of birth or home address. By comparison, the definition of 'personal information' is information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion. This definition is broader than the definition under the *Court Information Bill 2010*.
16. Although it might be considered advantageous in the interests of privacy to align the definition of 'personal identification information' under the *Court Information 2010* with that of 'personal information' under the *Privacy and Personal Information Protection Act 1998*, the Committee notes that extending the defined breadth of 'personal identification information' may impact on the open access principle of Bill, potentially compromising its overall intent by redacting information imperative in providing meaning and context to court records. It is the understanding of the Committee that Privacy NSW has 'no major, continuing concerns' with the open access principle of this Bill.
17. Clause 4 also enables that the descriptors of other, additional information that could be used to establish a person's identity can be prescribed by the regulations. The Committee notes that, consistent with the making of privacy related regulations in NSW under other requisite legislation, it may be advantageous that the Privacy Commissioner is consulted before the making of any such regulation, although recognises that it is not required that such an arrangement be legislated for.
18. The Bill also contains further privacy protections at Clause 6 by classifying certain, sensitive information as 'restricted access information', such as information contained in a medical report or information contained in a statement of a person's criminal record. A person is only entitled to access such information by leave of the court or by the regulations, thereby subjecting the information to tighter standards of protection.
19. The Committee notes the design of the Bill to strike an appropriate balance between two important interests, facilitating open access to court information and maximising privacy protections. The Committee recognises the value both these interests have on the rights and liberties of individuals, but at times appreciates that these interests may compete. In light of comments received by Privacy NSW that it does not take significant issue with Bill, and given the safeguards implemented to protect personal identification information, the Committee appreciates the extent to which the balance has been achieved.

20. The Committee notes the intent of the Bill to strike an appropriate balance between two important interests, facilitating open access to court information and maximising privacy protections. The Committee recognises the value these interests have on the rights and liberties of individuals, but at times appreciates that these interests may compete. In light of comments received by Privacy NSW that it does not take significant issue with this Bill, and given the safeguards implemented to protect personal identification information, the Committee appreciates the extent to which the balance has been achieved.
21. The Committee also notes the differentiated standards that will apply between court records created before the enactment of the Bill and those created afterward. The Committee is concerned that the lesser standard of protection afforded to court records created before this Bill is proclaimed risks compromising an individual's security and raising the threat of identity theft. Although the Committee recognises the onerous task of subjecting all pre - *Court Information Act 2010* court records to the privacy standards provided for under the Bill, the Committee is still concerned about the differentiated standard of privacy protection and refers this matter to Parliament for its consideration.

#### **Delegation of Legislative Power [s 8A(1)(b)(iv) LRA]**

##### **Issue: Commencement by proclamation at clause 2.**

22. The Committee notes that the proposed Act is to commence operation on a day or days to be appointed by proclamation. This delegates to the Government the power to commence the proposed Act on whatever day it chooses, or not at all. However, according to the Agreement in Principle Speech, this Bill marks only the first tranche of reform pertaining to the provision of access to court information. A second stage of reform is required in which further provisions will be included, pertaining to the making of non-publication and suppression orders by the courts. The Committee also notes the regulation-making powers of the Bill provided for under Clause 26 and the comprehensiveness of the Act's operation may be reliant on the making of certain regulations, for example, regulations relating to the means of providing access.

23. The Committee accepts that there may be good reasons for commencing an Act on proclamation, such as additional provisions to be included in the Act or the Act's contingency on the making of certain regulations, and has not identified any issues under s8A(1)(b)(iv) of the *Legislation Review Act 1987*.

***The Committee makes no further comment on this Bill.***

## 5. CRIMES AMENDMENT (GRIEVOUS BODILY HARM) BILL 2010\*

Date Introduced:	18 March 2010
House Introduced:	Legislative Council
Minister Responsible:	Reverend the Hon Fred Nile MLC
Portfolio:	Non government – Christian Democratic Party (Fred Nile Group)

### Purpose and Description

1. This Bill amends the *Crimes Act 1900* to ensure that offences under that Act relating to the infliction of grievous bodily harm extend to the destruction of a child in utero of a pregnant woman (other than in the course of a medical procedure).
2. The proposed amendment extends the application to any form of human life in the embryonic stage. Such offences are currently limited to human life in the foetal or later stages—that is, at eight weeks or 56 days gestation.

### Background

3. According to the Second Reading speech:

Two public incidents, one in 2001 and another in 2002, draw attention to the deficiency of law in the protections extended to women during pregnancy. In November 2001 Renee Shields was the victim of a road rage incident that led to the death of her unborn child, Byron. Byron's law has since been passed—the legislation I am hoping to amend—and I am pleased to use that title for this bill. In August 2002 Kylie Flick refused the demands of Phillip Nathan King to abort the child they had conceived. Kylie was subsequently punched and stomped on by Mr King, which resulted in the death of their unborn child.
4. On 1 March 2005, the Government followed the recommendations of the Finlay report, and codified the principles from the Court of Criminal Appeal in December 2003. The NSW Court of Criminal Appeal in *R v King* [2003] NSW CCA 399, found that the loss of the unborn child may amount to grievous bodily harm to a pregnant woman even where the woman suffers no other injury because of the close physical connection between a pregnant woman and her unborn child. The *Crimes Amendment (Grievous Bodily Harm) Bill 2005* then amended the definition of "grievous bodily harm" within the *Crimes Act* to include section 4 (1) (a), which states: The destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm. That legislation was passed by both Houses in 2005.
5. The Second Reading speech also referred to the matter of taking a conscience vote when dealing with such a Bill.

## The Bill

6. The object of this Bill is to amend the *Crimes Act 1900* to ensure that offences under that Act relating to the infliction of grievous bodily harm extend to the destruction by a person (other than in the course of a medical procedure) of a child in utero. The proposed amendment extends the application to any form of human life in the embryonic stage. Such offences currently apply to human life in the foetal or later stages.

## 7. Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent.

**Clause 3** amends the definition of ***Grievous bodily harm*** in section 4 of the *Crimes Act 1900* to give effect to the object set out in the Overview above.

## Issues Considered by the Committee

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

#### Issue: Personal Physical Integrity – Clause 3 (1) and (2) – Amendment of *Crimes Act 1900*:

8. Proposed clause 3 (1) and (2) amends the *Crimes Act 1900* with regard to section 4 definitions by replacing section 4 (1)(a) with: the destruction (other than in the course of a medical procedure) of a child in utero of a pregnant woman, whether or not the woman suffers any other harm, and; also by inserting at the end of the definition of ‘Grievous bodily harm’: For the purposes of paragraph (a) of this definition, a ***child in utero*** is any form of human life in either the embryonic or foetal stage of development.

9. The current definition of ‘grievous bodily harm’ under section 4 (1) of the NSW *Crimes Act 1900*, states:

(a) the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm, and

(b) any permanent or serious disfiguring of the person, and

(c) any grievous bodily harm disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease).

10. The proposed new definition of grievous bodily harm will extend to the meaning of human life to the embryonic stage. Such grievous bodily harm offences are currently limited to the destruction of the foetus of a pregnant woman or at later stages—that is, at eight weeks or 56 days gestation. By re-defining a ‘child’ and human life as a ***‘child in utero’*** in either the embryonic or foetal stage of development, this may also affect the definition of and liability for ‘child murder’ (when a child is deemed born alive) currently under section 20 of the *Crimes Act 1900*: ‘On the trial of a person for the murder of a child, such child shall be held to have been born alive if it has

breathed, and has been wholly born into the world whether it has had an independent circulation or not'. This may affect and impact on the current definition of 'human life' and liability under murder and manslaughter defined in section 18 of the *Crimes Act*. It could also affect and impact on the liability provisions (sections 82, 83 and 84) regarding attempts to procure abortion under the *Crimes Act*.

11. The new definition as proposed above will hold broader implications which may lead to and impact on policy debate areas such as 'pro-choice' and 'pro-life' attitudes toward abortion as well as competing rights and interests that may be involved, including those of women, the pregnant woman, foetus, biological father and the medical staff.<sup>1</sup>

**12. As the Bill proposes to redefine human life and the foetus, it may also revolve around concerns for personal physical integrity. The Committee notes that a range of interests and rights may potentially be impacted upon, including references made in the Second Reading speech as suggesting a conscience vote.**

**13. Therefore, the Committee refers clauses 3 (1) and (2) of this Bill to Parliament for consideration as to whether the Bill may trespass unduly on personal rights and liberties including matters of personal physical integrity and wider criminal liabilities potentially arising from the contrasting definition of 'grievous bodily harm' as extended to any embryonic stage.**

***The Committee makes no further comment on this Bill.***

<sup>1</sup> For an overview of the different rights and interests, refer to the NSW Parliamentary Library Research Service's Briefing Paper No 9/05, 'Abortion and the law in New South Wales' by Talina Drabsch, August 2005.

## 6. PARLIAMENTARY ELECTORATES AND ELECTIONS AMENDMENT BILL 2010

Date Introduced:	19 March 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Kristina Keneally MP
Portfolio:	Premier

### Purpose and Description

1. The object of this Bill is to amend the *Parliamentary Electorates and Elections Act 1912* (the Principal Act) so as to:
  - (a) provide that the Electoral Commissioner is to conduct an investigation into the feasibility of providing internet voting for vision-impaired and other disabled persons for elections under the Principal Act and, if such internet voting is feasible, propose a detailed model of such internet voting, and
  - (b) clarify that the requirement under the Principal Act that advertisements, pamphlets, posters or notices containing certain electoral matter must contain a specified authorisation does not apply to T-shirts, buttons, badges and certain other articles, and
  - (c) provide that the Electoral Commissioner must not register electoral material for distribution on polling day if it appears to the Electoral Commissioner that the material does not clearly identify the person, political party, organisation or group on whose behalf the material is to be distributed, and
  - (d) facilitate the registration of political parties under the Principal Act under the same name as they are registered under the *Commonwealth Electoral Act 1918* of the Commonwealth (the **Commonwealth Act**), and
  - (e) clarify how amendments of the particulars in the Register of Parties are to be dealt with.

### Background

2. The bill provides for the Electoral Commissioner to conduct an investigation into the feasibility of providing Internet voting for vision-impaired and other disabled persons and, if such Internet voting is feasible, propose a detailed model for adoption by Parliament.
3. Because the Electoral Commission is an independent agency, this is done by legislation rather than executive order. According to the Agreement in Principle speech, in undertaking that investigation, the Electoral Commissioner will be expected to consult with stakeholders in the disability sector and take appropriate technical advice. Subject to the Electoral Commissioner's report, the Government plans to introduce Internet voting in time for the next election. The Electoral



Commissioner will therefore report to the Premier within three months, and that report will be tabled in Parliament.

4. In addition to providing for the development of I-voting, the bill will also make a number of amendments to clarify certain administrative processes under the Act, many of which were requested by the Electoral Commissioner. Schedule 2 of the bill clarifies that T-shirts and other small items that might bear political slogans do not need to bear the name and address of the person on whose instructions the matter was printed or the name and address of the printer. The proposed amendment is consistent with section 328 of the *Commonwealth Electoral Act*. Schedule 2 also amends the Act to make clear that electoral material must clearly identify the actual person, political party, organisation or group on whose behalf the material is to be distributed, not just the author of that material.
5. The amendments in Schedule 3 of the bill clarify the rules governing the registration of parties. At present parties that wish to nominate candidates for election must be registered with the New South Wales Electoral Commission. Under the Act the Electoral Commissioner can refuse to register a party name on various grounds—for example, if the name is obscene or offensive, or if it is identical to the name of another registered party, or so nearly resembles the name of another registered party that it is likely to be mistaken for that name.
6. The *Commonwealth Electoral Act* gives the Commonwealth Electoral Commissioner similar grounds to refuse to register the name of a party applying for Federal registration. Even though the Commonwealth and New South Wales provisions regarding party names are consistent, it is possible that a party that has been registered under the *Commonwealth Act* may be refused registration under the very same name in New South Wales. This would be a strange result and could lead to voter confusion. To ensure consistency at the Commonwealth and State levels, the bill therefore provides that the New South Wales Electoral Commissioner cannot refuse to register a party on the relevant grounds if the party, or an associated party, is already registered under that name under the *Commonwealth Electoral Act*. The only exception is where the proposed name of an aspiring party too closely resembles the name of an existing party that is only registered in New South Wales and not at the Commonwealth level.
7. Schedule 3 to the bill also seeks to provide greater certainty for the Electoral Commission with respect to amendments to the register of parties. In particular, it clarifies that amendments to registration details can be made at any time other than in the period between the issue of the writ for an election and polling day. It also confirms that the Electoral Commissioner is not obliged to take any action with respect to amendment applications in the period between the issue of the writ and polling day.
8. Finally, Schedule 4 to the Act amends a not-commenced provision of the *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009* to clarify that political parties and members of Parliament may request access to data regarding pre-polling places as well as ordinary polling places. This amendment corrects a minor drafting oversight in the 2009 amendments.

## The Bill

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent to the proposed Act.

### **Schedule 1 Amendment of *Parliamentary Electorates and Elections Act 1912 No 41* relating to investigation of internet voting for vision-impaired and other disabled persons**

**Schedule 1** inserts proposed section 187 into the Principal Act to provide that the Electoral Commissioner is to conduct an investigation into the feasibility of providing internet voting for vision-impaired and other disabled persons for elections under the Principal Act and, if such internet voting is feasible, propose a detailed model of such internet voting. A report on the investigation and any proposed model are to be given to the Minister administering the Principal Act (currently the Premier) for tabling in Parliament. The proposed section also makes it clear that the Electoral Commissioner is not required under the Principal Act or any other law to provide any special or alternative form of voting for vision-impaired or other disabled persons, other than that already provided for under the Principal Act. In particular, the Electoral Commissioner is not required under the Principal Act or any other law to provide a form of voting to vision-impaired or other disabled persons that enables such persons to vote without the assistance of another person.

### **Schedule 2 Amendment of *Parliamentary Electorates and Elections Act 1912 No 41* relating to authorisation and registration of electoral material**

Section 151E (1) (Name and address of author and printer to be printed on advertisements etc) of the Principal Act provides that advertisements, how to vote cards, handbills, pamphlets, posters or notices containing any electoral matter must have printed on them:

- (a) the name and address of the person on whose instructions the matter was printed, and
- (b) the name of the printer and the address at which it was printed.

**Schedule 2 [1]** inserts proposed section 151E (3) into the Principal Act to provide that section 151E (1) does not apply in relation to:

- (a) a T-shirt, lapel button, lapel badge, pen, pencil or balloon, or
- (b) a business or visiting card that promotes the candidacy of any person in an election, or
- (c) a letter or other card:
  - (i) that bears the name and address of the sender, and
  - (ii) that does not contain a representation or purported representation of a ballot paper for use in an election, or
- (d) any other article prescribed (or of a class prescribed) by the regulations made under the Principal Act.

Sections 151F and 151G of the Principal Act provide that certain how to vote cards, handbills, pamphlets and notices containing electoral matter must not be distributed on polling day unless the items have been registered by the Electoral Commissioner.

**Schedule 2 [2]** inserts proposed section 151G (7A) (a1) into the Principal Act to provide that the Electoral Commissioner must not register the electoral material if it appears to the

Electoral Commissioner that the material does not clearly identify the person, political party, organisation or group on whose behalf the material is to be distributed.

**Schedule 3 Amendment of *Parliamentary Electorates and Elections Act 1912 No 41* relating to registration of political parties**

Part 4A of the Principal Act (sections 66A–66N) relates to the registration of political parties. Section 66G (3) (b)–(d) provide that the Electoral Commissioner must refuse to register a party if, in the opinion of the Electoral Commissioner, the name of the party or the abbreviation of the name (if any) as set out in the application for registration of the party:

- (a) is obscene or offensive, or
- (b) is the name, is an abbreviation or acronym of the name, or is a derivative of the name, of a registered party or a party currently represented in Parliament, or
- (c) so nearly resembles the name, or an abbreviation or acronym of the name, of a registered party or a party currently represented in Parliament that it is likely to be confused with or mistaken for that name or that abbreviation or acronym.

Section 129 of the *Commonwealth Act* contains almost identical provisions.

**Schedule 3 [1]** inserts proposed section 66G (5) into the Principal Act to ensure that the Electoral Commissioner does not refuse to register a party under a name or abbreviation by operation of those provisions where a party is already registered under the *Commonwealth Act* under that name or abbreviation (or has the written consent of that party) and, where relevant, the other political party concerned is also already registered under the *Commonwealth Act*.

Section 66H (Amendment of Register) of the Principal Act provides that the provisions of Part 4A relating to an application for the registration of a party apply (subject to the regulations) to an application for the amendment of the Register of Parties. Section 66FA provides that for certain specified purposes a party does not become registered under the Principal Act until 12 months after its registration. By operation of section 66H this 12 month delay would apply to amendments of the Register of Parties as well.

**Schedule 3 [2]** makes a law revision amendment.

**Schedule 3 [3]** clarifies that an application for an amendment of the Register of Parties (unlike an initial application for registration) need not be accompanied by a list of the names and addresses of 750 electors who are members of the party and declarations completed and signed by those members. It is noted that this amendment does not affect the continuing operation of section 66HA of the Principal Act that relates to annual returns with respect to continued registration and the power of the Electoral Commissioner to make inquiries and require information to be produced to determine whether a party is entitled to continued registration.

**Schedule 3 [4]** inserts proposed section 66H (3C)–(3E) into the Principal Act to provide that section 66FA does not apply to an amendment of the Register of Parties. The proposed provisions also provide that such an amendment to the Register of Parties must not be made in the period commencing on the day of the issue of the writ for an election and ending on and including the day fixed for the return of the writ.

**Schedule 4 Amendment of *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009 No 102***

**Schedule 5 [62]** to the *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009* on commencement will insert section 138 (Electoral information) into the Principal Act. The section provides that, after an election, certain electoral information about the distribution of first preference votes is to be made available to the public and certain other information is to be made available to each registered political party that so

requests and each member of Parliament who is not a member of a registered political party and who makes a request in respect of the member's district.

**Schedule 4** amends proposed section 138 in Schedule 5 [62] to the *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009* to make it clear that the information supplied relating to polling places is to include information relating to pre-poll voting places.

## **Issues Considered by the Committee**

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| <p>9. <b>The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b></p> |
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***The Committee makes no further comment on this Bill.***

## 7. REGISTRAR-GENERAL LEGISLATION (AMENDMENT AND REPEAL) BILL 2010

Date Introduced:	17 March 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Tony Kelly MLC
Portfolio:	Lands

### Purpose and Description

1. This Bill amends the *Real Property Act 1900* to provide for the delegation of the Registrar-General's functions; to repeal the *Registrar-General Act 1973* and transfer certain provisions to other Acts; and for other purposes.
2. The Registrar-General is responsible for the administration of a range of Acts, including the *Real Property Act*, the *Conveyancing Act*, and various strata legislation. These Acts contain provisions relating to the powers of the Registrar-General. Therefore, the need for a separate Registrar-General Act no longer exists. This Bill will repeal the *Registrar-General Act 1973* and do away with the executive appointment of a Deputy Registrar-General.
3. It will insert a new section 4A in the *Real Property Act 1900*. This new section will provide for the delegation of the functions of the Registrar-General and for the use of the Registrar-General's seal of office.
4. There are other minor consequential amendments. First, the Registrar-General will be defined in the *Interpretation Act 1967*. Second, section 5 of the *Registrar-General Act 1973* provides that a statutory declaration may be made before the Registrar-General or a Deputy Registrar-General. As that Act will be repealed by this Bill, this provision will be reflected in the *Oaths Act 1900*, which will provide that statutory declarations may be made before the Registrar-General or a Deputy Registrar-General.

### Background

5. Section 3 (1) of the *Registrar-General Act 1973* refers to the Registrar-General being appointed by the Governor under the repealed *Public Service Act of 1902*. Similarly, the section refers to Deputy Registrars-General being appointed by the Governor.
6. Appointments to positions in this manner are made redundant by the provisions of the *Public Sector Employment and Management Act*, which governs the appointment of public service staff and officers. Therefore, it is no longer a requirement that the Governor appoint senior executive officers to public service positions.
7. From the Agreement in Principle speech:

The *Registrar-General Act* is silent on the ability of the Registrar-General to delegate his powers. Delegation powers are common in most of today's legislation where there is a senior officer or chief executive officer...The Registrar-General has requested

delegation powers so that he may effectively exercise his powers and functions under the various pieces of legislation that require his services. The Registrar-General may not be available at times, therefore, enabling him to delegate his functions to another person will ensure that the Registrar-General's functions are being performed at all times.

## The Bill

8. The objects of this Bill are:

- (a) to repeal the *Registrar-General Act 1973* and transfer provisions relating to the Registrar-General's seal and the making of statutory declarations to the *Real Property Act 1900* and the *Oaths Act 1900*, respectively, and
- (b) to amend the *Real Property Act 1900* to allow the Registrar-General to delegate functions and powers to authorised persons.

## 9. Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent.

**Clause 3** provides for the repeal of the *Registrar-General Act 1973*.

### Schedule 1 Amendment of Acts

**Schedule 1.1** amends section 21 of the *Interpretation Act 1987* to include a definition for **Registrar-General**. That section defines certain terms and expressions that are commonly used in Acts and instruments.

**Schedule 1.2** amends the *Oaths Act 1900* to provide that statutory declarations may be made before the Registrar-General or a Deputy Registrar-General.

Currently, section 5 of the *Registrar-General Act 1973* (which is repealed by the proposed Act) provides that a statutory declaration may be made before the Registrar-General or a Deputy Registrar-General.

**Schedule 1.3** inserts proposed section 4A into the *Real Property Act 1900*. The proposed section provides for the delegation of the functions of the Registrar-General and for the use of the Registrar-General's seal.

## Issues Considered by the Committee

<p>10. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p>
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*The Committee makes no further comment on this Bill.*

## 8. ROAD TRANSPORT LEGISLATION AMENDMENT (UNAUTHORISED VEHICLE USE) BILL 2010

Date Introduced:	19 March 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon David Campbell MP
Portfolio:	Transport and Roads

### Purpose and Description

1. This Bill amends the *Road Transport (Vehicle Registration) Act 1997* concerning registered operators of vehicles and the detection of offences involving unauthorised vehicle use; and to make consequential amendments to certain other legislation.
2. It will provide the legislative basis for improving detection of unregistered and uninsured vehicles by allowing images from enforcement cameras, including red light, speed, bus lane, transit way and tollway cameras, to be used to detect these offences.
3. It will also make it clear that only a single registered operator is allowed for each vehicle and remove any ambiguity in the legislation.
4. The registration Act currently allows for the regulation to provide for one or more registered operators. However, in May 2008, the *Road Transport (Vehicle Registration) Regulation 2007* was amended to allow only one person to be recorded as the registered operator of a vehicle.

### Background

5. Consultations on the reforms in May 2008 had been undertaken with the Motor Traders Association, the Motor Accidents Authority and compulsory third party [CTP] insurers. Consultations on the current reform have been conducted with the New South Wales Police Force, the Attorney General's Department and the State Debt Recovery Office.
6. One of the amendments in the Bill to allow the use of enforcement cameras to detect unauthorised driving, comes from a recommendation by the New South Wales Audit Office report "Dealing with Unlicensed and Unregistered Driving". The Audit Office recommended that red light and speed cameras be used to detect unregistered vehicles.
7. According to the Agreement in Principle speech:

Comparing information captured by cameras with the Roads and Traffic Authority's registration database is a cost-effective means of detecting large volumes of unregistered and uninsured vehicles. New South Wales and the Australian Capital Territory are the only Australian jurisdictions not using camera technology to detect and

prosecute the use of unregistered vehicles. This bill will provide for penalty notices to be issued for other offences identified as a result of an initial camera-detected offence. For example, where the registered operator receives a penalty notice for a camera-recorded speeding offence and a check of the Roads and Traffic Authority database indicates the vehicle is unregistered the registered operator will also receive a penalty notice for the offence of "use unregistered motor vehicle".

8. The Agreement in Principle speech further explained that: "under the registration Act, registration is not evidence of vehicle ownership or property rights to a vehicle. Registration records the name of the person responsible for ensuring a vehicle is registered, roadworthy and used responsibly on the road network. Recording only a single operator will assist law enforcement agencies in identifying the person or corporation responsible for the vehicle and simplify the registration process".

## The Bill

9. The objects of this Bill are:

(a) to amend the *Road Transport (Vehicle Registration) Act 1997*:

(i) to enable photographs taken by certain approved camera devices to be tendered and used in evidence for certain offences involving unauthorised vehicle use (such as the use of an unregistered or uninsured vehicle), and

(ii) to confirm that generally only one person may be recorded as the registered operator of a registrable vehicle in the Register of Registrable Vehicles maintained under that Act (***the Register***), and

(iii) to consolidate in one section all of the provisions currently in that Act relating to maintenance of the Register, and

(b) to make consequential amendments to the *Road Transport (General) Act 2005* and the *Road Transport (Vehicle Registration) Regulation 2007*.

## 10. Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

### **Schedule 1 Amendment of *Road Transport (Vehicle Registration) Act 1997* No 119:**

#### **Use of photographic evidence from approved camera devices for unauthorised vehicle use offences**

**Schedule 1 [6]** inserts proposed section 22C in the *Road Transport (Vehicle Registration) Act 1997* to enable evidence of a photograph taken by an approved camera device that is evidence of an offence for which the device is ordinarily approved for use to also be used in proceedings for an unauthorised vehicle use offence.

An ***unauthorised vehicle use offence*** is defined to mean any of the following:

(a) an offence against section 18 (Prohibition on using unregistered registrable vehicles),

(b) an offence against section 8 (Offence of using uninsured motor vehicle on road) of the *Motor Accidents Compensation Act 1999*,

(c) an offence against the regulations involving a prohibited use of a registrable vehicle that is prescribed by the regulations for the purposes of the proposed section.



**Schedule 2.2 [4]** amends the *Road Transport (Vehicle Registration) Regulation 2007* to prescribe offences against clauses 50 (3) and 84 (3) and (5) of the Regulation for the purposes of proposed section 22C.

An **approved camera device** for the purposes of the proposed section is:

- (a) each of the following devices within the meaning of the *Road Transport (Safety and Traffic Management) Act 1999*:
  - (i) an approved average speed detection device,
  - (ii) an approved camera detection device,
  - (iii) an approved camera recording device,
  - (iv) an approved traffic lane camera device, and
- (b) an approved toll camera within the meaning of section 250A of the *Roads Act 1993*.

Currently, photographs taken by these approved camera devices may only be used in proceedings for specified kinds of offences for which the devices are approved for use. For instance, photographs taken by an approved camera detection device may be used in evidence in proceedings for traffic light offences subject to certain evidential safeguards such as the tendering of certificate evidence concerning the reliability of the device. The proposed section will operate to apply the same evidential safeguards to a photograph used in evidence in proceedings for an unauthorised vehicle use offence as would apply in proceedings for offences for which the approved camera device concerned is ordinarily approved for use.

### **Maintenance of Register (including recording of registered operators)**

**Schedule 1 [5]** re-enacts section 10 of the Act to consolidate in one section provisions concerning the maintenance of the Register that are currently found in sections 7 (2)–(4), 10, 11 and 23A of the Act.

Section 4 of the Act defines a **registered operator** of a registrable vehicle to mean a person recorded in the Register as a person responsible for the vehicle. The proposed section will also provide that only one person may be recorded in the Register as being responsible for a registrable vehicle unless the vehicle is a transitional registrable vehicle. A **transitional registrable vehicle** is defined to mean a registrable vehicle for which 2 persons were recorded in the Register as being responsible for the vehicle immediately before the commencement of the proposed section. The Roads and Traffic Authority may continue to record 2 registered operators in the Register for a transitional registrable vehicle until it ceases to be such a vehicle. A vehicle ceases to be a transitional registrable vehicle if the registration of the vehicle is transferred, cancelled, surrendered or expires without being renewed at any time after the commencement of the section.

The provisions concerning the recording of registered operators have been relocated to the Act from their current location in clause 7 of the *Road Transport (Vehicle Registration) Regulation 2007*.

**Schedule 1 [1]–[4] and [7]** make consequential amendments to the Act.

### **Savings and transitional provisions**

**Schedule 1 [8]** amends clause 1 of Schedule 3 to the Act to enable the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

**Schedule 1 [9]** inserts a new Part in Schedule 3 to the Act containing provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

**Schedule 2 Consequential amendment of other legislation**

**Schedule 2.1** makes amendments to the *Road Transport (General) Act 2005* that are consequential on the amendment made to the *Road Transport (Vehicle Registration) Act 1997* by Schedule 1 [6].

**Schedule 2.2 [1]–[3]** make amendments to the *Road Transport (Vehicle Registration) Regulation 2007* that are consequential on the amendments made to the *Road Transport (Vehicle Registration) Act 1997* with respect to the recording of registered operators in the Register.

## Issues Considered by the Committee

### Delegation of legislative powers [s 8A(1)(b)(iv) LRA]

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

11. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

12. **Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

***The Committee makes no further comment on this Bill.***

## 9. WASTE RECYCLING AND PROCESSING CORPORATION (AUTHORISED TRANSACTION) BILL 2010 (NO 2)

Date Introduced:	18 March 2010
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Daley MP
Portfolio:	Finance

### Purpose and Description

1. The object of this Bill is to authorise and facilitate to the private sector the assets, rights and liabilities of the Waste Recycling and Processing Corporation.

### Background

2. The Waste Recycling and Processing Corporation (WSN) operates a State-owned waste collection and processing business. The purpose of the Bill is to allow the Government to transfer WSN to the private sector.
3. According to the Agreement in Principle Speech, the Government intends to sell WSN for two reasons:
  - (a) Firstly, the sale of WSN addresses the inherent conflict between Government being both owner and regulator of the business; and
  - (b) Secondly, WSN operates in an increasingly competitive market along with private sector operators, who are best placed to make the significant technology development and capital investment necessary in an expanding industry.
4. The Bill authorises the transfer of WSN to the private sector and does through various means: through direct vesting of assets and liabilities; through the conversion of WSN to a *Corporations Act 2001* company and the subsequent transfer of its shares; and through the establishment and transfer of a new company.
5. The Bill provides the Treasurer with the necessary powers and functions to affect the transfer to the private sector via one of these means as well as a provision that allows the purchaser to be excluded from the payment of State taxes relating to the transaction, such as stamp duty.
6. Clause 19 ensures that the *State Owned Corporations Act 1989* does not prevent, restrict or otherwise limit the carrying out of this transaction.
7. The Bill provides for the repeal of *Waste Recycling and Processing Corporation Act 2001* after the successful completion of the transaction, as well as establishing the

Waste Assets Management Corporation, which will retain and manage sites not transferred to the new owner as part of the transaction.

8. The Bill provides for employee protections for those currently employed by WSN, authorising their transfer to the private sector and the continuation of their existing leave and superannuation entitlements, as well guaranteed continuance of employment for all permanent and temporary employees.

## The Bill

### 9. Outline of Provisions

#### Part 1 Preliminary

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of most of the provisions of the proposed Act on the date of assent, with provisions that will disestablish WSN as a statutory State owned corporation to commence on a day to be appointed by proclamation.

**Clause 3** contains definitions of key terms used in the proposed Act. Schedule 1 contains other definitions. The clause defines **authorised transaction** to mean the transfer of WSN assets authorised by Part 2.

#### Part 2 The authorised transaction

**Clause 4** authorises the transfer to the private sector of WSN assets.

**Clause 5** authorises the transfer of WSN assets to one or more public sector agencies.

**Clause 6** requires the proceeds of the transfer of WSN assets pursuant to the authorised transaction, after deduction of certain amounts for debt repayment and payment of expenses, to be paid into the Fund established under clause 7.

**Clause 7** provides for the establishment of a Fund to be used for the payment of the outstanding landfill liabilities of WSN that become liabilities of the Waste Assets Management Corporation, with the balance of the Fund to be payable into the Consolidated Fund.

**Clause 8** requires the Treasurer to prepare a report on the broad strategies for compliance with EPA waste management strategies and resolution of competition issues resulting from the authorised transaction.

#### Part 3 Facilitating the authorised transaction

**Clause 9** provides that the Treasurer has and may exercise all such functions as are necessary or convenient for the purposes of the authorised transaction.

**Clause 10** provides for the establishment of companies as **transaction companies** for the purposes of the authorised transaction (including by means of the corporate conversion of WSN).

**Clause 11** provides that WSN and each transaction company has and may exercise all such functions as are necessary or convenient for the purposes of the authorized transaction. The clause also authorises the Treasurer to act for and on behalf of and in the name of WSN or a transaction company in the exercise of any of its functions for the purposes of the authorised transaction.

**Clause 12** provides that WSN and transaction companies are subject to the direction and control of the Treasurer in the exercise of any of their functions for the purposes of the authorised transaction.

**Clause 13** provides for the Treasurer to give directions for the grant of any relevant authorisation under various laws to a person who becomes or is proposed to become the new operator of WSN assets pursuant to the authorised transaction.

**Clause 14** authorises the Treasurer to make vesting orders under Schedule 3 for the purposes of the authorised transaction.

**Clause 15** references Schedule 4 which provides for the transfer of employment of employees of WSN in connection with the authorised transaction.

**Clause 16** establishes the Waste Assets Management Corporation to hold WSN assets acquired by it or transferred to it and to carry on any activities or business that relate to any WSN assets held by it.

**Clause 17** provides that various State taxes and charges are not payable by public sector agencies in connection with transactions for the purposes of the authorized transaction and authorises the Treasurer to exempt other persons from liability for State taxes and charges in connection with the authorised transaction.

**Clause 18** exempts contracts for the sale of land from section 52A of the *Conveyancing Act 1919* when entered into for the purposes of the authorized transaction.

#### **Part 4 Miscellaneous**

**Clause 19** authorises the release of information by the Auditor-General for the purposes of the authorised transaction.

**Clause 20** authorises the Treasurer to delegate any function of the Treasurer under the proposed Act to the Secretary of the Treasury or any other officer of the Government Service prescribed by the regulations.

**Clause 21** provides for the proposed Act to bind the State and all other Australian jurisdictions.

**Clause 22** provides for the provisions of the proposed Act to prevail in the event of an inconsistency between the proposed Act and other State legislation.

**Clause 23** provides for the operation of the proposed Act outside the State.

**Clause 24** provides for the interpretation of the proposed Act so as not to exceed the legislative power of the State.

**Clause 25** prevents the operation of the proposed Act and the various arrangements and actions that it authorises from constituting a breach of various civil obligations.

**Clause 26** protects the State from claims for compensation in connection with the enactment or operation of the proposed Act.

**Clause 27** provides for the issue of evidentiary certificates by the Treasurer.

**Clause 28** is a general regulation-making power.

**Clause 29** provides a savings and transitional regulation-making power.

**Clause 30** repeals the *Waste Recycling and Processing Corporation Act 2001*.

### **Schedule 1 Interpretative provisions**

**Schedule 1** contains definitions and other interpretative provisions for the purposes of the proposed Act.

### **Schedule 2 Corporate conversion of WSN**

**Schedule 2** provides the procedure for the corporate conversion of WSN into a transaction company.

### **Schedule 3 Vesting of assets, rights and liabilities**

**Schedule 3** provides for the making of vesting orders by the Treasurer for the purposes of the authorised transaction. Vesting orders operate to vest assets, rights and liabilities of WSN or a transaction company in the transferee specified in the order.

### **Schedule 4 Employee protections**

**Schedule 4** provides for the transfer of employees of WSN either to an employer in the private sector or to a Public Service Department as an excess employee of the Department or as staff of the proposed Waste Assets Management Corporation. Permanent and temporary employees can elect not to be transferred to the private sector.

The following employment protections will apply for the benefit of transferred employees:

(a) the terms and conditions of employment of an employee transferred to the private sector are to be the same as applied to the employee immediately before transfer,

(b) those terms and conditions will not be able to be varied for permanent and temporary employees during their **employment guarantee period** (which is 3 years, or a shorter period for those temporary employees who have less than 3 years to run on their appointment),

(c) employment of permanent and temporary employees with the private sector employer will not be able to be terminated during their employment guarantee

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period (with exceptions for such things as serious misconduct and disciplinary termination),

(d) employees transferred to a Public Service Department will be employed on the terms and conditions that applied before their transfer and (in the case of employees who are transferred as excess employees) their employment will be managed in accordance with the Public Service excess employee policy,

(e) employees will be entitled to remain as members of or contributors to their current superannuation schemes and will retain any rights to accrued leave,

(f) service with WSN will count as service with the new employer.

The Schedule also authorises the payment of transfer payments to transferred employees.

### Schedule 5 Waste Assets Management Corporation

**Schedule 5** makes further provision for the proposed Waste Assets Management Corporation, including provision for the following:

- (a) the management and staff of the Corporation,
- (b) the formation or acquisition of subsidiaries of the Corporation,
- (c) the transfer of assets, rights and liabilities of the Corporation,
- (d) dissolution of the Corporation.

### Schedule 6 Amendment of Acts

**Schedule 6** makes consequential amendments to various Acts in connection with the authorised transaction

## Issues Considered by the Committee

### Delegation of legislative powers [s 8A(1)(b)(iv) LRA]

#### Issue: Commencement by Proclamation at Cl. 2

10. The Committee notes that the Bill provides for the commencement of most of the provisions of the Bill on the date of assent, with provisions that will disestablish WSN as a statutory State owned corporation to commence on a day to be appointed by proclamation. The Committee recognises that the disestablishment of WSN and the consequential repeal of the *Waste Recycling and Processing Corporation Act 2001* is contingent on the successful transfer of WSN to the private sector, which will take place on an unknown future date. The Committee recognises the difficulty in commencing all provisions on assent or a fixed date and therefore has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

11. **Although some provisions of the Bill commence on proclamation, the Committee recognises the difficulty in commencing all provisions on assent or a fixed date and therefore has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.**

***The Committee makes no further comment on this Bill.***



# 10. WEAPONS AND FIREARMS LEGISLATION AMENDMENT BILL 2010

Date Introduced:	17 March 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Michael Daley MP
Portfolio:	Police

## Purpose and Description

1. This Bill amends the *Weapons Prohibition Act 1998* to make further provision with respect to the regulation and control of certain weapons; to amend the *Firearms Act 1996* in relation to imitation and antique firearms and certain other matters; and for other purposes.
2. Through this Bill, improvised explosive devices and Taser-proof clothing are proposed additions to the schedule of prohibited weapons.
3. The Bill will amend the definitions of several items already on the schedule of prohibited weapons. For example, handcuffs designed as children's toys or theatrical props have been specifically excluded from the definition contained in the schedule of prohibited weapons. The Bill will also introduce a separate schedule of military-style prohibited weapons. These will include bombs, rocket launchers and flamethrowers.
4. It will introduce a higher level of control around these items by prescribing more stringent storage requirements. It also includes offences relating to military-style prohibited weapons as offences for which there is a presumption against bail in the *Bail Act 1978*.
5. The Bill changes the regulatory model governing the lawful possession and use of "imitation firearms". Currently, the terms "imitation firearm" and "replica firearm" are used interchangeably in New South Wales legislation. The Bill will amend the use of these terms and bring New South Wales into line with other Australian States and Territories.
6. It adds a new section 4D to the *Firearms Act 1996* relating to imitation firearms. This proposed provision includes a definition of "imitation firearm", which means something that would reasonably be taken to be a firearm but is incapable of firing a projectile and therefore does not meet the definition of "firearm". Objects that are produced and identified as children's toys are excluded from the definition of "imitation firearm". As part of the new section 4D, registration will not be required for imitation firearms. However, a permit will still be required for their possession and use and they must be stored according to prescribed safe storage guidelines.
7. As agreed through the Ministerial Council of Police Emergency Management—Police, the definition of 'replica firearm' will be taken to refer to firearms that are exact replicas of recognised brands of firearm that are capable of firing a projectile. These

are controlled under the *Firearms Act 1996*. The Bill also removes existing references to imitation and replica firearms from the *Weapons Prohibition Act*, as these items will be regulated through the *Firearms Act 1996*.

8. Proposed sections 10 (3A) and 10 (3B) will be inserted into the *Weapons Prohibition Act* so as to provide the Commissioner of Police with the authority to rely on criminal intelligence in determining applications for prohibited weapons permits. The Police Commissioner may refuse a weapons permit on the basis of criminal intelligence when that person is considered a risk to public safety. The Police Commissioner is not required to give reasons for these decisions in order to protect the contents of the police criminal intelligence reports. The Bill provides that any such grounds for not issuing a permit may also be grounds for suspending or revoking the permit. In relation to weapons clubs, the Bill enables the regulation to make provision for the approval of clubs societies or organisations with regard to the possession or use of prohibited weapons.

## Background

9. The *Weapons Prohibition Act* has the following functions: to outline those weapons that can only be lawfully owned with a permit; to outline the conditions for a prohibited weapons permit; and to provide offences applicable to the misuse or unlawful possession of prohibited weapons.

10. According to the Agreement in Principle speech:

This Bill formalises the recommendations arising out of a substantive review of the *Weapons Prohibition Act 1998*. A report on this review was tabled in the House in June 2009. The bill amends and modernises the *Weapons Prohibition Act 1998* by providing a more comprehensive range of appropriate offences and penalties to ensure effective control of prohibited weapons. This is of particular importance as, unlike firearms, prohibited weapons are not registrable items. The offences and penalties have been designed to reflect this and to provide for greater alignment with equivalent offences and penalties in the *Firearms Act 1996*.

11. Currently, the items classed as prohibited weapons range from certain types of specialist knives to Tasers and knuckledusters. The list is dynamic and additions are made in response to feedback from police. For example, over the years, items such as road spikes and laser pointers have been included as prohibited weapons.
12. The schedule of prohibited weapons also serves as guidelines for the Australian Customs and Border Protection Service. In order to import any item on the schedule, Customs will require proof of police authorisation.

## The Bill

13. The object of this Bill is to amend the *Weapons Prohibition Act 1998* (***the Weapons Act***) as follows:
  - (a) to modify and extend the list of prohibited weapons under the *Weapons Act*,
  - (b) to provide for a separate category of military-style weapons in that list,
  - (c) to modify and extend offences relating to the unauthorised sale of prohibited weapons (including a new offence of selling weapons on an ongoing basis),
  - (d) to create an offence relating to the unauthorised manufacture of prohibited weapons,

- (e) to provide that authorised weapons dealers and authorised theatrical weapons armourers must keep records of their sales,
- (f) to provide mandatory grounds for refusing a weapons permit on the basis of criminal intelligence held about an applicant for a permit where that person is considered a risk to public safety,
- (g) to make further provision in respect of the safe keeping of prohibited weapons,
- (h) to make other miscellaneous amendments in respect of permits and other matters under the *Weapons Act*.

The Bill also amends the *Firearms Act 1996* (***the Firearms Act***) to clarify provisions dealing with imitation firearms and exemptions for antique firearms and to make other miscellaneous amendments. The Bill also makes consequential amendments to other legislation.

#### **14. Outline of provisions**

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

#### **Schedule 1 Amendment of *Weapons Prohibition Act 1998* No 127:**

##### **Amendments relating to list of prohibited weapons:**

**Schedule 1 [29]–[40]** amend the list of things that are identified as prohibited weapons in Schedule 1 to the *Weapons Act*. In particular, the amendments provide as follows:

- (a) bombs, grenades, rockets, missiles, mines and flame throwers are grouped into a separate category of prohibited weapons known as military-style weapons,
- (b) Improvised Explosive Devices are included as types of bombs,
- (c) articles that are produced and identified as children's toys that are similar in appearance to certain military-style weapons, kung fu sticks or side-handled batons are not taken to be prohibited weapons,
- (d) Taser guns or similar anti-personnel conducted energy devices are listed separately from hand-held defence or anti-personnel devices designed to administer an electric shock on contact,
- (e) cartridges containing probes or prongs for Taser guns or similar anti-personnel conducted energy devices are added to the list of prohibited weapons,
- (f) imitation or replica firearms are removed from the list of prohibited weapons as they are to be dealt with solely under the *Firearms Act* (see Schedule 2 [1] and [2]),
- (g) the description of body armour vests is modified to include articles designed for protection against electroshock or conducted energy devices,
- (h) handcuffs are now described as a set of ring-shaped shackles of any material (and connected by any means) that are designed to be worn on the wrists, thumbs or ankles, including thumb and leg cuffs, but excluding antique handcuffs, children's toys and handcuffs designed to be released by the wearer,
- (i) firearm magazines are now described as detachable firearm magazines and include a number of additional types of magazines (such as those for machine guns),

- (j) other minor wording or technical changes are made to the descriptions of articles in the list of prohibited weapons.

**Schedule 1 [1]** makes a consequential amendment to insert a definition of *military-style weapon* for the purposes of the *Weapons Act*.

**Amendments relating to permits:**

**Schedule 1 [4]** replaces an existing provision that prevents a permit under the *Weapons Act* from being issued to a person who is subject to a recognisance to keep the peace with an equivalent provision that prevents a permit being issued if the person is subject to a good behaviour bond in relation to an offence prescribed by the regulations.

**Schedule 1 [5]** provides for the mandatory refusal of an application for a permit under the *Weapons Act* on the grounds that the Commissioner of Police, having regard to any criminal intelligence report or other criminal information held in relation to the applicant, is of the opinion that the applicant is a risk to public safety or that the issuing of the permit would be contrary to the public interest.

**Schedule 1 [6] and [7]** make consequential amendments.

**Schedule 1 [13]** provides that, in the case of a person whose permit is suspended on such grounds, the Commissioner is not required to give reasons to the person for the suspension or to request that the person provide the Commissioner with reasons why the permit should not be revoked. **Schedule 1 [14]** provides that the Commissioner is also not required to give any reasons for revoking a permit on those grounds.

**Schedule 1 [26]** provides that certain provisions of the *Administrative Decisions Tribunal Act 1997* (for example, the requirement to provide the applicant with reasons for decisions) do not apply to an application to the Administrative Decisions Tribunal for a review of a decision to refuse to issue a permit on the grounds referred to above. The Tribunal is also required, if an application for review of the decision is made, not to disclose the existence or content of any criminal intelligence report or criminal information that formed the basis of the refusal to issue the permit. An applicant for a permit under the *Weapons Act* must have a genuine reason for possessing or using a prohibited weapon before a permit can be issued to the applicant.

**Schedule 1 [8]** provides that membership of a historic or commemorative club or society approved by the Commissioner is a genuine reason.

**Schedule 1 [9]** modifies the current requirements relating to weapons collection as a genuine reason for possessing or using a prohibited weapon, so that an applicant for a permit must:

- (a) be a current member of a collectors' club or society approved by the Commissioner in accordance with the regulations, and
- (b) demonstrate that the applicant's weapons collection has a genuine commemorative, historical, thematic or financial value.

**Schedule 1 [10]** provides that a permit under the *Weapons Act* must contain a recent photograph of the permit holder (currently a photograph is only required if the Commissioner so determines).

**Schedule 1 [11]** makes it clear that the Commissioner may impose conditions on a permit under the *Weapons Act* at any time. **Schedule 1 [12]** makes a consequential amendment.

**Schedule 1 [15]** provides that a person who is the holder of a permit under the *Weapons Act* must immediately surrender to a police officer the permit and any prohibited weapon in the person's possession if the permit ceases to be in force for any reason (and not only because of a suspension or revocation, as is currently the case).

**Amendment relating to record keeping by weapons dealers and theatrical weapons armourers:**

**Schedule 1 [17]** requires authorised weapons dealers and authorised theatrical weapons armourers to keep records of all their weapons sales. The maximum penalty for failing to comply with this requirement is 50 penalty units.

**Amendments relating to miscellaneous offences:**

It is currently an offence for a person to sell a prohibited weapon to an unauthorised buyer, with a maximum penalty of 50 penalty units or imprisonment for 12 months, or both.

**Schedule 1 [20]** recasts that offence in a new section and increases the maximum penalty to imprisonment for 14 years. The new section also provides for a separate offence of selling a military-style weapon to an unauthorised buyer, with a maximum penalty of imprisonment for 20 years. **Schedule 1 [19]** makes a consequential amendment.

**Schedule 1 [20]** also makes it an offence to sell a prohibited weapon in contravention of the above unauthorised sale offences on an ongoing basis. A person will be guilty of an ongoing unauthorised sale offence if the person sells a weapon on 3 or more separate occasions during any consecutive period of 12 months. The maximum penalty for this offence is imprisonment for 20 years.

**Schedule 1 [21]** creates offences of manufacturing prohibited weapons without a permit. The maximum penalty is imprisonment for 14 years for prohibited weapons and 20 years for military-style weapons.

**Amendments relating to safe keeping of prohibited weapons:**

**Schedule 1 [24]** inserts a new Part 4A into the *Weapons Act* dealing with the safe keeping of prohibited weapons. The current general safe keeping requirement (ie that a person who possesses a prohibited weapon must take all reasonable precautions to ensure its safe keeping) is preserved. The new Part 4A further provides for 3 levels of specific safe keeping requirements which deal with matters such as safes, receptacles and the buildings in which prohibited weapons are to be stored. Generally, the safe keeping requirements are in line with current guidelines issued by the NSW Firearms Registry or that are imposed as conditions on permits under the *Weapons Act*.

The regulations may prescribe the prohibited weapons that must meet the level 1 and level 2 safe keeping requirements. Level 3 requirements will generally apply to military-style weapons. In each case, a permit holder does not have to comply with a safe keeping requirement if the Commissioner is satisfied that alternative arrangements of a standard not less than the specified requirements have been made.

The Commissioner may also vary or modify a safe keeping requirement for a particular permit holder by imposing a condition on the relevant permit.

**Schedule 1 [3] and [22]** make consequential amendments.

**Amendments clarifying operation of penalties:**

**Schedule 1 [2], [16], [18], [23] and [25]** merely restate the existing penalties that apply to indictable offences under the *Weapons Act*. The purpose of these amendments is to clarify the existing arrangement in which indictable offences under the *Weapons Act* are, in accordance with the *Criminal Procedure Act 1986*, to be dealt with summarily unless the prosecution elects otherwise. The maximum penalty for these offences, if dealt with summarily, will continue to be imprisonment for 2 years or a fine of 100 penalty units (or

both). However, indictable offences under the *Weapons Act* that attract a maximum penalty of imprisonment for 20 years (ie the new offences involving selling or manufacturing military-style weapons or selling weapons on an ongoing basis) may only ever be prosecuted on indictment (see **Schedule 1 [27]** which replaces section 43 of the *Weapons Act*).

#### **Other amendments:**

**Schedule 1 [28]** extends the regulation-making power under the *Weapons Act* so that the regulations may make provision for or with respect to the approval of clubs, societies or organisations in relation to the use or possession of prohibited weapons (including requirements in relation to the membership of such clubs, societies or organisations).

**Schedule 1 [41]** enables savings and transitional regulations to be made as a consequence of the proposed Act.

**Schedule 1 [42]** inserts savings and transitional provisions into the *Weapons Act* as a consequence of the enactment of the proposed Act.

#### **Schedule 2 Amendment of *Firearms Act 1996 No 46*:**

##### **Amendments relating to imitation firearms:**

Imitation firearms (or replica firearms as the term is alternatively expressed) are currently listed as prohibited firearms under the *Firearms Act*, but are also included as prohibited weapons under the *Weapons Act*. The following amendments clarify provisions in the *Firearms Act* relating to the regulation of imitation firearms.

**Schedule 2 [1] and [2]** provide that an imitation firearm is an object that, regardless of its colour, weight or composition or the presence or absence of any moveable parts, substantially duplicates in appearance a firearm but that is not a firearm. However, it does not include any such object that is produced and identified as a children's toy. The *Firearms Act* will apply to an imitation firearm in the same way as it applies to a firearm. This means that imitation firearms will be subject to existing firearms safe keeping requirements and restrictions in relation to the buying or selling of firearms. However:

- (a) the Commissioner may issue a permit, but not a licence, authorising the possession or use of an imitation firearm, and
- (b) an imitation firearm is not required to be registered.

An imitation firearm that is an imitation of a pistol will be taken to be a pistol and an imitation firearm that is an imitation of a prohibited firearm will be taken to be a prohibited firearm.

**Schedule 2 [9]** omits the reference to imitation or replica firearms in the list of prohibited firearms in the *Firearms Act*.

##### **Amendments relating to exemptions for antique firearms:**

**Schedule 2 [3]** substitutes section 6A of the *Firearms Act* to extend the exemption currently contained in that provision in respect of certain antique firearms (ie those manufactured before 1900) that do not take breech-loaded metallic cartridges or for which ammunition is not commercially available. At present, section 6A provides that a person may acquire an antique firearm without having to get a permit to acquire it and provides that such firearms are not required to be registered. The substitution extends the exemption to provide that a person is exempt from the requirement for a licence or a permit to actually possess such a

firearm. As is currently the case, a person will not be required to register an antique firearm, but will require a licence or permit to use it.

### Other amendments:

**Schedule 2 [4] and [8]** provide that, in the case of a person whose licence or permit under the *Firearms Act* is suspended on the grounds of a risk to public safety or that it is contrary to the public interest for the person to hold a licence or permit based on criminal intelligence, the Commissioner is not required to give reasons for the suspension or to request that the person provide the Commissioner with reasons why the licence or permit should not be revoked. **Schedule 2 [5] and [8]** also provide that the Commissioner is not required to give any reasons for revoking a licence or permit on such grounds.

**Schedule 2 [6] and [7]** provide that a person who is the holder of a licence or permit under the *Firearms Act* must immediately surrender to a police officer the licence or permit, as the case may be, and any firearm in the person's possession if the licence or permit ceases to be in force for any reason (and not only because of a suspension or revocation as is currently the case).

**Schedule 2 [10]** enables savings and transitional regulations to be made as a consequence of the proposed Act.

**Schedule 2 [11]** inserts savings and transitional provisions into the *Firearms Act* as a consequence of the enactment of the proposed Act.

### Schedule 3 Amendment of other legislation:

**Schedule 3.1** amends the *Bail Act 1978* to provide that there is a presumption against bail for offences relating to the unauthorised possession, sale, ongoing sale and manufacture of military-style weapons under the *Weapons Act*.

**Schedule 3.11 [3]** amends the *Criminal Procedure Act 1986* so that certain offences relating to the unauthorised possession, sale, ongoing sale and manufacture of prohibited weapons under the *Weapons Act* will be dealt with summarily unless the prosecutor elects to have the matter prosecuted on indictment. **Schedule 3.11 [1]** also amends the *Criminal Procedure Act 1986* to provide for the maximum penalty for indictable offences under the *Weapons Act* when dealt with summarily.

**Schedule 3.14 [1]** repeals clauses 116 and 116A of the *Firearms Regulation 2006*, which currently provide for exemptions in respect of certain firearms manufactured before 1900, as a consequence of the amendment made to the *Firearms Act* by Schedule 2 [3].

**Schedule 3.2–3.10, 3.11 [2], 3.12, 3.13, 3.14 [2], 3.15–3.19 and 3.22–3.28** amend a number of Acts and regulations to clarify references to imitation firearms in those Acts and regulations as a consequence of the amendments to the *Firearms Act* made by Schedule 2 [1], [2] and [9].

**Schedule 3.20** amends the *Road Transport (Driver Licensing) Act 1998* to provide that photographs stored by the Roads and Traffic Authority for the purposes of permits under the *Firearms Act* and the *Weapons Act* are subject to certain limits in respect of their retention and use by that Authority. **Schedule 3.21** makes a consequential amendment to the *Road Transport (Driver Licensing) Regulation 2008*.

## Issues Considered by the Committee

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

**Issue: Not required to provide reasons – closed justice – denial of natural justice and procedural fairness – amendment of *Weapons Prohibition Act 1998* - Schedule 1 [5] - proposed insertion of section 10 (3A) and (3B); Schedule 1 [13] – proposed insertion of section 16 (1A); Schedule 1 [14] – proposed insertion of section 18 (2A); and Schedule 1 [26] – proposed insertion of section 35 (2) and (3); amendment of *Firearms Act 1996* – Schedule 2 [4] – proposed insertion of section 22 (1A); Schedule 2 [5] – proposed insertion of section 24 (2A) and Schedule 2 [8] – proposed insertion of section 30 (8) and (9):**

### **Amendment of *Weapons Prohibition Act 1998* - Schedule 1 [5] - proposed insertion of section 10 (3A) and (3B):**

15. Schedule 1 [5] provides for the mandatory refusal of an application for a permit under the *Weapons Act* on the grounds that the Commissioner of Police, having regard to any criminal intelligence report or other criminal information held in relation to the applicant, is of the opinion that the applicant is a risk to public safety or that the issuing of the permit would be contrary to the public interest.
16. Proposed section 10 (3A) of Schedule 1 [5] reads: A permit must not be issued to a person if the Commissioner is of the opinion, having regard to any criminal intelligence report or other criminal information held in relation to the person, that:
  - (a) the person is a risk to public safety, and
  - (b) the issuing of the permit would be contrary to the public interest.
17. Proposed section 10 (3B) goes on to read: The Commissioner is not, under this or any other Act or law, required to give any reasons for not issuing a permit on the grounds referred to in subsection (3A).
18. The Committee notes that any such grounds for not issuing a permit may also be grounds for suspending or revoking the permit – see sections 16 (1) and 18 (2).

### **Amendment of *Weapons Prohibition Act 1998* - Schedule 1 [13] – proposed insertion of section 16 (1A):**

19. Schedule 1 [13] provides that, in the case of a person whose permit is suspended on such grounds, the Commissioner of Police is not required to give reasons to the person for the suspension or to request that the person provide the Commissioner with reasons why the permit should not be revoked. Schedule 1 [14] provides that the Commissioner is also not required to give any reasons for revoking a permit on those grounds.
20. Proposed section 16 (1A) of Schedule 1 [13] reads: If a permit is being suspended because the Commissioner is satisfied that there may be grounds for revoking the permit under section 10 (3A), the notice suspending the permit is not required:
  - (a) to state the reasons for the suspension, or



(b) to include any request that the permit holder provide the Commissioner with reasons why the permit should not be revoked.

**Amendment of *Weapons Prohibition Act 1998* - Schedule 1 [14] – proposed insertion of section 18 (2A):**

21. Proposed section 18 (2A) of Schedule 1 [14] reads: If the Commissioner revokes a permit because the permit holder would be refused a permit on the grounds referred to in section 10 (3A), the Commissioner is not, under this or any other Act or law, required to give any reasons for revoking the permit on those grounds.

22. **The Committee is concerned that the Commissioner of Police will not be required to provide any reasons for the decision that a particular applicant will be refused a permit or that the permit holder will have their permit suspended or revoked respectively under the proposed section 10 (3B) of Schedule 1 [5]; proposed section 16 (1A) of Schedule 1 [13]; and proposed section 18 (2A) of Schedule 1 [14], based on the public safety and public interest grounds arising from the proposed section 10 (3A) with the reliance of criminal intelligence report or other criminal information held in relation to the person.**

23. **Such affected permit applicants or permit holders who will have their permits refused, suspended or revoked under the above proposed provisions may then be denied a right of reply or an opportunity to test the veracity of the criminal intelligence reports submitted against them.**

24. **By way of comparison, the Committee notes that when the then Security Industry Amendment Bill 2005 was first introduced and which had been passed both Houses and received the Royal Assent on 1 July 2005, a similar concern with regard to procedural fairness was reported in *Digest 9 of 2005*. The Security Industry Amendment legislation in 2005 also contained a new provision that when determining whether an applicant is a fit and proper person, the Commissioner of Police may have regard to certain criminal intelligence reports and other criminal information and may revoke the security licence if of the opinion that the licensee is no longer a fit and proper person to hold a licence. In the public interest, the security legislation, similarly, ensures that any such information will remain confidential in a review by the Administrative Decisions Tribunal of a decision to refuse to grant a licence or to revoke a licence.**

- 25.** In *Digest 9 of 2005*, with respect to procedural fairness on the comparative provision proposed by that Security Industry Amendment legislation, the Committee commented at paragraph 11 on page 14, that: “While the Committee appreciates the aim of maintaining the confidentiality of such information, it is concerned that decisions may be made with potentially deleterious effects on a person’s livelihood, without that person being aware of the material on which those decisions are based”. “Procedural fairness, or natural justice, means that decision-makers must comply with certain obligations where any decision made may directly and adversely affect a person’s rights, interests, status or legitimate expectations”. At paragraphs 16 to 19, on page 15 of the *Digest 9 of 2005*, the Committee noted that it is a fundamental common law rule that a person must be given an opportunity to participate in the decisions that affect him or her. The Committee then referred the matter to Parliament to consider whether that new provision unreasonably trespasses on an applicant’s right to a fair hearing.
- 26.** The Committee notes the above comments and conclusions reached in *Digest 9 of 2005* on a similar amendment in the context of the security industry where the Commissioner and the Tribunal could rely on confidential criminal intelligence reports and other criminal information held against the applicant.
- 27.** The reliance of criminal intelligence reports has become increasingly important and useful, particularly in the context of protecting public safety. The Committee also has the obligation of considering what may constitute an undue trespass on personal rights and liberties. In determining whether a trespass on a right is undue, this may require the identification of the degree of trespass to the right; evaluation of the right that is trespassed upon; the importance of the purpose of the trespass such as public interests and public safety concerns; and assessment of the necessity of trespassing on the right to achieve the intended legislative objective including the least restrictive means available to achieve that purpose.
- 28.** The Committee notes that traditionally, the common law rule of procedural fairness is treated as a core right and fundamental principle. Some of the key sources such as the recent South Australian Supreme Court decision<sup>2</sup> and previous High Court judgment<sup>3</sup> may also assist the Committee in assessing whether the extent or degree of a trespass were undue in the context of public interest concerns.

<sup>2</sup> *Totani & Anor v The State of South Australia* [2009] SASC 301, where the South Australian Supreme Court decided that the person should have a right to know that he or she has been accused as well as what he or she has been accused of; and that courts should have a right to question and test the accuracy of ‘criminal intelligence’.

<sup>3</sup> Kirby J in *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* [2001] HCA 22, paragraph 183.

29. **By taking consideration of the above issues, the provisions proposed by this Bill could appear to be contrary to the fundamental principles of natural justice and procedural fairness by relying on secret or confidential evidence which would not be disclosed to the affected individual and may lead to an undue trespass on individual rights and liberties. Accordingly, the Committee refers the Bill's amendments to the *Weapons Prohibition Act 1998*, concerning proposed section 10 (3B) of Schedule 1 [5]; proposed section 16 (1A) of Schedule 1 [13]; and proposed section 18 (2A) of Schedule 1 [14] to Parliament for consideration.**

**Amendment of *Weapons Prohibition Act 1998* - Schedule 1 [26] – proposed insertion of section 35 (2) and (3):**

30. The Committee notes Schedule 1 [26] provides that certain provisions of the *Administrative Decisions Tribunal Act 1997* (for example, the requirement to provide the applicant with reasons for decisions) do not apply to an application to the Administrative Decisions Tribunal for a review of a decision to refuse to issue a permit on the grounds referred to above. The Tribunal is also required, if an application for review of the decision is made, not to disclose the existence or content of any criminal intelligence report or criminal information that formed the basis of the refusal to issue the permit. An applicant for a permit under the *Weapons Act* must have a genuine reason for possessing or using a prohibited weapon before a permit can be issued to the applicant.
31. Proposed section 35 (2) of Schedule 1 [26] reads: The following provisions of the *Administrative Decisions Tribunal Act 1997* do not apply to an application to the Administrative Decisions Tribunal for a review of a refusal to issue a permit, or the revocation or suspension of a permit, that was made on the grounds referred to in section 10 (3A):
- (a) Part 2 of Chapter 5,
  - (b) section 58.
32. Proposed section 35 (3) of Schedule 1 [26] reads: In determining an application for a review of any such decision, the Administrative Decisions Tribunal:
- (a) is to ensure that it does not, in the reasons for its decision or otherwise, disclose the existence or content of any criminal intelligence report or other information referred to in section 10 (3A), and
  - (b) in order to prevent the disclosure of any such report or other information, is to receive evidence and hear argument in the absence of the public, the applicant for review and the applicant's representative.
33. Under the Bill, Part 2 of Chapter 5 of the *Administrative Decisions Tribunal Act 1997* will not apply to an application to the Administrative Decisions Tribunal for a review of a refusal to issue a permit, or the revocation or suspension of a permit, that was made on the grounds referred to in proposed section 10 (3A) relating to public safety and public interest grounds arising from criminal intelligence report or other criminal information held in relation to the person.

34. If Part 2 of Chapter 5 of the *Administrative Decisions Tribunal Act* had not been excluded by the Bill, it would have provided for notice of decision and review rights to be given by the Commissioner of Police; duty to give reasons on request; the Administrative Decisions Tribunal may determine whether the person is entitled to reasons; the Tribunal may order the Commissioner to provide a statement of reasons; and provisions on internal reviews. Similarly, if section 58 of the *Administrative Decisions Tribunal Act* had not been excluded by the Bill, the Commissioner of Police would have the duty to lodge material documents with the Tribunal where the decision is reviewed, including the provision of any statement of reasons.
35. The Committee notes that the effect of proposed section 35 (2) and (3) of Schedule 1 [26] may be that the applicant would not know the reasons and therefore, make it harder to find the grounds for appeal and challenge or dispute the secret criminal intelligence or other criminal information used against him or her.
- 36. It could appear that the proposed section 35 (3)(b) affecting the right to natural justice and an opportunity to test the veracity of the criminal intelligence reports or other criminal information may be further undermined by the reliance by the Administrative Decisions Tribunal to base its review on material received in closed hearing, in the absence of the affected applicant and the applicant's representative.**
- 37. The Committee notes the recent decision of the South Australian Supreme Court in *Totani & Anor v The State of South Australia* [2009] SASC 301. The South Australian Supreme Court discussed a legislation which involved secret intelligence and administrative decision making on questions which should be judicially decided and on appeal by a superior court; and how the person should have a right to know that he or she has been accused as well as what he or she has been accused of; and that courts should have a right to question and test the accuracy of 'criminal intelligence'.**
- 38. Based on the South Australian Supreme Court decision, the proposed amendments may appear to cause the Tribunal to act in a manner contrary to natural justice and due process by denying people the right to know the allegations made against them including a right of access by a party to all adverse materials taken into account by the Tribunal.**
- 39. While the Committee appreciates the aim of maintaining the confidentiality of such information, however, in light of the above principles decided from the recent South Australian Supreme Court decision, the Committee is concerned that the Administrative Decisions Tribunal is not required to provide any reasons arising from the review of a decision by the Commissioner of Police to refuse to issue a permit, or the revocation or suspension of a permit that was made on the grounds in the proposed section 10 (3A), by the insertion of section 35 (2) and (3) of Schedule 1 [26].**
- 40. The Committee, therefore, refers this to Parliament to consider whether it may be contrary to principles of natural justice and due process and could unduly trespass on individual rights and liberties.**

**Amendment of *Firearms Act 1996* – Schedule 2 [4] – proposed insertion of section 22 (1A):**

41. Proposed section 22 (1A) of Schedule 2 [4] reads: If a licence is being suspended because the Commissioner is satisfied that there may be grounds for revoking the licence under section 11 (5A), the notice suspending the licence is not required:
- (a) to state the reasons for the suspension, or
  - (b) to include any request that the licensee provide the Commissioner with reasons why the licence should not be revoked.

**Amendment of *Firearms Act 1996* – Schedule 2 [5] – proposed insertion of section 24 (2A):**

42. Proposed section 24 (2A) of Schedule 2 [5] reads: If the Commissioner revokes a licence because the licence holder would be refused a licence on the grounds referred to in section 11 (5A), the Commissioner is not, under this or any other Act or law, required to give any reasons for revoking the licence on those grounds.

**Amendment of *Firearms Act 1996* – Schedule 2 [8] – proposed insertion of section 30 (8) and (9):**

43. Proposed section 30 (8) and (9) of Schedule 2 [8] reads:
- (8) If a permit is being suspended because the Commissioner is satisfied that there may be grounds for revoking the permit under section 11 (5A), the notice suspending the permit is not required:
    - (a) to state the reasons for the suspension, or
    - (b) to include any request that the permit holder provide the Commissioner with reasons why the permit should not be revoked.
  - (9) If the Commissioner revokes a permit because the permit holder would be refused a permit on the grounds referred to in section 11 (5A), the Commissioner is not, under this or any other Act or law, required to give any reasons for revoking the permit on those grounds.

44. **The Committee expresses similar concerns with the Bill's amendment to the *Firearms Act 1996* with regard to the proposed section 22 (1A) of Schedule 2 [4], proposed section 24 (2A) of Schedule 2 [5], proposed section 30 (8) and (9) of Schedule 2 [8], where they respectively ensure that the Commissioner of Police will not need to provide any reasons for suspending the licence under the new section 11 (5A); for revoking the licence arising from the new section 11 (5A); or for suspending or revoking a permit because of the grounds for revoking the permit under the new section 11 (5A).**

45. Such affected licence or permit holders under the above proposed provisions may then be denied a right of reply or an opportunity to test the veracity of the materials submitted against them. The Committee is aware of the public interest concerns and also weighs up the implications for fundamental principles of natural justice and procedural rights as discussed earlier in relation to the equivalent amendments to the *Weapons Prohibition Act 1998* and also identified in the context of the previously reported *Digest 9 of 2005* with respect to the security industry amendments.
46. Therefore, the proposed amendments to the *Firearms Act 1996* may appear to be contrary to the fundamental principles of natural justice and procedural fairness, and may trespass unduly on personal rights and liberties. Accordingly, the Committee refers this to Parliament for consideration.

**Issue: Retrospectivity – amendment of *Weapons Prohibition Act 1998* - Schedule 1 [42] - proposed insertion of Part 4 - section 11 – existing permits may be revoked on grounds of risk to public safety etc:**

47. Proposed section 11 of the new Part 4 of Schedule 1 [42] reads: Section 10 (3A), as inserted by Schedule 1 [5] to the amending Act, extends to a permit that was in force immediately before the commencement of that subsection.

48. The Committee will always be concerned to identify the retrospective effects of legislation that may have an adverse impact on a person. The Committee also observes the right established by Article 15 of the *International Covenant on Civil and Political Rights* that a person not be subject to a heavier penalty than what was applicable at the time of the commission of the offence.
49. Therefore, the Committee refers to Parliament to consider whether providing for the revocation of permits which had been duly made under the law and in force immediately before the commencement of the new section 10 (3A) as proposed in Schedule 1 [42] by the insertion of section 11 in the new Part 4, may unduly trespass on personal rights and liberties.

**Delegation of legislative powers [s 8A(1)(b)(iv) *LRA*]**

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

50. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. However, the Committee accepts the advice received from the NSW Department of Premier and Cabinet that “This is preferred so as to provide the NSW Police Force with flexibility to delay commencement of certain provisions, for operational reasons”.

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

***The Committee makes no further comment on this Bill.***

## Appendix 1: Index of Bills Reported on in 2010

	Digest Number
Building and Construction Industry Long Service Payments Amendment Bill 2009	1
Carers Recognition Bill 2010*	3
Casino Control Amendment Bill 2010	2
Children and Young Persons (Care and Protection) Amendment (Parental Responsibility) Bill 2010*	4
Coal Mine Health and Safety Amendment Bill 2010	4
Companion Animals Amendment (Dogs in Outside Eating Areas) Bill 2010*	4
Court Information Bill 2010	4
Credit (Commonwealth Powers) Bill 2010	2
Crimes (Administration of Sentences) Amendment Bill 2010	2
Crimes Amendment (Child Pornography and Abuse Material) Bill 2010	3
Crimes Amendment (Grievous Bodily Harm) Bill 2010*	4
Crimes Amendment (Police Pursuits) Bill 2010	2
Gas Supply Amendment Bill 2009	1
Housing Amendment (Community Housing Providers) Bill 2009	1
James Hardie Former Subsidiaries (Winding Up and Administration) Amendment Bill 2009	1
National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010	2
National Parks and Wildlife Amendment Bill 2010	2
Parliamentary Electorates and Elections Amendment Bill 2010	4
Registrar-General Legislation (Amendment and Repeal) Bill 2010	4
Road Transport Legislation Amendment (Unauthorised Vehicle Use) Bill 2010	4
State Senate Bill 2010	2
Sydney Olympic Park Authority Amendment Bill 2009	1
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010	3
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010 (No 2)	4
Weapons and Firearms Legislation Amendment Bill 2010	4
Workers Compensation Amendment (Commission Members) Bill 2010	2

## Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009	Digest 2010
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1			
Casino Control Amendment Bill 2010	Minister for Gaming and Racing and Attorney General	08/03/10					2
Civil Liability Legislation Amendment Bill 2008	Attorney General	28/10/08			12		
Contaminated Land Management Amendment Bill 2008	Minister for Climate Change and the Environment	22/09/08	03/12/08		10	1	
Credit (Commonwealth Powers)	Minister for Fair Trading	08/03/10					2
Crimes (Administration of Sentences) Amendment Bill 2008	Attorney General and Minister for Justice	2/12/07			15		
Crimes (Administration of Sentences) Amendment Bill 2009	Minister for Corrective Services	08/08/09				10	
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08	06/02/09		9		
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		1		2	
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1		
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning		12/06/08		8		
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7			
Home Building Amendment	Minister for Fair Trading		30/10/08		10, 13		
Liquor Legislation Amendment Bill 2008	Minister for Gaming and Racing	24/11/08	05/01/09		14	2	
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		1		2	
Parking Space Levy Bill 2009	Minister for Transport	23/03/09	26/05/09			3, 8	



Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009	Digest 2010
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1,2			
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1			
Water Management Amendment Bill 2008	Minister for Water	28/10/08	15/12/08		12	2	

## Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2010

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Building and Construction Long Service Payments Amendment Bill 2009				N	
Casino Control Amendment Bill 2010	N, R, C		N, R		
Children and Young Persons (Care and Protection) Amendment (Parental Responsibility) Bill 2010*	N				
Coal Mine Health and Safety Amendment Bill 2010	N, R			N, R	
Court Information Bill 2010	N, R			N	
Credit (Commonwealth Powers) Bill 2010	N, R, C			N, R, C	
Crimes Amendment (Child Pornography and Abuse Material) Bill 2010	N			N	
Crimes Amendment (Grievous Bodily Harm) Bill 2010*	N, R				
Crimes Amendment (Police Pursuits) Bill 2010	N, R				
Gas Supply Amendment Bill 2009				N	
Housing Amendment (Community Housing Providers) Bill 2009	N				
James Hardie Former Subsidiaries (Winding Up and Administration) Amendment 2009				N	
National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010				N	N
National Parks and Wildlife Amendment Bill 2010	N, R			N, R	
Road Transport Legislation Amendment (Unauthorised Vehicle Use) Bill 2010				N, R	
Sydney Olympic Park Authority Amendment Bill 2009	N, R			N	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010	N			N	
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010 (No 2)				N	
Weapons and Firearms Legislation Amendment Bill 2010	N, R			N	

Key

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

## Appendix 4: Index of correspondence on regulations

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2008	Digest 2009	Digest 2010
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12		
Criminal Procedure Amendment (Local Court Process Reforms) Regulation 2010	Attorney General	23/02/10				1
Fisheries Management Legislation Amendment (Fishing Closures) Regulation 2009	Minister for Primary Industries	23/11/09	11/01/10		16	1
Liquor Regulation 2008	Minister for Gaming and Racing and Minister for Sport and Recreation	22/09/08	5/01/09	10	2	
Retirement Villages Regulation 2009	Minister for Fair Trading	22/02/10				1
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10		